

judgment  
29, 1954

# In the Privy Council.

## ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL AT LAGOS.

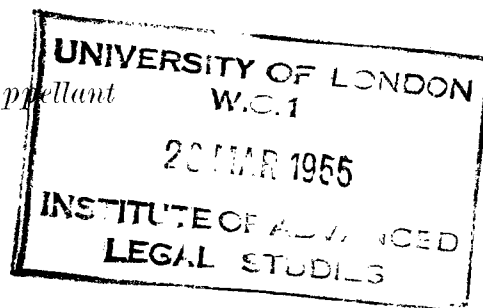
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BETWEEN

ANTONIO ASSAF (Plaintiff-Respondent) . . . . . *Appellant*

AND

DANIEL OLATUNJI FUWA, MICHAEL OREDOLAPO ONAYEMI and ABIGAIL PELEWURA OSIFESO the Executors and Executrix of MUSURU OKUNUBI deceased (Defendant-Appellant) . . . . . *Respondents.*



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## Case for the Appellant.

RECORD.

1. This is an appeal from a Judgment of the West African Court of Appeal at Lagos, Nigeria, dated the 26th May 1951, which allowed the appeal of the Defendant, Musuru Okunubi, and set aside the Judgment of the Supreme Court of Nigeria, at Lagos, dated the 28th October 1950 in favour of the Plaintiff, Antonio Assaf. p. 33.

2. The question for determination is whether Antonio Assaf is entitled to recover possession of the premises No. 130 Denton Street, Ebute-Metta, Nigeria, and the sum of £400, being mesne profit covering the period October 1948 to February 1950. p. 12.

3. The facts can be stated thus:—

One Sarminu Ajose based his title to the property in issue through—

(1) A Conveyance from S. W. Savage to Mustafa Ajose dated the 24th June 1921. p. 55.

(2) An Order of the Supreme Court of Nigeria in Suit No. 273 of 1947 following the death of Mustafa Ajose intestate on the 19th February 1944. He mortgaged the property on the 5th July 1948 to Oshodi and Apena Limited for the sum of £1,000 repayable with interest. p. 57.

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A Director of, and Solicitor to, this moneylending firm was one A. Latunde Johnson, now deceased.

- p. 64, l. 30. Following verbal arrangements between Antonio Assaf and Sarminu Ajose both went to the office of Irving & Bonnar, Solicitors, on the 9th October 1948 when Ajose informed Mr. Cameron, a member of the firm that he agreed to sell to Assaf the property now in issue for £1,600 but that £1,300 was due on the mortgage.
- p. 65, l. 4. Ajose instructed Mr. Cameron to obtain the deeds from Mr. Latunde Johnson to prepare a reconveyance from Mr. Johnson to himself and a conveyance from himself to Assaf. These conveyances were not then prepared for reasons to be explained later.
- p. 65, l. 9. Assaf paid a deposit of £300 to Mr. Cameron who was instructed by 10 Ajose to keep the money until the balance of £1,300 was paid.
- p. 65, l. 11. On the 11th October 1948 Mr. Cameron wrote to Mr. Latunde Johnson  
p. 59. who acknowledged that letter on the 12th October 1948 and sent him a certified copy of the title deeds of the property in issue and of another property which had also been mortgaged. He asked for a cheque for the sums due on the properties.
- p. 65, l. 14. The title deeds of the property in issue being in order, Assaf paid the  
p. 60. balance of £1,300 to Mr. Cameron who credited the sum to Ajose's account.
- On the 25th October 1948, however, Mr. G. B. A. Coker wrote to Irving & Bonnar saying he was instructed by Ajose to countermand the 20 instructions given about the sale as Ajose had now got a more reasonable offer and that further steps about the sale should be stayed. He further stated that Mr. Latunde Johnson had also been informed about this.
- p. 65, l. 29. On the 26th October 1948 Mr. Latunde Johnson wrote to Irving and  
p. 61, l. 20. Bonnar stating that Ajose had paid off the mortgage debt with interest and requested the return of the title deeds.
- p. 65, l. 32. But the deeds remained with Irving & Bonnar.
- p. 65, l. 43. Ajose admitted that he had accepted Assaf's offer of £1,600 but  
stated in his evidence that he did so provided no higher offer was received before the end of October 1948. 30
- p. 15, l. 32. On the 27th October 1948 Musuru Okunubi paid £1,500 to Ajose  
p. 8, l. 8. and bought the property in issue, according to the evidence of Okunubi, for £2,700.
- p. 62. The Conveyance which is dated the 29th October 1948 also mentions this sum.
- In the said Conveyance of Ajose to Okunubi the mortgagees neither joined in it nor executed a previous reconveyance.
- p. 64. 4. On the 28th June 1949, Mr. Justice Gregg delivered Judgment in the Supreme Court of Nigeria in an action where Assaf sought to recover from Ajose possession of the property now in issue and prayed for specific 40 performance of the contract of purchase between them.
- p. 65, l. 43. The learned Judge said he could not accept Ajose's Statement that he accepted Assaf's offer of £1,600 provided he did not get a higher offer

before the 28th October 1948. On the face of it, this was a most unlikely condition and there was no evidence other than Ajose's own statement to support it.

Taking into account all the oral and documentary evidence, the learned Judge held that there was a definite contract of sale between the parties and that Assaf did in fact purchase the property for £1,600. He ordered all parties concerned to execute the relevant conveyances in the hands of Irving & Bonnar within 30 days and that on execution of the conveyances Assaf shall have possession of the property. p. 61, l. 1.

10 Pursuant to the said Order of Mr. Justice Gregg, Ajose executed a Conveyance of the property of the 13th September 1949 to Assaf. p. 66, l. 18.

The mortgagees neither joined in the Conveyance nor executed a previous reconveyance.

### 5. THE PRESENT SUIT

was instituted on the 11th March 1950 in the Supreme Court of Nigeria at Lagos by Assaf against Okunubi in which he claimed possession of the premises at Denton Street, Ebute-Metta and also a sum of £400 mesne profit accruing during the period October 1948 to February 1950. p. 2.

20 The Statement of Claim, dated the 15th April 1950, set out the facts as already mentioned. p. 3.

In the Statement of Defence, dated the 13th May 1950, it was pleaded *inter alia* that Okunubi bought the property in October 1948 without notice of any prior sale to Assaf; that the Deed of the 29th October 1948 was registered in the Lands Registry at Lagos; and that Okunubi was a *bona fide* purchaser for value without notice of any interest in the property as claimed by Assaf. p. 5.

After oral and documentary evidence had been led on the 22nd September 1950 and Counsel had addressed the Court on the 26th September 1950 Judgment was reserved. pp. 6-10.

30 6. Judgment was delivered by Mr. Justice Ademola on the 28th October 1950. p. 12.

The learned Judge held that Okunubi, who had obtained the estate, was bound by the notice his solicitor had of the previous transaction; that Ajose had nothing to sell after he sold to Assaf; that Okunubi knew about the case, where he was called as a witness, in which Mr. Justice Gregg made an Order against Ajose for the recovery of the premises as well as for specific performance; that Okunubi was re-opening what had been decided by Mr. Justice Gregg on the same facts; that Okunubi could not get behind the said Judgment; and that Assaf would have judgment for the recovery of possession of the premises No. 130 Denton Street, Ebute-Metta, and also for the sum of £400 as mesne profit. p. 16, l. 11.  
p. 16, l. 13.  
p. 16, l. 25.  
p. 16, l. 30.  
p. 16, l. 42.

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7. There was an appeal to the West African Court of Appeal at Lagos which delivered Judgment on the 26th May 1951. p. 33.

The West African Court of Appeal at Lagos reversed the Judgment of the Court below and held—

(1) That, inasmuch as Ajose had only the equitable interest in the property but contracted to sell the property as such to Assaf, the latter obtained no interest *in rem* under his contract.

(2) That Okunubi was in the position of a purchaser for value acquiring the legal estate without notice of Assaf's interest.

It had been contended that by virtue of Section 16 of the Land Registration Ordinance the prior registration of the Conveyance to Okunubi barred Assaf from setting up any claim under the subsequent 10 conveyance to him.

The Court held that this contention could not hold good in view of the provisions of Section 19 of the Ordinance.

p. 49. 8. On the 19th November 1951 the West African Court of Appeal at Lagos refused to give leave to appeal to the Privy Council to Assaf inasmuch as he had not complied with the conditions laid down by the Court on the 27th June 1951.

These conditions were substantially the same as those laid down in the West African (Appeal to Privy Council) Order in Council 1949, Section 6 (a); that the Order of the Court was to "enter into good and 20 "sufficient security"; and that the Court held by making a cash deposit of £500 the applicant had not complied with the Order of the Court.

p. 52. By an Order in Council, dated the 24th June 1952, Special Leave to Appeal was granted from the Judgment of the West African Court of Appeal at Lagos, dated the 26th May 1951, and from the said Judgment dated the 19th November 1951.

p. 53. 9. By an Order in Council, dated the 30th April 1953, Daniel Olatunji Fuwa, Michael Oredolapo Onayemi and Abigail Pelewura Osifeso, executors and executrix of Musuru Okunubi, who died on the 3rd November 1952, were substituted in the appeal for the said deceased Respondent and 30 the appeal was revived accordingly.

10. The Appellant humbly submits that the Judgment of the West African Court of Appeal at Lagos, dated the 26th May 1951, which allowed the Appeal from the Judgment of Mr. Justice Ademola, dated the 28th October 1950, is erroneous and should be reversed, and this appeal allowed by the restoration of the Judgment of Mr. Justice Ademola with costs, for the following, among other,

## REASONS

- (1) BECAUSE the legal estate in the property was at all relevant times vested in the mortgagees.
- (2) BECAUSE the mortgagees did not join in the Conveyance, or execute a previous reconveyance to either Assaf or Okunubi.

- (3) BECAUSE Assaf took an equitable interest in the property by virtue of the contract of the 9th October 1948.
- (4) BECAUSE the mortgagees through Mr. Latunde Johnson as one of their directors or alternatively as their Solicitor had express or alternatively constructive notice of Assaf's equitable interest and were thereby precluded in equity from constituting themselves as trustees upon a valid trust for Okunubi.
- 10 (5) BECAUSE the mortgagees never in fact purported to constitute themselves as trustees for Okunubi.
- (6) BECAUSE Okunubi through his employment of Mr. Latunde Johnson as solicitor had constructive notice of Assaf's equitable interest.
- (7) BECAUSE the West African Court of Appeal at Lagos was wrong in holding that Okunubi was in the position of a purchaser for value acquiring the legal estate without notice of Assaf's equitable interest.
- 20 (8) BECAUSE the equitable interest of Assaf was prior to and prevails over the equitable interest of Okunubi under the Contract of the 27th October 1948.

J. PENNYCUICK.

T. B. W. RAMSAY.

In the Privy Council.

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**ON APPEAL**

*from the West African Court of Appeal  
at Lagos.*

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BETWEEN

**ANTONIO ASSAF** (Plaintiff-  
Respondent) . . . . *Appellant*

AND

**DANIEL OLATUNJI FUWA  
and Others** (Defendant-  
Appellant) . . . . *Respondents.*

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**Case for the Appellant.**

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