

Judgment  
29/1954

No. 3 of 1953.

# In the Privy Council.

## ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL AT LAGOS.

38095

BETWEEN

ANTONIO ASSAF . . . . .

(Plaintiff/Respondent)  
Appellant

AND

10 DANIEL OLATUNJI FUWA, MICHAEL  
OREDOLAPO ONAYEMI and ABIGAIL  
PELEWURA OSIFESO the Executors and  
Executrix of MUSURU OKUNUBI, deceased

(Defendant/Appellant)  
Respondents.

UNIVERSITY OF  
W.I.C.I.  
23 MAR 1955  
INSTITUTE OF  
LEGAL STUDIES

## Case for the Respondents.

RECORD.

1. This is an appeal by the Plaintiff in the action from a judgment and Order of the West African Court of Appeal holden at Lagos in favour of the Defendant on his appeal from a judgment of Mr. Justice Ademola under which the Plaintiff recovered judgment for possession of certain premises at Ebute Metta and the sum of £400 as mesne profits. pp. 33, 40.

20 2. The premises in dispute are situate at and known as No. 130 Denton Street, Ebute Metta, Lagos, Nigeria, West Africa, and prior to the events hereinafter mentioned one Sarminu Ajose (hereinafter called "Ajose") being the owner in fee simple of such premises charged them by an Indenture of Mortgage dated the 5th July 1948 to The Oshodi and Apina Limited to secure the principal sum of £1,000 and interest thereon. p. 57.

3. By a Conveyance dated the 29th October 1948 and made between Ajose of the one part and Emanuel Musuru Okunubi (hereinafter called "Okunubi") of the other part the said property was in consideration of the sum of £2,700 (the receipt of which sum was therein acknowledged) conveyed by Ajose to Okunubi in fee simple. p. 62.

4. The said Conveyance was registered in the month of November 1948 at the Land Registry at Lagos pursuant to the Land Registration Ordinance, Cap 108. p. 15, l. 11. p. 39, l. 45.

p. 29. 5. On the 25th October 1948 the said Musuru Okunubi obtained a receipt from Ajose for £2,700 part of which (namely £2,675 16s. 9d.) Okunubi had paid by two cheques, one in favour of Johnson for £1,290 in part satisfaction of the mortgage debt and the other for £1,385 16s. 9d. in favour of Ajose for the balance of the purchase money. The sum of £24 3s. 3d. making up the £2,700 appears to have been paid by Okunubi to the Mortgagees in cash.

pp. 3, 4, 12, 34. 6. The Appellant claims that on the 9th October 1948 Ajose agreed to sell the aforementioned property to him for £1,600. It is not denied that the Appellant paid to Messrs. Irving & Bonnar, Ajose's Solicitors, 10 the sum of £300 on account of the purchase money on or about the 9th October 1948 and the further sum of £1,300 (being the balance of his purchase money) on or about the 16th October 1948.

p. 34. 7. Although on or about the 9th October 1948 the Appellant asked Messrs. Irving & Bonnar to investigate the title and instructed them to prepare a conveyance to him from Ajose and although Ajose (at about the same time) instructed his said solicitors to prepare a re-conveyance to him from the said Mortgagees and although Messrs. Irving & Bonnar had by the 16th October 1948 accordingly prepared a conveyance and a re-conveyance and had informed both the Appellant and Ajose of that fact no 20 further steps were taken to carry through the proposed sale from Ajose to the Appellant until after the said conveyance to Okunubi and the registration thereof as aforesaid had been executed and completed.

pp. 4, 5, 15, 35. 8. The said Okunubi entered into possession of the said property or of the rents and profits thereof in or about November 1948 and remained in such possession until his death on the 3rd November 1952. The Respondents as his personal representatives are and have since the grant of probate of the Will of Okunubi to them on the 3rd January 1953 been in such possession.

9. The Respondents submit that there never was any or alternatively 30 any binding contract for the sale of the said property by Ajose to the Appellant. In any event the Respondents claim that Okunubi entered into and completed his contract to purchase the said property from Ajose without any notice or knowledge of the acts in relation to the said property of the Appellant or of his negotiations or transactions relative thereto with Ajose.

pp. 64, 65. 10. Notwithstanding the matters aforesaid the Appellant during the month of November 1948 commenced proceedings in the Supreme Court of Nigeria against Ajose for specific performance of his alleged contract for the purchase of the said property and on the 29th June 1949 Mr. Justice 40 Gregg gave judgment in his favour, making an order that " All the parties concerned do execute the relevant conveyances within 30 days " and making also an Order for possession.

p. 66.

11. Okunubi was not a party to the said proceedings although he gave evidence therein on behalf of the Defendant.

12. Although as a result of the said judgment of Mr. Justice Gregg p. 35.  
Ajose executed a Conveyance dated 13th September 1949 of the said p. 66.  
property in favour of the Appellant he (the Appellant) was unable to secure  
possession thereof. Such Conveyance was registered on the 31st October p. 35.  
1949.

13. The first question with which the West African Court of Appeal p. 35.  
dealt in delivering judgment was whether or not the judgment of Mr. Justice  
Gregg was binding upon Okunubi in the present suit and, in disagreeing  
with and overruling the decision of the trial judge upon this point, the  
10 Court of Appeal said :—

“ A purchaser who enters into negotiations with a vendor after p. 35.  
“ proceedings have been commenced to determine the vendor’s  
“ rights and especially if he has notice and knowledge of such  
“ proceedings, does so with his eyes open and may well be bound  
“ by the result thereof. But a purchaser who buys and completes  
“ his purchase before any such proceedings cannot be affected by  
“ such proceedings unless he is made a party thereto, for the  
“ contractual relationship between the vendor and himself has come  
“ to an end by performance of the contract.”

20 The judgment of the Court of Appeal on this question concludes as  
follows :—

“ I consider, therefore, that the judgment of Mr. Justice Gregg p. 36.  
“ in the suit against Ajose is not binding upon the Appellant in the  
“ present proceedings and that the learned judge in the Court below  
“ erred in holding that as between the present parties he could not  
“ go behind it.”

14. The Court of Appeal then proceeded to examine into and consider p. 36.  
the nature and effect of the transaction between Ajose and the Respondent  
(the present Appellant) on the 9th and 16th October 1948 and stated that  
30 it was open to Okunubi—notwithstanding the finding of Mr. Justice Gregg  
that that transaction was a contract for sale—to attack the validity of that  
contract which was the very root of the present Appellant’s claim against  
him. The Court of Appeal proceeded, however, to reach the conclusion  
that two receipts (being exhibits “ A ” and “ A1 ” not printed in this p. iii.  
Record of Proceedings) constituted a sufficient note of an oral agreement  
between the present Appellant and Ajose and that the contract for sale p. 37.  
between them was thereby established.

15. It is submitted that the Court of Appeal erred in coming to the  
conclusions mentioned in the preceding paragraph hereof.

40 The Statement of Claim in the action does not set up any oral contract p. 4, 5.  
between the present Appellant and Ajose nor does it rely upon or refer to  
the receipts being exhibits “ A ” and “ A1 ” or either of them. No p. iii.  
admissible evidence of any such oral agreement appears to have been  
tendered by the Plaintiff (the present Appellant) at the trial. pp. 6, 7.

16. In the result it is submitted that the present Appellant has failed  
in this action to establish any oral or written contract between himself and

Ajose for the purchase by him from Ajose of the property in question. The establishment of such a contract is, it is submitted, an essential element in the Appellant's case.

p. 37. 17. On the footing that the present Appellant had succeeded in establishing his contract of sale with Ajose the Court of Appeal next considered what was the nature of that contract in the light of the oral testimony given at the trial. In summarising such evidence the Court of Appeal said that the subject matter of the contract was the legal estate in the property and not merely the equity of redemption, which by reason of the subsisting mortgage or mortgages was all that the vendor possessed on the 16th October 1948 : that no re-conveyance by the Mortgagees had ever been executed and that, therefore, the vendor had at no time been in a position to convey to the present Appellant what he had contracted to sell ; that there was, no doubt, an obligation upon the vendor to get in the legal estate in order that he might carry out his contract ; and that his failure to do so gave rise to an action (at the suit of the present Appellant) for damages for breach of contract and not for specific performance. 10

p. 38. 18. Finally, the Court of Appeal gave consideration to the question what would have been the position between the present Appellant and Okunubi on the footing that the former had, prior to the purchase by Okunubi, acquired an equitable interest in the property. 20

p. 38. 19. After finding as a fact that Okunubi had prior to the conveyance to him paid off the mortgage but that by reason of the absence of any re-conveyance by the Mortgagee—the legal estate remained vested in the Mortgagees as trustee for Okunubi the Court of Appeal held that his position was that of a purchaser for valuable consideration who obtains a legal estate at the time of his purchase without notice of a prior equitable right which entitled him to priority in equity as well as in law.

20. It is submitted that the Court of Appeal were correct in law in the conclusions at which they arrived as stated in paragraph 19 hereof. 30

p. 11.  
p. 31, l. 34. 21. It was submitted, on behalf of the present Appellant, to the Court of Appeal that, as Johnson, who was not only a Solicitor and director of the mortgagee firm, but also Solicitor for Okunubi, had notice of the prior transaction between Ajose and the present Appellant such notice must be imputed to Okunubi. With regard to this submission the Court of Appeal said :—

p. 39. “ . . . it is clear that Johnson was not acting on behalf of both  
“ parties in the transaction, that is to say, for both Respondent  
“ and Appellant, nor did he acquire notice of the transaction between  
“ the Respondent and Ajose by virtue of his position as solicitor to  
“ either. Notice was given him of the proposed sale by Ajose to the  
“ Respondent in his capacity as solicitor to the Mortgagees and it  
“ cannot be said, I think, that he owed any duty to communicate  
“ his knowledge to the Appellant when the latter subsequently  
“ became his client.” 40

It is submitted that this view of the law as to Notice is correct.

22. The Respondents submit that this Appeal ought to be dismissed and that the judgment and Order of the West African Court of Appeal at Lagos affirmed for the following among other

### REASONS

- 10
- (1) BECAUSE the Appellant has failed to plead or to establish any binding contract between Ajose and himself for the sale to him of the property in question.
- (2) BECAUSE the finding of the Court of Appeal that there was a binding contract between the Appellant and Ajose was erroneous ought to be reversed.
- (3) BECAUSE the action for specific performance between himself and Ajose was misconceived.
- (4) BECAUSE the judgment and Order of Mr. Justice Gregg in the said action was wrong and ought never to have been pronounced.
- 20
- (5) BECAUSE, in any event, the judgment and Order of Mr. Justice Gregg were not binding upon and in no way affected Okunubi and are not binding upon and in no way affect the Respondents as the personal representatives of Okunubi.
- 30
- (6) BECAUSE in any event the purchase by Okunubi was entered into and completed by means of (1) the payment off of the mortgage upon the property (2) the payment of the full balance of the purchase money (3) the conveyance of the property by Ajose to him on the 29th October 1948 and (4) the due registration of such Conveyance at the Nigerian Land Registry in November 1948 without any knowledge by or notice to Okunubi of the transaction concerning the property between the Appellant and Ajose.
- (7) BECAUSE save as mentioned in reason No. (2) hereof the judgment of the Court of Appeal and the Order made by it were correct and ought to be affirmed.

JOHN BOWYER.

**In the Privy Council.**

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**ON APPEAL**

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

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BETWEEN

**ASSAF** . (*Plaintiff/Respondent*)  
*Appellant*

AND

**FUWA and Others** (*Defendant/Appellant*)  
*Respondents.*

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**Case for the Respondents**

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**HATCHETT JONES & CO.,**

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