Privy Council Appeal No. 30 *of* 1958

Tejumade Onitiri - - - - - - - - - *Appellant*

v.

Samuel A. Oyadiran and Others - - - - - - *Respondents*

FROM

THE FEDERAL SUPREME COURT OF NIGERIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH NOVEMBER, 1959

Present at the Hearing:

THE LORD CHANCELLOR (VISCOUNT KILMUIR)
LORD JENKINS
MR. L. M. D. DE SILVA

[*Delivered by* LORD JENKINS]

In this case the appellant, one of the children of the late Lawani Idowu Onitiri (who died intestate and is hereinafter called the deceased) brought an action in the Supreme Court of Nigeria, Lagos Judicial Division, on behalf of herself and the other children of the deceased, against the three respondents, claiming that a sale to the first respondent by the second and third respondents, as administrators of the estate of the deceased, of a piece of land known as Onitiri (sometimes called "Ajegunle Onitiri"). Brickfield, at Yaba on the mainland of Lagos and forming part of such estate, should be set aside on the ground of fraud.

The action was heard in the Supreme Court by Jibowu, J., who dismissed it by a judgment dated the 30th December, 1955. The appellant appealed to the Federal Supreme Court of Nigeria (Sir Stafford Foster Sutton, F.C.J., and Lestang and Abbott, F.JJ.). By a judgment of that court dated the 30th December, 1957, her appeal was dismissed, and from that judgment she now appeals to this Board.

The dispute concerning the sale of Onitiri Brickfield arose in this way:—At the date of his death the deceased was owner in fee simple of land on the mainland of Lagos which included the brickfield and also included the villages of Onitiri, Onike, and Araromi. On the 27th January, 1948, pursuant to an Order of the Supreme Court made in the year 1947, the Administrators offered all the undevised properties of the deceased for sale by public auction, through the agency of one Sammy Crowther, in accordance with an auction notice dated the 19th January, 1948, wherein the properties offered for sale were described as "freehold landed property in a very good locality situated at Onitiri Village popularly known as Onitiri Brickfield and Village, Yaba, including Onike and Araromi Villages". The conditions of sale set out in the auction notice provided (by Condition 3) that the highest bidder should be the purchaser subject to the approval of the Vendors and (by Condition 6) that if the reserve price should not be obtained "hammer should not be down but the highest bidder should sign and bid submitted for seller's consent".

At the auction the first respondent was the highest bidder with a bid of £3,800, but a sale at that price was not approved by the Administrators, on the ground that the reserve price (namely £10,000) had not been reached.

On the 21st March, 1948, the first respondent agreed with the Administrators by private treaty to purchase the brickfield at the price of £650, this being the agreement which the appellant claimed to have set aside as fraudulent. Inasmuch as that claim was founded substantially on the contention that the sale for £650 comprised the whole of the land which had been offered for sale at the auction and for which the first respondent had then bid £3,800, reference should next be made to the description applied to the land sold for £650, as compared with the description given in the auction notice above referred to of the land then offered for sale. Three receipts appear to have been given during March, 1948, to the first respondent by the Administrators or their agent Crowther in respect of the sale for £650. The first, dated the 3rd March, 1948, acknowledged the receipt of the sum of £450 "as part of the purchase price of piece of a landed property situate and being at Ajegunle Onitiri Brickfield Sabo via Yaba". The second, dated the 16th March, 1948, acknowledged the receipt of £50 "in settlement of an account re Ajegunle Brickfield Sabo". The third, dated the 24th March, 1948, acknowledging the receipt of £500 (in fact represented by the two sums of £50 and £450 already paid), described the property sold in the same way as the first, but added "Dimension to be stated after separation of the said portion part from the whole plan". The balance of £150 appears to have been paid by the first respondent to the Administrators on or about the 23rd July, 1949.

Before proceeding to examine further the basis of the charge of fraud made by the appellant in respect of the sale for £650, their Lordships would briefly refer to an earlier action (No. 55 of 1950) brought in the Supreme Court by the first respondent as plaintiff against the administrators and one Taiwo as defendants. The administrators brought this earlier action upon themselves by executing a conveyance dated the 6th January, 1949, whereby they purported to convey to Taiwo for a sum of £1,000 land described as "All that piece or parcel of land situate . . . at Onitiri Brickfield near Onike Village Yaba . . ." and further defined by reference to a plan. On the 23rd July, 1949, the first respondent tendered to the Administrators for execution a conveyance to the first respondent of the brickfield described as "All that piece or parcel of land situate . . . at Ajegunle—Onitiri Brickfield Sabo via Yaba Lagos . . ." and further defined by reference to a plan, which showed the Brickfield as having an area of 23·95 acres. The Administrators refused to execute the conveyance so tendered, on the ground that the plan drawn thereon did not represent the land agreed to be sold to the first respondent. On the 4th February, 1952, judgment was given in favour of the first respondent, and it was ordered that the conveyance to Taiwo be set aside, and declared that the first respondent was the true owner of the land depicted in the survey plan attached to the conveyance tendered by him. The judge expressed the opinion that the conveyance so tendered should be more carefully drafted before execution. An appeal by the Administrators from this judgment to the West African Court of Appeal was dismissed, but the conveyance to the first respondent has never been executed.

The appellant was not a party to this earlier litigation, which did however determine conclusively as between the first respondent and the Administrators that the land sold by the Administrators to the first respondent for £650 was the land described in the conveyance tendered by him, that is to say (to put it shortly), Onitiri Brickfield comprising an area of 23·95 acres.

The Civil Summons in the present suit was issued on the 11th June, 1954, and the appellant thereby claimed to set aside the sale of the brickfield to the first respondent by the Administrators on the ground of fraud.

By her statement of claim as amended pursuant to an Order of the Supreme Court dated the 22nd November, 1954, the appellant, after pleading her representative capacity, the capacity of the Administrators and the deceased's ownership of the brickfield alleged in para. 4 as follows:—

" 4. On the 21st day of March 1948, the first Defendant fraudulently bargained with the second and third Defendants and purchased the land known as Onitri Brickfield for £650.

Particulars of Fraud

(*a*) The first Defendant on 27th January 1948 was the highest bidder at a sale by Auction of the aforesaid property for £3,800.

(*b*) That the sale was eventually rescinded because the reserved price of £10,000 was not reached.

(*c*) On the 21st day of March 1948 the first Defendant purported to purchase the same piece of land for £650.

(*d*) That the aforesaid Onitiri Brickfield was divided into plots on or about the same period and sold at £800 a plot, i.e. an acre.

(*e*) The first Defendant now claims to have bought about 23 plots (acres) for £650. Rent on this land being about £1,000 p.a.

(*f*) That there was no notice of the sale to the Plaintiff.

(*g*) That the alleged sale was by private treaty surreptitiously concluded by the Defendants without any cause whatsoever in that the estate being solvent the sale in itself was unnecessary.

(*h*) The Plaintiff says that the second and third Defendants have no power to sell aforesaid property."

By his defence the first respondent admitted the Administrators' capacity and that he bought the brickfield from them for £650 but denied all other allegations in the Statement of Claim and particularly the allegations of fraud. He also pleaded *res judicata* by virtue of the action brought by him in 1950, and estoppel.

By their joint defence the Administrators made no admissions as to the appellant's representative capacity, admitted their own capacity and also admitted sub-paras. (*a*), (*b*) and (*d*) of para. 4 of the Statement of Claim, but denied every other allegation contained therein. They also pleaded that they sold the brickfield as Administrators and that they were not bound to consult the appellant before such sale.

The pleas of *res judicata* and estoppel raised by the first respondent were heard by the Supreme Court as preliminary points and Jibowu, J., in a judgment dated the 3rd January, 1955, found against the first respondent on both of them.

On the pleadings it was clear enough that the cardinal issue of fact in the case was whether, as alleged in para. 4 (*c*) of the Statement of Claim, the land bought by the first respondent from the Administrators for £650 on the 21st March, 1948, was the same as the land for which he had bid £3,800 at the auction sale on the 27th January, 1948. With a view to proving this allegation three witnesses were called on the appellant's behalf, namely, the agent Crowther, the plaintiff herself, and a son of the deceased named Emanuel Idowu Onitiri. After considering the evidence of these witnesses and the relevant documents the learned judge found on this issue of fact that the land bought by the first respondent for £650 was not the same as the land for which he had offered £3,800 at the auction but (as is clearly implicit in his finding) was a part only of the land so offered. On the appellant's appeal to the Federal Supreme Court the learned judge's finding on this issue of fact was upheld, and the appellant does not seek to challenge these concurrent findings. There are however two passages in the evidence of Emanuel Idowu Onitiri and the appellant to which reference should be made. The former witness, in giving evidence (which the learned judge rejected) to the effect that the land offered at the auction sale for which the first respondent bid £3,800 consisted only of the 23 acres subsequently bought by the first respondent for £650, said this:—" Onitiri Village comprises of 238 acres of land. Land for which the first defendant offered £3,800 was only a portion of the land. It was 23 acres of land that was sold for £650." The appellant, in her evidence, thus described the fraud of which she complained:—" The fraud is that the land was sold for £650 after we refused to accept £3,800 for it."

Also called on the appellant's behalf was an auctioneer and valuer named Emanuel Sosanya, who gave expert evidence to the effect that Onitiri Brickfield, 23·95 acres in size, was worth in 1948 between £250 and £300 per acre, and in 1954 over £400 per acre.

In his Judgment dated the 30th December, 1955, the learned Judge after finding as above adversely to the appellant on the allegation in paragraph 4 (*c*) of the Statement of Claim to the effect that the piece of land bought by the first respondent for £650 was the same as the land for which he had bid £3,800 at the auction sale, and holding that this allegation of fraud therefore failed, went on to consider the remaining particulars of fraud alleged in paragraph 4 of the Statement of Claim.

With regard to the allegation in sub-paragraph (*d*) that "Onitiri Brickfield was divided into plots on or about the same period and sold at £800 a plot i.e. an acre", the learned Judge observed, and it is not disputed, that there was no proof that the brickfield had been divided into plots or that a plot had been sold for £800. He pointed out that the evidence of Emanuel Onitiri was to the effect that although it was intended to divide the brickfield into plots, that intention had not been carried out up to the 14th December, 1955, when he gave evidence. It plainly follows that whatever its import, which is decidedly obscure in that it does not say by whom, or for whose benefit, or at what cost in the way of development and so forth, the division into plots and sales at £800 a plot are alleged to have been carried out, and whatever assistance (if any) it might have afforded to the appellant's case if proved, this allegation as matters actually stood, could only suffer the fate of complete rejection as an allegation which the appellant had wholly failed to substantiate. No point was made on the appellant's side of the admission of paragraph 4 (*d*) of the Statement of Claim in the Defence of the Administrators. This was shown by the evidence referred to by the learned Judge to have been contrary to the facts, and appears to have been disregarded as a mere mistake.

As to the allegation in sub-paragraph (*e*) that "the first defendant now claims to have bought about 23 plots (acres) for £650. Rent on this land being about £1,000 p.a.", the learned Judge said that the first respondent was justified by the judgment of the Court in Suit No. 55 of 1959 in claiming that he bought the 23 acres for £650 and that "the question whether rent of £1,000 p.a. might be collected on it" was "beside the point". It was, of course, common ground that the first respondent had bought the brickfield, 23 acres in extent, for £650. But there has been some discussion as to the learned Judge's meaning when he said "the question whether rent of £1,000 p.a. might be collected on it" was "beside the point". It may be said at once that there was no evidence that the brickfield had ever in fact been let for £1,000 p.a., or expert evidence to the effect that it could be or could have been let at that rent. This in itself would seem to have been sufficient to dispose of sub-paragraph (*e*) so far as it alleged that the "rent on the land" was "about £1,000 p.a." which like the allegation as to sale in plots contained in sub-paragraph (*d*) had necessarily to fail as an allegation without evidence to support it. But it appears to their Lordships that in saying that "the question whether rent of £1,000 p.a. might be collected" was "beside the point" the learned Judge was construing this allegation as referring to the rent potentially obtainable for the brickfield as at the date of the Statement of Claim. That is borne out by the learned Judge's use of the words "might be collected" which refers to the present, as distinct from "might have been collected" which would have been apt to refer to the date of the allegedly fraudulent agreement. This construction of the allegation as to the "rent on the property" appears to their Lordships to be right, having regard to the reference to the present imported by the words "the first defendant now claims" at the beginning of sub-paragraph (*e*). If that is right then the allegation as to the rent obtainable even if true could not assist the appellant on her case as pleaded. The mere fact that the first respondent might be able to obtain a rent of £1,000 p.a. in 1954 for land purchased in 1948 for £650 could not in itself entitle the appellant to have the agreement set aside. Be that as it may the short answer

to this allegation is that it was never proved. The remaining allegations in sub-paragraphs (*f*), (*g*) and (*h*) of the Statement of Claim were all rejected by the learned Judge, and as such rejection has not been challenged, their Lordships find it unnecessary to refer to them further.

So far, it would seem to their Lordships that the course taken by the learned Judge was wholly correct. He dealt with the case *secundum allegata et probata*, and, concluding that none of the allegations of fraud in the Statement of Claim was proved, dismissed the action accordingly.

It remains, however, to consider the circumstance that Mr. Sosanya was called and gave evidence to the effect that the brickfield in 1948 was worth between £250 and £300 per acre and would be worth over £400 in 1954. None of the respondents took any objection to that evidence, and Mr. Sosanya was not cross-examined. On the other hand Mr. Thompson, counsel for the appellant did not refer to this evidence at any stage in his argument before the learned Judge or invite him to draw any conclusion from it. The learned Judge for his part made no reference at all to this evidence.

It is clear that Mr. Sosanya's evidence was not relevant to any issue expressly raised in the Statement of Claim, which contained no express allegation that the sale was at an undervalue so gross in comparison to the true market value of the brickfield as to raise an inference of fraud on the strength of which the sale should be set aside, but founded its basic charge of fraud on the special ground that the Administrators sold to the first respondent for £650 land for which he had offered £3,800.

If gross undervalue in comparison to market value had been pleaded, Mr. Sosanya's evidence would of course have been relevant, but it was wholly irrelevant to the actual complaint to the effect that fraud was to be inferred from the gross discrepancy between the £650 paid and the £3,800 offered by the first respondent, with which expert opinion as to market value had nothing to do.

If Mr. Sosanya's evidence was irrelevant, as in their Lordships' view it undoubtedly was, the mere fact that he gave it could not make it relevant. The position might have been different if Mr. Thompson had told the Court that in his submission the Statement of Claim sufficiently raised the general issue of undervalue by reference to market value, and that he proposed to call Mr. Sosanya to give evidence as to the market value of the brickfield at the material time, and Mr. Taylor, counsel for the first respondent had then allowed Mr. Thompson to call and examine Mr. Sosanya without objection. There might then conceivably have been something to be said for the view that Mr. Taylor had waived any objection based on the lack of a sufficient plea of undervalue in the Statement of Claim, the more so if Mr. Taylor had cross-examined the witness. But nothing of that sort happened. Again, Mr. Thompson might have applied for leave to amend the Statement of Claim so as to raise the issue to which Mr. Sosanya's evidence was directed. But he made no such application.

In fact Mr. Taylor, according to the learned Judge's note, founded his argument entirely on the particular fraud alleged. Thus the learned Judge records him as submitting "the mere fact that the first defendant knew the land was worth more than £650 as £3,800 had been rejected for it raises a presumption of fraud as the property was sold at under-value"; and as saying near the close of his argument "the defendant has obtained land for £650 which he could not get for £3,800".

In these circumstances, it appears to their Lordships entirely proper that Mr. Sosanya's evidence should have been ignored, as in fact it was, both by counsel in argument and by the learned Judge in his Judgment.

An argument was addressed to their Lordships to the effect that although the primary allegation that the Administrators sold to the first respondent for £650 the same area of land as that for which he had offered £3,800 was not made good, and although the alleged division into plots and sale of plots at £800 each never took place, and although the alleged rental of £1,000 (whether actual or potential) was not proved, nevertheless the Statement of Claim by alleging these matters did by implication raise the general issue of undervalue, because these abortive allegations

were all directed to inadequacy of price. Their Lordships cannot accept this argument. It seems to them to be wholly inconsistent with the well-established principles applicable to the pleading and proof of charges of fraud. Where fraud is alleged, the grounds on which it is alleged must be stated with particularity, and it must be strictly proved in accordance with those grounds, and no others.

To take a simple example, let it be supposed that A. and B. hold land on trust for sale and to pay the proceeds to C., and let it be supposed that A. and B. sell the land to X. for £500. Being dissatisfied with this sale, C. brings an action against A., B. and X. to have it set aside, in which he delivers a statement of claim whereby he pleads the sale and alleges it to have been fraudulent, and alleges further as particulars of the fraud complained of that X. sold the property to Z. on the following day for £5,000, no other particulars being given. At the trial C. wholly fails to prove that the land was sold to Z. as alleged or at all. Can it then be open to C., without amendment of his pleading, to set up, and call evidence directed to proving, a case to the effect that the sale was at a gross undervalue, on the ground that the particulars which he wholly failed to prove would if proved have supported that inference? It appears to their Lordships self-evident that the answer to that question must be "No". But the appellant's argument demands that it should be answered affirmatively.

By her original notice of appeal to the Federal Supreme Court the appellant complained of the learned Judge's decision that the land sold for £650 was not the same as the land for which the first respondent offered £3,800.

By a statement of further grounds of appeal she complained that the learned Judge failed to direct himself as to (so far as now material) "the sale at undervalue". This (so far as their Lordships are aware) was the first time that reference had been made to "undervalue" as a general issue.

As their Lordships have already mentioned, the Federal Supreme Court upheld the learned Judge's finding on the issue as to the identity of the land, and the appellant has accepted these concurrent findings as conclusive.

On the question whether it was open to the appellant to raise the issue of gross undervalue Sir Stafford Foster Sutton (in the course of a Judgment with which the other members of the Court concurred) said this:—

> "No rule is more clearly settled than that fraud must be distinctly alleged and as distinctly proved, and that it is not allowable to leave fraud to be inferred from the facts, Thesiger L.J. in Davy v. Garrett (1887-8) 7 Ch. D. 489. It has repeatedly been held that any charge of fraud must be pleaded with the utmost particularity. The reason for this rule is obvious; it is only fair and right that the person against whom fraud is charged may have the opportunity of knowing what he has to meet, and of shaping his defence accordingly.
>
> In the present instance it is clear that the issue of fraud was that set out with particularity in paragraph 3 (*a*) (*b*) and (*c*) of the Statement of Claim, and which was so succinctly put by the Plaintiff in her evidence. Gross undervalue as an issue was not once referred to by Counsel for the Plaintiff during his closing address at the trial.
>
> In these circumstances I think it would be wrong at this late stage to allow the Plaintiff to contend, for the first time, that the pleading and evidence disclosed another fraud to the one upon which the case was fought in the Court below."

With these observations their Lordships respectfully agree.

For the reasons above stated their Lordships are of opinion that this appeal fails and should be dismissed, and will humbly advise Her Majesty accordingly.

The appellant must pay the costs of the appeal.

(39933) Wt. 8078 37 100 12/59 D.L.

In the Privy Council

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DELIVERED BY LORD JENKINS

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1959