

In the Privy Council.

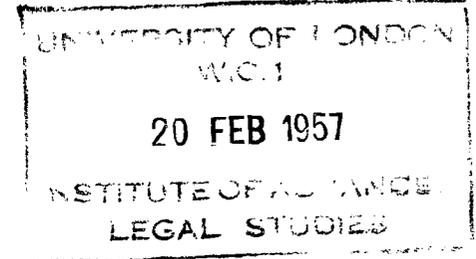
ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL AT LAGOS.

BETWEEN

- 1. PATIENCE KASUMU
 - 2. MOSES ADELEYE KASUMU
 - 3. JAMES BASANYA FERGUSON ODUWOLE
 - 4. ARTHUR TAIWO OLUKOYA
- as the Administratrix and Administrators of
the Estate of C. O. KASUMU deceased

10



Appellants

46050

AND

GBADAMOSI BABA-EGBE *Respondent.*

CASE FOR THE APPELLANTS

RECORD.

1. This is an appeal from a Judgment of the West African Court of Appeal, dated 22nd February, 1954, allowing an appeal from a Judgment of the Supreme Court of Nigeria, dated 26th February, 1952, in consolidated suits. pp. 57-63.

20 2. The principal issues which fall to be determined in this case are (1) whether the Respondent must be taken to have waived the Money-lenders Ordinance, and (2) whether the West African Court of Appeal, in granting the Respondent a declaration that the mortgage deed was unenforceable, was wrong in refusing to put the Respondent on terms requiring him to repay the monies advanced under the mortgage.

3. The Appellants are the Administrators of the estate of C. O. Kasumu (hereinafter referred to as "the deceased") who was at all material times a licensed moneylender carrying on business at an address in Lagos.

30 4. On the 13th September, 1946, an Indenture of Lease was executed whereby the Lagos Executive Development Board (hereinafter referred to as "the Board") leased to the Respondent for a term of 99 years from the 1st August, 1943, a parcel of land situate in Lagos and described as Block No. 21, Plot No. 10. The lessee covenanted (*inter alia*) to erect and complete on the said land buildings to the value of not less than £200 to the satisfaction of the Lessor. The said Indenture included an option to purchase the freehold of the said plot on compliance with the provision for building and on payment of all rent rates and taxes up

p. 68.

to the time of such compliance or the exercise of the option. On the 22nd August, 1945, the Respondent executed a mortgage deed whereby he mortgaged the said land to C. O. Kasumu for the remainder of his term for the consideration of the sum of £2,000. He covenanted to pay the said sum on the 30th September, 1946, with interest thereon at the rate of Fifteen pounds per centum per annum (Exhibit B).

On the 20th October, 1945, the Respondent wrote a letter to the Secretary of the Development Board in the following terms :—

“ Sir,

p. 71.

I have the honour to bring to your notice and knowledge the following fact : that I have this day surrendered my plot No. 10 in Block 21 at Great Bridge St. Lagos, to Mr. C. O. Kasumu of No. 27 Omididun St. Lagos and I hope your kind goodself will take all the necessary immediate action on the receipt of this letter . . .” (Exhibit C).

p. 71.

On the 23rd October, 1945, the Respondent executed a receipt for £55 which was expressed to be received from C. O. Kasumu as being part payment of the sum of £200 balance of the £2,250 full purchase of the property sold to him by the Respondent (Exhibit D).

pp. 72-73.

On the 29th October, 1945, and the 12th November, 1945, the Respondent executed similar receipts in respect of the sums of £10 and £79 respectively (Exhibits E and F).

The Respondent, who was illiterate, executed all three Exhibits by impressing thereon his thumb mark.

5. By an Application for Summons, dated 30th January, 1950, in the Supreme Court, the Respondent instituted

SUIT No. 42 OF 1950

pp. 1 & 2.

in which the Respondent claimed against the Appellants as Administrators :—

“ (i) An order for the redemption of the property at No. 55 Great Bridge Street, Lagos, mortgaged by him to the deceased by deed dated the 22nd August, 1945, and duly registered. Alternatively a declaration that the said mortgage is void.

(ii) An account of rents and mesne profits received by the deceased and the Appellants.

(iii) Recovery of possession of the said property.”

6. By an Application for Summons dated 28th February, 1950, in the Supreme Court the Appellants instituted :

pp. 3-4.

SUIT No. 77 OF 1950

against the Respondent and one Momodu Balogun (hereinafter referred to as “ the second Defendant ”) in which the Appellants, suing as Administrators, claimed :—

“ (i) That the Respondent, having on the 20th October, 1945, agreed to assign his interest in the said property to the deceased

for a consideration of £2,250, which was then the principal and interest due and owing under the said mortgage deed, be made to execute a deed of assignment.

(ii) That a purported sale of the said property by the Respondent to the second Defendant made on the 16th November, 1948, be set aside."

7. On the 13th March, 1950, pleadings were ordered in Suit No. 42 p. 5.
of 1950, and on 20th March, 1950, pleadings were ordered in Suit No. 77
of 1950. p. 6.

10 8. By his Statement of Claim in Suit No. 42 of 1950 the Respondent pp. 7-8.
alleged (*inter alia*) as follows :—

(i) that the ownership in fee simple of the property was vested in the Board ;

(ii) that by Deed of Lease dated 13th August, 1943, the Board leased the property to the Respondent for a term of 99 years ;

20 (iii) that one of the covenants and conditions governing the lease was that the lessee should not assign, sublet or otherwise part with the possession of the land comprised in the lease or any part thereof, without the previous consent in writing of the Chairman of the Board ;

(iv) that by a Deed of Mortgage, dated 22nd August, 1945, the Respondent mortgaged the property to the deceased with the necessary consent of the Chairman of the Board ;

(v) that the deceased was at all material times a licensed moneylender carrying on business at No. 27 Omididun Street, Lagos ;

30 (vi) that it was the practice of moneylenders in Nigeria to advance, if their clients so desired, the principal amount stipulated in the mortgage deed by instalments, especially when the loan was required for building ;

(vii) that the deed of mortgage was executed so that the deceased might be able to supply funds from time to time to the Respondent as and when required for the expenses of putting up a building on the property ;

(viii) that the deceased in accordance with the said practice of moneylenders issued out of the capital stipulated in the deed of mortgage by way of instalments up to a total sum of £1,150 ;

40 (ix) that as evidence of receipt of these various advances the deceased made out various receipts which he represented to the Respondent as receipts for the said advances received in respect of the mortgage deed and to which the Respondent affixed his thumb impression as such ;

(x) that as the deceased kept no book in which the principal amount advanced was entered the Appellants had assumed that the principal amount was £2,000 ;

(xi) that the building was completed in September, 1946 ;

(xii) that the deceased was in possession as mortgagee from September, 1946, and after his death in June, 1948, the Appellants had been in possession ;

(xiii) that the property had been let out by the deceased to various tenants who were paying rents to him and after his death to the Appellants ;

(xiv) that the Appellants were the Administrators of the estate of the deceased ;

(xv) that the deceased had been fraudulent in that he made 10
out the said receipts as evidence of part payment of the purchase price of the building and not as evidence of advances on the mortgage deed ;

(xvi) that the Respondent never agreed to sell the property to the deceased nor was he ever told that he was executing a document of the type that he did in fact execute ;

(xvii) that the Board never gave consent to the Respondent to assign his equity of redemption to the deceased ;

(xviii) that the Respondent had applied to the Appellants for a Statement of Account so that he might pay off the mortgage and 20
release the property ;

(xix) that the Appellants maintained that the property had been " sold " to them and refused to submit an account. The Respondent claimed as per the Writ of Summons. The claim for a declaration that the deed of mortgage was void has never been amended or sought to be amended.

9. By their statement of defence in Suit No. 42 of 1950, the Appellants, while admitting that there was no book in which the principal amounts advanced by the Respondent were entered, denied that the averment of £2,000 as the principal was an assumption. They also pleaded (*inter alia*) 30
that the deceased did let out premises to various tenants who paid him rents and now paid the Appellants ; that the Board were prepared to consent to the assignment of the equity of redemption to the deceased ; and that the property in dispute was sold to the deceased on the 20th October, 1945, for the consideration of £2,250 and that the Respondent by a letter of the same date informed the Board that he had surrendered the plot to the Appellants.

pp. 9-10.

10. By their statement of claim in Suit No. 77 of 1950, dated 29th March, 1950, the Appellants pleaded (*inter alia*) that on the 20th October, 1948, the Respondent agreed to assign his leasehold interest 40
in the property to the deceased for a consideration of £2,250 which then represented the principal and interest due and owing and had actually surrendered the property to the deceased but no deed of assignment was prepared ; that the Respondent by a letter of 20th October, 1945, had communicated the assignment to the Secretary of the Board ; that the Respondent had not executed a deed of assignment although he had been

requested to do so by a letter dated 26th September, 1949, and still refused to do so; and that in spite of the matters aforesaid the Respondent, without the consent or approval of the Appellants, purported to sell the leasehold interest in the said property for a consideration of £2,700 to Momodu Balogun who was the second Defendant in the action.

11. By his statement of defence in Suit No. 77 of 1950, dated the 6th March, 1950, the Respondent denied (*inter alia*) that the consent of the Board had been obtained for any sale or transfer to C. O. Kasumu. Alternatively he pleaded the statutes of fraud [*sic*] and said that there was
 10 no memorandum in writing signed by him such as would entitle the Appellants to any decree for specific performance. pp. 12-14.

12. By his statement of defence in Suit No. 77 of 1950 the second Defendant, Momodu Balogun, pleaded (*inter alia*) that he had no notice of any interest of the Respondents in the said property. He also pleaded Section 4 of the Statute of Frauds. pp. 15-16.

13. At the hearing the Respondent deposed that at the time when he executed the deed of mortgage in favour of the deceased he received from the deceased £1,150 out of £1,300 due to him. He also deposed that he obtained no permission from the Board to sell to the deceased. He was
 20 not told that any of the documents to which he fixed his thumb impression was the sale to the deceased of the land and building. He had received £2,700 from the second Defendant as purchase money for the sale of the building. In cross-examination the Respondent agreed that he executed Exhibit B before a Magistrate and that it had been read over to him by a Yoruba interpreter before he affixed his thumb impression on it. He agreed it was correct before inserting his thumb impression. His evidence then proceeded as follows:— p. 17, l. 12. p. 17, l. 31.

30 “ There were two mortgage deeds. The first one was read to me and it was for £1,300, the second was for £2,000 but it was not read to me. Both mortgages were not executed on the same day. p. 17, l. 35.

This is my thumb impression on Exhibit ‘ B ’ it was after the completion of the building that I knew I was signing a mortgage deed for £2,000. I gave evidence at a criminal trial over this property. I did say there was only one mortgage for £1,300. I mortgaged the property only once to Kasumu. Both deeds were prepared by Kasumu and I sign all documents he asked me to sign. Kasumu died in June 1948 he was collecting the rents up to his death, and after his death his administrator continued I did put my finger impression on a document to the L.E.D.B. on 20/9/45 but it was Kasumu who prepared it and said it was the ‘ Deliver.’
 40 I understand the word ‘ Deliver ’ to mean that I placed my house in his care. Kasumu told me the letter was addressed to the L.E.D.B. I was roofing the building when I wrote to L.E.D.B. about the ‘ Deliver.’ I was on the roofing when the mortgage for £2,000 was executed.”

This witness further deposed that a letter had been shown to him at the criminal trial which he wrote to the Board but he explained that all

documents had been prepared by Kasumu and that he had signed. He did not know the contents of some of them. His contract with Belo Raji was for £1,150 and that was what he received from the deceased. He could not say how much Belo Raji received from the deceased at the time he executed the mortgage for £2,000. The second Defendant in Suit No. 77 of 1950 had sued him to recover the purchase money. At the time when he sold the property to the second Defendant the latter knew that he had mortgaged the property to the deceased and that the land was leased.

p. 20.

14. Moses Kasumu, the brother of the deceased, produced Exhibits C, D, E, and F. He deposed that he had prepared a deed of assignment to the property to the deceased's Estate and asked the Respondent to execute it but that he had refused. 10

15. In the course of this "Summing Up and Finding" dated the 27th June, 1950, the learned trial judge (Rhodes, J.) stated that from the word "go" the Respondent was telling the Court nothing but deliberate lies and called a witness in support of his evidence who was no improvement on the Respondent. He continued as follows:—

p. 24.

"... It may be argued that if these two were such incorrigible liars, why were they not committed for perjury; the answer to that is if this Court will commit every litigant and witness who commits deliberate perjury, the number of litigants and witnesses who will return to their homes after a case will be very few. 20

"These two men were so mean as to take advantage of the absence by death of Kasunmu and deny almost every transaction between themselves and Kasunmu. Although the name of Belo Raji was mentioned so many times as being the contractor for Baba-Egbe and Sumonu Neriwa and who actually received the money from Kasunmu, yet they did not deem it necessary to call him as a witness."

Since, however, the property at 55 Great Bridge Street was on a Government lease and could not be sold until the overlord had given his consent he could not uphold the sale. The learned Judge then continued as follows:— 30

p. 24, l. 15.

"It is argued by Counsel for Baba-Egbe that Kasunmu was a moneylender and kept no books as required by our local Ordinance therefore he cannot enforce his mortgage. Counsel for the Kasunmus contended that as the Moneylenders Ordinance was not pleaded it could not be raised. Counsel for Baba-Egbe replied that it will be an offence against the Rules of Pleadings to plead law. This seems to be the impression of almost every Counsel that has appeared before me in Lagos, if this assumption is correct, then wherein comes 'Special Pleas' such as barred by the Statute of Limitations, Statute of Frauds, etc. My conception of the rule that one should not plead law, is that it will be an offence against the rule to plead that under Section XX Sub. X of the Moneylenders Ordinance, etc. 40

Moreover, I am supported in this by *Cohen v. Lester Ltd.* on page 188 Vol. 4 of All England Reports 1938. I do not regard Ex. 'C' as evidence of sale to Kasunmu by Baba-Egbe, in my

view it was only an expression of an intention to sell as, probably Baba-Egbe did not know about his covenant not to part with the property without first obtaining the consent in writing of the Lagos Executive Development Board.”

The learned Judge found that there was no effective sale of the property by the Respondent to the deceased. He also found that the Respondent did execute the mortgage deed in favour of the deceased for £2,000 and had received a certain amount from the deceased. But such amount could only be ascertained by an account being taken of the rents collected on the property by the deceased. He therefore ordered that the Respondent was to exercise his equity of redemption and recover all his property after an account had been taken of the amounts due on the mortgage so as to determine what was actually owing by him on the mortgage and paid off to the estate of the deceased. The action against Balogun was dismissed. p. 24, l. 32.

16. By his report dated the 17th October, 1951, the Referee appointed by the Court found the sum due as from 1st October, 1947, to 30th June, 1950, on both the mortgage account and rent and profits account was £1,541 2s. 6d. pp. 41-43.

17. On the 26th February, 1952, Gregg, J., gave judgment adopting the Referee's award in favour of the Defendants in Suit No. 42 of 1950 of £1,541 2s. 6d. but adding thereto interest due on the principal as from 22nd August, 1945 to the 1st October, 1947, amounting to £525, with interest thereon on the scale followed by the Referee. With this addition he adopted the Referee's report and ordered that judgment be entered accordingly. From the said judgment the Respondent preferred an appeal to the West African Court of Appeal. p. 48.

18. The principal judgment in the West African Court of Appeal, dated 22nd February, 1954, was delivered by Coussey, J.A. In dealing with the arguments advanced on behalf of the Appellants that the mortgagee had failed to plead the Ordinance and must therefore be deemed to have waived its provisions, the learned Judge of Appeal referred to the reasoning of Cozens-Hardy, M.R., in “*In re Robinson's Settlement*” 1912 1 Chancery page 717 at page 725 to the effect that no Court ought to enforce an illegal contract if the illegality was duly brought to the notice of the Court and if the person invoking the aid of the Court was himself implicated in the illegality. Coussey, J.A., said :— pp. 57-62.

“In the present case the claim on the contract is by the Ordinance declared unenforceable; the contract is not declared illegal, but the principle is equally applicable.” p. 60.

40 The learned Judge of Appeal next considered the contention advanced on behalf of the Appellants that as the Respondent was applying to the equitable jurisdiction of the Court he could get relief only on the terms of paying the sum due. Following the decision of Tucker, J. (as he then was), in *Cohen v. Lester* 1938 4 A.E.R. 188 he held that the mortgagor should not be placed on terms.

p. 61, l. 40.

As regards Suit No. 77 of 1950, the learned Judge of Appeal held that in praying for specific performance the Appellants were seeking to enforce a contract arising from a transaction which was declared to be unenforceable. It followed that the claim in this suit wholly failed.

p. 62, l. 10.

p. 62, l. 17.

Foster-Sutton, P., and Verity, C.J., concurred. An Order was passed accordingly setting aside the judgment appealed from in so far as it awarded the said Defendants £1,541 2s. 1d.

p. 64.

19. On the 5th July, 1954, Leave to Appeal to Her Majesty in Council was granted.

20. The Appellants humbly submit that this Appeal should be 10 allowed and the Judgment and Order of the West African Court of Appeal be set aside or varied and judgment entered for the Appellants in both Suits and that they should be awarded costs throughout for the following amongst other

REASONS

- (1) Because both Courts below erred in holding that the Respondent had not waived the provisions of the Moneylenders' Ordinance.
- (2) Because the West African Court of Appeal erred in holding in relation to the issue of waiver that the same 20 principle applied to unenforceable as to illegal contracts.
- (3) Because the purported sale on the 16th November, 1948, to Momodu Balogun should have been set aside.
- (4) Because Rhodes, J., was right in holding that the Respondent should be put upon terms and the West African Court of Appeal were wrong in holding to the contrary.
- (5) Because the West African Court of Appeal erred in holding that, because the contract in the present case was unenforceable and not illegal, the Respondent 30 should not be put upon terms.

DINGLE FOOT.

RALPH MILLNER.

In the Privy Council

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OF APPEAL AT LAGOS

BETWEEN

PATIENCE KASUMU and
Others *Appellants*

AND

GBADAMOSI BABA-EGBE *Respondent.*

CASE FOR THE APPELLANTS.

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