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Judgment
30, 956

In the Privy Council

No. 9 of 1955.

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

10 as the Administratrix and Administrators of the
Estate of C. O. Kasumu Deceased APPELLANTS

AND

GBADAMOSI BABA-EGBE RESPONDENT

UNIVERSITY OF LONDON
W.C.1
20 FEB 1957
INSTITUTE OF ADVANCED
LEGAL STUDIES
46051

CASE FOR THE RESPONDENT

RECORD

1.—The Appellants in this Appeal are the Administratrix and Administrators of Christopher Olatunji Kasumu deceased (hereinafter called "the Deceased") who was at all material times a Licensed Money Lender carrying on business at No. 27 Omidudun Street Lagos in the Colony of Nigeria.

20 2.—This Appeal is from a Judgment and Order of the West African Court of Appeal at Lagos Nigeria, dated the 22nd February, 1954, which allowed the appeal of the Respondent from a Judgment and Order of the Supreme Court of Nigeria at Lagos dated the 26th February, 1952, set aside the last mentioned Judgment and Order and made consequential Orders in favour of the Respondent. pp. 57-62 p. 63 p. 49

3.—The questions for determination arise out of two consolidated Suits numbered respectively No. 42 of 1950 and No. 77 of 1950 and (shortly stated) are :—

- (A) Whether having regard to the pleadings in the said consolidated Suits the Respondent is entitled to rely on Section 19 of the Money Lenders Ordinance Cap. 136.
- (B) Whether having regard to the provisions of the said Section 19 the Respondent is entitled to recover possession of certain premises

RECORD

comprised in a Mortgage effected by the Respondent in favour of the Deceased and to delivery up of the said Mortgage and the Title Deeds of the said premises.

- (c) Whether having regard to the provisions of the said Section the Appellants are entitled to recover from the Respondent the principal moneys and interest secured by the said Mortgage.

4.—The material facts can be stated thus :—

- (i) At the date of the Mortgage hereinafter mentioned the Respondent held the property situate at and known as No. 55 Great Bridge Street Lagos (hereinafter called “ the premises ”) for a term of 99 years from the 1st August, 1943, as lessee of the Lagos Executive Development Board. 10
- (ii) By a Mortgage dated the 22nd August, 1945, the Respondent with the consent of the said Board mortgaged the premises to the Deceased to secure a principal sum of £2,000 and interest thereon at the rate of 15 per cent per annum.
- (iii) The Deceased (as hereinbefore stated) was at all material times a Licensed Money Lender. 20
- (iv) The Deceased never kept any book in which the principal moneys advanced to the Respondent were entered.
- (v) From September, 1946, until his death in June, 1948, the Deceased was in possession of the premises as Mortgagee thereof and since June, 1948, the Appellants have been and are now in possession of the premises as Personal Representatives of the Deceased.
- (vi) Since September, 1946, the premises have been let to various tenants who have paid their rents to the Deceased during his life and to the Appellants after his death. 30

5.—The relevant provisions of the Ordinances of Nigeria are as follows :—

- (i) Sub-sections (2), (3) and (4) of Section 19 of the Money Lenders Ordinance Cap. 136 provide :—

“ (2) Every money-lender shall keep a book (which shall be securely bound and paged so that leaves cannot be removed or inserted without apparent damage) in which he shall enter in connexion with every loan made by him

“ (A) the date on which the loan was made ; 40

“ (B) the amount of the principal ;

“ (C) the rate of interest ;

“ (D) all sums received in respect of the loan or the interest thereon, with the date of payment thereof,

“ and shall produce such book when required to do so by

“ any court.

“(3) The entries in the said book shall be made forthwith on the making of the loan or the receipt of sums paid in respect thereof as the case may.

“(4) Any money-lender who fails to comply with any of the requirements of this section shall not be entitled to enforce any claim in respect of any transaction in relation to which the default shall have been made. He shall also be guilty of an offence under this Ordinance and shall be liable on conviction to a fine of ten pounds or in the case of a continuing offence to a fine of five pounds for each day or part of a day during which such offence continues.”

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(ii) Rules 5, 7 and 13 of Order 32 of the Supreme Court (Civil Procedure) Rules provide :—

“1. Every pleading shall contain a statement of all the material facts on which the party pleading relies, but not the evidence by which they are to be proved, such statement being divided into paragraphs numbered consecutively, and each paragraph containing as nearly as may be a separate allegation.

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“7 Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and may also ask for general relief, and the same rule shall apply to any counterclaim made or relief claimed by the defendant in his defence.

“13. The defence must allege any fact not stated in the statement of claim on which the defendant relies in defence, as establishing, for instance, fraud on the part of the plaintiff, or showing that the plaintiff's right to recover or to any relief capable of being granted on the petition, has not yet accrued, or is released, or barred, or otherwise gone.”

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6.—The Suit No. 42 of 1950 was instituted on the 14th February, 1950, in the Supreme Court of Nigeria by the Respondent against the Appellants whereby the Respondent claimed :—

pp. 1, 2

- (i) An Order for the redemption of the premises. In the alternative a declaration that the said Mortgage was void.
- (ii) An account of all rents and mesne profits received by the Deceased and the Appellants from the premises.
- (iii) Recovery of possession of the premises.

40 7.—The Suit No. 77 of 1950 was instituted on the 7th March, 1950, in the Supreme Court of Nigeria by the Appellants against the Respondent and one Momodu Balogun whereby the Appellants claimed :—

pp. 3, 4

- (i) That the Respondent be made to execute a Deed of Assignment of the premises to the Appellants pursuant to an alleged Agreement made on or around the 16th November, 1948.

RECORD

(ii) That a purported sale of the premises by the Respondent to the said Momodu Balogun be set aside. Neither of the said claims is material to any issue raised in this Appeal.

8.—By his Statement of Claim delivered in the Suit No. 42 of 1950 on the 25th March, 1950, the Respondent alleged (inter alia) :—

p. 7

“ (5) The said Christopher Olatunji Kasumu was at all material times a Licensed Money-lender carrying on business at No. 27, Omidudum Street, Lagos.

p. 8

“ (10) As the said C. O. Kasumu kept no book in which the principal amount advanced by the Plaintiff is entered, the Defendants have since his death assumed that the principal amount is £2,000.” 10

p. 11

9.—By their Statement of Defence delivered on the 31st March, 1950, in the Suit No. 42 of 1950 the Appellants denied that the averment of £2,000 as the principal was an assumption but otherwise admitted the allegations referred to in paragraph 8 hereof.

pp. 9, 10
pp. 12-14
pp. 15, 16

10.—The Statement of Claim and Statements of Defence delivered in the Suit No. 77 of 1950 are not material to any issue in this Appeal.

p. 14

11.—By an Order of the Supreme Court of Nigeria, Lagos Judicial Division dated the 17th April, 1950, the Suit No. 42 of 1950 was consolidated with the Suit No. 77 of 1950. 20

pp. 22-25

12.—On the 27th June 1950 Mr. Justice Rhodes delivered a reserved judgment in the consolidated Suit. The Learned Judge gave no relief to the Appellants on their claims on the Suit No. 77 of 1950 dismissed the Action against the said Momodu Balogun with costs and :

p. 25, l. 5

(i) Held that it was not open to the Respondent upon the pleadings to rely on Section 19 of the Money Lenders Ordinance.

p. 24, l. 23

(ii) Ordered an account to be taken of the rents collected on the premises by the Deceased and the amount due and owing on the principal and interest secured by the said Mortgage to the date of Judgment. 30

p. 24, l. 38

(iii) Ordered that the Respondent was to exercise his Equity of Redemption and recover the premises after an account had been taken to determine what was actually owing by him on the said Mortgage and paid off to the estate of the Deceased.

p. 25, l. 1

p. 47

13.—In due course the said accounts were taken and the consolidated Suit was restored for hearing by the Supreme Court of Nigeria at Lagos on the 5th February, 1952, when Counsel addressed the Court. A submission that the Respondent was entitled to rely on Section 19 of the Money Lenders Ordinance was formally made on behalf of the Respondent and opposed on behalf of the Appellants. 40

p. 47, l. 33
p. 48, l. 1

14.—On the 26th February, 1952, Mr. Justice Gregg delivered a reserved judgment in the consolidated Suit wherein the Learned Judge adopted with modifications the Referee's report on the said accounts and gave judgment for the Appellants for £1,541 2s. 6d. and interest and costs. p. 49

15.—On the 22nd May, 1952, the Respondent gave notice of appeal against the said Judgment dated the 26th February, 1952. The said Appeal was heard by the West African Court of Appeal at Lagos on the 17th and 18th November, 1953, and Judgment therein was delivered on the 22nd February, 1954. pp. 53, 54
pp. 54-56
pp. 57-62

10 The Court of Appeal allowed the Appeal ; set aside the said Judgment dated the 26th February, 1952 ; declared that the Respondent was entitled to a declaration that the said Mortgage transaction was unenforceable by reason of the Deceased's non-compliance with the Money Lenders Ordinance and to recovery of possession of the premises and that the said Mortgage and the Respondent's Title Deeds to the premises should be delivered up to him by the Appellants ; and made consequential Orders as to costs. p. 63

16.—In allowing the said Appeal the Court of Appeal :—

- (i) recorded a concession on behalf of the Appellants that the said Mortgage transaction was unenforceable ; p. 59, l. 37
- 20 (ii) rejected the submission on behalf of the Appellants that on the pleadings the Respondents was not entitled to rely on the Money Lenders Ordinance ; p. 60, l. 10
- (iii) rejected the submission on behalf of the Appellants that the Respondent could recover possession of the premises only on terms that he paid the sum due on the said Mortgage and p. 61, l. 38
- (iv) applied the principle enunciated in *Cohen v. Lester Ltd.* [1938] 4 All E.R. 188 distinguishing *Lodge v. National Union Investment Co. Ltd.* [1907] 1 Ch. 300. p. 61

17.—On the 5th July, 1954, the West African Court of Appeal at Lagos gave final leave to the Appellants to appeal to Her Majesty's Privy Council from the said Judgment dated the 22nd February, 1954. p. 64

18.—It is submitted that the reasoning and conclusions of the Court of Appeal as set out in paragraphs 15 and 16 hereof were correct in law.

19.—The Respondent humbly submits that this Appeal ought to be dismissed and the Judgment of the West African Court of Appeal at Lagos affirmed for the following among other

REASONS

1. BECAUSE in Suit No. 42 of 1950 the Respondent claimed a declaration that the said Mortgage was void.
2. BECAUSE in Suit No. 42 of 1950 the material facts to support a claim by the Respondent based on Section 19 of the Money Lenders Ordinance were alleged in the Statement of Claim and admitted in the Statement of Defence.
3. BECAUSE as a matter of pleading it was not necessary for the Respondent to refer in terms to the Money Lenders Ordinance. 10
4. BECAUSE the Deceased failed to keep a book in which he entered the principal amount advanced by him to the Respondent on the security of the said Mortgage and accordingly failed to comply with the requirements of Section 19 of the Money Lenders Ordinance.
5. BECAUSE the transaction effected by the said Mortgage was a transaction in relation to which the Deceased made default in complying with the requirements of Section 19 of the Money Lenders Ordinance.
6. BECAUSE the Deceased was not and the Appellants as his Personal Representatives are not entitled to enforce any claim in respect of the said transaction. 20
7. BECAUSE a Mortgagee in seeking to retain possession of the mortgaged property and refusing to deliver up such possession except on terms that the Mortgagor pays the money due on the security of the Mortgage is seeking to enforce a claim in respect of his Mortgage.
8. BECAUSE the claim of the Appellants is a claim in respect of the Mortgage transaction effected on the 22nd August, 1945, between the Deceased and the Respondent. 30
9. BECAUSE the effect of the Judgment of the Supreme Court of Nigeria dated the 26th February, 1952, was to enforce a claim which the Appellants by virtue of Section 19 of the Money Lenders Ordinance were not entitled to enforce.
10. BECAUSE the Judgment of the West African Court of Appeal and the Order made by that Court were correct and ought to be affirmed.

ARTHUR BAGNALL.

In the Privy Council

No. 9 of 1955.

ON APPEAL FROM THE WEST AFRICAN
COURT OF APPEAL AT LAGOS.

BETWEEN

PATIENCE KASUMU and OTHERS

APPELLANTS

AND

GBADAMOSI BABA-EGBE RESPONDENT.

CASE FOR THE RESPONDENT

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