

*Privy Council Appeal No. 3 of 1953*

Antonio Assaf - - - - - *Appellant*

v.

Daniel Olatunji Fuwa and others - - - - - *Respondents*

FROM

**THE WEST AFRICAN COURT OF APPEAL**

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 4TH OCTOBER, 1954**

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*Present at the Hearing :*

LORD PORTER

LORD ASQUITH OF BISHOPSTONE

LORD KEITH OF AVONHOLM

[*Delivered by* LORD PORTER]

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In 1948 one Ajose owned certain premises called 130 Denton Street, Ebute Metta, Lagos, Nigeria. On 5th July, 1948, Ajose mortgaged these premises by an instrument of that date for £1,000 to a limited company of registered moneylenders, Messrs. Oshodi and Apena. A gentleman called Latunde Johnson, since deceased, was at this and all material times a director of that company, and also employed as its solicitor. He attended to this particular matter.

On the 9th October, 1948, Ajose contracted to sell this mortgaged property to the plaintiff (and appellant) in the present action, at a price of £1,600. This contract was made on the date mentioned and acknowledged on the same day at the offices of Messrs. Irving and Bonnar, solicitors, before one Cameron, a representative of that firm, who from then on acted, in relation to this transaction, as solicitor for both parties. On this occasion both parties instructed Cameron to obtain from the mortgagees the title deeds. Cameron did so, was satisfied as to title, and drafted (a) a reconveyance from the mortgagees: (b) a conveyance to Assaf, neither of which, however, were in the event executed.

The intention was that the plaintiff should acquire this property free from incumbrances, and in order to achieve this result that £1,300 out of the total price of £1,600 should be applied to the discharge of the mortgage debt and mortgage interest. Accordingly the plaintiff paid Cameron as agent for Ajose two cheques, the first for £300, the second for £1,300 (dated 9th October and 15th October, 1948, respectively). It is common ground now, though it was contested at some stages (1) that this contract of 9th October was a valid contract; (2) that it was evidenced by a note or memorandum sufficient to satisfy the requirements of the Statute of Frauds. It is here perhaps convenient to add that the law of Nigeria, so far as relevant to this case, consists of the rules of Common Law and Equity, and Statutes of general application ruling in England in 1900. Hence in Nigeria today a mortgagee is still, as under the law of England before 1926, the owner of the legal estate in the realty mortgaged: and the mortgagor has a mere equity of redemption. The mortgagor is not, as in England since the 1925 legislation, the owner, subject to a charge.

By the 16th October, 1948, the plaintiff—the intending buyer—had accepted proof of Ajose the seller's title, and had paid the whole of the purchase price, which Cameron had credited in his books to Ajose.

It follows, in their Lordships' opinion, that at this stage, by the equitable doctrine of conversion, the plaintiff had become owner of the premises in equity, that as between Ajose himself, Ajose was a trustee and that the plaintiff's equitable title related back to the date of the contract—9th October, 1948.

Meanwhile, although the whole of the purchase price due from the plaintiff had been paid to Cameron as Ajose's agent by 16th October, neither Cameron nor Ajose had applied the appropriate or any portion of it to the redemption of the mortgage so as to secure, by repayment of the mortgage debt and interest, the execution of a reconveyance of the legal estate in favour of whoever might be entitled to such reconveyance. This might have been the plaintiff, who was the owner in equity of Ajose's interest, or Ajose as trustee for the plaintiff. At 16th October no one else was in the picture, and the position in law was then clear. The only beneficial title was in the plaintiff, who would have been wise, at the earliest moment, to get in the legal estate from the mortgagees. The position however became obscure owing to the group of events which next followed, and to which their Lordships proceed to refer.

Ajose does not seem to have been, in commercial matters, a man of supersensitive scruple. He now proceeded to sell over again to one Okunubi the property which he had already sold and been paid for by the plaintiff and this gentleman was the original defendant in the present proceedings: has since died after action brought, and has been succeeded by his legal personal representatives.

The correspondence relating to the two transactions, though slender, is important, and should be set out in full.

It seems to have opened with a letter from Irving and Bonnar on behalf of the plaintiff (or of the plaintiff and Ajose) of 11th October relating to the sale to the plaintiff. This letter has not survived, but the reply, dated 12th October, was in the following terms:—

Messrs. IRVING & BONNAR,  
Solicitors,  
Lagos.

12th October, 1948.

Dear Sirs,

*Re Sarminu Ajose's Mortgage Accounts.*

Yours of the 11th October, 1948, came to hand and duly noted.

Mr. Sarminu Ajose has two mortgages with Messrs. The Oshodi & Apena Ltd., one at No. 130, Denton Street, Ebute Metta, and the other at Igbobi Village, Yaba, both Mortgages are at the Lands Registry Lagos for registration which has not yet completed.

The certified true copies of conveyances in respect of these properties are herewith enclosed.

The mortgage debt on the two properties are as follows:—

Re 130 Denton Street, Ebute Metta ... ..	£1,000	0	0
Interest at 2½d. on £1 p.m. from 29.9.48—			
29.10.48 ... ..	10	8	4
Re Igbobi Village, Yaba ... ..	300	0	0
Interest at 3d. on £1 p.m. from 29.9.48—			
29.10.48 ... ..	3	15	0
Total ... ..	£1,314	3	4

I shall be glad to receive your cheque for the above sums at your earliest convenience.

Yours faithfully,

(Sgd.) A. L. JOHNSON,  
Solicitor for Oshodi & Apena Ltd."

There next followed two letters between one, G. B. A. Coker and Irving and Bonnar bearing on the sale to Okunubi, both dated 25th October.

Date 25th October, 1948.

Messrs. IRVING & BONNAR,  
Solicitors etc., Lagos.

Dear Sir,

Re Sarminu Ajose: Property at No. 130 Denton Street, E.B.

I have been instructed by Mr. Sarminu Ajose to countermand the instructions already given with regard to the sale of the above-named property. Mr. Ajose informs me that the contract of sale in respect of the property has not been completed by you with anyone at all and as he has now got another more reasonable offer than that proposed by you. I think you would agree that he should stick to the higher offer the more so as the property is at present under a mortgage.

2. In the circumstances, I shall be much obliged if you would be good enough to stay any further steps with regards to the sale of the property until further instructions: The mortgagee—Mr. Latunde Johnson has also been informed of this.

With many thanks,

Yours faithfully,

(Sgd.) G. B. A. COKER."

25th October, 1948.

G. B. A. COKER Esq.,  
Solicitor,  
13, Idumagbo Avenue, Lagos.

Dear Sir,

Mr. Sarminu Ajose.

130, Denton Street, Ebute Metta.

We are in receipt of your letter of today's date with regard to the above.

We were also acting for the purchaser Mr. A. E. Assaf and we presume his agreement to the cancellation of the sale to him has been obtained.

We hold the purchase price paid by Mr. Assaf to Mr. Ajose's credit in our client's account.

Yours faithfully,

IRVING AND BONNAR."

No reply was ever received to the inquiry in the second paragraph of this letter.

Lastly there came a letter dated 26th October from A. L. Johnson to Irving and Bonnar.

Messrs. IRVING & BONNAR,  
Broad Street,  
Lagos.

Re Sarminu Ajose.

Mortgage of 130, Denton Street, E.B.

I have to inform you that Sarminu Ajose has paid off the whole mortgage debt with interests thereon since 25th Oct., 1948.

Will you kindly return the certified true copies of the conveyances I sent you on the 12th of this month as to enable me to return same to him.

Yours faithfully,

(Sgd.) A. L. JOHNSON."

The events to which these letters furnish land marks were these:—

(a) Ajose, after contracting to sell the property to the plaintiff, later, through a solicitor called Coker (who only crosses the stage on this one occasion) tells the plaintiff that he Ajose has received

a "more reasonable" offer for the property (viz.: Okunubi's offer) and means to embrace it. Coker says that Latunde Johnson, the representative of the mortgagees, has been informed of "this". How much or how little "this" includes, has been in controversy, but their Lordships will assume it to cover all the information contained in Coker's letter.

In later proceedings Ajose has contended that his contract with the plaintiff was "subject" to his obtaining a better offer, but this contention—not on the face of it plausible—has been rejected by every tribunal before whom it has been preferred, and is not now pursued.

(b) Ajose purported to sell the same property to Okunubi on 25th October and on that date Okunubi paid £2,700 for the property, the purchase price of the freehold. Out of this sum Ajose applied the appropriate amount (£1,500) to the repayment of the mortgage debt and this payment (though out of funds furnished by Okunubi and perhaps paid direct by him) was in law a payment by Ajose.

(c) Neither then nor at any subsequent time did the mortgagees reconvey the legal estate to anyone—Ajose, the plaintiff, or Okunubi. To this day it remains vested in the mortgagees; whether subject to any, and if so what, trust, is one of the issues in the appeal.

(d) On 29th October, 1948, Ajose purported by a "conveyance" of that date to transfer to Okunubi the fee simple of the property. The "fee simple" in the circumstances of this case could not exceed the right—the utmost right Ajose retained—to require the mortgagees to reconvey the legal estate in the premises to himself. More he did not possess.

Their Lordships may at this point anticipate, in outline, the main issue which this case raises. The plaintiff contends that the legal result of the facts just recited, which in substance are not in dispute, was that (1) the ownership in equity of the premises was vested in the plaintiff, by virtue of the contract of 9th October, 1948, and the doctrine of "conversion", and (2) that the legal estate never vested in Okunubi. It is not questioned that Okunubi gave value for whatever he got, and got it without notice of the plaintiff's interest, but neither it is questioned that he never obtained the legal estate. (3) Consequently the utmost interest that could vest in Okunubi was an equitable interest and (4) equitable interests in land take effect in the temporal order in which they are created. Hence the plaintiff, being indubitably, prior tempore, claims to be potior jure.

For the defendant Okunubi on the other hand and later for his personal representatives it was contended that on the discharge of the mortgage debt by Ajose (a) the mortgagees were not bound by any duty other than a duty owed to their mortgagor Ajose. Therefore in particular they were not concerned with and owed no obligations to persons standing behind Ajose or claiming under him, by virtue of a contract to buy the mortgaged premises from him; (b) that their only duty was to reconvey the legal estate to him; (c) that by the conveyance of 29th October, 1948, Ajose transferred or conveyed (the term does not matter) this right to Okunubi who thereupon became entitled to call for a reconveyance; (d) that upon the relevant authorities, the right to call for a reconveyance from a mortgagee of a legal estate vested in him by the mortgagor is as effective (granted (i) value and (ii) the absence of notice) as the reconveyance itself of that estate as an accomplished fact. Hence, it was argued, Okunubi, who certainly gave value and had no notice of the plaintiff's interest, was the equivalent of a purchaser for value without notice of the legal estate, and his title prevailed.

It is not suggested that this summary of the contentions on the two sides is exhaustive. Without expanding it at this stage their Lordships will conclude the narrative.

Okunubi, after the mortgage debt had been discharged, largely by money he had supplied, having no notice at that time of the plaintiff's

interest, entered into possession of the premises and remained so possessed till he died, after the present action had been initiated and his personal representatives succeeded him as defendants.

The plaintiff brought an action against Ajose in 1949, for a decree of specific performance and mesne profits. The action was tried by Gregg, J., who on the 28th June, 1949, made the decree prayed for. Ajose in compliance therewith, executed a conveyance of the premises to the plaintiff. Okunubi gave evidence in these proceedings, but was not a party to them. Hence it is not surprising that every tribunal which was confronted with the contention that he was bound by the result of such proceedings, should have rejected it.

By writ of 11th March 1950, the plaintiff started the present action against Okunubi, which since his decease has been continued against his personal representatives. The action was for recovery of the premises in question, and mesne profits. The Statement of Claim has been criticised but in their Lordships' view alleges sufficiently the contract of sale by Ajose to the plaintiff: and recites the facts of the previous litigation before Gregg, J. By his defence Okunubi averred that he had bought the property in dispute in October, 1948, bona fide, without notice of any interest in the property claimed by the plaintiff, and that Ajose conveyed to him, Okunubi, by the conveyance dated 29th October, 1948 ("1950" is it would seem a misprint) all the rights and interests which Ajose had left in such property.

The action came on for hearing before Ademola, J., in the Supreme Court of Nigeria and judgment was given by that learned Judge on 28th October, 1950, in favour of the plaintiff for recovery of possession of the premises and £400 mesne profits.

Ademola, J., seems to have based his view in part on the reasoning that after Ajose had paid off the mortgage (an event which he dates the 25th October, 1948) Ajose had nothing left which he could convey to Okunubi. The plaintiff was already owner in equity and from that moment the legal estate also vested in him. But earlier in his judgment he uses language which suggests that Okunubi did obtain the legal estate, though as he had had notice of the plaintiff's rights through Latunde Johnson as his solicitor, those rights remained intact.

The case on appeal came before the West African Court of Appeal which gave judgment on 26th May, 1951, Chief Justice Verity's judgment being concurred in without individual reasons by the three other members of the Court.

The learned Chief Justice, after dealing with a number of issues which are no longer contested, held in effect (1) that the plaintiff had at no stage any estate in the land. He had merely a contract, and unless and until Ajose paid off the mortgage and obtained a reconveyance, and so made that contract capable of performance, the plaintiff could have no proprietary interests. If, as in fact happened, Ajose failed to obtain a reconveyance, all he the plaintiff could do was to sue Ajose for damages for breach of contract, which he had not done. (2) The Chief Justice does however also advert to the principle stated in these words in Snell's Principles of Equity (23rd Ed. p. 29 seq): "A purchaser for valuable consideration who obtains a legal estate without notice of a prior equitable right is entitled to priority in equity as well as in law."

On this point he held (a) that Okunubi had no notice of the prior equitable interest, notice to Latunde Johnson being in his view not notice to Okunubi but merely notice to the mortgagees, for whom he was acting; (b) that Okunubi had at the material time acquired the legal estate or its equivalent as a consequence of the discharge of the mortgage debt. The reasoning of the learned Chief Justice would seem to be: that after that discharge the mortgagee held the legal estate as trustee for the mortgagor, Ajose: and that after the conveyance executed by Ajose in the defendant's favour on 29th October, 1948, the legal interest remained vested in the mortgagees but was so vested "on behalf of the defendant".

On these grounds the appeal was allowed. The plaintiff appeals from this decision of the Court of Appeal for Western Africa, to this Board.

Before this Board, counsel for the plaintiff-appellant raised five questions (a sixth, relating to registration of titles to land, no longer arises). (1) Was there in the first fortnight of October, 1948, between Ajose and Assaf the plaintiff a valid contract for the sale of those premises for £1,600? ; (2) If yes, was the contract one of which specific performance would have been granted? ; (3) If so, did such contract create an equitable interest or ownership in equity in the property in favour of Assaf? ; (4) If it did, did the equitable interest of Assaf, being earlier in time than any interest acquired by Okunubi, prevail over *his* interest, or (5) Did Okunubi obtain priority over Assaf as a purchaser for value, without notice of Assaf's interest, of the legal estate? Counsel for the appellant claimed that the first four questions should be answered in the affirmative, citing *Holroyd v. Marshall* 10 H.L.C. 191, and *Shaw v. Foster* L.R. 5 E. & I. Appeals 321 and *Potter v. Sanders* 6 Hare 1, amongst other authorities and claimed that the fifth question should be answered in the negative. The fifth question raises the real contest between the parties.

It is undisputed that neither the plaintiff nor the defendants ever acquired the legal estate : but it is argued for the defendants-respondents that priority as between them and the plaintiff depended not on which of them had the legal estate, but on which of them had the better right to " call for " it. Counsel for the respondents relied on the contention that once the mortgage debt had been repaid by Ajose, and Ajose had executed the " conveyance " of the 29th October in favour of Okunubi, Okunubi acquired the right, or at any rate a better right than the plaintiff possessed, to require a reconveyance of the legal estate from the mortgagees, and should be treated for the purpose of the rule as though that right had been successfully exerted. On this view the existence and effect of the instrument of the 29th October are decisive.

This instrument, so the argument runs, conveyed to Okunubi the rights of a mortgagor who has redeemed the mortgage, rights not possessed by one who has a mere contract to purchase from the mortgagor uncompleted by any conveyance. These rights, it is said, consisted of or included the right to call upon the mortgagee to convey to him the legal estate, or to hold it in trust for him. Such is the main argument for the respondents.

In support of his contention as to the infirmity of the rights of a person who has merely contracted to buy from the mortgagor, counsel relied on *Tasker v. Small* (3 Mylne & Craig 63) and *Pearce v. Morris* (5 Ch. App. 227). Their Lordships would however remark (i) that the reasoning in this and other cases relied on, so far as it depreciates the rights of the intending purchaser on the mere ground that a mortgagee cannot safely convey to him because he may resile from his contract, is hardly applicable to a case where the intending purchaser has approved the title, paid the whole contract price to the solicitor for both parties who on his part has credited it to the seller's account in his books, and has executed the whole of his side of the contract ; (ii) that in such circumstances the contract could not " go off " through his action ; and (iii) that the second of these cases might well have been decided differently if, as in the present case, the contractor to buy from the mortgagor had approved the title before filing his bill.

In support of the contention that a " better right " to call for a transfer of the legal estate is equiparated with actual possession of that estate, the respondents relied *inter alia* on *Wilkes v. Bodington* (2 Vernon 599) ; *Stanhope v. Verney* (1761 2 Eden 81) ; *Maundrell v. Maundrell* (1804 10 Vesey Junior 247) ; and *Taylor v. London and County Banking Co.* (1901 2 Ch. 231).

When these cases are closely examined it will be found that in every one of them there was, in addition to the mortgagor's act in redeeming or its equivalent, some positive act by the mortgagee operating

in favour of the claimant ; and counsel for the appellant contended that such an act there had to be, in order to defeat the strict temporal order in which, *prima facie*, equitable interests in land take priority. Okunubi, he argued, to be treated as though he had acquired the legal title, must be able to point to some such act ; mere inertia or passivity on the part of the mortgagees will not avail him. He must show that the mortgagees either (1) had declared an express trust in his favour or (2) had joined in the assignment or conveyance to him of the 29th October or (3) had lodged the title deeds with him. *Taylor v. London and County Banking Co.* (supra) in their Lordships' view supports this argument more particularly in the following passage from the judgment of Stirling, L.J. :—

“ Now, a purchaser for value without notice is entitled to the benefit of a legal title, not merely where he has actually got it in, but where he has a better title or right to call for it. This rule is laid down in *Wilkes v. Bodington* ((1707) 2 Vern. 599). It has accordingly been held that if a purchaser for value takes an equitable title only, or omits to get in an outstanding legal estate, and a subsequent purchaser for value without notice procures, at the time of his purchase, the person in whom the legal title is vested to declare himself a trustee for him, or even to join as a party in a conveyance of the equitable interest (although he may not formally convey or declare a trust of the legal estate), still the subsequent purchaser gains priority.”

In the present case there was no transfer of the legal estate to Okunubi ; no positive act by the mortgagees which could take its place ; no declaration of trust in his favour ; no joinder in the conveyance of the 29th October ; nor delivery to Okunubi of the title deeds. There was therefore, it appears to their Lordships, nothing to displace the operation of the principle “ *qui prior est tempore potior est jure* ”. In this case there is no doubt who is “ *prior tempore* ”. The appellant had made his contract, paid the price in full, and accepted the title before Okunubi made his first appearance. In these circumstances their Lordships consider that the appellant's title must prevail and for the reasons given above will humbly advise Her Majesty that the appeal should be allowed. The respondents must pay the appellant's costs of the appeal to this Board and of the appeal to the West African Court of Appeal.

In the Privy Council

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ANTONIO ASSAF

v.

DANIEL OLATUNJI FUWA AND OTHERS

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[DELIVERED BY LORD PORTER]

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

1954