

39, 1960

UNIVERSITY OF LONDON
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INSTITUTE OF ADVANCED
LEGAL STUDIES

39, 1960

IN THE PRIVY COUNCIL

F 9004

No. 24 of 1959

ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA

BETWEEN

ANGELINA AREFUNWON CATHERINE AYODELE AND
SAMUEL S.I. WRIGHT DE SOUZA Defendants/
Appellants

and

SALLY SHOLA BARBER EMILY LANDE
BARBER HENRIETTA YETUNDE BARBER
SAMUEL BANDELE BARBER and BEN Plaintiffs/
Respondents
LOLADE BARBER

CASE FOR THE APPELLANTS

Record

1. This is an Appeal, by leave of that Court, p 54
from a Judgment of the Federal Supreme Court of
Nigeria dated the 19th day of May 1958 dismiss- pp 49-53
ing an appeal by the Appellants from a Judgment
of the Supreme Court of Nigeria dated the 15th pp 38-43
day of March 1957 whereby it was ordered that
the Defendants (Appellants) should execute a
reconveyance of certain freehold property known
as No.19 Williams Street, Lagos, Nigeria to the
Plaintiffs (Respondents) and should give up
possession thereof to them forthwith.

2. By a Crown Grant dated the 8th day of July p 56
1869, the land which ultimately came to be known
as No.19 Williams Street were granted to one
Beal Buko (or Bucock) his heirs executors
administrators and assigns for ever.

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- Record 3. By a Crown Grant dated the 19th day of
p 57 11. November 1894 certain adjoining land which
14-20 ultimately came to be known as Nos.90/92 Broad
Street, Lagos, were granted to one William George
Barber (through whom the Respondents claim) his
heirs and assigns for ever.
- pp 55-6 4. The said Beal Bucock made his last Will and
Testament on the 18th day of August 1892 whereby
he devised his real estate unto and to the use
of the said William George Barber and his heirs 10
for ever subject to the said William George
Barber finding him his livelihood clothing and
when necessary repairing the said premises during
his lifetime and after his death paying his
funeral and testamentary expenses and debts.
- p 55 5. The said Beal Bucock died on the 26th day
day of April 1893 without having revoked or
altered his said Will, Probate whereof was on
the 6th day of November 1893 granted to the
Executors therein named. 20
- pp 57- 6. By an Indenture of Mortgage dated the 14th
61 day of July 1896 the said William George Barber
mortgaged first the said premises Nos.90/92
Broad Street and secondly the said premises No.
19 Williams Street to one James Emmanuel Wright
(through whom the Appellants claim) to secure
the principal sum of £125.11s.6d.
- pp 62- 7. By a Conveyance dated the 13th day of July
64 1898 the said William George Barber conveyed
Nos.90/92 Broad Street to the said James 30
Emmanuel Wright in consideration of the sum of
£300. Thereby the said William George Barber
acknowledged the receipt of the said sum of £300.
8. On three occasions thereafter prior to his
death, the said William George Barber mortgaged
or charged the remaining property, No.19 Williams
Street, namely:-

- (a) By a Memorandum of Deposit of Title Deeds dated the 2nd day of July 1901 to secure repayment of the sum of £10; Record pp. 64-65
- (b) By a Loan Agreement dated the 27th day of January 1902 to secure the sum of £6; p 66
- (c) By an Indenture of Mortgage of the 30th day of December 1912 to secure the sum of £76. pp 66-69
- 10 9. The said William George Barber died in the year 1904. After his death his Widow continued to live in the said property No. 19 Williams Street until the house standing thereon was demolished at the instance of the Lagos Town Council. There was a conflict of evidence as to the precise date of demolition, but this appears to have been in 1926. Compensation was apparently payable or paid in respect of such demolition but the learned trial Judge held on the evidence that the payment thereof to the representatives of the Respondents had not been proved. p 39 l. 11-19
p 41 l. 11-19
p 41 l. 11-19
- 20 10. The Respondents are grandchildren of the said William George Barber, being children of his only son Gabriel Barber. p 38 l. 11-19
28-33
- 30 11. The said James Emmanuel Wright died in the year 1928, having by his Will dated the 24th day of January 1910, Probate whereof was duly granted on his death to the Executors therein named, appointed his sister Hanna Henrietta de Souza to be his residuary legatee. p 39 l. 11-19
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pp 71-73
12. The Appellants are the surviving children of the said Henrietta de Souza and the surviving next of kin of the said James p 50 l. 11-19
12-14

Record
pp 41 1.
44
p 4 11.
26-31

Emmanuel Wright. The said Henrietta de Souza died in the year 1946.

p 4 11.
32-36

13. It is alleged in paragraph 5 of the Statement of Claim herein, that sometime after the death of the said James Emmanuel Wright, the said Henrietta de Souza entered the land and took possession thereof as against the issue of William George Barber, and in paragraph 6 of the said Statement of Claim that on the death of the said Henrietta de Souza the Appellants continued in possession and denied the title of the Respondents to the land.

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p 20 11.
31-36

14. The Second and Third Appellants in their Defence denied paragraph 5 but alleged that after the death of the said James Emmanuel Wright his said sister entered into possession of the said property and exercised all rights of ownership thereon without let or hindrance. They admitted paragraph 6 of the Statement of Claim.

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p 20 137-
p 21 13.

15. It was accordingly on the pleadings and still is (no application having been made to amend the same) common ground between the Appellants and the Respondents that at some date after the death of the said James Emmanuel Wright his sister the said Henrietta de Souza took possession of the land and that after her death the Appellants took possession thereof.

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p 25 11.
11-13

16. The acts of the said Henrietta de Souza relating to the said land were all of the same nature, namely the letting of the land for the deposit of firewood, and took place, as the learned trial Judge found, between the years 1928 and 1946. He further found that the third Defendant made various lettings of the land between the years 1946 and 1956. There was no evidence at all of any acts of

ownership by the Respondents, or any persons through whom they claim, over the said land, until after the termination of the 1951 proceedings hereinafter mentioned, when they caused to be placed on the said land a Sign-board to the effect that the land belonged to the Barber family.

Record

p' 24 ll.
27-29

10 17. In 1951, the Respondents commenced an action against the Appellants in the Supreme Court of Nigeria in which they sought a declaration of their title in fee simple to Nos. 91 and 92 Broad Street and 19 Williams Street aforesaid, the claim to Nos. 91 and 92 (by which was meant Nos. 90 and 92) Broad Street being withdrawn in the Statement of Claim. The learned trial Judge (Jibowu J) in this action in his Judgment therein delivered on the 16th day of March 1953 deduced from the evidence tendered before him at the trial that the mortgage debt on No. 19 Williams Street had been satisfied, and that the Respondents as the descendants of the said William George Barber were accordingly entitled to the property, but he felt himself unable to declare that the property belonged to the Respondents in fee simple in the absence of evidence of re-conveyance of the property to the said William George Barber. He accordingly non-suited the Respondents.

pp 74-
82

pp 82
ll. 14-
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18. The Respondents accordingly commenced these proceedings on the 27th day of October 1953 against the Appellants, claiming a re-conveyance of the said property.

p 1

19. The Respondents in their Statement of Claim after setting out the conveyancing history of the property, which is undisputed and making the allegations as to possession already noticed in paragraph 13 hereof, referred to the findings of fact of Mr.

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Record

p 5 ll.

3-7

Justice Jibowu in the 1951 proceedings and the fact that the Appellants had not appealed therefrom, and pleaded that the Appellants were estopped from raising any fresh issues on the said findings of fact.

pp 20-21

20. The first Appellant did not deliver a defence; the Second and Third Appellants did, whereby they asserted that there had been no reconveyance of No.19 Williams Street to the said William George Barber or his heirs, denied the repayment of the said mortgage, and pleaded long possession, acquiescence stale claim laches and all equitable defences in support of their defence, stated that they would also rely upon the Statutes of Limitation and pleaded that the Plaintiffs' claim was misconceived.

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21. The learned trial Judge (Jobling J) by his Judgment of the 15th March 1957 found in favour of the Respondents. After disposing of certain allegations of the Appellants which cannot now be further pressed, his Judgment continued :-

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pp 41

ll.30-38

"The question of who had been in possession remains. The Plaintiffs were clearly in possession up to the demolition of the building in 1926. After that they visited the place occasionally and state that they protested when they found it being used for the deposit of firewood by the Defendants' mother. They also took action when they heard Defendants were about to sell the land.

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p 42 ll.

13-29

I am satisfied that the land was let by Third Defendant to tenants between 1946 and 1956, but for deposit of firewood only. On the question of possession I find therefore that the facts are that the Plaintiffs vacated

the property in 1926 but visited the place from time to time and protested when they considered anyone was exercising rights of ownership over it. The land was vacant and they did not seriously object to it being used occasionally by their neighbour for the deposit of firewood.

Record

10 I find that the Defendants made occasional use of the land for firewood between 1928 and 1946 - how often has not been proved - and let it out between 1946 and 1956 but the letting was of such a nature that it would not necessarily have come to the notice of the Plaintiffs.

.. .. .

20 In my view the occasional deposit of firewood on the land by Henrietta de Souza was not an entry into possession. The letting of the land by Third Defendant between 1946 and 1956 may be but, even if it is accepted as possession by the Mortgagee time would only run from 1946 to 1951 when proceedings against the Defendants were first instituted, a period of some 5 years."

p 42 ll.
40-47

30 22. The learned trial Judge therefore found that Section 12 of the Limitations Act 1939 did not apply to bar the Respondents from redeeming the mortgage. He then proceeded to consider the question of whether the mortgage moneys were still outstanding and concluded as follows :-

p 43 ll.
1-3

"It is inconceivable that the Mortgagee would purchase one of the mortgaged properties without deducting the full amount of the mortgage from the purchase price. I agree that this taken with the fact that the mortgagor thereafter acted as if the property was free from encumbrances constitutes a good ground for assuming that the loan of £125 was fully

p 43 ll.
25-43

Record repaid at the time that 90/92 Broad Street was purchased by the Mortgagee.

After consideration of the evidence I am fully satisfied this is so. The Mortgagor therefore became the tenant at will of the Mortgagee in 1898, and as I have already found he and his successors in title were in possession up to 1926 - a period of some 28 years, it follows that the mortgagee's title has been extinguished.

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It also follows from the facts I have found above that the Defendants' claim to long possession cannot be accepted."

p 43 ll.
44-47

23. The learned trial Judge accordingly entered Judgment for the Respondents with costs and ordered the Appellants to execute a reconveyance of No.19 Williams Street to the Respondents, and give up possession to the Respondents forthwith.

pp 44-45

24. From this Judgment the Appellants appealed to the Supreme Federal Court of Nigeria on the following grounds :-

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"(1) The learned trial Judge erred in law in holding that the dealings with the property by the Defendants' predecessor were inconsistent with the mortgage to the Defendants.

(2) The learned trial Judge erred in law in holding that the limitation does not apply to the present case.

(3) The learned trial Judge erred in law and in fact in rejecting the plea of long possession.

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(4) The learned trial Judge misdirected himself in law on the facts in holding that the Plaintiffs' predecessor must have deducted the mortgage debt from the sale of the property at No.90 and 92 Broad Street, Lagos.

(5) Judgment against the weight of evidence." Record

25. The Federal Supreme Court of Nigeria (Sir pp 40-53
Adetckunbo Ademola F.C.J., Wilfred Hugh Hurley
and Samuel Okai Quashi-Idun, Ag. F. JJ) by
their Judgment of the 19th day of May 1958
dismissed the Appellants' said appeal. Quashi-
Idun Ag F.J. (in whose Judgment the other
members of the Court concurred) said in rela-
tion to the second ground of appeal :-

p 52 11.
7-16

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"The onus of proving long possession was
on the Defendants-Appellants; and although
the Plaintiffs-Respondents alleged in their
Statement of Claim that some time after the
death of James Emmanuel Wright his sister,
Henrietta de Souza, took possession of the
land and that after her death the Defendants
continued in possession, the evidence
adduced supported the finding of the learned
trial Judge that the Defendants had not
proved long possession."

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26. In relation to grounds (1) and (4) of the
grounds of Appeal he said as follows :-

"In my view the learned trial Judge was
justified in coming to the conclusion that
the mortgage debt had been paid. He
considered the evidence led in support of
the allegation that after the redemption of
the property in dispute and the sale of No.
90/92 Broad Street to Wright, Barber mort-
gaged the property in dispute in 1901 and
in 1902 and repaid the loans in each case.
Although the learned trial Judge held that
there was not sufficient evidence that the
Plaintiffs received and were paid compen-
sation when the building on the land was
demolished by the Lagos Town Council, I
think it was the duty of the Defendants who
said they were in possession of the property
to have proved that they and not the
Plaintiffs claimed or were paid compensation

p 52 134

p 52 19

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Record

by the Town Council. This they never did.

The inference that the mortgage debt had been paid was the only one that could be drawn from the evidence adduced before the trial court."

pp 53-54

27. The Federal Supreme Court of Nigeria accordingly dismissed the said appeal with costs.

p 54

28. Against the Judgment of the Federal Supreme Court of Nigeria this Appeal is now preferred final leave so to do having been granted by the Federal Supreme Court of Nigeria on the 8th day of September 1958. 10

29. It is submitted that the decisions of the Supreme Court and the Federal Supreme Court are erroneous, in that

(1) The acts of the said Henrietta de Souza in depositing firewood upon the land represented a sufficient act of taking possession of the said land to commence the running of the provisions of the Statutes of Limitation in favour of her and her successors in title. 20

(2) It was common ground between the Appellants and the Respondents upon the pleadings that the said Henrietta de Souza had taken possession of the said land, the only difference being as to the date when she took possession.

(3) As the acts of possession of the said Henrietta de Souza in relation to the said land from 1928 to 1946 were precisely the same, viz the depositing of firewood upon the said land, the clear inference must be that she took possession of the said land in 1928. 30

(4) Since the 1951 proceedings terminated unsuccessfully for the Respondents, in that they were non-suited therein, the commencement of those proceedings did not interrupt the

running of time under the Statutes of
Limitation.

Record

10 (5) The inference that the original mort-
gage debt owing from the said William
George Barber to the said James Emmanuel
Wright had been repaid ought not to have
been drawn in the circumstance that the
original Mortgage Deed was produced from
the custody of the Appellants, and that
there was no receipt for the said sum of
£125 endorsed thereon, receipts having
been duly endorsed on all the three
mortgages or charges referred to in para-
graph 8 hereof.

20 30. It is therefore submitted that the said
Henrietta de Souza having been in possession
of the land from shortly after the death of
her brother James Emmanuel Wright in 1928
until her death in 1946 and the third Appel-
lant having been in possession on behalf of
all the Appellants from her death in 1946
until the commencement of the present action,
or alternatively until the year 1956, whether
with or without the support of a legal title
to the land as Mortgagee thereof under the
said Indenture of Mortgage of the 14th day of
July 1896, the Appellants have acquired a
good title to the said land freed and dis-
charged from any equity of redemption in the
30 Respondents.

40 31. It is further submitted that if the
Judgments of the said Federal Court and Federal
Supreme Courts are correct, in fact and law, so
much of each Judgment as orders the Appellants
to execute a reconveyance of No.19 Williams
Street to the Respondents is erroneous in law
in that it is an essential consequence of such
Judgments that the Appellants' title to the
said land had been extinguished by 1926, so
that there is no title left in them which they
are able to convey.

32. The Appellants will therefore humbly submit that the Judgments of the Federal Court and the Federal Supreme Court of Nigeria were wrong and ought to be set aside and that the Respondents' action should be dismissed with costs for the following amongst other

REASONS

- (1) BECAUSE the acts of the said Henrietta de Souza in depositing firewood upon the said land for a period from 1928 to 1946 represented a sufficient act of taking possession of land to commence the running the provisions of the Statute of Limitations in favour of herself and her successors in title. 10
- (2) BECAUSE neither the Respondents nor any person through whom they claim was ever in possession of the said land or any part thereof at any time since 1928.
- (3) BECAUSE it was common ground between the Appellants and the Respondents on their pleadings that the said Henrietta de Souza had taken possession of the said land, the only question being as to the date when she took possession, which was determined by the evidence of the Respondents' own witness as being shortly after the death of the said James Emmanuel Wright. 20
- (4) BECAUSE the Respondents are barred from any title which they might otherwise have under the provisions of the Statutes of Limitation.
- (5) BECAUSE the 1951 proceedings neither created any estoppel against the Appellants nor interrupted the running of time in their favour. 30
- (6) BECAUSE the Judgments of the Federal Supreme Court and the Supreme Court are wrong and ought to be set aside.

(7) BECAUSE even if such Judgments are right, on their analysis of the facts and law so much thereof as directed the Appellants to reconvey to the Respondents a title which on such analysis they did not have is wrong and cannot be sustained.

RAYMOND WALTON.

No.24 of 1959

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL SUPREME

COURT OF NIGERIA

ANGELINA AREFUNWON & OTHERS

— v —

SALLY SHOLA BARBER & OTHERS

CASE FOR THE APPELLANTS

HATCHETT JONES & Co.,
90, Fenchurch Street,
London, E.C.3.