

Privy Council Appeal No. 24 of 1959

Angelina Arefunwon and others - - - - - *Appellants*

v.

Sally Shola Barber and others - - - - - *Respondents*

FROM

THE FEDERAL SUPREME COURT OF NIGERIA

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 29TH NOVEMBER, 1960**

Present at the Hearing

LORD KEITH OF AVONHOLM
LORD HODSON
MR. L. M. D. DE SILVA

[*Delivered by MR. DE SILVA*]

The respondents instituted this action in the Supreme Court of Nigeria claiming against the appellants an order for possession of the property 19 Williams Street, Lagos, and for an order that the appellants do execute in their favour a deed of conveyance of the said property. The Supreme Court gave judgment as prayed for and this judgment was on appeal affirmed by the Federal Supreme Court.

The property in question and an adjoining property 90/92 Broad Street at one time belonged to one William George Barber. In 1896 Barber mortgaged both the properties to one James Emmanuel Wright to secure a loan of £125. In 1898 Barber sold the Broad Street property to the mortgagee for £300. A material question in the case upon which the parties are at issue is whether the loan of £125 was repaid.

William George Barber left one son, Gabriel, by his wife Rebecca. Gabriel left seven children, five of whom are the respondents. The two others are dead. It is not disputed that the respondents are the successors of W. G. Barber.

James Emmanuel Wright died in 1928. The appellants, who are the children of his sister Henrietta, claim the property through her. It is not disputed that the property would have passed to her if it had belonged to J. E. Wright and that the appellants are the successors in title to her.

The case for the appellants is that the mortgage was not repaid, that on instructions from the mortgagee the property was sold by public auction and purchased by a lawyer Akinsemoyin on behalf of the mortgagee. The appellants also plead that independently of the purchase they are entitled under the Statute of Limitation to retain the property by reason of long possession.

The case for the respondents is that the mortgage was repaid, that there was no sale and purchase on behalf of the mortgagee and that the Statute of Limitation did not operate against them. They say that they are entitled to a conveyance from the successors of J. E. Wright and to an order for possession.

It is convenient to deal first with the question of purchase. No documents were produced in support of the alleged purchase and, on

the facts, for this and other reasons the trial Judge rejected the appellants' assertion. The Federal Supreme Court affirmed this view and their Lordships can find no reason for disagreeing with it.

On the question of the repayment of the mortgage the appellants relied strongly on the fact that there had been no reconveyance and that the deed of mortgage itself has remained in the possession of the mortgagee and his successors (the appellants). As against this it has been established that the title deeds to the property are in the possession of the respondents, the successors of the mortgagor. Further, Barber in 1901 and 1902 borrowed money on the security of the property from other persons on documents which have been produced; and after his death in 1904 his wife Rebecca and her son Gabriel mortgaged the property to secure a loan which they repaid in 1919 and 1920.

The trial Judge held that it was not likely that the mortgagee who was, as already stated, the purchaser from the mortgagor of the adjoining property, 90/92 Broad Street, would not have deducted the amount of the mortgage from the purchase price. If he had not done so he would have continued the loan on security smaller than the original. For this reason and on a consideration of the evidence as a whole he held on the facts that the mortgage had been repaid. The Federal Supreme Court affirmed this finding. Their Lordships can find no reason to disagree with it.

The Lagos Town Council for reasons not relevant to this case demolished the building which stood on 19 Williams Street in 1926. Up to the date of demolition William George Barber (till his death in 1904) and his successors were in possession of the building. It has been held by the Courts in Africa and it is not disputed on this appeal that if the mortgage had been paid off and the mortgagor and his successors had been in possession until 1926 the mortgagee's title would have been extinguished under the relevant law. It is therefore on this basis that their Lordships will proceed.

Their Lordships will now consider the plea that by reason of long possession and user the appellants are entitled to succeed. It is urged on this appeal that possession for a period of twelve years is necessary and sufficient to acquire title and that Henrietta and her successors (children) had been in possession for this period. It has been found by the Courts in Africa that the premises 19 Williams Street, which had become a vacant yard after the demolition of the building, had been used by Henrietta "for the occasional deposit of firewood" and that at a later date it had been let in separate allotments to tenants for the same purpose. The trial Judge held that this letting commenced after the death of Henrietta in 1946. On this appeal reference has been made to Exhibit 16 which is a summons dated 3rd February, 1944, in which Henrietta is named as plaintiff and a claim is made for rent for four months in respect of the premises 19 Williams Street from October, 1943. It is argued that the trial Judge overlooked this document. No reference is made to the document in the petition of appeal to the Federal Supreme Court and it would appear that no suggestion of such an error was made to the Federal Supreme Court. Its judgment does not discuss the document or its implications. What has just been said indicates that there may have been a good reason for ignoring this document although that reason cannot be ascertained from the recorded proceedings. Their Lordships will not pursue the matter further because, for reasons which follow, they are of opinion that, even if it is assumed that a tenant was in occupation in October, 1943, and that such occupation satisfied all the requirements of possession on behalf of the appellants, the appellants nevertheless fail.

The trial Judge held that "the occasional deposit of firewood on the land by Henrietta de Souza was not an entry into possession". The Federal Supreme Court agreed. Their Lordships are of opinion that the facts found on this point are too slender to afford support to a plea of title by possession.

The Courts in Africa have held that the letting to tenants did not commence till 1946. This action was commenced in 1953. Even if the date of commencement of letting be regarded as 1943 (date appearing in Exhibit 17) possession for twelve years prior to action is not established. Counsel asked their Lordships to hold that letting must have commenced at least two years prior to 1943, namely in 1941. Receipts from tenants have been produced but none prior to 1946. Nor has any document (other than the one mentioned) been produced which would support the suggestion of tenancies prior to 1946. Their Lordships have considered the oral evidence in the case and the views of the Courts in Africa of that evidence and find it impossible to hold that there have been tenancies for twelve years. The appellants' case therefore fails.

It was strongly urged on this appeal that the respondents' statement of claim contained admissions of possession by Henrietta and her children which supported the appellants' case. Of this the Federal Supreme Court said:—

“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”.

The statement of claim could not be said to contain an admission of the appellants' title as it contains no dates (possession by Henrietta at least from 1941 was necessary to establish the appellants' title, as already stated) and it gave no indication of the nature of the possession averred. A more precise statement would have made simpler the clarification of the points in issue. Their Lordships agree with the view of the Federal Supreme Court that long possession for the period, and of the nature, necessary to establish title have not been proved by the appellants.

The order made by the trial Judge and affirmed by the Federal Supreme Court contains a direction for a reconveyance by the appellants to the respondents of the property in question. But as stated above and held by the Courts in Africa the title of the appellants has been extinguished and there is nothing they can convey. That part of the order which contains the direction has therefore to be deleted.

For the reasons which they have given their Lordships will humbly advise Her Majesty that subject to the variation indicated in the last paragraph this appeal be dismissed. As the respondents did not appear there will be no order as to costs.

In the Privy Council

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v.

SALLY SHOLA BARBER and others

DELIVERED BY MR. DE SILVA

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