

611462 7, 1961

No 13 of 1959.

IN THE PRIVY COUNCIL

ON APPEAL FROM THE FEDERAL SUPREME COURT
OF NIGERIA

BETWEEN

1. C. A. SAVAGE
2. SOLOMON KAYODE
3. JONATHAN SUNDAY ROTIBI
(Trustees of the Will of S.O. Rotibi)
Defendants-Appellants
and

M.O. UWECHIA
Plaintiff-Respondent

CASE FOR THE RESPONDENT

Record

1. This Appeal is from a Judgment and Order of the Federal Supreme Court of Nigeria dated the 18th March 1957, allowing an appeal from a Judgment of the Supreme Court of Nigeria dated the 14th day of December 1955, and ordering Specific Performance of an Agreement dated the 24th day of August 1954, between the Respondent and S.O. Rotibi, deceased.

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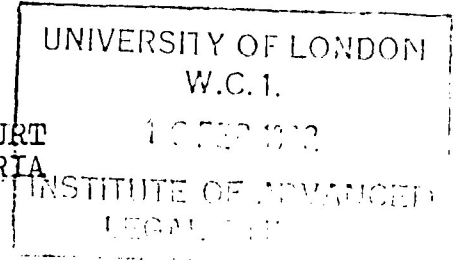
10 2. The principal question to be determined on this Appeal is as to the proper construction of the said Agreement (hereinafter called the Agreement) which reads as follows:-

PROMISSORY NOTE

£780

Owerri
24th August 1954

I promise to pay to Mathew Uewchia or order three months after date the sum of Seven hundred and eighty pounds for value



63400

Record received or in default to convey to him all those messuages together with appurtenances thereto situate at No.6 New Market Road in the township of Onitsha, to hold the same unto the said Mathew Uwechia or order in fee simple.

Sgd. S.O. Rotibi.

3. The promisee named in the Agreement is the Respondent (hereinafter called the Plaintiff) and it is common ground that the promisor, S.O. Rotibi (hereinafter called the deceased) died on the 3rd day of September 1954. By his last Will dated the 27th day of March 1954, the deceased appointed the Appellants (hereinafter called the Defendants) to be the Executors and Trustees of the Will. The sum of £780 referred to in the Agreement never was paid, either by the deceased or the Defendants.

4. This suit was commenced in the Supreme Court, Onitsha, by a Civil Summons issued on the 6th day of May 1955, and there was a Statement of Claim (in terms similar to those of the Summons) dated the 2nd day of May 1955. Pleadings were ordered, and the Plaintiff delivered a further Statement of Claim dated the 4th day of October 1955, whereby the Plaintiff pleaded the death of the deceased, the Will and the appointment of the Defendants as Executors and Trustees, alleged that since the death the Defendants had done certain acts in relation to the estate of the deceased, including the collection of certain rents, and pleaded the Agreement in terms as follows :-

"6. By an agreement to convey made between the plaintiff and the deceased Samson Omolona Rotibi on the 24th day

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of August 1954, at Owerri, the said deceased agreed to convey to the plaintiff for the sum of £780 (Seven hundred and eighty pounds) after three months from the aforementioned date his freehold properties with the appurtenances thereto situate at No.6 New Market Road, Onitsha."

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- 10 It was further pleaded that immediately after the death of the deceased the Plaintiff caused the fact of the Agreement to be brought to the notice of the Defendants, that they had neglected and refused to take any steps towards the completion thereof and that the Plaintiff had performed his obligations to the deceased which led to the Agreement. The claim was for Specific Performance of the Agreement to convey. p 8
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1.20
- 20 5. By their Defence dated October 1955, the Defendants stated inter alia that although they were appointed the Executors and Trustees of the Will of the deceased they had not yet obtained probate and a Caveat had been entered and that they had collected the rents mentioned in the Statement of Claim to preserve the property from wastage and loss. As regards the Agreement and the allegation that they were informed about it, the Defendants pleaded as follows :- p 9
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- 30 "9. Paragraph 6 of S/C: The Defendants plead that the said Agreement was in essence a Mortgage for money lent. A claim for specific performance does not therefore arise. p 10
10. Defendants will, however, contend that plaintiff's right of action was to sue the Executor and Trustees when duly appointed either to pay the loan or to ask for an order for Foreclosure Nisi

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with an interval of six months.
These have not been done.

11. Paragraph 8 of S/C: 2nd and 3rd
Defendants will contend they were
never informed of the Agreement as
alleged."

p 10 They further pleaded that they cannot act
l.24 as Executors and Trustees until they have
p 10 been granted probate, that they are not
l.28 "at present" the lawfully appointed 10
Executors and Administrators, that such

acts as they perform are purely to
p 10 preserve the estate from wastage and loss,
l.34 and that the action is premature.

p 11 6. At the trial on the 4th day of
p 12 November 1955, the Plaintiff called one
l.30 Lasisi Rotibi, who stated that he was the
manager of the business of the deceased in
p 13 Owerri and Onitsha. The witness said
l.16 that he showed the Agreement to the 20
Defendants on the 14th day of September

1954; this fact was recorded in a letter
p 53 dated the 1st day of November 1954 from the
witness to the Plaintiff, which the witness
p 13 l.16 said was true. The witness identified a
p 13 l.20 copy of the Agreement which was tendered by
p 54 the Plaintiff. A certified copy of the
p 13 l.25 Will of the deceased was admitted by
p 55 consent.

p 13 7. By his Judgment dated the 14th day of 30
December 1955, the learned trial Judge
(Brown J.) found that, although the Will
p 14 l.16 had not yet been proved, the Defendants
had intermeddled with the estate and held
that therefore they could be sued and the
claim was not premature. On the question
of the effect of the Agreement, however,
the learned Judge stated his view in the

following terms.

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"The document is described as a "promissory note", the wording is that of a promissory note, the promise is now impossible of fulfilment owing to the death of the promisor. The conveyance of the property is said in the note to be contingent on the default of the promisor.

p 14 1.46

10 The promisor was not in default at his death nor liable for payment until 24th November 1954 by which date it was no longer possible. I must presume that at the time of his death the deceased was intending to fulfil his obligations in accordance with his undertaking and had every prospect of being able to avoid the contingency of default and so at no time was the Plaintiff entitled to this conveyance
20 which he sought."

The Plaintiff's claim was therefore dismissed with costs.

p 15 1.15

8. The Plaintiff gave Notice of Appeal against the Judgment of the Supreme Court on the 19th day of January 1956. In the appeal, the Plaintiff applied for leave to introduce new evidence by affidavit, sworn by him on the 24th day of August 1956, to which were exhibited (i) a certified copy of the Probate of the Will of the deceased granted on the 28th day of July 1956, i.e. after the date of the Judgment of the Supreme Court, and (ii) a copy of a Plan of the land referred to in the Agreement. The application was not opposed. Leave to introduce the new evidence was granted.

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Record
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9. In the Federal Supreme Court (Foster-Sutton F.C.J., Jibowu and Lestang F.J.J.) the principal Judgment was delivered by the learned Chief Justice, who stated his view as to the proper construction of the Agreement in the following terms :-

- p 30 1.1 "Some time was occupied before us on a submission that the document in question was not a promissory note, but it does not appear to me to be material what label is attached to it. It certainly is not a mortgage. It is an agreement to pay a specific sum by a certain date, and in default of such payment to convey the property referred to." 10
- p 28 1.41 He criticised the reasoning of the learned trial Judge, as set out in the passage quoted above, and mentioned the general rule that it is the duty of a legal personal representative to perform all the contracts of his testator or intestate, as the case may be, that can be enforced by way of specific performance or otherwise. 20
- p 29 1.9
- p 28 1.10 The learned Chief Justice referred to the fact that the sum of £780 had not been paid within the period of 3 months stipulated by the Agreement and the evidence that after the death of the deceased the Defendants were shown the Agreement on the 14th day of September 1954, so that they had ample time in which to comply with the term regarding payment, had they chosen to do so. He concluded by way that he would allow the appeal and order Specific Performance. 30
- p 30 1.9
- p 30 Jibowu and Lestang F.JJ. both concurred.
- p 37 10. Conditional leave to appeal to Her Majesty in Council was granted to the

Defendants on the 22nd day of May 1957. Record
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 An Application for an order extending the time within which to perfect the conditions of appeal was dismissed on the 29th day of October 1957. pp 47 48
p 49 Special leave to appeal to Her Majesty in Council was granted on the 22nd day of October 1958, costs reserved.

10 11. The Plaintiff humbly submits that this Appeal should be dismissed with Costs, including the Costs of the Petition for Special Leave to Appeal, for the following amongst other

REASONS

(1) BECAUSE the Judgment and Order of the Federal Supreme Court are right for the reasons given in the Judgment of the learned Federal Chief Justice;

(2) BECAUSE the Agreement in suit is not a mortgage;

20 (3) BECAUSE the Agreement in suit is a Conditional Agreement for Sale and in the events which happened the Plaintiff became entitled to call for the property to be conveyed to him.

PHINEAS QUASS

RALPH MILLNER

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B E T W E E N

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2. SOLOMON KAYODE
3. JONATHAN SUNDAY ROTIBI
(Trustees of the Will of
S.O. Rotibi) (Defendants) Appellants

- and -

M. O. UWECHIA
(Plaintiff) Respondent

CASE FOR THE RESPONDENT

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