

IN THE COURT OF APPEAL
HOLDEN AT LAGOS
ON THURSDAY THE 14TH DAY OF JULY, 2005
BEFORE THEIR LORDSHIPS:

<u>KUMAI BAYANG AKAAHS</u>	<u>JUSTICE, COURT OF APPEAL</u>
<u>CLARA BATA OGUNBIYI</u>	<u>JUSTICE, COURT OF APPEAL</u>
<u>MOHAMMED LAWAL GARBA</u>	<u>JUSTICE, COURT OF APPEAL</u>

APPEAL NO. CA/L/303/2002

BETWEEN:

MR. OLADIPO OKUWOBI APPELLANT

AND

FLORENCE ACHONU RESPONDENT

JUDGMENT
(DELIVERED BY KUMAI BAYANG AKAAHS, J.C.A.)

In the Amended Statement of Claim dated 29/10/93 the Plaintiff who is the Respondent to this appeal claimed the following reliefs from the Defendant/Appellant:

- “(1) Special (sic) performance of the contract for the sale of the property situate at and being No. 65 Bode Thomas Street, Surulere Lagos by executing and doing in favour of the plaintiff all necessary acts, deeds, forms and things for the due vesting and registration of ownership of the said property in the

plaintiff and obtaining and delivering to the plaintiff a valid copy of his tax clearance certificate and of all other documents necessary for supporting an application for change of ownership in favour of the plaintiff.

- (2) Mesne profits in the sum of N150,000.00 p.a. with effect from the 1st August, 1992 in respect of the ground floor flat at 65, Bode Thomas Street, Surulere, Lagos until possession is given up.”

The facts which gave rise to the case now on appeal are that Mr. Oladipo Okuwobi decided to sell his property located at No. 65 Bode Thomas Street, Surulere, Lagos (formerly Plot 174 Herbert Macaulay Street) which is registered under the Registration of Titles No. MO5197 in the Lands Registry Lagos to the Respondent for N1,500,000.00 (One Million, Five Hundred Thousand Naira). The Respondent paid part of the purchase price in two instalments of N500,000.00 and N200,000.00 and the Appellant issued Exhibit 1 (a memorandum of contract of sale) to her on 3/6/92. In Exhibit 1, the appellant stated:

“This is to confirm the sale of 65, Bode Thomas property to Miss Florence Achonu at N1,500,000.00 (One Million, five hundred thousand Naira only) for which I have collected N200,000.00 (two hundred thousand Naira).

A sum of N500,000.00 (five hundred thousand Naira) is to be paid with the release of the documents with a balance of N800,000.00 (Eight hundred thousand Naira) to be paid as soon as all necessary papers are formalized.

Signed: Engineer Oladipo Okuwobi.”

Exhibits 2 and 3 are the receipts for the payment of N500,000.00 and N200,000.00 respectively totalling N700,000.00 and they are all dated 3/6/92. According to the Appellant when the Respondent was not forthcoming with the balance of N800,000.00 on the agreed date he

instructed his solicitors to write to the Respondent informing her that he was no longer interested in selling the house since the project for which he needed the proceeds from the sale of the house had been frustrated by the Respondent's inability to pay the purchase price within the stipulated or agreed time. He said that it was after a receipt of this letter that the Respondent secured the services of her own Solicitors to forward a cheque in the sum of N500,000.00 out of the remaining balance of N800,000.00 which he refused to accept. The Respondent however contended that after they had concluded negotiation for the purchase of the house, she made a down payment of N200,000.00 in cash and the appellant wrote Exhibit 1 confirming that he had sold the property to her for N1,500,000.00 for which she made a part payment of N200,000.00 and that upon payment of another N500,000.00 he would release the title documents to her while the balance was to be paid after the necessary papers had been formalized. It was based on this understanding that she approached Progress Bank Plc for a facility to finance the purchase of the property. A tripartite Memorandum of undertaking (Exhibit 5) was entered into between the Appellant, the Respondent and the Bank. This enabled the Appellant to release the title documents to the Bank to secure the loan which the Respondent wanted from the Bank. The Bank then released N500,000.00 on 3/6/92. When a search was conducted in the Lands Registry, it was discovered that there was a charge on the property which had to be removed. Before the necessary papers were formalized, the appellant purported to rescind the contract and this led the Respondent to institute the action in the High Court of Lagos State in Suit No. LD/3177/92 before Silva J. In a reserved judgment which was delivered on 13/2/97 the learned trial Judge held that there was a valid and subsisting contract between the parties and there was sufficient part

performance on the part of the plaintiff to entitle her to an order for specific performance. He then proceeded to enter judgment in her favour and granted an order of specific performance of the contract for the sale of the property situate at and being at No. 65 Bode Thomas Street, Surulere in her favour. Being dissatisfied with the judgment the Defendant/Appellant appealed against the said judgment in his Notice of Appeal dated 13th March, 1997 containing eight grounds of appeal. In her Brief of argument Alhaja Ruqayat O. Ayoola formulated seven issues for determination, two of the issues were said to be principal issues while the other five were titled Secondary Issues. The principal issues are

1. Was Exhibit 1 admissible in evidence notwithstanding the provisions of Section 15 of the Lands Instruments Registration Law Cap 64 Laws of Lagos State?
2. Was time of the essence of the contract sought to be specifically performed despite the uncontroverted evidence of the Appellant and an admission of the Respondent in paragraph 12 of the Amended Statement of Claim?

The Secondary Issues

1. Was specific performance available to the Respondent when the lower court had held that Exhibit 1 was not an instrument affecting land?
2. Was the learned trial Judge right in not making a specific finding on the validity of the purported contract of sale by virtue of Section 5 of the Law Reform (Contracts) Act 1961 applicable in Lagos State?
3. Was the learned trial Judge right in holding that “the value of the house in question to the Respondent cannot be matched with any damages that may be awarded her for breach of contract” when there was no such evidence before the court?

4. Was the Respondent ready and willing to perform the terms and conditions to be performed by her when the facts before the Lower Court pointed to the contrary?
5. Was the judgment of the lower court supportable having regard to the weight of evidence adduced before it

Mr. Irabor, learned counsel for the Respondent raised the following three issues for determination:

1. Whether there was no valid contract of sale of the property (the subject matter of this appeal) between the Appellant and Respondent upon which specific performance could be ordered.
2. Whether Exhibit 1 was not rightly admitted in evidence having regard to Section 5(3) Law Reform (Contracts) Act 1961 applicable to Lagos State.
3. Whether there was no sufficient evidence to sustain the judgment of the Honourable Court below.

The first issue raised by the appellant is whether Exhibit 1 is admissible in evidence having regard to the provisions of Section 15 of the Land Instruments Registration Law Cap 64 Laws of Lagos State. Closely connected to this issue is the second Secondary issue on the validity of the contract involving sale of land which should be made in writing by virtue of Section 5 of the Law Reform (Contracts) Act 1961 applicable to Lagos State. Learned Counsel had argued in the lower court and further submitted in her brief that Exhibit 1 is invalid and inadmissible for lack of registration under the Land Instruments Registration Act Law since it is a document affecting land and cannot be pleaded or tendered in evidence without being first registered. Learned Counsel went on to argue that if this Honourable Court holds that Exhibit 1 is not admissible, then there is no valid contract between the Appellant and the Respondent as a contract for sale of land must

be in writing in order to comply with Section 5 of the Law Reform (Contracts) Act, 1961.

The learned trial Judge found that Exhibit 1 was an agreement or contract to sell the property No. 65 Bode Thomas Street, Surulere and was followed by a valid sale which was concluded by part-payment. On the argument that Exhibit 1 is not merely a document showing payment of money but a document showing sale of land which must be registered in accordance with Section 15 of the Land Instruments Registration Law Cap 64 Laws of Lagos State, the learned trial Judge referred to Snell's Principle of Equity 27th Edition page 585 and held at page 227 lines 11-21 of the judgment as follows:

“It is not an instrument affecting land. It was tendered in evidence merely to show:

1. That there was an agreement or contract between the parties.
2. That part payment was made to the Defendant pursuant to the Agreement.
3. That the mode of liquidating the balance was by instalmental payment. It is my opinion therefore that the admissibility of Exhibit 1 is in no way affected. It establishes that there was a valid contract between the parties,”

I agree with the learned trial Judge that Exhibit 1 was properly admitted because it is an acknowledgement of part payment of money for the purchase of No. 65 Bode Thomas Street, Surulere by the Respondent. Since it is an unregistered instrument it is not admissible in evidence to prove the respondent's title to the property sold to him. If delivery of possession of the property is given by the appellant to the respondent, it will

give rise to an equitable interest which is capable of being converted into a legal estate by specific performance. See: OGUNBAMBI VS. ABOWAB (1951) 13 WACA 222; FAKOYA VS. ST. PAUL'S CHURCH SHAGAMU (1966) 1 All NLR 74; ADESANYA VS. ADERONMU (2000) 9 NWLR (PT 672) 370. AMANKRA VS. ZANKLEY (1963) 1 All NLR 364; ABU VS. KUYABANA (2001) 1 NWLR (PT 695) 491. NIGER CONSTRUCTION LTD VS. OGBIMI (2001) 18 NWLR (PT 744) 83. As stated in Exhibit 1, the delivery of possession was to take place as soon as all the necessary papers are formalized on payment of the balance of N800,000.00.

The bone of contention in this appeal has to do with the time the payment of the balance of N800,000.00 was to be undertaken. This brings me to the second principal issue in the appellant's brief which can be taken up with the fourth subsidiary issue formulated in the brief. According to the learned trial Judge the payment of the balance of N800,000.00 could be made instalmentally but learned Counsel for the Appellant referred to paragraph 12 of the Amended Statement of Claim where it was pleaded that the balance of N800,000.00 was to be paid within a week from the 3rd July, 1992 and submitted that the evidence given by the Respondent was at variance with paragraph 12 of the Amended Statement of Claim and she was bound by the pleadings filed. Learned Counsel argued that the trial Judge ought to have ignored the evidence led by the Respondent. She further contended that even if the Respondent was allowed to pay the balance by instalment, it will not affect the claim by the appellant that time of payment was of the essence since the person under obligation to pay by instalment pays according to the schedule laid out in the instalmental plan and the Appellant's complaint is that the time schedule was not kept or complied

with by the Respondent. It was submitted that time being of the essence of the contract to sell the house which the Respondent breached the Appellant was entitled to rescind the contract and the remedy of specific performance will not be available to the Respondent.

Learned Counsel for the Respondent argued that Exhibit 1 was admitted to show that there was a contract of sale and the terms of payment thereof. It was also admitted to prove part performance. It is the contention by learned counsel that to date the necessary papers have not been formalized due to the act of the appellant in renegeing to complete the transaction and despite this the Respondent forwarded a N500,000.00 cheque to him but he returned it claiming that the Respondent has failed to pay within time. Learned Counsel also contended that the Appellant bullied the Respondent to sign the undertaking but this did not obliterate the original terms of the contract between the parties to the effect that the balance sum will be paid upon finalizing the necessary documents. He argued that payment of the outstanding sum within one week is conditional upon the necessary documents being formalized within the period. He went further to state that the charge on the property coupled with the inability of the Appellant to furnish the Bank with his Tax Clearance Certificate were the causes of the delay in completing the transaction and submitted that the appellant cannot rely on his own ineptitude and negligence to avoid a legitimate transaction. Apart from invoking equitable principles to pray for an order of specific performance it was further submitted that since there is a binding contract between the parties, for which there is sufficient part performance, since it was a contract of sale of real property the remedy of specific performance is available to the Respondent.

Parties are bound by their pleadings and it was never the Respondent's case that she was bullied into signing the letter of undertaking. Once pleadings are ordered, filed and exchanged, the parties and the courts are bound by the pleadings so filed. It therefore follows that evidence must be led in accordance with the pleadings. Evidence led not in conformity with the pleadings, and/or upon facts not pleaded go to no issue. See: NKANU VS. ONUM (1977) 5 S.C. 13. OVERSEAS CONSTRUCTION LIMITED VS. CREEK ENTERPRISES LTD (1985) 3 NWLR (PT 13) 407. EZE VS. ATASIE (2000) 10 NWLR (PT 676) 470. There is no evidence to support the submission in the Respondent's brief that the Respondent was bullied into signing the undertaking to pay the balance of N800,000.00 within one week. It was during cross-examination that the Respondent who was the Plaintiff at the lower court denied that she gave an undertaking that the balance would be paid in one week and when she was referred to paragraph 12 of the Amended Statement of Claim she told her lawyer that the defendant wanted her to give an undertaking to pay the balance within one week but she said she could not. It was the Respondent who pleaded in paragraph 12 of the Amended Statement of Claim that-

“Pursuant to their agreement, such receipt was issued and an aide memoire was prepared and signed by the plaintiff on the 3rd July, 1992 signifying that in fact such sum of money (N200,000.00) was yet to pass and that the balance of the purchase price should be paid within a week”

The N200,000.00 being referred to in paragraph 12 is in connection with Exhibit 4 which is the receipt dated 3/7/92 and the explanation which was given regarding the issuance of Exhibit 4 was to convince Progress Bank who were going to finance the purchase of the property through the

loan they had approved or were going to approve for the Respondent that she had infact made further deposit as a sign of her seriousness in completing the transaction.

It is true that at the time the parties negotiated the contract for the sale of the property, the Respondent was not aware that the property was encumbranced as the appellant had not stamped and registered the release charge sent to him by Mortgage Bank (formerly Nigeria Housing Development Society Limited) in whose favour a Deed of Mortgage dated 30th June, 1970 had been registered on 14th August, 1970 (See Exhibits 6 and 8). Before the Release Charge could be stamped and registered, the Appellant had to produce his current tax clearance certificate which he obtained on 6/7/92 (Exhibit 10). In the letter of undertaking dated 9/6/92 which was signed by both the respondent and appellant as purchaser and vendor respectively, they undertook “that by 10th June, 1992 to bring our lawyer to effect the necessary release of all encumbrances on the property and obtaining the Land Certificate deposited with the Land Registry.” They also promised to do all they were called upon to effect the proper security documentation in the name of the Bank. So at the time the Respondent gave the subsequent undertaking on 3/7/92 to pay the balance of N800,000.00 within one week the appellant had given the tax clearance certificate and land certificate to progress Bank Plc who were processing the loan for the Respondent. Chukwuma Okonronkwo Ucheya, the Legal Officer in Progress Bank testified on behalf of the Respondent as PW2 stated at page 133 lines 23-28 thus:

“After the undertaking Exhibit 5, I told the Defendant to cause the charge to be removed and to bring back the land certificate. He did this and brought back the land certificate. On 15th June, 1992 I caused another

search to be made. The report now showed that the charge had been removed”

He testified further at page 135 lines 3-5 as follows:

“We have given the plaintiff enough money to cover what was required for payment of the balance of the purchase price”

On page 119 lines 27-29 the Respondent testifying then as Plaintiff stated –

“The matter of tax clearance did not effect the approval of the loan but it affected disbursement.”

If the charge had been removed by 15th June, 1992 any delay in disbursing of the loan after that date cannot be attributed to the Appellant’s failure to furnish his Tax Clearance Certificate. It was no longer the fault of the appellant that the documents could not be formalized since he had surrendered the Land Certificate and the Tax Clearance Certificate to Progress Bank.

The sequence of events that followed were that when the Respondent was not forthcoming with the balance of N800,000.00 on the agreed date, the Appellant instructed his Solicitors to write to the Respondent to rescind the sale as the project for which he needed the money had been frustrated. The letter of the Appellant’s Solicitors is dated 30th July because of the Reply which the Respondent’s Solicitors sent on 5th August, 1992 which was put in evidence as Exhibit 11. The excerpts of Exhibit 11 read thus:

“The truth is that your client was in urgent need of money and so decided to sell what he has and our client agreed to buy. They both produced a home made contract which is sufficiently binding.

You must appreciate that buying a house is not like buying a shirt. Your client must show good root of title which must be investigated and the delay in completion has been that of your client who had a mortgage on the property which had to be redeemed first for title document

Our client is quite aware of the position of the ground floor and bought the house subject to that tenancy.

Since you have failed to give us date of completion at Progress Bank premises we have persuaded them to send the balance money to us for completion which they have done.

We now enclose herewith our cheque for N500,000.00 which is the balance and engrossed Transfer and Power of Attorney for execution by your client and return to us within ten days. If your client want (sic) cash it can be arranged to your client any day before the week and.

This office will close for one week from Monday 24th August, for the Bar Conference.

However if your client fails to complete within ten days we shall apply to court for specific performance and damages.

Yours faithfully,
Signed; OFULUE AND OFULUE”

In Exhibit 11, the Respondent’s Solicitors confirmed that the Appellant was in urgent need of the money and so decided to sell the property. The appellant testified that he instructed his lawyer to return the cheque to the plaintiff because the project for which he wanted the cheque had been frustrated. His evidence was not seriously challenged.

The evidence that the respondent made part payment of the purchase price is not in doubt. It was decided in ODUFUYE V FATOKE (1977) 4SC 11 that where a purchaser of land made part payment of the purchase price but defaulted in paying the balance there can be no valid sale even where the purchaser is in possession. Such possession is incapable of defeating the vendor’s title. This case was decided under the rules of law governing sale of land under customary law. In MANYA V IDRIS (2001)

8 NWLR (pt. 716) 627, this court followed the decision in ODUFUYE V FATOKE supra and in the lead judgement of Salami J.C.A. he declared at page 638 that-

“the position under the native law and custom is not different from the rule of common law. At common law, payment of purchase price as well as possession vests the purchaser with equitable interest on the basis of which he can seek an order of specific performance. But where the purchaser fails to pay the purchase price fully he will have no right to a decree for specific performance. There will then be a right in the vendor to rescind the contract of sale and resell the property”

Apart from relying on ODUFUYE VS FATOKE supra; OLOTO VS.AMINISTRATOR-GENERAL (1946) 12 WACA 76, the decision of the Supreme Court in ODUSOGA VS. RICKETTS (1997) 7 NWLR (PT 511) 1 further fortified his stand where Wali J.S.C. said at page 21:

“The fact that the respondent made part-payment to the vendor for which he obtained a receipt, Exhibit A did not pass the legal estate of the land in dispute to him. Where a purchaser, as in this case, paid only part of the purchase price of a parcel of land which was demarcated into plots before the sale, went into possession, developed substantial part of the land while leaving the rest bushy and undeveloped, the legal estate of the undeveloped part still remained with the vendor, particularly when the purchaser had failed to pay the balance of the purchase price after several repeated demands.”

The reasons given by the Respondent for her refusal to pay the balance of N800,000.00 are not tenable. The appellant had good title to pass after the removal of the encumbrance. The respondent was aware the appellant needed the money urgently for a project but showed a nonchalant

attitude towards settling the balance and instead of remitting the whole amount since the bank had released sufficient amount of money from the loan she applied for, the Respondent instructed her Solicitors to make a cheque for N500,00.00 thereby leaving a balance of N300,000.00 unsettled and this was long after the period she undertook to pay the balance had expired. What is more, the land certificate in respect of the property was already with the bank. If the respondent had settled the balance before preparing the documents for the transfer of title and the appellant refused to execute them, it is then she could apply to court seeking an order of specific performance; instead she taunted the appellant in Exhibit 11 that he had no chance of winning the case should he embark on legal proceedings and went on to threaten the appellant that she would apply to court to seek for an order of specific performance if the latter refused to execute the documents of Transfer and Power of Attorney in respect of the property for which full payment had not been effected.

I entirely agree with the submission of learned counsel for the Appellant that the Respondent was not ready and willing to perform the terms and conditions which she was required to perform under the contract and used the delay and tardiness of the appellant as a lame excuse for her inability or unwillingness to abide by the terms of the contract. She in fact frustrated the appellant by not paying the balance of the purchase price despite her undertaking. A party who seeks to enforce his right under contract must himself show that he has performed his own side of the contract and thus be in a position to insist on the other party's performance. See: ONYEMELUKWE VS. L. D'ALBERTO & CO. LTD 2001 FWLR (PT 83) 2166. I find that there is merit in the arguments advanced by learned

counsel for the appellant and since this issue is the crux of the appeal, I shall allow the appeal. I therefore hold that there wasn't sufficient evidence on which the order of specific performance could have been made in favour of the Respondent. Since the transaction was frustrated by the failure of the Respondent to pay the balance of N800,000.00 within one week from 3/7/92 all that the respondent is entitled to is a refund of the N700,000.00 part-payment she made.

I find that the appeal has merit and I accordingly allow it. The order of specific performance of the contract for the sale of the property situate at and being at 65 Bode Thomas Street, Surulere, Lagos made in favour of the Respondent is hereby set aside. In its place I order that the Appellant shall return the sum of N700,000.00 being part-payment of the purchase price of the said 65, Bode Thomas Street, Surulere Lagos to the Respondent. I assess costs of N10,000.00 in favour of the Appellant against the Respondent.

K. B. AKAAHS

JUSTICE, COURT OF APPEAL

ALHAJA R. O. AYOOLA for the Appellant

K. O. IRABOR for the Respondent

