**MAUREEN OTIGBAH & ORS**

**V.**

**AGATHA ADETUTU UWANAKA & ANOR**

IN THE COURT OF APPEAL OF NIGERIA

ON WEDNESDAY, THE 18TH DAY OF MARCH, 2020

CA/L/956/2015

**LEX (2020) – CA/L/956/2015**

**OTHER CITATIONS**

3PLR/2020/29 (CA)

(2020) LPELR-49539(CA)

**BEFORE THEIR LORDSHIPS**

MOHAMMED LAWAL GARBA, JCA

UGOCHUKWU ANTHONY OGAKWU, JCA

JAMILU YAMMAMA TUKUR, JCA

**BETWEEN**

1. MAUREEN OTIGBAH

2. EJIMOFOR OTIGBAH

3. EKENE OTIGBAH

4. NGOZI OTIGBAH

5. UCHENNA OTIGBAH

6. ONOCHIE OTIGBAH - Appellant(s)

AND

1. AGATHA ADETUTU UWANAKA (nee OTIGBAH)

2. GEORGE IFEANYI OTIGBAH - Respondent(s)

**ORIGINATING COURT(S)**

HIGH COURT OF LAGOS STATE

**REPRESENTATION**

Oladipo Yeye, Esq. with him, S. A. Obafemi, Esq. - For Appellant

AND

Respondents absent and not represented by Counsel - For Respondent

**ISSUES FROM THE CAUSE(S) OF ACTION**

REAL ESTATE AND PROPERTY LAW – LAND – FAMILY PROPERTY:- Leasehold purchased and bequeathed to joint owners – Claim by one of the joint-owners of repurchasing, in personal capacity, the entirety of the leasehold from prior owners – Validity of – Burden of proving that bequeathed lease had expired – On whom lies – Effect of failure to discharge burden

REAL ESTATE AND PROPERTY LAW – LAND - ALLOTMENT AND PARTITION OF FAMILY LAND/PROPERTY:- Conditions precedent for a valid partitioning of a family property – Need for the consent of all co-owners of the property and for the partitioning to be done on equal basis – Validity of Deed of Partitioning done in breach thereof

REAL ESTATE AND PROPERTY LAW – FAMILY LAND:- Rent collected by party as sole owner of property – Where court orders that property is joint property of the parties – Whether party obligated to render an account to her co-owners

REAL ESTATE AND PROPERTY LAW – FAMILY LAND:- Action for account of rent – When will arise – Evidence of having spent some of the money on wellbeing/education of the joint owners/claimants – Relevance of in making an order for account

REAL ESTATE AND PROPERTY LAW – LAND:- Legal maxim of “nemo dat quod non habet” – Meaning of – Vendor who had sold interest in land – Whether can validly resold same interest in land on a latter date to anybody

COMMERCIAL LAW – CONTRACT - EQUITY - PRINCIPLES OF EQUITY:- Proof that a party has benefited from a transaction/agreement – Whether basis to prevent that party from turning around to challenge the legality of the transaction

**PRACTICE AND PROCEDURE ISSUES**

ACTION - ACTION FOR ACCOUNT: Instance(s) in which action for account will lie

APPEAL - RESPONDENTS NOTICE:- Purpose of - Rule that Respondents Notice of Contention is resorted to where the position of the Respondent is that the judgment was based on wrong grounds or premise; and that there is evidence on record which can sustain the judgment on grounds other than those relied upon by the Trial Court – Whether a Respondent’s Notice can be used to assert the correctness of judgment of trial court undergoing appellate review

EVIDENCE – PERCEPTION AND EVALUATION OF EVIDENCE:- Duty of trial Court in the evaluation of evidence and ascription of probative value thereto – Need for finding of fact to entail both perception and evaluation of evidence

EVIDENCE - PERCEPTION AND EVALUATION OF EVIDENCE:- Distinction between perception of evidence and evaluation of evidence - Where a trial Court unquestionably evaluates and justifiably appraises the facts – Attitude of Appellate Courts to invitation to substitute its own views for the views of the Trial Court – When an Appellate Court can intervene

EVIDENCE - PERCEPTION AND EVALUATION OF EVIDENCE:- Where the Lower Court drew wrong conclusions from the evidence and made findings of facts that do not result from the evidence – Where the said question of evaluation of evidence does not involve the credibility of witnesses

WORDS AND PHRASES - LATIN MAXIMS - "NEMO DAT QUOD NON HABET": Instance(s) where the principle of "Nemo dat quod non habet" will apply

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The parties in this appeal are scions from the loins of the late Paul Dawson Otigbah. He sired them from two different women. The Appellants and the 2nd Respondent are children of the same mother while the 1st Respondent has a different mother. The common denominator between the parties is their late father. The root of the contest in this appeal is the property left behind by their father. The property is situate at No 3 Otigbah Street, Ikeja, Lagos. In his lifetime, their father by a Deed of Assignment dated 2nd June, 1977 assigned the said property to his children, the parties herein, out of love, bond and affection. The said Deed of Assignment was admitted at the trial as Exhibit C1. Subsequently, a Deed of Partition was executed between the 1st Respondent and the 2nd Respondent partitioning the property. The Deed of Partition is Exhibit C2. There is also a Development Lease by which the 1st Respondent was to develop and take control of the property. The Development Lease is Exhibit C3. The Deed of Partition and the Development Lease are both dated 23rd June 2008. Furthermore, there is a Purchase Agreement, it is between the original owners of the land and the 1st Respondent. It is dated 10th February, 1977. By the said Purchase Agreement, the property was sold to the 1st Respondent as the outright sole owner of the property. It is Exhibit D6 in this matter.

Now, the Appellants contending that the Deed of Partition and Development Lease Agreement are illegal and that the 1st Respondent had failed to give an account of rents collected from the tenants at the property instituted proceedings before the High Court of Lagos State in SUIT NO. ID/1174/2011: MAUREEN OTIGBAH & ORS vs. AGATHA ADETUTU UWANAKA (nee OTIGBAH) & ANOR. wherein they claimed the following reliefs:

“1. A DECLARATION that the purported Deed of Partition between Mrs. Agatha Adetutu Uwanaka (Nee Otigbah) and George Ifeanyi Otigbah dated 23rd June, 2008 is illegal, unlawful, null, void and of no legal effect.

2. A DECLARATION that the purported Development Agreement/Lease between George Ifeanyi Otigbah and Mrs. Agatha Adetutu Uwanaka (Nee Otigbah) purportedly signed on 3rd April, 2009 is illegal, unlawful, null, void and of no legal effect.

3. A DECLARATION that by virtue of the Deed of Assignment dated 2nd June, 1977 between Paul Dawson Otigbah and Agatha Adetutu Otigbah for herself and other children of the Assignor registered as No. 55 Page 55 in Volume 1627 of the Lagos State of Nigeria Land Registry, Ikeja, Lagos, the Claimants and the Defendants are joint owners on equal basis of 3, Otigbah Street, Ikeja., Lagos.

4. AN ORDER permanently restraining the Defendants from giving effect to the purported deed of partition between Agatha Adetutu Nwanaka (Nee Otigbah) and George Ifeanyi Otigbah dated 23rd June, 2008.

5. AN ORDER setting aside the said Deed of Partition and the Development Agreement/Lease entered into between the 1st Defendant and the 2nd Defendant.

6. AN ORDER directing the 1st Defendant to give account of all proceeds of rent collected by her from inception till the final determination of the suit.

7. AN ORDER compelling the 1st Defendant to pay over to the Claimants all funds due to them as joint owners of the property in dispute.”

The 1st Respondent set up a counter-claim and she claimed the following reliefs:

“1. A DECLARATION that what the late Pa Dawson transferred to his children was his unexpired residue in the leasehold of and the 1st defendant having converted it to a freehold by buying the said property in dispute, she is now the owner of the said property and can partition, develop, lease and do with it as she pleases.

2. A DECLARATION that the said Deed of Partition and Development Agreement/Lease is legal and valid and should stand as per terms in it.

3. The sum of One Million Naira (N1,000,000) being the cost and Professional fees for this Litigation be charged against the Estate.”

The matter was subjected to a full dressed hearing at which testimonial and documentary evidence was adduced by the parties. In its judgment delivered on 30th June, 2015, the Lower Court dismissed the Appellants’ case and entered judgment for the 1st Respondent in terms of her counterclaim.

DECISION(S) APPEALED AGAINST

“1. Whether the Lower Court, having found that the Appellants and the Respondents were joint owners of the leasehold interest in No. 3, Otigba Street, Ikeja, Lagos as per Exhibit C1, was not wrong in refusing to grant the order directing the 1st Defendant/Respondent to render account of the rents collected by her in respect of the said property to the other co-owners (see Grounds 1, 2 and 7).

2. Whether the lower Court was right in holding that the Deed of Partition and the Development Agreement made between the 1st and 2nd Defendant/Respondents were legal and valid in law and not liable to be set aside (see Grounds 6 and 8)

3. Whether the lower Court was right in holding that the 1st Defendant/Respondent had become the sole owner of No. 3 Otigba Street, Ikeja, Lagos by virtue of the purchase receipts dated 6th March, 1996, 2nd October, 1996 and the Purchase Agreement dated 10th February, 1977 (see Ground 3, 4, 5).”

ISSUE(S) FOR DETERMINATION ON APPEAL

*BY APPELLANTS:*

“1. Whether the Lower Court, having found that the Appellants and the Respondents were joint owners of the leasehold interest in No. 3, Otigba Street, Ikeja, Lagos as per Exhibit C1, was not wrong in refusing to grant the order directing the 1st Defendant/Respondent to render account of the rents collected by her in respect of the said property to the other co-owners (see Grounds 1, 2 and 7).

2. Whether the lower Court was right in holding that the Deed of Partition and the Development Agreement made between the 1st and 2nd Defendant/Respondents were legal and valid in law and not liable to be set aside (see Grounds 6 and 8)

3. Whether the lower Court was right in holding that the 1st Defendant/Respondent had become the sole owner of No. 3 Otigba Street, Ikeja, Lagos by virtue of the purchase receipts dated 6th March, 1996, 2nd October, 1996 and the Purchase Agreement dated 10th February, 1977 (see Ground 3, 4, 5).”

*BY RESPONDENTS*

[Not available]

*AS ADOPTED BY COURT*

[Adopted Issues as distilled by Appellants]

DECISION OF COURT OF APPEAL

The appeal is meritorious. The decision of the Lower Court dismissing the Appellants’ claim and entering judgment for the 1st Respondent on her counterclaim is set aside. In its stead, the 1st Respondent’s counterclaim is dismissed in its entirety and judgment is entered for the Appellants in the following terms:

1. It is hereby declared that the Deed of Partition between Mrs. Agatha Adetutu Uwanaka (Nee Otigbah) and George Ifeanyi Otigbah dated 23rd June, 2008 is illegal, unlawful, null, void and of no legal effect.

2. It is hereby declared that by virtue of the Deed of Assignment dated 2nd June, 1977 between Paul Dawson Otigbah and Agatha Adetutu Otigbah for herself and other children of the Assignor registered as No. 55 at page 55 in Volume 1627 of the Lagos State of Nigeria Land Registry, Ikeja, Lagos, the Appellants and the Respondents are joint owners on equal basis of No. 3, Otigbah Street, Ikeja, Lagos.

3. The Respondents are hereby restrained from giving effect to the Deed of Partition between Agatha Adetutu Uwanaka (Nee Otigbah) and George Ifeanyi Otigbah dated 23rd June, 2008.

4. The said Deed of Partition dated 23rd June, 2008 is hereby set aside.

5. The 1st Respondent is hereby ordered to give an account of all the proceeds of rent collected by her from inception until 29th February, 2020 and to pay over to the Appellants all the monies due to them as joint owners of the property.

6. The Appellants are entitled to the costs of this appeal which I assess and fix at N500, 000.00 against the 1st Respondent.

**MAIN JUDGMENT**

UGOCHUKWU ANTHONY OGAKWU, J.C.A. (Delivering the Leading Judgment):

The parties in this appeal are scions from the loins of the late Paul Dawson Otigbah. He sired them from two different women. The Appellants and the 2nd Respondent are children of the same mother while the 1st Respondent has a different mother. The common denominator between the parties is their late father. The root of the contest in this appeal is the property left behind by their father. The property is situate at No 3 Otigbah Street, Ikeja, Lagos. In his lifetime, their father by a Deed of Assignment dated 2nd June, 1977 assigned the said property to his children, the parties herein, out of love, bond and affection. The said Deed of Assignment was admitted at the trial as Exhibit C1. Subsequently, a Deed of Partition was executed between the 1st Respondent and the 2nd Respondent partitioning the property. The Deed of Partition is Exhibit C2. There is also a Development Lease by which the 1st Respondent was to develop and take control of the property. The Development Lease is Exhibit C3. The Deed of Partition and the Development Lease are both dated 23rd June 2008. Furthermore, there is a Purchase Agreement, it is between the original owners of the land and the 1st Respondent. It is dated 10th February, 1977. By the said Purchase Agreement, the property was sold to the 1st Respondent as the outright sole owner of the property. It is Exhibit D6 in this matter.

Now, the Appellants contending that the Deed of Partition and Development Lease Agreement are illegal and that the 1st Respondent had failed to give an account of rents collected from the tenants at the property instituted proceedings before the High Court of Lagos State in SUIT NO. ID/1174/2011: MAUREEN OTIGBAH & ORS vs. AGATHA ADETUTU UWANAKA (nee OTIGBAH) & ANOR. wherein they claimed the following reliefs:

“1. A DECLARATION that the purported Deed of Partition between Mrs. Agatha Adetutu Uwanaka (Nee Otigbah) and George Ifeanyi Otigbah dated 23rd June, 2008 is illegal, unlawful, null, void and of no legal effect.

2. A DECLARATION that the purported Development Agreement/Lease between George Ifeanyi Otigbah and Mrs. Agatha Adetutu Uwanaka (Nee Otigbah) purportedly signed on 3rd April, 2009 is illegal, unlawful, null, void and of no legal effect.

3. A DECLARATION that by virtue of the Deed of Assignment dated 2nd June, 1977 between Paul Dawson Otigbah and Agatha Adetutu Otigbah for herself and other children of the Assignor registered as No. 55 Page 55 in Volume 1627 of the Lagos State of Nigeria Land Registry, Ikeja, Lagos, the Claimants and the Defendants are joint owners on equal basis of 3, Otigbah Street, Ikeja., Lagos.

4. AN ORDER permanently restraining the Defendants from giving effect to the purported deed of partition between Agatha Adetutu Nwanaka (Nee Otigbah) and George Ifeanyi Otigbah dated 23rd June, 2008.

5. AN ORDER setting aside the said Deed of Partition and the Development Agreement/Lease entered into between the 1st Defendant and the 2nd Defendant.

6. AN ORDER directing the 1st Defendant to give account of all proceeds of rent collected by her from inception till the final determination of the suit.

7. AN ORDER compelling the 1st Defendant to pay over to the Claimants all funds due to them as joint owners of the property in dispute.”

The 1st Respondent set up a counter-claim and she claimed the following reliefs:

“1. A DECLARATION that what the late Pa Dawson transferred to his children was his unexpired residue in the leasehold of and the 1st defendant having converted it to a freehold by buying the said property in dispute, she is now the owner of the said property and can partition, develop, lease and do with it as she pleases.

2. A DECLARATION that the said Deed of Partition and Development Agreement/Lease is legal and valid and should stand as per terms in it.

3. The sum of One Million Naira (N1,000,000) being the cost and Professional fees for this Litigation be charged against the Estate.”

The matter was subjected to a full dressed hearing at which testimonial and documentary evidence was adduced by the parties. In its judgment delivered on 30th June, 2015, the Lower Court dismissed the Appellants’ case and entered judgment for the 1st Respondent in terms of her counterclaim.

The Appellants being dissatisfied with the said judgment appealed against the same by Notice of Appeal filed on 22nd July, 2015. The judgment of the Lower Court is at pages 508-524 of the Records while the Notice of Appeal is at pages 525-537 of the Records. The 1st Respondent filed a Notice of Contention that the judgment of the Lower Court be affirmed on grounds other than those relied on by the Lower Court. The said Notice of Contention which was filed on 24th August, 2015 is at pages 538-539 of the Records. The Records of Appeal was compiled and transmitted and the Appellants filed their brief of argument on 7th September, 2016 but deemed as properly filed on 16th January, 2019. The Respondents did not file any brief of argument and even though all the processes were served on them, they also did not attend Court at the hearing. The appeal was consequently heard on the Appellants’ brief alone, which brief the learned counsel for the Appellants adopted and relied upon at the hearing of the appeal.

The Appellants nominated three issues for determination as follows:

“1. Whether the Lower Court, having found that the Appellants and the Respondents were joint owners of the leasehold interest in No. 3, Otigba Street, Ikeja, Lagos as per Exhibit C1, was not wrong in refusing to grant the order directing the 1st Defendant/Respondent to render account of the rents collected by her in respect of the said property to the other co-owners (see Grounds 1, 2 and 7).

2. Whether the lower Court was right in holding that the Deed of Partition and the Development Agreement made between the 1st and 2nd Defendant/Respondents were legal and valid in law and not liable to be set aside (see Grounds 6 and 8)

3. Whether the lower Court was right in holding that the 1st Defendant/Respondent had become the sole owner of No. 3 Otigba Street, Ikeja, Lagos by virtue of the purchase receipts dated 6th March, 1996, 2nd October, 1996 and the Purchase Agreement dated 10th February, 1977 (see Ground 3, 4, 5).”

I will review the submissions of the Appellants’ counsel and thereafter resolve the appeal seamlessly en bloc.

SUBMISSIONS OF THE APPELLANTS’ COUNSEL

The Appellants submit on the first issue that the Lower Court having held that the parties were joint owners of the property was wrong to have refused the order directing the 1st Respondent to render an account of the rents collected as she was the one managing the property and collecting rent from the tenants at the property. It was opined that the 1st Respondent was in the position of a trustee, since their father assigned the property to her on behalf of and for the benefit of all his children vide IWOK vs. UNIVERSITY OF UYO (2011) 6 NWLR (PT 1243) 211 at 236, JOLUGBO vs. AINA (2016) LPELR 40352 CA, NBN vs. SAVOL W. A. LTD (1994) 3 NWLR (PT 333) 435, ADEKEYE vs. AKIN-OLUGBADE (1987) 3 NWLR (PT 60) 214 at 228 and 229 and LEMBOYE vs. OGUNSIJI (1990) 6 NWLR (PT 155) 210 at 238.

It was maintained that the 1st Respondent, as trustee had a duty to render account of her management of the property and that the 1st Respondent’s evidence on having spent money on the upkeep and education of some of the Appellants does not amount to rendering an account. The cases of A-G BENDEL STATE vs. A-G FEDERATION (1983) ALL NLR 208 at 225, A-G FEDERATION vs. A-G ABIA STATE (NO. 2) (2002) 6 NWLR (PT. 764) 542 at 672, ADEKEYE vs. AKIN-OLUGBADE (supra) at 228-229, OLUFON vs. HADAEMEC LTD (2001) FWLR (PT 33) 208 at 216 and ANYAORAH vs. ANYAORAH (2001) 7 NWLR (PT 711) 158 at 179-180 were referred to on the duty of a trustee to render account.

On the second issue, the Appellants submit that their interest in the property with the 1st Respondent was joint and that the 1st Respondent cannot claim 50% of the property while the 2nd Respondent and the Appellants would collectively have the remaining 50%. The joint ownership, it was asserted, implied that the parties have the same right and equal share over the property. The cases of OSUJI vs. EKEOCHA (2009) 16 NWLR (PT. 1166) 81 at 128 and OBASOHAN vs. OMORODION (2001) 13 NWLR (PT. 729) 206 at 222 were relied upon. The Appellants posit that being jointly owned, the property could only be partitioned with the consent and approval of all the joint owners and shared equally or where equal sharing cannot be achieved, monetary compensation of equal value of the land will be paid to the co-owners. The cases of BARUWA vs. OSOBA (1997) 3 NWLR (PT 492) 164 at 176-177 and 181 and ODEKILEKUN vs. HASSAN (1997) 12 NWLR (PT 531) 56 at 74-75 were cited in support.

It is the further contention of the Appellants that the 1st Respondent being a trustee cannot turn herself into a developer of the trust property since a trustee should not place herself in a situation where her personal interest and her trusteeship duties may possibly conflict. The cases of BRAY vs. FORD (1896) AC 44, BOARDMAN vs. PHIPPS (1967) 2 AC 46 and ”Cases and Commentary on Law of Trusts” by Hayton (7th Ed. Stevens & Sons) at Page 510 were called in aid. The Appellants maintained that the 1st Respondent used the rent proceeds collected from the property to develop the property and that the Development Lease Agreement is, in consequence, illegal, null and void. It was conclusively submitted that the Lower Court was wrong in holding that the Deed of Partition and Development Lease Agreement were legal and valid in law and not liable to be set aside.

The quiddity of the Appellants submission on issue number three is that the Lower Court was wrong in holding that the 1st Respondent had become the sole owner of the property by virtue of her having purchased the same. It was argued that in the absence of evidence that the leasehold jointly owned by the parties had expired, the 1st Respondent’s purchase of the property could not extinguish the subsisting lease. The Appellants submit that the 1st Respondent’s Purchase Agreement, Exhibit D6, was executed on 10th February, 1977 before the death of their father and that having counterclaimed that she used her money to purchase the property, she failed to lead evidence to show the source of the money she used to purchase the property. The Appellants contended that it was their joint money, the proceeds of rent from the property that the 1st Respondent used to pay for the property. It was opined that the purchase receipts relied on by the 1st Respondent, Exhibits D3A and B were issued in the name of their deceased father and not the 1st Respondent, and that it does not show that it relates to No. 3, Otigbah Street, Ikeja, Lagos.

It is the further contention of the Appellants that the 1st Respondent is described in the Purchase Agreement, Exhibit D6, as the Administratrix of the Estate of their late father and that being a trustee she cannot be allowed to buy the trust property vide EX P JAMES (1803) 8 VES 337 at 344, EX P LACEY (1802) 6 VES 625 at 626, SILKSTONE & HAIGH MOOR COAL CO. vs. EDEY (1990) 1 Ch. 1, FARRAR vs. FARRAR LTD (1888) 40 Ch. D 395 and JOLUGBO vs. AINA (supra). It was conclusively submitted that the lower Court failed to properly evaluate the evidence as a result of which it made preserve findings and entered judgment on the 1st Respondent’s counterclaim thereby occasioning a miscarriage of justice.

RESOLUTION

Shorn of the rind, the core of the contest in this appeal is not convoluted. It has not been confuted that the property in question in this matter belonged to the late Paul Dawson Otigbah and that he executed Exhibit C1, assigning the property to his children, the parties to this appeal. The Lower Court found and held at page 518 of the Records that even though Exhibit C1 only refers to the 1st Respondent by name, the expression therein that it includes her sisters and other brothers being children of the late Paul Dawson Otigbah, shows that the property was assigned to his children jointly. There is no appeal against this finding. Even though the 1st Respondent filed a Notice of Contention in this regard, she failed to prosecute the same, having failed to file a Respondent’s Brief and she also did not appear at the hearing. In any event, the thrust of the 1st Respondent’s Notice of Contention (see pages 538-539 of the Records) is to overturn the finding of the Lower Court that the Appellants and the Respondents are joint owners of the property. This is not the purpose of a Respondent’s Notice of Contention for the judgment to be affirmed on grounds other than those relied on by the Court. The Respondents Notice of Contention is resorted to where the position of the Respondent is that the judgment was based on wrong grounds or premise; and that there is evidence on record which can sustain the judgment on grounds other than those relied upon by the Trial Court. The Respondents Notice of Contention postulates the correctness of the judgment. See AMERICAN CYANAMID COMPANY vs. VITALITY PHARMACEUTICALS LTD (1991) 2 NWLR (PT 171) 15 or (1991) LPELR (461) 1 at 23-24, SUNMONU vs. ASHOROTA (1975) 1 NMLR 16 and LAGOS CITY COUNCIL vs. AJAYI (1970) 1 ALL NLR 291.

It goes without saying that a Respondents’ Notice that postulates the correctness of the decision appealed against cannot complain about the decision of the Court. Where the 1st Respondent seeks to have the finding and decision of the Lower Court that all the children of late Paul Dawson Otigbah are joint owners of the property reversed, the appropriate procedure is for her to file a cross appeal. It is not to be achieved by a Respondents Notice of Contention to affirm: AFRICAN CONTINENTAL SEAWAYS LTD vs. NIGERIAN DREDGING ROADS AND GENERAL WORKS LTD (1977) 5 SC 235, ELIOCHIN NIG. LTD vs. MBADIWE (1986) 1 NWLR (PT. 14) 47, ORO vs. FALADE (1995) 5 NWLR (PT. 398) 385 and COUNTY & CITY BRICKS DEVELOPMENT COMPANY LTD vs. MKC NIGERIA LTD (2019) LPELR (46889) 1 at 8-11.

So by the unchallenged finding and decision of the Lower Court, the parties are joint owners of No. 3, Otigbah Street, Ikeja, Lagos. Having so found and held, the Lower Court correctly identified the question that arises as being the status of the subsequent acts and documents executed by the 1st Respondent and the land owning family and subsequently between the 1st and 2nd Respondents (see page 518 of the Records). Now, for clarity, the document executed between the 1st Respondent and the land owning family is the Purchase Agreement, Exhibit D6; while the documents executed between the Respondents are the Deed of Partition, Exhibit C2 and the Development Lease, Exhibit C3. It is on the strength of these said documents that the 1st Respondent counterclaimed, inter alia, for a declaration that she had bought the property in dispute and was now the owner of the said property and can partition, develop, lease and do with it as she pleases. It is therefore lucent that 1st Respondent bases the propriety of the Deed of Partition, Exhibit C2 and the Development Lease, Exhibit C3, on her having purchased and become the sole owner of the property. In answering the question it raised as to the status of the documents executed between the 1st Respondent and the land owning family, the Lower Court stated and held thus at pages 520-521 of the Records:

“The question this Court asks itself is what would have become of the property had the 1st Defendant not purchased it. The answer is simple. The property would have reverted at the expiration of the leasehold to the landowners and there would have been nothing to fight over today.

This Court has perused the said Exhibit C1 very carefully. It is unable to find any term of years of the said leasehold in the document.

What was the unexpired residue? The actual Deed of Lease referred to in Exhibit C1 was never tendered by any of the Parties herein. It was however made in 1976.

The said Deed of Assignment - Exhibit C1 - is dated 2nd day of June, 1977. No Letters of Administration were tendered. It is therefore irrelevant that the 1st Defendant is referred to in Exhibit D6 as Admistrator [sic].

The outright purchase by the 1st Defendant vide Exhibits D3A & B & D6 was in 1996, 20 years after Exhibit C1. Unfortunately, this Court without concrete evidence cannot speculate on whether the Lease was about to run out or not at the time the 1st Defendant purchased same”.

From Exhibit D6, there is no such indication either but there are clauses that indicate of a reversion by inheritance. Clauses 4, 5 & 6 of Exhibit D6 are reproduced hereunder for ease of reference:

Clauses 4, 5 & 6 of Exhibit D6:

4. By virtue of the said lease agreement, the purchaser has been in undisturbed possession of the said parcel of land since 1976.

5. Upon the death of the original owner of the plot of land known and described as No. 3 Otigbah Street, Ikeja, the vendor in this Deed who is the child of late Madam Ayinke Banjoke Aro inherited the parcel of land in accordance with Yoruba Native Law and Custom.

6. The vendor for himself and on behalf of all the members of the family of late Madam Ayinke Banjoke Aro have agreed to sell to the Purchaser the plot of land described in this Deed.

Thus, as at the time the 1st Defendant bought the leasehold which her father had assigned to all his children had been overtaken by the superior purchase which she had done with her own funds & subsequently then developed as per the uncontroverted evidence before the Court.

To this Court’s mind, her status at that point changed from joint beneficiary and assignee to Owner. This Court so finds and holds. Therefore the issue of her rendering account to the Claimants does not arise.

Still from the evidence before the Court, in her magnanimity and because her father as she stated said she should show her siblings love, she still invited them to partake of a property which had has [sic] she not bought, would have reverted to the land owners.

From the evidence before this Court, this is the genesis and what led to the partitioning of the property.

With due deference to the learned counsel for the Appellants, the critical question is not on the duties of a trustee which was dwelt upon in the Appellants’ Brief. The clear reasoning of the Lower Court is that the 1st Respondent had become sole owner and therefore the issue of her rendering an account would not arise and that it was in obedience to their father’s wishes that she magnanimously partitioned her property with her siblings. It is my considered view that the critical issue is whether the Lower Court correctly held that the 1st Respondent had become the owner of the property. This is the crux of Appellants’ issue number three. It is premised on the manner this issue is resolved that would determine the fate of the Deed of Partition, Exhibit C2, the Development Lease, Exhibit C3 and indeed the Appellants demand for an account since based on the reasoning of the Lower Court, the 1st Respondent having become the owner was within her rights in her actions consequent upon which it dismissed the Appellants’ case.

As found and held by the Lower Court, there was no evidence before it as to whether the lease granted to the late Paul Dawson Otigbah had expired as at the time the 1st Respondent purchased the property. The Deed of Assignment assigning the property to the parties herein, Exhibit C1, is dated 2nd June 1977. It recites that Paul Dawson Otigbah is entitled to the property by virtue of the Deed of Lease dated 25th August, 1976. The Purchase Agreement, Exhibit D6, by virtue of which the 1st Respondent claims ownership of the property is dated 10th February, 1977, about four months before Exhibit C1. So based on the documentary evidence before the Lower Court, as at 10th February 1977 when the Purchase Agreement, Exhibit D6, was entered into, the land owning family had already divested their interest and vested the same in Paul Dawson Otigbah by virtue of the Deed of Lease dated 25th August,1976. So as at 10th February 1977, the date on Exhibit D6, they did not have any title to pass to the 1st Respondent. Taking it a notch farther, the Lower Court also relied on the purchase receipts, Exhibits D3A, & B, to show the outright purchase of the property by the 1st Respondent. Now, the purchase receipts, Exhibits D3A & B, are dated 6th March, 1996 and 2nd October, 1996 respectively. This was during the subsistence of Exhibit C1. The late Paul Dawson Otigbah, having assigned his interest to his children by Exhibit C1, which as held by the Lower Court made them joint owners of the property, the land owning family did not have the property to sell to the 1st Respondent in 1996.

The well established legal maxim is expressed in the Latinis,m nemo dat quod non habet; meaning that no one may give that which does not belong to him. At all times material to Exhibits D3A & B and Exhibit D6, the land owning family had divested itself of the property and it had nothing left to convey to any person. See OLOHUNDE vs. ADEYOJU (2000) LPELR (2586) 1 at 25, OJENGBEDE vs. ESAN (2001) LPELR (2372) 1 at 28, IBRAHIM vs. OSUNDE (2009) LPELR (1411) 1 at 30, ADELAJA vs. FANOIKI (1990) LPELR (110) 1 at 25, OKELOLA vs. ADELEKE (2004) LPELR (2438) 1 at 17 and GBADAMOSI vs. AKINLOYE (2013) LPELR (20937) 1 at 29-30. Accordingly, the 1st Respondent did not acquire any interest to the property by any of Exhibits D3A & B and Exhibit D6.

Exhibits C1, D3A & B and D6 were in evidence at nisi prius. The lower Court as the trial Court has the duty of evaluation of evidence and ascription of probative value thereto. There is a duty on the trial Court to receive all available relevant evidence on an issue. This is perception of evidence. After that there is another duty to weigh that evidence in the context of the surrounding circumstances of the case. This is evaluation of evidence. A finding of fact will entail both perception and evaluation. See OLUFOSOYE vs. OLORUNFEMI (1989) 1 SC (PT I) 29 or (1989) LPELR (2615) 1 at 9, GUARDIAN NEWSPAPER LTD vs. AJEH (2011) 10 NWLR (PT. 1255) 574 at 592 and WACHUKWU vs. OWUNWANNE (2011) LPELR (3466) 1 at 50-51.

There is little or no difficulty with perception of evidence, id est, receive all available relevant evidence. It is in perception of evidence that the Lower Court admitted Exhibits C1, D3A & B and D6 in evidence. Evaluation of evidence on the other hand is basically the assessment of the facts by the trial Court to ascertain which of the parties to a case before it has more preponderant evidence to sustain his claim. See ONWUKA vs. EDIALA (1989) 1 NWLR (PT. 96) 182 at 208-209, OYADIJI vs. OLANIYI (2005) 5 NWLR (PT. 919) 561 and AMEYO vs. OYEWOLE (2008) LPELR (3768) 1 at 9. The evaluation involves a reasoned belief of the evidence of one of the contending parties and disbelief of the other or a reasoned preference of one version to the other. A Court of trial has the duty to consider the evidence adduced in respect of any facts on which issues were joined, decide which evidence to prefer on the basis of how the evidence preponderates and then make logical and consequential findings of facts. See ADEYEYE vs. AJIBOYE (1987) 1 NWLR (PT 61) 432 at 451 and STEPHEN vs. THE STATE (1986) 5 NWLR (PT 46) 978 at 1005.

The settled legal position is that where a trial Court unquestionably evaluates and justifiably appraises the facts, it is not the business of an Appellate Court to substitute its own views for the views of the Trial Court, however, an Appellate Court can intervene where there is insufficient evidence to sustain the judgment; or where the Trial Court fails to make proper use of the opportunity of seeing, hearing, and observing the witnesses; or where the findings of facts by the Trial Court cannot be regarded as resulting from the evidence or where the Trial Court has drawn wrong conclusion from accepted evidence or has taken an erroneous view of the evidence adduced before it or its findings are perverse in the sense that they do not flow from accepted evidence or not supported by the evidence before the Court. See FHA vs. OLAYEMI (2017) LPELR (43376) 1 at 69-71, EDJEKPO vs. OSIA (2007) 8 NWLR (PT. 1037) 635 or (2007) LPELR (1014) 1 at 46-47, ARE vs. IPAYE (1990) LPELR (541) 1 at 22, WOLUCHEM vs. GUDI (1981) 5 SC 291 at 320 and FASIKUN II vs. OLURONKE II (1999) 2 NWLR (PT. 589) 1 or (1999) LPELR (1248) 1 at 47-48.

The ascription of probative value by the Lower Court to Exhibits D3A & B and D6 as showing that the 1st Respondent had become the sole owner of the property did not take into cognisance the application of the principle of nemo dat quod non habet, since at the material time the transaction in the said Exhibits were undertaken, it was not shown on the evidence that the leasehold title of the late Paul Dawson Otigbah which he assigned to his children had expired. This being so, in the light of the said subsisting interest, the land owning family had no interest in the property to pass to the 1st Respondent. The Lower Court consequently drew wrong conclusions from the evidence and made findings of facts that do not result from the evidence. Ineluctably, having taken an erroneous view of the evidence, the findings which the Lower Court arrived at that the 1st Respondent had become the sole owner of the property are perverse as they are not supported by the evidence on record. In the circumstance, the Lower Court having failed to properly evaluate the evidence, and the question of evaluation of evidence not involving the credibility of witnesses, this Court is in as good a position as the Court of trial to intervene, evaluate the evidence, set aside the perverse findings in order to obviate miscarriage of justice and then make the consequential and proper findings of facts. See NARUMAL & SONS NIG LTD vs. NIGER BENUE TRANSPORT COMPANY LTD (1989) 2 NWLR (PT 106) 730 at 742, ABISI vs. EKWEALOR (1993) LPELR (44) 1 at 51-55, ATOLAGBE vs. SHORUN (1985) 1 NWLR (PT 2) 360 and SAPO vs. SUNMONU (2010) LPELR (3015) 1 at 54-55. For the reasons already advanced and based on the applicability of the legal principle of nemo dat quod non habet, Exhibits D3A & B and D6 do not have the vires to form the basis on which the 1st Respondent can be said to be the sole owner of the property. The position therefore remained as held by the Lower Court, that by virtue of Exhibit C1, the parties were joint owners of the property.

It is on the basis of the erroneous finding that the 1st Respondent had become the sole owner of the property that the Lower Court held that the Appellants’ claim for account to be rendered does not arise and that it was magnanimous of the 1st Respondent to have partitioned and shared her property with the Appellants and the 2nd Respondent. This brings us to the Deed of Partition, Exhibit C2. By the said Exhibit C2, the joint property of the parties was shared in two equal halves with the 1st Respondent taking one half while the Appellants and the 2nd Respondent jointly had the other half. Furthermore, Exhibit C2 was only executed by the Respondents and there is no evidence that the Appellants, as joint owners of the property, consented to the property being partitioned. The law is settled that in order for there to be a valid partition of a property which is jointly owned, all the co-owners have to consent to the property being partitioned and the partitioning has to be in equal shares or where that cannot be attained, provision would be made for payment of money to secure equality of partition: BARUWA vs. OSOBA (1996) LPELR (13680) 1 at 14-16 and 24-26, ADELEKE vs. ASERIFA (1986) 3 NWLR (PT. 30) 575, ADEGOKE vs. OLOTIN (2019) LPELR (48766) 1 at 27 -28 and ODEKILEKUN vs. HASSAN (1997) LPELR (2206) 1 at 24-25. From the evidence on record, the Deed of Partition, Exhibit C2, is therefore not valid since the Appellants did not consent to the partitioning and the partitioning was also not done on equal basis.

With regard to the Development Lease Agreement, Exhibit C3, it provides for a ten year duration commencing on the 1st day of November, 2008 and terminating on the 31st day of October, 2018. So the said Development Lease Agreement is no longer extant, having expired by effluxion of time. The Development Lease stipulates that at the expiration of the ten year period, the 1st Respondent shall give up possession and surrender the shops. The effect of having held that the Deed of Partition, Exhibit C2, is invalid and that the 1st Respondent is not the sole owner of the property, is that the property as developed reverts to the parties under the joint ownership established by Exhibit C1. The Lower court found and held that on the evidence the 2nd Respondent voluntarily signed Exhibit C3 and that his signature was witnessed by the 6th Appellant. Furthermore, that they collected some money as their share based on the stipulations of Exhibit C3. The contention of the Appellants that the property was developed with the proceeds of the rent from the property is inutile since I have already stated that the Development Lease having effluxed, the property reverts to the joint ownership established by Exhibit C1. From the evidence, the parties have benefitted from Exhibit C3 in line with its stipulations; the law and indeed equity will not allow the Appellants to repudiate or disown the said Exhibit C3 on any ground, more so, when it has now run its course as provided therein: OHIEWERI vs OKOSUN(2003) 11 NWLR (PT. 832) 463, BATALHA vs. WEST CONST. CO. LTD (2001) 18 NWLR (PT. 744) 85, ACHU vs. CIVIL SERV. COMM., CROSS RIVER STATE (2009) 3 NWLR (PT. 1129) 475 and NATIONAL UNION OF ROAD TRANSPORT WORKERS vs. FIRST CONTINENTAL INSURANCE CO. LTD (2019) LPELR (48005) 1 at 39-41.

Turning to the claim for accounts to be rendered, the lower Court in refusing the claim reasoned and held as follows at page 521 of the Records:

“Thus, as at the time the 1st Defendant bought the leasehold which her father had assigned to all his children had been overtaken by the superior purchase which she had done with her own funds & subsequently then developed as per the uncontroverted evidence before the Court.

To this Court’s mind, her status at that point changed from joint beneficiary and assignee to Owner. This Court so finds and holds. Therefore the issue of her rendering account to the Claimants does not arise.”

The evidence on record is that the 1st Respondent has been collecting the rent from the property (See pages 445 and 456-458 of the Records). Having held in this judgment that the Lower Court wrongly held that the 1st Respondent is the sole owner of the property, the foundational basis on which the Lower Court held that the issue of rendering account does not arise has been defenestrated. In the circumstances, since the property is the joint property of the parties and the evidence is that the 1st Respondent has been collecting the rent from the tenants, she is obligated to render an account to her co-owners. I am not oblivious of the evidence and finding of the Lower Court that the 1st Respondent had been providing for the upkeep and education of the Appellants; this however does not absolve the 1st Respondent from rendering accounts. See MESRS MISR (NIG) LTD vs. IBRAHIM (1974) 5 SC 55 at 61, EME vs. WAMUOH (1991) 7 NWLR (PT 203) 375 at 389, GODWIN vs. THE CHRIST APOSTOLIC CHURCH (1998) LPELR (1327) 1 at 27-28 and NJOKU vs. BALOGUN (2018) LPELR (46983) 1 at 41- 44.

The conflating of the foregoing is that this appeal is meritorious. The decision of the Lower Court dismissing the Appellants’ claim and entering judgment for the 1st Respondent on her counterclaim is hereby set aside. In its stead, the 1st Respondent’s counterclaim is hereby dismissed in its entirety and judgment is entered for the Appellants in the following terms:

1. It is hereby declared that the Deed of Partition between Mrs. Agatha Adetutu Uwanaka (Nee Otigbah) and George Ifeanyi Otigbah dated 23rd June, 2008 is illegal, unlawful, null, void and of no legal effect.

2. It is hereby declared that by virtue of the Deed of Assignment dated 2nd June, 1977 between Paul Dawson Otigbah and Agatha Adetutu Otigbah for herself and other children of the Assignor registered as No. 55 at page 55 in Volume 1627 of the Lagos State of Nigeria Land Registry, Ikeja, Lagos, the Appellants and the Respondents are joint owners on equal basis of No. 3, Otigbah Street, Ikeja, Lagos.

3. The Respondents are hereby restrained from giving effect to the Deed of Partition between Agatha Adetutu Uwanaka (Nee Otigbah) and George Ifeanyi Otigbah dated 23rd June, 2008.

4. The said Deed of Partition dated 23rd June, 2008 is hereby set aside.

5. The 1st Respondent is hereby ordered to give an account of all the proceeds of rent collected by her from inception until 29th February, 2020 and to pay over to the Appellants all the monies due to them as joint owners of the property.

6. The Appellants are entitled to the costs of this appeal which I assess and fix at N500, 000.00 against the 1st Respondent.

**MOHAMMED LAWAL GARBA, J.C.A.:**

I agree

**JAMILU YAMMAMA TUKUR, J.C.A.:**

I had the advantage of reading in draft the lead judgment just delivered by my learned brother UGOCHUKWU ANTHONY OGAKWU, JCA and I adopt the judgment as mine with nothing further to add.