**ADEPATE**

**v.**

**BABATUNDE AND ANOR.**

IN THE COURT OF APPEAL [ILORIN DIVISION]

18TH OCTOBER 2001

CA/IL/44/2000

**LEX (2000) - CA/IL/44/2000**

OTHER CITATIONS

2PLR/2001/21 (CA)

(2002) 4 NWLR (Pt.756) 99

**BEFORE THEIR LORDSHIPS:**

MURITALA AREMU OKUNOLA JCA, (Presided)

PARICK IBE AMAIZU JCA,

WALTER SAMUEL NKANU ONNOGHEN JCA, (Delivered the leading judgment)

**BETWEEN**

ALHAJA BAMIDELE ADEPATE

AND

1. JULIUS BABATUNDE

2. BANK OF THE NORTH LTD.

3. A. T. AYANTUNDE

**ORIGINATING COURT(S)**

KWARA STATE HIGH COURT HOLDEN AT ILORIN (J. F. Gbadeyan J., Presiding)

**REPRESENTATION**

KOLADE ADELOLA AWOJOBI Esq., for appellant.

P.A.O. OLORUNNISOLA, SAN for 1st respondent.

S. DURO ADEYELE Esq. For 2nd and 3rd respondents.

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

ADMINISTRATIVE AND GOVERNMENT LAW:- Powers of Governor in land transactions before the coming into force of the Land Use Act – Mortgages before the Land Use Act, 1978 came into effect – Land Tenure Law of 1963 of Northern Nigeria as it is applicable to Kwara State – Power to grant consent or approval to mortgage etc. - Whether section 46(1) empowers the Governor in council or the minister in charge of land matters to delegate his powers under section 28 – How delegation is proved

BANKING AND FINANCE:- Banking practices – Recovery of loans/ credit facilities secured via legal mortgages on properties - auction of same – When deemed void

CHILDREN AND WOMEN LAW:- *Women and Property* – *Women in business* – Sourcing of credit guaranteed by interest in property – Acquisition of additional land annexed to one already under a mortgage - How proved – Implications where claim is not proved

COMMERCIAL LAW – CONTRACT:- Conveyancing – Section 19 of Auctioneers Law – requirement of seven days notice before sale by auction thereunder – whether can be waived by parties in their contract.

DEBTOR AND CREDITOR – ACTION:- Auctioneers Law – Requirement of seven days notice before sale by auction under section 19 of Auctioneers Law – Whether can be waived by parties in their contract.

REAL ESTATE/LAND LAW - MORTGAGE:– Consent of State Governor to mortgage – Where the naira value of the credit facility is subsequently enhanced - Whether fresh consent is required

REAL ESTATE/LAND LAW - MORTGAGE:– Requirement of Kwara State Legal Notice No. 8 of 1975 - Whether letter written by Chief Lands Officer conveying the consent of appropriate authority to a mortgage transaction meets requirement

REAL ESTATE/LAND LAW:– Title to Land – Claim that land under mortgage had been expanded through further purchase and development - Proof of purchase of land – how determined

**PRACTICE AND PROCEDURE ISSUES**

APPEAL:- Issues for Determination – Failure to profer any argument in brief of argument on any particular issue – Whether such an unargued issue is deemed abandoned

EVIDENCE**:–** Party making an allegation – burden on party to prove same

INTERPRETATION OF STATUTE:- Land Use Act – Whether does not have retroactive application

**MAIN JUDGMENT**

**SAMUEL NKANU ONNOGHEN, JCA** (Delivered the following judgment):

This is an appeal against the judgment of Hon. Justice J. F. Gbadeyan of the Kwara State High Court sitting at Ilorin in suit No. KWS/148/93 delivered on 3rd December 1999 in which he declared the deeds of legal mortgage executed by the 1st respondent in favour of the 2nd respondent and the auction sale premised on the deeds void and awarded damages for trespass etc.

The facts of the case are that the 1st respondent being a customer of the 2nd respondent at its Muritala Mahammed Way, Ilorin branch where the said 1st respondent was granted credit facilities between 1976 and 1978 which were secured by mortgages perfected to cover his property covered by Alienation Permit No. 1120 dated 10/3/76 issued by Ilorin Local Government.

The 1st respondent later defaulted in repayment of the credit facilities resulting in the 2nd respondent instructing the 3rd respondent to sell the mortgaged property by public auction; which instructions the 3rd respondent duly carried out and the property in dispute containing six flats was sold to the appellant.

The 1st respondent was not happy with the sale so he instituted an action in the lower court where he contended that the block of six flats the property in dispute was not part of the property mortgaged to the 2nd respondent; that the deeds of legal mortgage which he executed were invalid the same having not been consented to by the appropriate authority; that the auction was also invalid and the 1st respondent also sought declaratory orders, damages for trespass and injunction.

Being dissatisfied with the judgment of the lower court the appellant has appealed to this court on seven grounds of appeal out of which learned counsel for the appellant, Kolade Adelola Awojobi Esq., has formulated five issues for the determination of the appeal. The said issues are as follows:-

"1. Did the learned trial court rightly find that the 1st respondent purchased an additional plot of land to the one mortgaged to 2nd respondent?

2. Are the deeds of legal mortgage executed by the 1st respondent (exhibits 6 and 7) valid?

3. From the totality o the evidence, was the learned trial Judge correct in holding that the sale of the 1st respondent’s property to the appellant was invalid?

4. Did the 1st respondent prove trespass to his property to warrant the award of N50,000.00 damages in his favour?

5. Is the award of N7,500.00 cost not excessive?”

I must point out here that learned counsel for the appellant did not profer any argument in his brief of argument deemed filed on 11/6/01 on issue No. 5 dealing with award of cost see page 4 of the brief. That being the case it is trite law that such an unargued issue is deemed abandoned.

In arguing issue No. 1 learned counsel for the appellant referred to the first schedule to exhibits 6 and 7 and submitted that they mean that the mortgaged property includes the landed property of an area of 10,000 sq. ft. with the building thereon which at the time consisted of four semi self contained bedroom flats. That it would also cover any building which the 1st respondent cares to put upon the land while the mortgage remains unredeemed based on the maxim qui quid plantatur solo solo cedit: learned counsel further submitted.

That even though the 1st respondent pleaded in paragraphs 10 and 11 of his further and further amended statement of claim that the block of 6 flats does not form part of the property mortgaged to the 2nd respondent and that he bought a half plot on which he put the block of six flats, he had a duty to prove the averments by evidence which he submitted that the 1st respondent failed to do. Learned counsel further submitted that the 1st respondent failed to produce either the receipt of purchase or the agreement executed by the vendor in his favour. That it is no excuse that the agreement was deposited with the United Bank for Africa, since no evidence was given of any effort to retrieve same nor was the bank subpoenaed to produce and tender same before the lower court. Also not tendered was the right of occupancy No. 248 which allegedly covered the half plot of land involved. Learned counsel then urged the court to hold that the failure to tender the right of occupancy No. 248 means that the 1st respondent had in effect abandoned paragraph 11 of the further and further amended statement of claim as was held by the Supreme Court in Oyediran v. Alebiosu II (1992) 6 NWLR (Pt. 249) 550 at 556 – 557 per Kutigi JSC.

That the learned trial Judge was in error when he held that the block of six flats was built on the half plot of land when there was no evidence in support of same on record.

On the claim of the 1st respondent for a declaration that the 2nd respondent could not dispose of the property in dispute (the six flats) learned counsel submitted that in an action for declaratory relief the claimant must succeed on the strength of his own case and not on the weakness of the defence for which he relied on Kodilinye v. Mbanefo Odu (1935) 2 WACA 336; Bello v. Eweka (1981) 1 SC 101; (1981) 12 NSCC 48 and Umesie v. Onuaguluchi (1995) 9 NWLR (Pt. 421) 515 at 528.

That while the schedule to exhibit 1 (the mortgage in favour of United Bank of Africa) refers to customary right of occupancy No. 248, the letter of approval given to the mortgage which is attached to it - exhibits 1A – refers to Alienation Permit No. 1120 and no explanation was offered for the discrepancy. That this clearly shows that approval was given for the mortgage of the property covered by Permit No. 1120 to UBA which said property had earlier been mortgaged to the 2nd respondent by the 1st respondent. That shows clearly that it was the same land that was mortgaged to the two banks. Finally learned counsel urged the court to resolve the issue in favour of the appellant.

In his brief of argument filed on 14/6/01 on behalf of the 1st respondent learned counsel for the 1st respondent Chief P.A.O. Olorunnisola, SAN adopted his argument on this issue in his brief filed in respect of the first appeal which is by the present 2nd and 3rd respondents; in which he submitted that the appellant missed the point in that the 1st respondent only pleaded that he bought additional plot of land in paragraphs 4, 5, 6 of the reply to statement of defence at page 21 of the record and not that he had a receipt or written agreement for the additional land purchased. That the defence did not ask for it in their defence or by notice to produce or by discovery. That the question of proving receipt or by written agreement does not arise, neither does the 1st respondent need to call the vendor who sold the land to him.

Learned counsel submitted that the appellant failed to show that the measurement on Alienation Permit No. 1120 and the right of occupancy No. 248 are the same as pleaded. That this court should take judicial notice of the fact that Alienation Permit existed only before the Land Use Act 1978 and at the commencement of the Land Use Act right of occupancy came into being and thereby come to the conclusion that the land covered by Permit to alienate No. 1120 and the land mortgaged to UBA though covered by right of occupancy No. 248 are not the same and that the 1st respondent bought an additional half plot.

Finally learned counsel urged the court to resolve the issue in favour of the 1st respondent.

On his part, learned counsel for the 2nd and 3rd respondents, S. Duro Adeyele Esq. in his brief of argument filed on 19/6/01 adopted his arguments in respect of issue No. 1 in his appellant’s brief filed on 5/2/2001 in which he submitted on all fours with the present appellant’s counsel. To reproduce same here will amount to repeating exactly what the present appellant’s counsel has submitted. However it must be put on record that the appeal in which Adeyele Esq. is the appellant is first in time and his appellant’s brief was filed on 5/2/01 while the present appellant’s brief was deemed filed by this court on 11/6/01. That apart, the two appeals are in effect the same thing since they are based on the same facts, grounds of appeal and issues canvassed.

To resolve the issue under consideration it is important to look at the pleadings of the parties. In paragraphs 9, 10, 11 and 12 of the further and further amended statement of claim to be found at pages 23 to 27 of the record, the 1st respondent pleaded as follows:-

"9. The plaintiff says that his house containing four flats of three bedrooms each, situate at Isale Asa Area, off Sabo – Line Ilorin and covered by Alienation Permit No. 1120 dated 10-3-76 issue by Ilorin Local Government was mortgaged to the 1st defendant as security for the payment of the overdraft by virtue of the legal mortgage deed referred to in paragraph 7 and 8 above.

10. The plaintiff says that two years after he mortgaged his house containing 4 flats (3 bedrooms each) to the 1st defendant, he (plaintiff) decided to build another house containing 6 flats (3 bedroom each) on a separate land beside the mortgage house at No. 50, Isale Asa Area, Off Sabo Line Street, Ilorin.

11. The plaintiff says that the 6 flats (3 bedrooms each) built in 1980 was covered by Ilorin Local Government Customary Right of Occupancy No. 248 dated 2nd June, 1980, and having an area of 928.030 square metres. The certificate is hereby pleaded. Also pleaded are relevant documents on the building.

12. The plaintiff says that his house referred to in paragraphs 10 and 11 above, was never mortgaged to the 1st defendant in any way as the said house has not been built as at the time the overdraft was taken from the 1st defendant."

These paragraphs clearly state that:-

(1) the plaintiff (now 1st respondent) did mortgage the property contained in Permit No. 1120 to the 2nd respondent.

(2) That the mortgaged property did not include the block of 6 flats which was built on a separate land acquired separately and covered by right of occupancy No. 248.

(3) That the land covered by Permit No. 1120 is different from the one covered by right of occupancy No. 248.

(4) That the property covered by right of occupancy No. 248 was never mortgaged to the 2nd respondent.

However in his answer to these paragraphs of the statement of claim the then 3rd defendant (now appellant) in his statement of defence at pages 18 to 20 of the record pleaded in paragraphs 5 to 9 thereof as follows:-

"5. The defendant denies paragraphs 9, 10, 11, 12, 13, 14, 20, 23, 24, 26 and 27 of the plaintiff’s statement of claim and puts the plaintiff’s (sic) to the strictest proof thereof.

6. The defendant in further denial of paragraph 9 of the plaintiff’s statement of claim avers that this house containing 4 flats of 3 bedroom each situate at Isale Asa Area Off Sabo Line, Ilorin is covered by a Customary Right of Occupancy of No. 248 which is dated 2nd day of June 1980 was neither mortgaged to United Bank for Africa nor to the 1st defendant nor any bank whatsoever.

7. The defendant in further denial of paragraph 9 of the plaintiff’s statement of claim avers that the house she bought from its 1st defendant on the 5th day of November 1992 is covered by Alienation Permit No. 1120 of 10-3-76 and the land on which the said house has been built has an area measuring 100 feet by 100ft a part of which the 4-3 bedroom house the plaintiff referred to in the said paragraph 9 was built on. The said Alienation Permit No. 1120 of 10-3-76 is hereby pleaded and shall be relied upon at the trial of this suit. The plaintiff is hereby given notice to produce the original of the said alienation Permit.

8. The defendant in further denial of paragraphs 9, 10, 11, 12, 13 and 14 of the plaintiff’s statement of claim avers the landed property she bought from the 1st defendant on 5-11-92 was bought together with the land having an area measuring 100 feet by 100 feet. The deed of assignment with which the house was sold to her is hereby pleaded and shall be relied upon at the trial of this suit.

9. The defendant avers that the plaintiff mortgaged the land measuring 100 feet by 100 feet covered by Alienation Permit No. 1120 of 10-3-76 together with the 6 flats of 3 – bedroom each to the 1st defendant."

From the above pleadings it is very clear that the appellant joined issues with the 1st respondent on the issue as to whether or not the 1st respondent purchased a separate piece of land covered by right of occupancy No. 248 and which is different from the land covered by Permit No. 1120 which the 1st respondent admitted mortgaging to the 2nd respondent. However the appellant is very emphatic that the two buildings (4flats of 3 bedroom and 6 flats of 3 bedroom) are built on the land covered by Permit No. 1120 which was mortgaged to the 2nd respondent.

To complete the picture it is necessary to also look at the pleadings of the 2nd and 3rd respondents who filed a joint statement of defence at pages 28 to 31 of the record. In paragraphs 4, 5, 6, 7 and 8 the 2nd and 3rd respondents pleaded as follows:-

"4. As security for the facilities enjoyed from the 1st defendant, the plaintiff executed a deed of mortgage over his property at Mala Road, Isale Asa, Ilorin. The property is a piece of land measuring 10,000 square feet (two plots) with all the developments thereon since 1978.

The defendants pleaded the two deeds of legal mortgage executed by the plaintiff in favour of the 1st defendant.

5. The plaintiff built another house on the same piece of land described in the schedule of the legal mortgage and not on a separate piece of land.

6. The defendants aver that the deed of legal mortgage referred to above covers the landed property and buildings thereon belonging to the plaintiff situate at Mala Road, Isale Asa, Ilorin as security for overdraft facility since 1978.

7. The defendants deny paragraph 11 of the statement of claim and state that the customary right of occupancy No. 248 dated 2/6/80 covers the same piece of land as that covered by the deed of mortgage referred to in paragraph 4 above.

8. The defendants will lead evidence to show that the plaintiff mortgaged the same piece of land to two banks at the same time namely; the 1st defendant and the United Bank for Africa at Ilorin. The defendants specifically plead approval of mortgage dated 12/5/82."

It is my considered opinion that from the relevant paragraphs of the pleadings reproduced (supra) it is clear and I hereby hold that parties to the suit joined issues as to whether or not the land on which the block of six flats was built (property in dispute) forms part of the land comprised in Permit No. 1120 mortgaged to the 2nd respondent or whether the said property was built on a separate piece of land other than the one covered by Permit No. 1120. In other words they joined issue as to whether or not the 1st respondent purchased an additional piece of land allegedly covered by right of occupancy No. 248 and on which the block of six flats was built. That being the case, it is trite law that he who alleges must prove. In other words it is the 1st respondent, from the state of the pleadings, who has the burden of proving that he actually purchased an additional piece of land on which the property in dispute was built, to enable him succeed in this case. The question that now calls for determination is whether or not the 1st respondent did prove by preponderance of evidence as laid down in Mogaji v. Odofin (1978) 4 SC 91 that the land on which the property in dispute is built is separate and different from the one covered by Permit No. 1120.

Going through the judgment the learned trial Judge at pages 108 to 109 of the record found as follows:-

"It is noteworthy that there is no denial by the defendants that the plaintiff did acquire an additional plot to the existing 100ft by 100ft to make it suitable for the plaintiff to put up an additional building of a block of six flats. Cross examination did not destroy this piece of evidence."

To begin with it is clear from the paragraphs of the pleadings of the parties reproduced earlier in this judgment that the defendants i.e. the present appellant and 2nd and 3rd respondents – did deny the allegation of purchase of an additional piece of land by the 1st respondent. The next question is whether there is any evidence in support of the denial? At page 78 of the record DW 1 Bola Oguniyi of 7 Oro – Agor Close Sabo Oke Ilorin who described himself as a banker with the bank of the North Ltd, Ilorin testified inter alia as follows:-

"The plaintiff executed a deed of legal mortgage on his property at Isale Asa off Sabo Line. It covers a piece of land measuring 10,000 square feet i.e. 2 plots and this has been endorsed since 1978. Exhibit 5 is hereby identified as the deed of legal mortgage.

The plaintiff submitted Permit to alienate land No. 1120 dated 10/3/76. After executing exhibit 5 the plaintiff went further to improve the land by adding another house other than the one he had at the time of executing the deed of legal mortgage.

Exhibit 1 is a deed, a legal mortgage between the plaintiff and UBA covering customary right of occupancy No. 248. The same plot of land is mortgaged to another bank ..."

(Italics supplied).

From the pleadings and the evidence reproduced (supra,) it is very clear that the learned trial Judge cannot be correct in his findings that the defendants never denied that the plaintiff acquired an additional plot etc. It is therefore my considered opinion that the above findings by the learned trial Judge is not borne out of the evidence on record. That apart, the said findings by the learned trial Judge become all the more questionable when put side by side with the answer given by 1st respondent under cross examination at page 70 of the record when he admitted that:

"It is not possible to build 6 flats on half a plot."

I therefore agree with the submission of learned counsel for the appellant that the above admission is conclusive proof that the block of 6 flats is built on the piece of land measuring 10,000 square feet which was mortgaged to the 2nd respondent vide exhibits 7 and 8.

Apart from the above stated admission against interest by the 1st respondent did the 1st respondent discharge the burden placed on him as regards the purchase of an additional half plot of land?

When we talk of proof of purchase of land, what readily comes to mind include purchase receipt, agreement of sale or something to show that such a transaction did take place. Where no receipt is issued or agreement written between the parties one expects that the vendor would be called to testify. Going through the record nothing of the sort took place. The importance of proof of the alleged purchase becomes compelling when one realizes that the present appellant and 2nd and 3rd respondents strenuously contend that the disputed property is built within the land covered by Permit No. 1120 and that no additional half plot was purchased by the 1st respondent.

The contention of the appellant that the property in dispute is built within the land mortgaged to the 2nd respondent is supported by the fact that the schedule to exhibits 7 and 8 not only mortgaged the block of 4 flats but also the land of an area of 10,000 sq. ft. This will clearly include any further building the 1st respondent might put up on the land during the life span of the mortgage, following the maxim quic quid plantator solo solo cedit.

That apart, there is also the disturbing fact that the letter of consent to mortgage – exhibit 1A, in respect of right of occupancy No. 248 does not talk of the half plot of land allegedly purchased and on which the 6 flats are allegedly built. It rather talks of consent being given to the 1st respondent to mortgage the property covered by Permit No. 1120 which was already mortgaged to the 2nd respondent, to the United Bank for Africa. This clearly confirms the contention of the appellant that no additional half plot was purchased by the 1st respondent which was then mortgaged to the UBA.

Here is a mortgagee who built a block of six flats on a piece of land which he admits is not enough to contain such a structure yet wants the world to agree that that structure of 6 flats was not built on even part of the mortgaged property covered by Permit No. 1120. With the above admission it is very clear that the 1st respondent has not told the court where he got the other piece of land to add to the half plot he allegedly purchased and which he admits is not sufficient to put up the property in dispute, to enable him build the block of 6 flats.

In conclusion, I resolve the issue under consideration in favour of the appellant.

On issue No, 2, which is whether the deeds of legal mortgage executed by the 1st respondent is valid; learned counsel for the appellant submitted that there was no reason why the learned trial Judge held that the deeds of legal mortgage are invalid. That apart from referring to the case of Savannah Bank v. Ajilo, the lower court did not adduce any reason for so holding.

That since exhibit 6 was executed before the coming into force of the Land Use Act 1978, the applicable law to that transaction is the Land Tenure Law of 1963; particularly as the Land Use Act, 1978 is not retroactive. For this learned counsel referred to Ojokolobo v. Alamu (1987) 3 NWLR (Pt. 61) 377; (1987) 7 SC 124 at 129; Salami Afolabi v. Government of Oyo State (1985) 2 NWLR (Pt. 9) 734;(1985) 9 SC 117; Okafor v. Utomi (1964) 1 All NLR 348 at 350.

Learned counsel further submitted that the approval granted for the 1st respondent to mortgage his property at Mala Road, Isale Asa, Ilorin contained in exhibit 6 dated 25/10/76 and signed by the Chief Lands Officer is valid and satisfies the provisions of the Land Tenure Law 1963. That the Governor of Kwara State duly delegated his power to the Permanent Secretary Ministry of Lands, Survey and Environment vide Kwara State Legal Notice No. 8 of 1975 and that the Chief Lands Officer merely conveyed the said approval given by the Permanent Secretary to the mortgage transaction. That section 45(1) of the Land Use Act 1978 is identical to section 46(1) of the Land Tenure Law 1963.

Turning now to the second legal mortgage, exhibit 7, learned counsel submitted that it is also valid since the property mortgaged therein was already under mortgage to the same 2nd respondent with the consent of the Permanent Secretary. That there was no legal necessity for fresh approval from the Governor under the Land Use Act, 1978 since the only difference between exhibits 6 and 7 is the enhancement of the facility from N12,000.00 in exhibit 6 to N33,000.00 in exhibit 7. For this learned counsel cited and relied on Moses Ola AND Sons v. Bank of the North Ltd. (1992) 3 NWLR (Pt. 229) 377 at 389.

That the 1st respondent should not be allowed to annul exhibits 6 and 7 under which he had taken advantage of credit facilities and which he is not making any effort to repay. That the law places the duty of obtaining consent on the mortgagor and as such the same law should not assist him to claim benefit from his default either to apply for a consent or to obtain the proper consent. For this counsel referred the court to the case of Ugochukwu v. Co-op AND Commerce Bank Ltd. (1996) 6 NWLR (Pt. 456) 524 at 683 – 684, and urged the court to decide the issue in the affirmative.

In his reaction to this issue, learned SAN for the 1st respondent submitted that the trial Judge was right in invalidating exhibits 6 and 7 by relying on Savannah Bank v. Ajilo’s case. That there is no evidence at all that the Chief Lands Officer conveyed approval of the commissioner. That this is not apparent on exhibits 1 or 1A. That no gazette evidencing the delegation of the Governor’s power under the Act to the Chief Lands Officer was either referred to or produced. That the Kwara State Commissioner for Lands cannot sub-delegate the power delegated to him by the Governor to any person and that the Chief Lands Officer did not include evidence of approval in his letter, exhibit 8. That the case of Awojugbagbe Light Ind. Ltd. v. Chinukwe (1995) 4 NWLR (Pt. 390) 379 at 426 is not relevant to this case since in that case there was Governor’s consent duly obtained. Learned SAN then urged the court to resolve the issue against the appellant after citing and relying on the decision of this court in Federal Mortgage Bank v. Babatunde (2000) FWLR (Pt. 3) 385.

In his reply learned counsel for the 2nd and 3rd respondents submitted that the power to consent or approve transactions under the Land Tenure Law vide Kwara State Legal Notices No. 8 of 1975 distinguishes the instant case from the case of Federal Mortgage Bank v. Babatunde (supra) relied upon by learned counsel for the 1st respondent. Learned counsel then urged the court to resolve the issue in favour of the appellant.

I have carefully gone through the record of proceedings including the exhibits and the submissions of learned counsel for both parties. It is not in dispute that exhibit 6 was executed on 26/10/76 before the Land Use Act, 1978 came into effect. Equally not in dispute is the fact that the Land Use Act, 1978 is not retroactive. I therefore agree with the submission of learned counsel for the appellant that the applicable law to exhibit 6 as far as approval of the transaction therein contained is concerned is the Land Tenure Law of 1963 of Northern Nigeria as it is applicable to Kwara State, and that under section 46(1) thereof the Governor in council or the minister in charge of land matters can delegate his powers under section 28 of same. Now the powers that can be so delegated under section 28 include the power to grant consent or approval to mortgage etc.

Equally not in dispute also is the fact that the Governor of Kwara State duly delegated his powers under the said section 28 to the Permanent Secretary, Ministry of Lands, Survey and Environment vide Kwara State Legal Notice No. 8 of 1975. What is however disputed is whether the letter of consent dated 25/10/76 by the Chief Lands Officer satisfies the provision of the Kwara State Legal Notice No. 8 of 1975. While learned counsel for the appellant as well as the one for the 2nd and 3rd respondents forcefully argue that it does, since it merely conveys the consent given by the Permanent Secretary, Ministry of Lands, learned counsel for the 1st respondent contends that it does not since there is nothing in that letter of consent to show that the consent came from the said Permanent Secretary.

It is my considered opinion that the validity of exhibit 6 is paramount in this case since it is the initial mortgage of the property though for a lesser sum of N12,000.00. If it is valid it does not matter that exhibit 7 is either valid or invalid since the admission then 1st respondent took an additional loan on the same property making it necessary to enter into exhibit 7does not with respect derogate from the continued validity or subsistence of the said exhibit 6. In other words, it is my view that exhibit 6 could simply have been up-stamped to cover the additional loan or credit facility without the necessity of entering into a fresh mortgage with its attendant problems of obtaining fresh consent etc. In any event the 1st respondent does not deny obtaining the additional credit facility.

It therefore follows that the question that needs an answer is whether the conveyance of the consent of the appropriate authority meets the requirement of Legal Notice No. 8 of 1975 having regard to the facts of the case. My answer to the above poser is in the affirmative. It is very clear to me that the Chief Lands Officer was merely conveying the approval given to the mortgage transaction by the appropriate authority to the 1st respondent who had applied for the approval as required by law. It is therefore my view that exhibit 6 (by which I mean the mortgage transaction entered into on 26/10/76) is valid and binding on the parties in accordance with the provisions of the Land Tenure Law 1963 of Northern Nigeria as applicable to Kwara State.

As regard the validity of exhibit 7 (by which I mean the other mortgage transaction entered into on 18/9/78 which is merely an enhancement of the naira value of the credit facility from N12,000.00 in exhibit 6 to N33,000.00 as earlier held in this judgment, has no legal necessity for a fresh approval from the Governor under the Land Use Act 1978 see Moses Ola AND Sons v. Bank of the North Ltd. (1992) 3 NWLR (Pt. 229) 377 at 389.

That apart, the 1st respondent does not deny taking the additional credit facility which brought the total indebtedness to N33,000.00 neither does he deny entering into exhibit 6 which covers the same property, which exhibit has been held to be valid in view of the facts, law and circumstances of this case.

In view of the facts of this case particularly the delegation of powers contained in Legal Notice No. 8 of 1975 of Kwara State, it is my considered view that the case of Federal Mortgage Bank v. Babatunde (supra) cited by learned SAN for 1st respondent where there was no actual delegation of power either in evidence as a fact or as a matter of law, does not apply to this case. In the present case, however Kwara State Legal Notice No. 8 of 1975 to which the attention of this court has been drawn, is clear on the fact that there is delegation of powers and that the letter of approval by the Chief Lands Officer merely conveyed that approval. That being the case, it is my view that issue No. 2 be and is hereby resolved in favour of the appellant.

The third issue to be considered is whether the learned trial Judge is correct in holding that the auction sale of the 1st respondent’s property is invalid. In his brief of arguments learned counsel for the appellant submitted that there was cogent evidence of advertisement being paid for by DW 3 who also tendered the receipts of payment issued to him as exhibits D4 and D5. That the best proof of an advertisement on television or radio is the direct evidence of the one who paid for them and saw and heard the advertisement when they were aired on the relevant media. That the 1st respondent did not give evidence that advertisements on the auction of the property were not carried by the NTA and the radio. That his attack was concentrated on the Herald Newspaper which carried the advertisement on the 4/11/92. Learned counsel then urged the court to apply the decision of the Supreme Court in Ebba v. Ogodo (2000) 17 WRN 95;(1984) 1 SCNLR 372; (1984) 4 SC 84 at 98 – 99 and thereby use the evidence on record to re-assess or evaluate the pieces of evidence on the issue of advertisement and substitute its own findings since the trial court failed to properly consider the evidence before it.

Referring to clause 3(b) if the deeds of legal mortgage, exhibits 6 and 7, learned counsel submitted that the issue of non compliance with the Auctioneer’s Law does not even arise because the parties have expressly stated that only the clauses in the deeds shall apply to their transaction to the exclusion of any other statute. That the Auctioneers Law does not contain a provision to the effect that it cannot be excluded by agreement of parties.

Referring to the case of UBA Ltd. v. Umeh AND Sons (1996) 1 NWLR (Pt. 426) 565 at 605 learned counsel submitted that it was the duty of the lower court to interpret the agreement which the parties entered into. That parties to the mortgage agreement were free to waive any right which they had except constitutional right, for which counsel referred to Okonkwo v. C.C.B. (Nig.) Plc (1997) 6 NWLR (Pt. 507) 48 at 69.

That the issue of the poor attendance at the auction does not arise from the pleadings neither was the fact that the auction lasted 5 minutes pleaded. That being the case it was wrong for the trial Judge to have relied on that as additional reason for setting aside the auction sale since parties are bound by their pleadings and evidence given on unpleaded facts ground to no issue. For this learned counsel relied on Emegokwe v. Okadigbo (1973) 8 NSCC 220 at 222.

Finally learned counsel urged the court to resolve the issue in favour of the appellant.

In his reply, learned SAN for the 1st respondent submitted that the cross examination of D.W. 3 showed that exhibits D4 and D5 could have been for any other bank and for other properties particularly as no witness testified to the fact that the advertisements were actually carried out or was heard or seen by any one. That to make matters worst, the Herald Newspaper carried the advertisement on 4/11/92 while the property was auctioned on 5/11/92.

Learned counsel agree that parties did agree that the statutory power of sales shall be exercisable without regard to any statute law but submitted that

"there is no situation where a party can sell without regard to any law."

That once a party decides to sell by auction it has to be done in accordance with the auction law of the territory concerned.

That the case of Okonkwo v. Elemo (1983) SCNLR 7 does not apply in that the appellant in that case waived his right under the Auctioneers Law whereas in this case the 1st respondent stood up promptly by going to court to say that

"if you must auction my property then you must follow the auction law."

That there are evidence of fraud on record. That parties cannot validly decide to avoid the Auctioneers Law for which learned counsel relied on Nigerian Bottling Co. Plc. v. Osofisan (2000) FWLR (Pt. 7) 118.

Learned SAN then urged the court to resolve the issue against the appellant. On his part, learned counsel for the 2nd and 3rd respondents submitted that parties to a mortgage transaction can by their own choice exempt the application of any statute to their contract. That rights under any statute can be waived except constitutional rights. For this counsel also relied on Okonkwo v. C.C.B. (Nig.) Plc (supra).

Learned counsel further submitted that the decision in Nigeria Bottling Co. Plc v. Osofisan (supra) does not apply to this case in view of the fact that Okonkwo’s case is directly on the point – whether or not the right to notice before sale can be waived. Learned counsel then urged the court to resolve the issue in favour of the appellant.

I have gone through the arguments of learned counsel in their briefs of argument and I am of the view that this issue can be properly disposed of on the issue whether or not the 1st respondent did waive his right to 7 days notice as stated in section 19 of the Auctioneer’s Law applicable to Kwara State in view of clause 3(b) of exhibits 6 and 7. To me a resolution of the issue either way disposes of the dispute; in view of the fact that exhibit 2 - Herald Newspaper clearly states that the notice was published on 4/11/92 for an auction to be held on 5/11/92. I am however not unmindful of exhibits D4 and D5.

Now clause 3(b) of exhibit 6 provides inter alia as follows:

"(b) The statutory power of sale shall be exercisable at any time after the moneys owing on this security shall have become payable without regard to any statute law…"

From the above, it is very clear that both parties agreed that once the money thereby secured becomes payable the statutory power of sale shall be exercisable by the mortgagee without regard to any statute - like the provisions of section 19 of the Auctioneers Law which provides that the mortgagor shall be entitled to seven days notice of auction sale of his property.

It is trite law that it is the duty of the trial court to interpret and give effect to the agreements of the parties – see Union Bank of Nig. Ltd v. Umeh AND Sons (1996) 1 NWLR (Pt. 426) 565 at 605 where it was held as follows:-

"It is an elementary principle of law that where parties are ad idem on the terms of a contract, the function of the court is to give effect to the terms without much ado. This is because the court must, in the construction of the terms of the contract give effect to the intention of the parties."

In the present case the learned trial Judge has held at page 110 of the record to the effect that the provision of the Auctioneer’s Law as regards notice cannot be waived as it enures for the benefit of the public.

In support of his contention that the clause under consideration is invalid the learned SAN has referred the court to the case of Nigeria Bottling Co. Plc v. Osofisan supra at 1192 where this court, Ibadan Division held inter alia as follows:-

"The guiding principles to determine whether the provisions of an enactment can be waived is to determine whether such provisions are directory or mandatory. A breach of mandatory provision renders what has been done null and void ..."

I have carefully gone through this decision and though I agree with the statement of the law stated above, I do not find it applicable to the facts of the instant case. The decision of this court in that case was based on the issue whether a person who has applied to be joined as an interested party in an application after a default judgment had been entered could be said to have waived such right to be so joined by his inaction during the pendency of the action at the trial court. There was no element of an agreement between the parties as to the waiving of the statutory right as in the present case.

However in Okonkwo v. C.C.B. Plc (supra) at 69 the Court of Appeal, this time the Port Harcourt Division, held inter alia as follows:-

"Appellant waived his right to be given notice under any law or custom in operation in Imo State in clause 8 of exhibit B applying the decision in Ariori v. Elemo (2001) 36 WRN 94; (1983) 1 SCNLR 1 such a waiver is permissible, it is only a constitutional right like fundamental right of fair hearing that a waiver is not permissible. So with respect to section 19 of Cap 12 (supra) does not apply due to waiver in clause 8 of exhibit B."

I must point out here and now that the learned counsel for the 2nd and 3rd respondents erroneously referred to Okonkwo’s case supra as a decision of the Supreme Court. It seems the error is induced by the publishers of the Nigerian Weekly Law Reports who initiated same. The truth however remains that it is a decision of this court delivered by Onalaja JCA, then of Port Harcourt Division.

In any event, the Okonkwo’s case is directly on the issue under consideration to wit whether the right to seven days notice before sale by auction under the Auctioneers law section 19 thereof, can be waived by parties in their contract or mortgage agreement. It is my considered view that the Okonkwo’s case is very applicable to the facts and law of this issue under consideration since the right that is waived has not been said to be one of the constitutionally guaranteed rights. I am strongly of the opinion that a right to notice can be waived by the person entitled to same under the law if there is consideration to make him to abandon same. In the present action on appeal, it is not the 1st respondent’s case that he never agreed to waive his right to notice.

As regards the sub-issue of fraud, it is trite law that if a party intends to rely on fraud he must first and foremost plead same and follow that up with particulars of the alleged fraud. Where fraud is not pleaded and particulars supplied, the court will definitely be in error in relying on it in its judgment however brilliant the argument of counsel in his address. It also does not matter that there is evidence of fraud on record since it is the law that evidence of facts not pleaded ground to no issue.

So in whatever angle one looks at it, the sub-issue of fraud cannot avail the 1st respondent. It is therefore my view that issue No. 3 be and is hereby resolved in favour of the appellant.

On issue No. 4, learned counsel for the appellant submitted that the learned trial Judge holding that trespass was proved is erroneous in law. That the 1st respondent cannot mortgage his property to the 2nd respondent and turn round to accuse it of trespass.

In the alternative learned counsel argued that the trial Judge ought to have awarded nominal damages since no loss was occasioned. That the award of N50,000.00 is excessive and unjustifiable.

In his submission the learned SAN for the 1st respondent submitted that the trial court was right in awarding damages for trespass in that appellant and 2nd and 3rd respondents sold a property of the 1st respondent which was not part of the property mortgaged to the 2nd respondent. That it is the duty of the trial Judge to decide the amount to be awarded and that his learned friend has failed to state why the award is excessive. He then urged the court to resolve the issue against the appellant and dismiss the appeal.

In his reply learned counsel for the 2nd and 3rd respondents submitted that at the time of sale no order of injunction existed against the sale. That lis pendes does not operate to turn a legal mortgagee to a trespasser on a property over which all legal interests have been charged to him. He then urged the court to resolve the issue in favour of the appellant and allow the appeal.

Now, having regards to the resolution of issue Nos. 1, 2 and 3 in favour of the appellant it follows that in law the appellant cannot be said to be a trespasser. That being the case it is my considered view that the lower court erred in finding the appellant liable in trespass and in awarding damages for same.

It must be remembered that the property involved is a subject of a legal mortgage which has not been redeemed and that the 1st respondent has defaulted in paying the debt thereby making it necessary for the 2nd respondent to take steps to recover its debt by sale of the mortgaged property to the appellant. That being the case, issue No. 4 is resolved in favour of the appellant.

In conclusion, it is my considered view that there are merits in this appeal which is accordingly allowed with N5,000.00 cost in favour of the appellant and against the 1st respondent only.

Consequently the judgment of Hon. Justice J.F. Gbadeyan of the Kwara State High Court in suit No. KWS/148/93 delivered on 3/12/99 is hereby set aside and in its place is substituted an order of this court dismissing the said suit as lacking in merits.

Appeal allowed.

**MURITALA AREMU OKUNOLA JCA:.**

I have had the advantage of reading in draft the judgment of my learned brother Onnoghen JCA just delivered. I agree with the reasoning and conclusion reached that the appeal has merit.

I also allow it and set aside the judgment of the court below. I abide by the consequential orders contained in the leading judgment including the order as to cost.

**PATRICK IBE AMAIZU, JCA:.**

I have had the advantage of reading in draft, the judgment just delivered by my learned brother, Onnoghen, JCA. I agree with his reasoning and conclusion that the appeal has merit. I also allow the appeal.

I have nothing to add. I abide by the consequential order made in the lead judgment, including the order as to costs.

**Cases referred to in the judgment**

Afolabi v. Gov. Oyo State (1985) 2 NWLR (Pt. 9) 734; (1985) 9 S.C 117.

Ariori v. Elemo (2001) 36 WRN 94; (1983) 1 SCNLR 1.

Awojugbagbe Light Ind. Ltd. v. Chinukwe (1995) 4 NWLR (Pt. 390) 379.

Bello v. Eweka (1981) 1 S.C 101; (1981) 12 NSCC 48.

Ebba v. Ogodo (2000) 17 WRN 95; (1984) 4 SC 84.

Emegokwue v. Okadigbo (1973) 8 NSCC 220.

F.M.B v. Babatunde (2000) FWLR (Pt. 3) 385.

Kodilinye v. Odu (1935) 2 WACA 336.

Mogaji v. Odofin (1978) 4 SC 91.

Moses Ola AND Sons v. B.O.N Ltd. (1992) 3 NWLR (Pt. 229) 377.

NBC Plc. v. Osofisan (2000) FWLR (Pt. 7) 118.

Ojokolobo v. Alamu (1987) 3 NWLR (Pt. 61) 377; (1987) 7 SC 124.

Okafor v. Utomi (1964) 1 All NLR 348.

Okonkwo v. C.C.B. (Nig.) Plc (1997) 6 NWLR (Pt. 507) 48.

Okonkwo v. Elemo (1983) SCNLR 7.

Oyediran v. Alebiosu II (1992) 6 NWLR (Pt. 249) 550.

Savannah Bank v. Ajilo (1989) 1 NWLR (Pt. 97) 305.

UBA Ltd. v. Umeh AND Sons (1996) 1 NWLR (Pt. 426) 565.

Ugochukwu v. Co-Op AND Commerce Bank Ltd. (1996) 6 NWLR (Pt. 456) 524.

Umesie v. Onuaguluchi (1995) 9 NWLR (Pt. 421) 515.

**STATUTES REFERRED TO IN THE JUDGMENT**

Auctioneers Law, s. 19.

Land Use Act 1978. s. 45(1)

Land Tenure Law 1963, Ss. 46(1) AND 28.