**J.J. ADJARHO AND ANOR**

**V.**

**MRS G. AGHOGHOVWIA AND OTHERS**

SUPREME COURT OF NIGERIA

1ST APRIL, 1985

SUIT NO. SC 153/1984

**LEX (1985) - SC 153/1984**

**OTHER CITATIONS**

3PLR/1985/2 (SC)

[1985] 1 NSCC 376

**BEFORE THEIR LORDSHIPS:**

MOHAMMED BELLO, J.S.C.

KAYODE ESO, J.S.C.

DAHUNSI OLUGBENI COKER, J.S.C.

ADOLPHUS GODWIN KARIBI-WHYTE, J.S.C.

SAIDU KAWU, J.S.C.

**REPRESENTATION**

J.B. IYARE, G.C. AKORO - for the Appellants

T.J.O. OKPOKO - for the Respondents

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

REAL ESTATE AND PROPERTY LAW - LAND:- Deed of conveyance for sale of family land – Application to set same aside – Whether can be at the instance of a third party or a stranger to the deed – Relevant considerations

REAL ESTATE AND PROPERTY LAW - LAND:- Family land – Where head of the family wrongly sold the land without the knowledge and consent of other members of the family as his own personal property – Whether sale is void or voidable at instance of other members of the family

CHILDREN AND WOMEN LAW: *Women and Real Estate/land* – Defence of interest in un-partitioned family land (rubber plantation) held under customary law against unilateral sale by eldest son/Head of family – How treated

CUSTOMARY LAW:– Un-partitioned Family land – Where sold by head of family without the family’s consent – validity thereof

COMMERCIAL LAW – CONTRACT:- Privity of contract – Deed of conveyance – Right of third party/strangers to the Deed to apply for it to be set aside - Relevant considerations

FOOD AND AGRICULTURE LAW:- Plantation farming - Rubber – Customary land law rules relating to sale of family land – Where not satisfied with respect to sale of rubber plantation – Implication for investors

**MAIN JUDGEMENT**

**COKER, J.S.C.** **(Delivering the Lead Judgment):**

The respondents’ counsel was not called to reply after hearing Mr. Iyare, learned counsel for the appellant, as the appeal has no merit. The land in dispute was part of the landed property of late Chief Erho Esike and formed part of his residuary estate; it therefore became part of his family land. It was not shared amongst his children. The plaintiffs, for themselves and on behalf of his (Chief Erho Esike) family claimed, amongst other reliefs, that it was the family land of Chief Erho Esike, in the High Court of Bendel State against the appellant (as 1st defendant) and Godwin Esike who was his eldest son. The latter sold, as his personal property, the said land which was a rubber plantation to the appellant. Both the appellant and Godwin Esike alleged they believed that the rubber plantation was his (Godwin’s) personal property. At the trial, the plaintiffs adduced evidence that the land was never partitioned and that it remained family property. Godwin who sold to the appellant gave evidence that he believed at the time he was selling that the land was part of his own inheritance, but later discovered that the land was never partitioned. The trial court found that the land was family land and not the personal property of Godwin Esike. The case was fought on both sides on the basis that the original owner was the father (of the 2nd defendant, Godwin) and was never shared to Godwin Esike. The law is clear that sale was therefore void for the said Godwin Esike was not the owner of the land and did not sell as head of the family. See Solomon v. Mogaji (1982)11 &C.1 where the law was reviewed. The sale of the land by Godwin Esike to the appellant was therefore void.

The document, exhibit A, was the deed of conveyance executed, by Godwin Esike to the appellant. It is dated 6th December 1971. Paragraph 22 of the statement of claim averred that sometime in 1970, the 2nd defendant without the knowledge and consent of the family sold or pledged the family land as his own personal land to the appellant. That was the essence of the case and fought on the basis that Godwin Esike sold and conveyed part of the family land as his own property. Mr. Iyare agreed that the sale was void, but he has asked the Court to consider the deceit of Godwin Esike. That may be, but it does not affect legal effect of the void sale.

We have considered the submission made by the appellant’s counsel and cannot find any substance in his contention. His complaint that the deed of conveyance exhibit A was not specifically pleaded is not correct. The document was pleaded in paragraph 22 of the statement of claim, although the date was erroneously stated as 26th October 1970. This was amended suo moto by the trial Judge In order to accord with the evidence. The appellant was aware as were the plaintiffs and Godwin, that the whole case was the sale of the land wrongfully made by Godwin Esike. The appellant was not misled. The trial Judge was therefore right to have amended the proceedings in order to do justice to all the parties by bringing the dispute to a finality. See Ayeni v. Sowemimo (1982) 5 S.C.60 Joseph Afolabi v. Joseph Adekunle (1983) 8 S.C.98 and WA. Metal Construction v. D.O. Meglioni (1979) 8 & 9 S.C. 163.

The question of whether the plaintiffs, who were strangers to the deed of conveyance - exhibit A, could seek an order to set it aside, must be answered in the affirmative. The land was family land. The action was on behalf of the family. The grantor, Godwin Esike, who was head of the family wrongly sold the land without the knowledge and consent of other members of the family as his own personal property. See l. Onitiri v. Oyadiran: W.A.C.A. No.3809, Selected Judgments of W.A.C.A. 1953; February - May, p.61 at 64. That made it clear that a third person whose title is affected by a registered deed, could seek an order to set aside the deed, since such a deed constitutes a cog to his title and could be used for fraudulent purposes.

On the whole, there is no substance in the appeal and is accordingly dismissed with N300.00 costs.

**BELLO, J.S.C.:**

I am satisfied this appeal has no merits. It is one of those cases where the head of the family sold family land as his own. Both the trial court and the majority of the Court of Appeal were right that the sale was void: Solomon & Ors. v. Mogaji & Ors. (1982) 11 S.C.1.

For the reasons fully stated by my learned brother, Coker, J.S.C. the appeal is hereby dismissed. The decision of the Court of Appeal is affirmed. N300 costs to the respondents.

**ESO, J.S.C.:**

This is a very simple case. The plaintiffs, who were the respondents in this Court, had claimed in the Ughelli High Court (Oki J.)

(1) declaration that the land in dispute is the property of Chief Erho Esike family according to the custom of Agbarhaotor people,

(2) declaration that no single member of the family had right to alienate the property without the consent of the family,

(3) that the second defendant sold the land to the first defendant claiming the land to be his when it is not,

(4) damages and injunction.

The trial court found as fact that the land belonged to the Esike family and not to the second defendant. And that when the second defendant sold to the appellant, he had no title. On these facts as found by the learned trial Judge there is no doubt that the appellant bought a void. The transaction of sale by the second defendant is a nullity.

I have gone through the grounds of appeal filed by the appellant. I have also read his brief. With utmost respect to the learned Counsel Chief Iyare, most of the points raised are without substance having regard to the basic nature of this case that the appellant bought from one who had no title. SeeSolomon v. Mogali (1982) 11 S.C. 1. as at p.62.

It is unfortunate that the appellant has been misled into a void transaction but the fact still remains that he bought nothing as the plaintiffs were bound to succeed as they did in the High Court and affirmed by a majority of the Court of Appeal. The appeal is hereby dismissed with N300.00 costs.

**KARIBI-WHYTE, J.S.C**.:

I agree entirely with the judgments of my brother D. O. Coker, J.S.C., and Kayode Eso, J.S.C. that this appeal be dismissed. This is again one of the now familiar cases where family land is sold by a member of the family as his own. Decided cases of this Court are numerous. Solomon v. Mogaii & ors (1982) 11 S.C.1 being the most recent and authoritative. There is no substance in all the grounds of appeal filed and argued. Appellant shall pay N300 as costs to the respondent. Judgment of the Court of Appeal is hereby affirmed.

**KAWU, J.S.C.:**

I am in entire agreement with the judgment of my learned brother, Coker, J.S.C. which has just been delivered, dismissing this appeal. In this case the trial court found as a fact that the 2nd defendant sold to the appellant as his own personal property, a rubber plantation which was in fact the property of the plaintiffs’ family. There was also evidence before the trial court, which that court accepted, that under the Agbarah customary law, a sale of family property by the head of the family without the consent of the other members of the family is void, and it was on this ground that judgment was given in favour of the respondent. On appeal to the Court of Appeal, the decision of the trial court was confirmed. Having given careful consideration to the submissions made by Chief Iyare in this court, I have come to the conclusion that nothing has been said to justify our interfering with the concurrent decisions of the lower courts. The appeal lacks merit and it is therefore dismissed. The decisions of the two lower courts are hereby affirmed. Costs are assessed at N300.00 to the respondents.