Privy Council Appeal No. 12 of 1973

Alhaji Malang Kanteh – – – – – – *Appellant*

v.

The Attorney General and Others – – – – *Respondents*

FROM

THE COURT OF APPEAL OF THE GAMBIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH JANUARY 1975

Present at the Hearing:

LORD MORRIS OF BORTH-Y-GEST
LORD HAILSHAM OF SAINT MARYLEBONE
LORD KILBRANDON

[*Delivered by* LORD MORRIS OF BORTH-Y-GEST]

This is an appeal by special leave from the judgment (dated the 11th July 1972) of The Gambia Court of Appeal which allowed an appeal from a judgment (dated the 16th December 1971) of the Supreme Court of The Gambia. That was a judgment in favour of the appellant in an action in which he claimed that a purported sale by the Sheriff of certain property of his situate at Serekunda, Kombo, St. Mary, Gambia should be set aside.

The sale referred to was a sale by auction of that property. It took place on the 20th September 1969. It took place in consequence of the issue of a Writ of *fieri facias* commanding the Sheriff to levy execution upon the property of the second respondent Wadda against whom a judgment (for the sum of £372.5.6) had been obtained by the third respondent George. At the sale the fourth respondent Jarju was the highest bidder (at the sum of £675) for the property. It was the appellant's case that at the relevant time the property in question belonged to him and did not belong to Wadda and that consequently what was a purported sale to Jarju should be set aside.

The relevant facts arose out of diverse financial obligations incurred by the respondent Wadda.

They concerned different people of whom the appellant was one. One obligation arose out of the fact that in January 1969 Wadda borrowed the sum of £240 from the appellant. An arrangement was then made that if the loan was not repaid, certain property belonging to Wadda could be taken by the appellant who was to refund the difference between the amount of the loan and the value of the property. This arrangement

was recorded in a document signed by Wadda. It was in the following terms:

> "I, Ousman Mamadou Wadda took two hundred and forty pounds cash (£240) from Alhaji Malang Kanteh. And if I failed to pay two hundred and forty pounds (£240) cash on 24th of January 1969, he is allowed to take my compound situated at Serakunda Kombo at value of four hundred and fifty pounds (£450). He may refund the change to me from the value of the compound."

The compound referred to is the property to which these proceedings relate. It was held by Wadda under the terms of a lease made on the 16th January 1969 by which the Minister for the time being responsible for the administration of certain lands on behalf of the Crown, demised the described land to the respondent Wadda as lessee for a term of 21 years from the 1st August 1968 at the net yearly rental of £4.1.4. The lessee covenanted to observe certain provisions and stipulations which were contained in a Schedule. One of these obliged the lessee within a certain time to erect and maintain a boundary fence. Another obliged him within a certain time to erect a dwelling-house at a stated minimum cost. Another provision was in the following terms:

> "That the lessee will not subdivide convey assign or otherwise alienate the premises or any part thereof by sale mortgage transfer of possession lease or sublease without the consent of the Minister in writing first had and obtained and such consent shall not be granted if the lessee shall not have developed the demised premises in accordance with the covenants in that behalf in this lease contained."

A further financial obligation which was incurred by the respondent Wadda and which now calls for mention was to one Sugufara. Wadda became in debt to him to the extent of £340.4.6. In connection with that debt the respondent Wadda deposited the lease above-mentioned with Sugufara.

In the month of February 1969 an arrangement was made between the appellant and Wadda pursuant to which the appellant was to discharge Wadda's indebtedness to Sugufara by paying him the sum of £340.4.6: as Wadda would then owe the appellant both that sum of £340.4.6 and the above mentioned sum of £240 Wadda was to sell his leasehold property to the appellant for £580.4.6.

That arrangement was made and carried out in the following way. On the 25th February the appellant and his lawyer Mr. Alhaji Drameh saw Sugufara. In the presence of and with the consent of Wadda the appellant paid to Sugufara the sum of £340.4.6 in full and final settlement of the debt owed by Wadda to Sugufara. The appellant and Wadda agreed to the sale of the leasehold property to the appellant. The lease itself which as above-mentioned had been deposited by Wadda with Sugufara was handed over by Sugufara to the appellant. That was done with the consent of Wadda. It was made clear to the parties by the appellant's lawyer Mr. Drameh that the consent of the Minister of Lands to the sale of the lease was necessary and Wadda agreed that Mr. Drameh should on his behalf write to the Ministry to ask for such consent. Before the money passed and before the lease was handed over a document was drafted by Mr. Drameh: it was signed by Wadda: it was witnessed by Mr. Drameh. Sugufara also signed it in Arabic and affixed his mark. The document was in the following form:

" 3, Anglesea Street,
Bathurst,

25th February, 1969

Received the sum of £340.4.6. from Alhaji Malang Kanteh 4 New Street, Bathurst being full and final settlement of account between O. M. Wadda and I relating to promisory note dated 20th January 1969, the subject matter of the proceedings in the Supreme Court due to be purchased on 27/2/69.

In return for this Mr. Wadda hereby agree to sell his property at Serekunda to me for this sum plus what he owe me *i.e.* £340.4.6. plus £240.

(Sgd) Sufugara his
X
Mark

Witness:
Alhaji A. M. Drameh
Solicitor
2 Cameron Street,
Bathurst.

Agree with the above
(Sgd) O. M. Wadda
25/2/69 "

Although the document was not actually signed by the appellant their Lordships have no doubt that the reference in it to " me " was a reference to the appellant. There was never any question of a sale to anyone else. The words " in return for this " clearly refer to the action of the appellant in paying to Sugufara the amount which Wadda owed to Sugufara. In respect of such amount a promissory note had evidently been given by Wadda to Sugufara and there were pending proceedings between Sugufara and Wadda. The learned Judge appears to have entertained no doubt as to who were the parties to the sale. He recorded in his judgment that Wadda had said that he agreed to part with the leasehold to the appellant. The learned Judge accepted the evidence which was given by Mr. Drameh as to what took place on the 25th February.

Pursuant to the events of the 25th February Mr. Drameh wrote a letter to the Lands Officer on the 28th February stating that he had been instructed by Wadda to apply for permission to assign the leasehold property (by way of sale) to the appellant. The property was described both by its location and by reference to its serial registration number. The Lands Office replied by letter dated the 9th April 1969. Permission was given and Mr. Drameh was told that the Deed of Assignment should be submitted to the Lands Office for onward transmission to the Registry Office. Mr. Drameh accordingly prepared a Deed of Assignment.

The financial obligations incurred by Wadda were however not limited to those already described. On the 26th February 1969 an action was commenced against him by the third respondent—Gabriel George. That was Suit No. 35/1969. The Claim was for the sum of £393.5.0. It was claimed as being the balance of money outstanding for goods supplied. Service of the writ on Wadda took place on the 7th March.

Some three days later (*viz.* on the 10th March) there was a notice of motion in that action (Suit No. 35/1969) asking that the leasehold property of Wadda (identified as that to which their Lordships have been referring) should be kept *in custodia legis* pending the determination of that action. In support of the motion there was an Affidavit of George in which he stated that Wadda proposed to mortgage or otherwise to dispose of the leasehold property and that such mortgage or disposal would defeat execution of any judgment he (George) might obtain against Wadda. The result of that motion was that on the 25th March 1969 the Chief

Justice made an order which was directed to the Sheriff commanding him to seize the leasehold property and to hold it until the Court made some further order.

It is to be observed that in fact there was no question that Wadda was "proposing" to dispose of the leasehold property: he had already *viz.* on the 25th February agreed to sell the property to the appellant and the lease had been handed to the appellant: furthermore the request to the Lands Officer for permission for the sale to take place had already (*viz.* on the 28th February) been made.

On the 12th March 1969 the lawyer acting for George wrote to the Lands Officer informing him that the notice of motion of the 10th March had been filed. To that letter the Lands Officer replied by a letter dated the 1st April saying that in the absence of a Court Order the Lands Office could not interfere with dealings concerning the land.

When the appellant and his lawyer Mr. Drameh came to know of the order that had been made on the 25th March they instituted two proceedings.

One was Civil Suit No. 83/69 which was a suit in which the appellant was plaintiff and Wadda was defendant and in which the appellant claimed specific performance of the contract for the sale of the leasehold property. In view of the making at the instance of George of the attachment order on the leasehold property Wadda had, not unnaturally, refused to execute the transfer to the appellant which as above stated Mr. Drameh, after receiving the consent of the Lands Officer to the sale, had prepared.

The other proceeding, which was Suit No. 84/1969 and which was issued on the 18th April 1969, was in the nature of an interpleader summons in the action which George had brought against Wadda. As claimant of the property seized under process of the Court in the action brought by George against Wadda the appellant summoned George to appear to answer his (the appellant's) claim that the property seized should be declared and adjudged to be his (the appellant's) property. In a supporting Affidavit the appellant referred to the agreement he had made with Wadda on the 18th January 1969, stated that he had confirmed the sale in writing in another transaction on the 25th February 1969, referred to the request made on the 28th February to the Lands Officer for permission for a formal assignment of the lease and to the permission granted by the Lands Officer on the 9th April 1969 and applied that the attachment be removed and the property be adjudged to be his. He further stated that the fact of the sale to him had been known to George and his solicitor before the attachment.

To that Affidavit there was on the 8th May 1969 an Affidavit in reply by the Solicitor acting for George. He denied that he knew of any sale of the leasehold property. He alleged that Mr. Drameh had at an earlier date told him that Wadda's leasehold property was in fact mortgaged to a client of Mr. Drameh whose name was not disclosed: that on checking with the Lands Officer and the Registry he (the Solicitor) found no record of any mortgage of or application to mortgage the property: that when making the application for interim attachment he had invited Mr. Drameh to hear the application in open court: and that it was only in the previous week that he had come to know of the appellant's suit against Wadda claiming specific performance. He further deposed "That Ousman Wadda is in physical possession of the said leasehold property and on his own account and not in trust for any other person." He further took the point that even if there had been agreement between the appellant and Wadda, any application for permission to assign ought to have been made by Wadda and not by the lawyer for the appellant. (As to this in the letter of the 28th February above referred to it was stated by

Mr. Drameh that he was instructed by Wadda to write to apply for permission and the learned Judge at the trial expressly found that at the meeting on the 25th February Wadda instructed Mr. Drameh to make the application for the necessary permission to assign.) He (the Solicitor acting for George) further took the point that the application of the appellant was premature and was not in proper form and that the attachment ought not to be removed.

On the day following (*viz.* on the 9th May 1969) George obtained judgment against Wadda (in Suit No. 35/69). It was for the amount of £372.5.6 and costs.

The interpleader summons was in fact not heard. The present appeal must be decided on the basis that there was no decision on the interpleader summons. In the Court of Appeal it was said that by abandoning the interpleader summons the appellant had deprived the Court of the chance of determining the rights of the appellant to the property at the earliest opportunity and that as a result a simple matter was unnecessarily complicated and costs increased. The summons was however being challenged by the Solicitor for George on the lines of his Affidavit as noted above and doubtless with the provisions of Order 44 of the Rules of the Supreme Court in mind.

Whether or not the appellant ought to have proceeded or could with success have proceeded with the interpleader summons need not now be decided. The course which he followed in seeking the adjudication of the Court in regard to his rights was that of proceeding with his action against Wadda for specific performance. But before that action came to be heard a Writ of *fi. fa.* was (on the 22nd May 1969) issued in respect of the judgment debt resulting from the judgment for £372.5.6. and costs obtained by George (in Suit No. 35/69) against Wadda. That writ commanded the Sheriff to levy execution upon Wadda's movable property or if that was not sufficient upon his immovable property to the extent of the judgment debt. It was in pursuance of this Writ that at a much later date (*viz.* on the 20th September 1969) the Sheriff purported to sell the leasehold property. In this connection it is here relevant to mention that s.26 of Chapter 102 (Vol. 5) of the Laws of Gambia provides as follows:—

> "No lease under this Act or under any Ordinance repealed by this Act which contains a covenant, whether express or implied, by the lessee not to assign without the consent of the Minister shall be sold by or under the orders of any court in execution of a decree or otherwise howsoever, except to a purchaser approved by the Minister."

Jarju obtained no approval of a sale to him and no consent to the sale was obtained by the Sheriff.

The specific performance proceedings (Civil Suit No. 83/69) came before the Chief Justice. Mr. Drameh appeared for the plaintiff (the present appellant) and Wadda appeared in person. In his evidence in the present proceedings Wadda said that in the specific performance proceedings he had explained to the Chief Justice that the property was already attached and that as a consequence he had been unable to sign the assignment of the lease. It was of course the Chief Justice himself who had previously (*viz.* on the 25th March 1969) made the order for the interim attachment of the property. The case appears to have been before the Chief Justice on more than one day in July. The Chief Justice on the 31st July 1969 made an order for specific performance of the agreement for the sale of the leasehold property. In Reasons for the Judgment dated the 11th August the Chief Justice referred to the January loan and agreement and to the later agreement and to the payment of £340.4.6 made by the plaintiff. He held that Wadda had signed a memorandum by which he

agreed to convey the lease of his property to the plaintiff for the amount of the debt (£580.4.6): he held that the necessary elements were contained in the memorandum and that it was a case for granting the equitable relief of specific performance.

The way was then clear for Wadda to execute the assignment of the leasehold property to the appellant. That he did on the 11th August 1969. The deed of assignment was registered.

The next event was the purported sale by auction of the leasehold property by the Sheriff. That was on the 20th September. As stated above the 4th respondent Jarju was the successful bidder at £675.

The present proceedings were thereupon commenced by the appellant. That was on the 22nd September 1969. The respondents *viz.* The Attorney General and Wadda and George and Jarju were sued as defendants. The appellant claimed that the purported sale of what he claimed to be his property should be set aside. The case came on for hearing on the 5th March 1971 and it was further heard on various later days. Evidence was called. Wadda appeared in person. The other defendants the Attorney General and George and Jarju were represented.

Having found the relevant facts in favour of the appellant the learned Judge held that there had been a proper assignment of the property to the appellant and that the deed of assignment (of the 11th August 1969) had been executed by Wadda. It followed that the appellant could not be deprived of his ownership of the property. The learned Judge ordered that the purported sale by the Sheriff to Jarju on the 20th September be set aside and that the sum of £675 paid by Jarju be refunded. Costs were ordered against all the defendants.

From that judgment there was an appeal to the Court of Appeal. It was an appeal by George. At the hearing he and the appellant were represented. Wadda appeared in person. There was no appearance by or on behalf of the Attorney General or Jarju.

The main argument advanced on behalf of George was that the order for specific performance had not been regular and that the assignment of the property by Wadda to the appellant was not valid. In the result the Court of Appeal allowed the appeal. That was on the basis that there had not been a proper assignment to the appellant and that the consequence was that the sale by the Sheriff was a valid sale. The Court held that the Chief Justice had been misled into making the order for specific performance. The main conclusion of the Court was that there had never been any agreement to sell the property to the appellant. That conclusion was arrived at after an examination of the documents of the 18th January 1969 and 25th February 1969 which Wadda had signed. The Court of Appeal decided that the reference to " me " in the latter document involved that Wadda had agreed to sell his property not to the appellant but to Sugufara and that there was no sufficient memorandum to found an order for specific performance of an agreement between Wadda and the appellant.

From that judgment this appeal of the appellant is now brought. As none of the respondents appeared to submit any argument learned Counsel for the appellant was at pains to ensure that full and careful attention should be directed to all the documents and orders and proceedings under review.

Their Lordships are unable to accept the validity of the reasons for reversing the judgment of the learned Judge. Though the document of the 25th February might with advantage have been differently and more happily worded it seems to their Lordships to be clear that the sale was one from Wadda to the appellant. The appellant was named in the document and his address was given and it was recorded that he was

paying £340.4.6 to Sugufara in discharge of Wadda's debt to Sugufara. " In return " for that Wadda agreed to sell the property to " me for this sum plus what he owe me *i.e.* £340.4.6 plus £240." Wadda already owed the appellant £240. There was no question of that sum being owed to Sugufara. In their Lordships' view it is clear that Wadda in signing the document was recording and acknowledging that he was selling his property at Serekunda to the appellant and was selling it for £580.4.6 which amount the appellant had paid. That was the conclusion reached both by the learned Chief Justice and by the learned Judge in the present proceedings.

All that remained after the 25th February was that the property had to be formally assigned after obtaining the consent of the Lands Officer. There was no reason which would justify depriving the appellant of that of which he had become the owner. No Court had ever purported to deprive the appellant of his property. The consent of the Lands Officer was obtained to the sale and assignment. The order made by the Chief Justice on the 25th March 1969 had naturally created a difficulty for Wadda and prevented his executing the assignment. When the specific performance proceedings came before the Chief Justice, Wadda (as he said in his evidence) explained that the property was already attached. The order of attachment had directed the Sheriff to hold the property until further order of the Court. The order made by the Chief Justice on the 31st July 1969 directed Wadda specifically to perform the agreement he had made to sell the property to the appellant.

In their Lordships' view there is no justification for impugning the judgment of the Chief Justice. He found that there was a good contract between Wadda as vendor and the appellant as purchaser. Wadda completed by executing the assignment on the 11th August 1969. There was no appeal by Wadda from the judgment of the Chief Justice. That judgment stands and in their Lordships' view was correct. The sale and assignment of the leasehold property to the appellant was valid and effective. The writ of *fi. fa.* of the 22nd May 1969 commanding a sale of the movable or immovable property of Wadda could not authorise the sale of property not belonging to Wadda but belonging to the appellant. After the 25th February 1969, subject to obtaining the consent of the Lands Officer to the assignment, the appellant was entitled to require Wadda to assign to him. On the findings both of the learned Chief Justice and of the learned Judge in this case a valid contract for the sale by Wadda of his interest in the land was made with the appellant. There was final completion when Wadda executed the assignment on the 11th August. In purporting to sell the property at the sale by auction on the 20th September as being the property of Wadda the Sheriff was offering for sale property which did not belong to Wadda but which belonged to the appellant.

For the reasons which have been set out their Lordships will allow the appeal and restore the judgment of Mr. Justice Brown-Marke and his order as to costs. As it was George who appealed against that judgment he must pay the appellant's costs in the Court of Appeal and his costs of this appeal.

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In the Privy Council

ALHAJI MALANG KANTEH

v.

THE ATTORNEY GENERAL AND OTHERS

DELIVERED BY

LORD MORRIS OF BORTH-Y-GEST

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