IN THE SUPREME COURT OF NIGERIA

Suit No: FSC289/1961

Petitioner: Ayo Solanke
And
Respondent: Abraham Abed, Mr. Ogunlowo

Date Delivered: 1962-04-27

Judge(s): Sir Adetokunbo Ademola, Unsworth, John Idowu Conrad Taylor

Judgment Delivered

This is an appeal from a decision of Reed, J. in which he dismissed the appellant\'s claim for damages for trespass by his landlord on the grounds that the alleged tenancy agreement was null and void under s.11 of the Land and Native Rights Act (Chapter 105 of the 1948 edition).

Section 11 of the Land and Native Rights Act reads as follows:'

Except as may be otherwise provided by the regulations in relation to native occupiers, it shall not be lawful for any occupier to alienate his right of occupancy, or any part thereof by sale, mortgage, transfer of possession, sub-lease or bequest or otherwise howsoever without the consent of the Governor first had and obtained, and any such sale, mortgage, sub-lease, transfer or bequest, effected without the consent of the Governor, shall be null and void.

There can be no doubt that the defendant had failed to obtain consent to the tenancy as required by s. 11 of the Land and Native Rights Act. In these circumstances the Government were entitled to revoke the Right of Occupancy under s. 12 of the Act, and recover possession in accordance with the terms of the Right of Occupancy. This is not, however, the issue with which we are now concerned. The issue here related to the relationship between the owner of the Right and the person whom the owner had put into possession. Was the defendant entitled to take advantage of his own wrong as against the plaintiff in this action for trespass and allege that the agreement was null and void or illegal'

Counsel for the defendant (the present respondent) argued that he could, because'

(a) the agreement of tenancy is unenforceable and an action for trespass cannot be maintained on an unenforceable contract, or, in the alternative

(b) the agreement was not only unenforceable but also illegal and a party to an illegal contract is entitled to raise the illegality notwithstanding that he is a party to it.

In support of the first point Counsel referred to the case of Delaney v. T.P. Smith Ltd. (1946) 2 All E.r. 283, where it was held that the plaintiff in an action for trespass could not, in the circumstances of that case, rely upon an unenforceable contract of tenancy. The case is, however, distinguishable in that the plaintiff in Delaney\'s case had entered into possession without the consent of the owner who had not been guilty of any wrongful act. In the present case the defendant was at fault in that he had failed to obtain consent to the tenancy and the plaintiff had, unlike the occupier in Delaney\'s case, entered into possession of the premises with the consent of the owner after payment of rent. In my view the defendant in this case cannot be heard as against the plaintiff, to put forward his own wrongful act and say that the agreement was unenforceable because he himself had failed to get the necessary consent under s. 11 of the Land and Native Rights Act.

This leads me to consideration of the question whether the agreement was illegal for, if it be illegal, there is authority for saying that the defendant could rely on his own wrongful act for reasons which are fully set out in Chitty on Contracts, (21st Edition), at page 470. It will, however, be unnecessary to consider whether the principles there set out apply in this

action for trespass if the agreement was not, in fact, illegal, and this must first be considered. The question whether a contract declared void by Statute is illegal has been considered in a number of cases which are referred to in Maxwell on the Interpretation of Statutes, (10th Edition), at page 212, where the position is set out in this way:'

It may, probably, be said that where a statute not only declares a contract void, but imposes a penalty for making it, it is not voidable merely. The penalty makes it illegal. In general, however, it would seem that where the enactment has relation only to the benefit of particular persons, the word \"void\" would be understood as \"voidable\" only at the election of the persons for whose protection the enactment was made and who are capable of protecting themselves, but that, when it relates to persons not capable of protecting themselves, or when it has some object of public policy in view which requires the strict construction, the word receives its natural full force and effect.

The Statute at present under consideration says that it shall be unlawful for the occupier to alienate his Right of Occupancy but the Statute does not provide any penalty for breach of the provision, nor would it appear necessary in the interest of public policy for an agreement of alienation to be treated as illegal. Public policy can be adequately safeguarded by the Government\'s power of revocation and right of re-entry previously mentioned. In these circumstances I would hold that the contract was not illegal. The reference in Maxwell referred to above also deals with the question of a contract being treated as voidable but this issue does not arise in this appeal.

For these reasons I am of the opinion that it was not open to the defendant in the circumstances of this case, to rely upon his own wrongful act so as to allege, as against the plaintiffs that the agreement of tenancy was null and void and unenforceable under s. 11 of the Land and Native Rights Act. The agreement was not illegal.

In the course of argument in this appeal mention was made of a recent decision of the Privy Council in a case from East Africa where the Judicial Committee considered the position under the Kenya Crown Lands Ordinance between the signing of an agreement of alienation and the Governor\'s consent to the alienation. The case is Denning v. Edwardes (1961) A.C. 245, and the Judicial Committee held under the wording of the Kenya law and circumstances of the case that the agreement was not void ab initio, but it remained inchoate pending the consent of the Governor.

The appeal succeeds. There are other issues to be decided in this case and I consider that the proper order is an order for retrial. I would accordingly allow the appeal and order the case to be retried before another Judge of the High Court. The appellant is entitled to costs in this Court which I would assess at 37 guineas. The order as to costs in the High Court is set aside and the costs in that Court should abide the event and be fixed at the conclusion of the further hearing.

Sir Adetokunbo Ademola. C.J.F.

I concur.

John Idowu Conrad Taylor. F.J.

I concur.