

MR SUNDAY ABIGBITE TAIWO
V.

1. SERAH ADEGBORO
 2. SOCIETE GENERAL BANK (NIG) LTD
 3. ALHAJI TIJJANIASHIRU.
- COURT OF APPEAL (KADUNA DIVISION)

CA/K/244/94.

UMARU ABDULLAHI, J.C.A. (Presided)

JAMES OGENYIOGEBE, J.C.A.

MAHMUD MOHAMMED, J.C.A. (Read the Leading Judgment)

MONDAY 14TH, JULY 1997.

APPEAL - Filing of appeal - Need for counsel to advise parties against.

EVIDENCE -Admission - Facts admitted - Treatment of- Whether require further proof.

EVIDENCE - Unchallenged evidence - How treated.

LOCUS STANDI - Party's standing to sue - how determined - What to look at.

LOCUS STANDI - Standing to sue - Issue of- What it involves - Relevant factors court should consider.

MORTGAGE- Mortgagee's power of sale - Exercise of- When court will interfere therewith.

MORTGAGE - Sale of mortgaged property by auction - Non-compliance with Section 19 Auctioneers Law of Kwara State - Effect of.

NOTABLE PRONOUNCEMENT - Need for counsel to be more considerate and advise litigants against filing of futile appeals.

PRACTICE AND PROCEDURE - Admission - Facts admitted - Treatment of.

PRACTICE AND PROCEDURE - Locus standi - Party's standing to sue - How determined - What to look at.

PRACTICE AND PROCEDURE - Standing to sue - Issue of- What it involves -Relevant factors court should consider.

Issues:

1. Whether the 1st respondent as the plaintiff at the trial court had the locus standi to maintain the action.
2. Whether having regard to all the circumstances of the case on the pleadings and the evidence led by the parties in support thereof, the trial Court was right in granting the reliefs sought by the 1st respondent.

Facts:

By a legal mortgage Deed made sometime in 1983 between Adegboro Construction (Nigeria) Limited as the borrower and Mr. Michael Adegboro. (the 1st respondent's husband) as the surety on one part and the 2nd respondent as the lending bank on the other part, the 1st respondents husband in order to secure a loan of N80, 000.00 granted to Adegboro Construction Nigeria Ltd by the 2nd respondent, agreed to mortgage his property, a house in which he and the 1st respondent lived together with their children as security to ensure the repayment of the loan. However, the said 1st respondent's husband died sometime in 1984 without repaying the loan while the 1st respondent and her children who lived in the mortgaged property were not aware of the existence of the transaction with the 2nd respondent bank affecting the property.

Meanwhile, the 2nd respondent, in exercise of its right of sale under the Deed of mortgage, appointed the 3rd respondent an auctioneer, to sell the property by public auction, whereupon the 3rd respondent in pursuance of his instruction to sell the property, visited the property on 16/6/89 and pasted his notice of sale of the property by public auction. The auction was conducted on the 17/6/89 and the property was sold to the appellant for the sum of N140, 000.00.

The 1st respondent on seeing that the house in which she and her children lived had been sold sued the appellant and 2nd and 3rd respondents herein as defendants in the Kwara State High Court, holden at Ilorin challenging the sale by auction the property of her husband mortgaged to the 2nd respondent and sold to the appellant and an order of injunction restraining the 2nd respondent from transferring ownership to the appellant.

At the conclusion of the hearing, the trial Court, in a considered judgment found for the 1st respondent and granted all her reliefs including the setting aside of the sale of the mortgaged property to the appellant

The appellant being dissatisfied appealed to the Court of Appeal.

Held (*Unanimously dismissing the appeal*):

1. *On Issue of locus standi -*

The issue of locus standi is not dependent on the success or merits of the case, but on whether the plaintiff has sufficient interest in the subject matter of the dispute. The question therefore, is whether the person whose standing is in issue is the proper person to request an adjudication of a particular issue, and not whether the issue itself is justifiable. *Fawehinmi v. Akilu* (1987) 4 NWLR (Pt. 67) 797; *Oloriode v. Oyebi* (1984) 1 SCNLR 390; *Adesokan v. Adegorolu* (1997) 3 NWLR (Pt.493) 261 at 278-279 referred to]. (Pp, 233, paras. E-F; 234, para. A).

2. *On Procedure for determining a party's locus standi -*

In order to determine whether a plaintiff has locus standi or not, it is the cause of action as averred in the statement of claim that one looks. From the averment in 1st respondent's statement of claim, she has shown that she has sufficient interest in the property sold by public auction to clothe her with standing to institute her action. Consequently, it is wrong for the appellant to contend, as he did at the trial court, that there being no nexus between the deed of legal mortgage and the 1st respondent, the 1st respondent has no standing to present the action at the trial court. [*Adesanya v. President of Nigeria* (1981) 2 NCLR 358 referred to](Pp. 233, para.F; 234, para. A). Per MOHAMMED, J.C.A at pages 233-234, paras. G-C:

"In the instant case, the 1st respondent having pleaded in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 14, 17, and 21 of the amended statement of claim that she is the widow of the late Adegboro who mortgaged the property jointly developed by them and the same property was sold by auction after the death of her husband while the 1st respondent and her children were still occupying the property, coupled with the fact that her action at the lower court sought reliefs among others of setting aside the sale for having been conducted in violation of section 19 of the Auctioneers Law, I am of the clear view that the 1st respondent had disclosed sufficient interest in the property sold by public auction to clothe her with standing to institute her action. It must be remembered that the issue of locus standi is not dependent on the success or merits of the case but on whether the plaintiff has sufficient interest in the subject matter of the dispute. See *Adesokan v. Adegorolu*

(1997) 3 NWLR (Pt.493) 261 at 278-279. In the present case, the mere fact that the 1st respondent was in possession and occupation of the house in dispute at the time it was sold by the 2nd and 3rd respondents to the appellant on 17/6/89, that alone in my view was enough to have given the 1st respondent a standing to institute an action to challenge the validity of the sale of her late husband's house in which she and her children lived at the time of the sale. Having regard to the facts averred in the statement of claim and reliefs claimed by the 1st respondent, it was quite clear that the 1st respondent was not claiming as a beneficiary of the mortgage deed of which she was not a party. For the foregoing reasons, I hold that the 1st respondent has the locus standi to institute and maintain her claims at the lower court and the learned trial Judge was right in his finding as such."

3. *On Effect of non-compliance with Section 19 of the Auctioneers Law of Kwara State in the sale by auction of mortgaged property-*

Where there is non-compliance with Section 19 of the Auctioneers Law of Kwara State, in the sale of mortgaged property by auction which requires that 7 days notice be given after the notice of sale is pasted, the sale is rendered invalid. In the instant case, the learned trial Judge was right in his finding that the sale by auction of the property by the 3rd respondent in violation of Section 19 of the Auctioneers Law of Kwara State was invalid. [Oseni v. A.I.I.C. Ltd. (1985) 3 NWLR (Pt.11) 229 at 233 - 234 referred to and followed](7>. 235-236, paras F-A)

4. *On Treatment of uncontradicted and unchallenged evidence -*

Where evidence on an issue is unchallenged the trial court would have no alternative but to accept it unless it is of such a quality that it is not worthy of belief. In the instant case, the 1st respondent testified as to when the notice of sale of the mortgaged property was pasted and also when the property was actually sold by auction sale. The 3rd respondent who conducted the auction sale on behalf of the 2nd respondent did not contradict this evidence nor gave contrary credible evidence destructive of the case of the 1st respondent. Therefore, the evidence remains unchallenged and rightly acted on by the trial court. (P. 235, paras. E-F)

5. *On When court may interfere with mortgagee's exercise of power of sale under a mortgage -*

Where a mortgagee in the exercise of his power of sale under mortgage sells the mortgaged property at an under valued price, the court will interfere to set aside the sale as this constitutes evidence of bad faith in the exercise of the said power. (P. 236, paras. C-E).

6. *On Treatment of facts admitted -*

What is admitted need not be proved. In the instant case, since the witness called by the Bank on whose behalf the auction sale was conducted who testified as D.W.3, had agreed in his evidence-in-chief that the value of the property at the time of the auction was far above the value at which it was sold, the finding of the trial court that the property was sold at grossly under value, was without resort even being had to the valuation report, justified. (P. 236, paras. A-C).

7. *On Need for counsel to be more considerate and advise litigant against filing futile appeal -*

Per MOHAMMED, J.C.A. at page 236, paras. E-H:

"I wish to observe in conclusion here that although the record of this appeal shows quite clearly that the mortgaged property which is the subject of the dispute between the parties in this appeal had already been sold to another unnamed party at the cost of N500,000.00 immediately after the judgment the subject of this appeal in 1993, which resulted in the 2nd respondent recovering the sum of N254,000.00 from proceeds of the sale towards repayment of the debt secured by the property, I refused to wade into this development because it took place after the delivery of the judgment being appealed against. Although that development is not part of this appeal, it however shows quite plainly the futility of the hearing of this appeal in 1997 at the time when the subject matter of the appeal, the mortgaged property having been sold since December 1993 is no longer available nor under the control of any of the parties to the appeal to enable this court make any order on its disposition on the determination of the appeal. No wonder, because neither in the reliefs sought in the Notice of Appeal nor in the appellant's brief, did the appellant ask for any relief touching directly on the auction sale of the property declared null and void by the lower court in granting the 1st respondent's reliefs. The question therefore to be asked is whether in the absence of the property it was really worth the trouble for the parties to have embarked on the prosecution of this appeal and the ultimate result of saddling this court with the extra duty of having to hear the appeal, reserve and write this judgment, when in fact a simple and honest legal advice rendered to the parties by their respective learned counsel could have resolved the dispute between them amicably.

“Per ABDULLAHI, J.C.A. at page 237, paras. B-C:

"As my learned brother rightly observed, a little bit of diligent legal advice to the parties by the learned counsel involved could have saved a lot of time, energy and valuable resources of the parties, the learned counsel themselves and indeed, this court; which at the end of the day had to hear, reserve, prepare and deliver this judgment. I urge learned counsel to be a little more considerate in situations like this."

Nigerian Cases Referred to in the Judgment:

Adefulu v. Oyesile (1989) 5 NWLR (Pt. 122) 377
Adesanya v. President (1981) 2 NCLR 358
Adesokan v. Adegorolu (1997) 3 NWLR (Pt.493) 261
Adigun v. Attorney General of Oyo State (1987) 1 NWLR (Pt53) 678
Fawehinmi v. Aldu (1987) 4 NWLR (Pt. 67) 797
Mogaji v. Odofin (1978) 4 SC 91
Moses Ola & Sons v. Bank of the North Ltd. (1992) 3 NWLR (Pt229) 377
Nabhan v. Nabhan (1967) 1 All NLR 47
Oloriode v. Oyebi (1984) 1 SCNLR 390
Oredola Okeya Trading Co. Ltd. v. Attorney General Kwara State (1992) 7 NWLR (pt.254)412
Oseni v. American International Insurance Co. Ltd. (1985) 3 NWLR (pt.11) 229
Union Bank of Nig. Ltd. v. Ozigi (1991) 2 NWLR (pt. 176) 677
Williams v. Dawadu (1988) 4 NWLR (Pt.87) 189

Nigerian Statutes Referred to in the Judgment:

Auctioneers Law of Kwara State, S. 19
Constitution of the Federal Republic of Nigeria, 1979 S. 6(6)(b).

Appeal:

This was an appeal against the decision of the High Court, given in favour of the 1st respondent. The Court of Appeal, in a unanimous decision, dismissed the appeal.

History of the Case:

Court of Appeal:

Division of the Court of Appeal to which the Appeal was brought:

Court of Appeal, Kaduna.

Names of Justices that sat on the appeal: Umaru Abdullahi, J.C.A.(Presided); James OgenyiOgebe, J.C.A; Mahmud Mohammed, J.C.A. (Read the Leading Judgment)

Appeal No: CA/K/244/94

Date of Judgment-Monday, 4th July, 1997

Names of Counsel: Chief Bayo Ojo -for the 1st Respondent

Chief Lambo Akanbi -for the 2nd and 3rd Respondents,

Appellant absent and unrepresented.

High Court:

Name of the High Court: High Court, Ilorin

Name of the Judge: Ibiwoye, J.

Date of Judgment: October 6, 1993.

Counsel:

Chief Bayo Ojo -for the 1st Respondent

Chief Lambo Akamnbi -for the 2nd and 3rd Respondents.

Appellant absent and unrepresented.

MOHAMMED, J.C.A. (Delivering the Leading Judgment): By a Legal Mortgage Deed executed on 20/3/93 between Adegboro Construction (Nigeria) Limited of No. 245 Ibrahim Taiwo Road, Ilorin, Kwara Slate as the borrower and Mr. Michael Adegboro also of No. 245 Ibrahim Taiwo Road, Ilorin as the surety on one part, and Societe General Bank (Nig.) Ltd. of No. 126/128 Broad Street, D Lagos as the lending bank on the other part, Mr. Michael Adegboro (now deceased) in order to secure a loan of N80,000.00 granted to his company by Societe General Bank, agreed to mortgage his property, a house in which he and his wife and children lived to the Bank as security to ensure the repayment of the loan. However Mr. Adegboro died on 16/9/84 leaving the loan still unpaid while his wife and children who lived in the mortgaged property were not aware of the existence of E the transaction with the Bank affecting the property.

Meanwhile the Bank as unpaid mortgagee decided to exercise its right of sale under the Deed of Mortgage by appointing an auctioneer to sell the property by public auction. The auctioneer in pursuance of his instruction to sell the property visited the property on 16/6/89 and pasted his notice of sale of the property by public auction. The auction was conducted on 17/6/89 and the property was sold to one Sunday Adegbite Taiwo for the sum of N140, 000.00. On seeing that the house in which she and her children lived had been sold, Mrs. Serah Adegboro then instituted an action at the Ilorin High Court on 20/6/89 against the Bank, the Auctioneer and the purchaser of the property. The reliefs claimed in the action according to the amended writ of summons and amended statement of claim is as follows:

“1. A declaration that a purported sale by auction of property of M. A. Adegboro (deceased) at Gaa-Akanbi, Ilorin on 17th June, 1989 on behalf of the 1st

defendant by 2nd defendant to a 3rd party is in violent breach of the Auctioneer's Law (Cap. 10) and the Sheriffs and Civil Process Law (Cap 125) and therefore null and void.

2. A declaration that the 2nd defendant (Auctioneer) by letting the H property which is worth N400,000.00 go for a paltry sum of N 140,000.00 is negligent, reckless and had sold in bad faith.
3. An order setting aside the purported sale by auction of the said house.
4. A perpetual injunction restraining the defendants from transferring the title documents or ownership to a 3rd party until the determination of this case."

The last and 4th relief being interlocutory in nature was heard and granted by the trial court before the remaining 3 reliefs went on trial before Ibiwoye J. of the Ilorin High Court of Justice, Kwara State after the exchange of pleadings. In the course of the trial, Mrs. Serah Adegboro as the plaintiff testified in support of B her claims but did not call any other witness. Societe General Bank (Nig) Ltd. as the 1st defendant also called only one witness while the Auctioneer and the purchaser of the property who were 2nd and 3rd defendants respectively each gave evidence in support of their respective cases. At the end of the hearing, the learned trial Judge Ibiwoye J. in a considered judgment delivered on 6/10/93, found for the plaintiff and granted all her reliefs including the setting aside of the sale of the mortgaged property to the 3rd defendant.

The Bank in exercise of whose right of sale the property was sold by public auction and the auctioneer who sold the property who were the 1st and 2nd defendants respectively, apparently had no quarrel with this judgment because not only did they decide not to appeal against it but also decided to team up with the plaintiff in defending the judgment in this appeal as 2nd and 3rd respondents respectively with the plaintiff being the 1st respondent. However, the 3rd defendant as the purchaser of the mortgaged property who was not happy with the judgment of the trial court had appealed against it to this court. Thus, the 3rd defendant who is now the appellant in this appeal has challenged the judgment of the trial court by a notice of appeal dated 25/10/93 containing 10 grounds of appeal.

In accordance with the rules of this court, briefs of arguments were duly filed and served before the appeal came up for hearing on 10/6/97. From the 10 grounds of appeal filed by the appellant, the following 4 issues for determination were identified in the appellant's brief.

- "1. Whether having regard to the amended statement of claim the evidence of the plaintiff/1st respondent thereon, the plaintiff can be said to have the standing to maintain the action or be granted the reliefs endorsed on the amended writ of summons, when the deed of legal mortgage Exhibit D1 was not made for the benefit of the plaintiff nor was she a party thereto.
2. Whether having regard to the uncontroverted evidence of D.W.1 and D.W.2, the learned trial Judge was right to have declared the auction sale null and void under the provisions of section 19 of the Auctioneer's Law moreover when the learned trial Judge misconstrued and misinterpreted the case of the defence especially that of the appellant
3. Whether the learned trial Judge was right in the view he held that the auction price was too low having regard to the valuation price when a sale by public auction like in this case is not governed by the current price of the auctioned property nor its real market value.

4. Whether having regard to the generality of the facts on record was the learned trial Judge right to have entered judgment in favour of the 1st respondent who failed to prove her case and when she abandoned the allegation of fraud which was the fulcrum of her claim."

However, in the 1st respondent's brief of argument, the following 4 issues A were identified for the determination of the appeal. They are:-

- "1. Whether the 1st respondent has the necessary locus standi to maintain this action (as the widow of the deceased title holder resident in the property with her children.
2. Whether the purported sale by Public Auction on 17/6/89 of the property could be held valid in view of the clear and unambiguous provisions of section 19 of the Auctioneer's Law of Kwara State and the evidence before the trial lower court.
3. Whether in view of the time lag between 1980 when Exhibit D2 was prepared and 1989 when Exhibit 2 was prepared the finding of the trial lower court that the auction price of N 140,000.00 was at a gross under value could be faulted (cognizance been taken of the eventual sale price of N500,000.00 in 1993).
4. Whether on the totality of the evidence before the trial court and the position of pleadings, the trial lower court could be said to have wrongly entered judgment for the 1st respondent."

The 2nd and 3rd respondents who filed a joint brief of argument have formulated only 2 issues for the determination of the appeal. The 2 issues are:-

- "1. Whether the plaintiff/respondent (widow of the mortgagor) has locus standi to maintain the suit.
2. Whether the auction exercise was conducted in accordance with the relevant provisions of the law."

Learned counsel to the appellant had also filed a reply brief each in response to some of the arguments advanced in the 1st respondent's brief and 2nd and 3rd respondents' brief respectively but did not appear at the hearing of the appeal which was deemed argued.

Having carefully examined the various issues formulated by the parties in their respective briefs of argument and taking into consideration the substance of the judgment of the trial court being appealed against, I am of the view that there are only 2 real issues for determination in this appeal. These are the issue relating to the standing of the 1st respondent to maintain the action at the trial court and the issue relating to the validity or otherwise of the auction sale of the mortgaged property conducted by the 3rd respondent. These two issues will take care of all the 4 issues formulated in the appellant's and the 1st respondent's briefs of arguments respectively.

The first issue for determination therefore is whether the 1st respondent as G the plaintiff at the trial court had the locus standi to maintain the action. It was submitted for the appellant by his learned counsel that there being no nexus between the deed of legal mortgage and the 1st respondent, the 1st respondent cannot be said to have proved her standing to prosecute the action at the trial court. That not being a party nor a beneficiary of the legal mortgage, the 1st respondent cannot be said to have recognizable interest to protect in the matter. Learned counsel then quoted section 6(6) (b) of the 1979 Constitution of Nigeria and referred to a number of cases notable of which are the leading cases of *Adesanya v. President* (1981) 2 NCLR 358 and *Adigun v. Attorney General of Oyo State* (1987) 1 NWLR (Pt.53) 678 and concluded that the 1st respondent had no locus standi to maintain the action at the lower court particularly when even the learned trial Judge in his judgment did not give any reason for finding the contrary.

For the 1st respondent it was contended that being the only widow of the deceased Michael Adegboro and the fact that the 1st respondent jointly developed the mortgaged property with the deceased Adegboro before the property was mortgaged, the 1st respondent clearly had interest in the property to enable her bring an action at the trial court. That the 1st respondent also led uncontradicted

g evidence that she and her children were in occupation of the property at the time it was sold by auction and as such no reasonable tribunal would have held that she had no locus standi to maintain the suit at the trial court particularly when her claim was to challenge the sale of the house which was done in contravention of section 19 of the Auctioneers Law applicable in Kwara State. Learned counsel to the 1st respondent explained that the 1st respondent did not institute the action to claim

C any benefit under the Deed of Mortgage and for that reason all the arguments of the appellant and the cases cited in support thereof based on this wrong notion, are totally irrelevant in this appeal.

2nd and 3rd respondents have also argued in their brief of argument that the 1st respondent clearly had locus standi to institute the action because her civil rights and obligations were in danger of being infringed having regard to the case

Of *Williams v. Dawodu* (1988)4NWLR (Pl.87)189 at 217. Further relying on the case of *Fawehinmi v. Akilu* (1987) 4 NWLR (Pi. 67) 797 (1987) 2 NSCC 1265 al 1266, learned counsel the 2nd and 3rd respondents concluded that having regard to the circumstances of the instant case, the claims of the plaintiff 1st respondent, the facts as revealed by the evidence, the 1st respondent clearly had locus standi to maintain the suit at the lower court. On the alleged change of stand of the

E respondents in this appeal learned counsel pointed out that as respondents in the appeal, their role is simply to defend the judgment of the lower court, citing the case of *Adefulu v. Oyesile* (1989) 5 NWLR (Pt. 122) 377(1989) 12 SCNJ 44 at 46 to support this contention.

It is trite law that when a party's standing to sue or maintain an action that is locus standi is in issue, the question is whether the person whose standing is in issue is the proper person to request an adjudication of a particular issue and not whether the issue itself is justiciable. See *Fawehinmi v. Akilu & Anor.* (1987) 4 NWLR (Pt.67) 797 and *Oloriode v. Oyebi* (1984) 1 SCNLR 390. Therefore in order to determine the issue of locus standi or standing to sue, all the court has to do is to look at the cause of action as averred in the plaintiffs statement of claim. See *Adesanya v. President of Nigeria* (1981) 2 NCLR 358. The cause of action contained in the statement of claim will disclose facts from which it could be ascertained whether there is infringement of or violation of the civil right and obligation within the requirements of section 6(6)(b) of the 1979 Constitution, of the party which, if established before the court, will entitle the party to relief or remedy.

In the instant case, the 1st respondent having pleaded in paragraphs 1,2,3, 4,5,6,7,8,14,17,and 21 of the amended statement of claim that she is the widow of the late Adegboro who mortgaged the property jointly developed by them and the same property was sold by auction after the death of her husband while the 1st respondent and her children were still occupying the property, coupled with the fact that her action at the lower court sought reliefs among others of setting aside the sale for having been conducted in violation of section 19 of the Auctioneers Law, I am of the clear view that the 1st respondent had disclosed sufficient interest in the property sold by public auction to clothe her with standing to institute her action. It must be remembered that the issue of locus standi is not dependent on the success or merits of the case

but on whether the plaintiff has sufficient interest in the subject matter of the dispute. See *Adesokan v. Adegorolu* (1997) 3 NWLR (Pt.493) 261 at 278-279. In the present case, the mere fact that the 1st respondent was in possession and occupation of the house in dispute at the time it was sold by B the 2nd and 3rd respondents to the appellant on 17/6/89, that alone in my view was enough to have given the 1st respondent a standing to institute an action to challenge the validity of the sale of her late husband's house in which she and her children lived at the time of the sale. Having regard to the facts averred in the statement of claim and reliefs claimed by the 1st respondent, it was quite clear that the 1st respondent was not claiming as a beneficiary of the mortgage deed of which she was not a party. For the foregoing reasons, I hold that the 1st respondent has the locus standi to institute and maintain her claims at the lower court and the learned trial Judge was right in his finding as such.

The second issue for determination is whether having regard to all the circumstances of this case on the pleadings and the evidence led by the parties in support thereof, the learned trial Judge was right in granting the reliefs sought by the 1st respondent

It was argued for the appellant that as a general rule, where a mortgagee exercises his power of sale under a deed of mortgage, only an allegation of fraud can be used successfully to challenge or impeach an otherwise valid exercise of the powers of the mortgagee to sell the property by public auction. That the requirements of section 19 of the Auctioneers Law is that at least 7 days notice must be given to the public before the conduct of the sale. That the words of the section are plain and must be given their clear meaning including the provisions of the penalty of a fine for its contravention. Learned counsel to the appellant then submitted that since the section of the law made no provision for voiding a sale conducted in contravention of the section, the learned trial Judge was wrong in declaring the sale in the present case null and void for non compliance with the section. The case of *Nabhan v. Nabhan* (1967) 1 ANLR 47 at 60 was cited in support of this argument. Learned counsel further contended that once the good faith of the mortgagee has not been assailed as in the present case, there is no valid ground upon which the sale by auction could be declared void on the ground of inadequacy of notice of the auction. The case of *Moses Ola & Sons v. Bank of the* (1992) 3 NWLR (Pt.229) 377 at 391 was cited to support this submission. It was also pointed out by the appellant that the 1st respondent having based her claim mainly on the allegation of fraud and having abandoned that basis of her claim, her claims ought to have been dismissed by the lower court. On the allegation that the house was sold for a price which was grossly under its market value, learned counsel to the appellant had argued that there was no evidence on record that the house was sold at an under valued price because the report Exhibit J-J 2 relied upon by the learned trial Judge was made in anticipation of litigation and that the document, on the authority of *Oredola Okeya Trading Co. Ltd. v. Attorney General Kwara State* (1992) 7 NWLR (pt.254) 412 at 424, ought to be expunged from the record. The appellant finally concluded by accusing the learned trial Judge, of making out a different case for the 1st respondent, because when the 1st respondent abandoned the allegation of fraud as the basis of her claim, having regard to the case of *Mogaji v. Odofin* (1978) 4 SC 91, her claims ought to have been dismissed.

For the 1st respondent however, it was submitted that the auction sale of the house by the 2nd and 3rd respondents to the appellant having been done in clear violation of section 19 of the Auctioneers Law was invalid on the authority of the decision of this court in *Oseni v. AJJ.C. Ltd.* (1985) 3 NWLR (Pt.1) 229 at 233-234. Learned counsel to the respondent observed that all the cases cited and relied upon by the appellant in

support of this issue are not relevant to the present case having regard to the claims of the 1st respondent that the sale by auction was contrary to section 19 of the Auctioneers Law and for this reason the finding of the lower court that the auction sale was conducted in contravention of section 19 of the Auctioneers Law is quite in order. On the question of whether the sale price C of the property at N 140,000.00 as against its current value of N340,000.00 was an under value, learned counsel had submitted that the learned trial Judge was right in relying on the evidence before him including Exhibit 2 in coming to the conclusion that the property was sold at an under valued price. Learned counsel to the 1st respondent observed that this finding is primarily against the 2nd and 3rd respondents who have not appealed against it that on the evidence before him, the learned trial Judge was right in coming to the conclusion that the 1st respondent was entitled to relief.

Mr. Lambo Akanbi for the 2nd and 3rd respondents agreed that the notice of only one day given by the 3rd respondent before the auction sale of the property on 17/6/89, was indeed contrary to the requirements of section 19 of the Auctioneers Law as rightly found by the learned trial Judge. He also conceded that on the evidence before the lower court, the learned trial Judge was right in coming to the conclusion that the price of N140, 000.00 at which the mortgaged property was sold as against its current value then of N340.000.00 was too low.

In the present case, the evidence led by the 1st respondent in support of her claims shows quite clearly that the sale of the mortgaged property by public auction on 17/6/89 was done barely a day after the pasting of the notice of the sale by auction on the property on 16/6/89. The 3rd respondent who conducted the auction sale on behalf of the 2nd respondent did not contradict this evidence nor gave contrary credible evidence tending to show that the notice of sale by auction was given before 16/6/89. Therefore based on the evidence on record, the finding of the learned trial Judge that the auction sale of the property was done in contravention of section 19 of the Auctioneers Law of Kwara State which requires 7 days notice before the sale, is indeed unassailable having regard to the decision of this court in the case of *Oseni v. American International Insurance Co. Ltd.* (1985) 3 NWLR (Pt.1 1) 229 at 234 where Ademola, J.C.A. (as he then was) in resolving similar issue on the non compliance with section 19 of the Lagos State Auctioneers Law which is in pari material with section 19 of the Kwara State Auctioneers Law now under consideration in this appeal, came to the following conclusion:-

"The conclusion therefore I have reached in this appeal is that no valid sale of the appellant's property had taken place on 29th day of February, 1984."

On this authority therefore, the learned trial Judge was right in his finding that the sale by auction of the property by the 3rd respondent in violation of section 19 of the Auctioneers Law of Kwara State was invalid. This finding was quite in order as the 2nd respondent's power of sale under the mortgage deed was not in issue in the action at the lower court

On the question of whether or not the property in question was sold at a price I which was too low, it is significant to note here that even the witness called by the 1 bank on whose behalf the auction sale was conducted appeared to have agreed that the value of the property at the time of the auction on 17/6/89 was far above the value of N140.000.00 at which it was sold. This is because that witness who; testified as D.W.3 clearly said in his evidence-in-chief and not even under cross-examination at page 104 of the record that -

"The value of the house now is N340.000.00."

Based on this evidence of D.W.3 alone without even bothering to rely on the valuation report Exhibit 2, and taking into consideration that the property was indeed sold for only N140,000.00,

the finding of the lower court that the property C was sold at grossly under valued price is quite justified. See the case of Moses Ola & Sons Ltd. v. Bank of the North Ltd. (1992) 3 NWLR (Pt.229) 377 at 391 and Union Bank of Nig. Ltd. v. Ozigi (1991) 2 NWLR (Pt. 176) 677. In other words in the present case, the 2nd respondent Bank having admitted through its own witness that the property was worth N340,000.00 but was sold by its agent at only N140,000.00, the 2nd respondent had virtually conceded that the auction sale was D not conducted in good faith. For this reason, I am of the firm view that in the circumstances of this case, having regard to the claims of the 1st respondent and the evidence on record, the learned trial Judge was perfectly justified in finding for the 1st respondent and in granting all her reliefs. In the result this appeal fails and it is hereby dismissed. The judgment of Ibiwoye J. of 6/10/93, in favour of the plaintiff now 1st respondent is hereby affirmed.

I wish to observe in conclusion here that although the record of this appeal shows quite clearly that the mortgaged property which is the subject of the dispute between the parties in this appeal had already been sold to another unnamed party at the cost of N500,000.00 immediately after the judgment the subject of this appeal in 1993, which resulted in the 2nd respondent recovering the sum of N254,000.00 from proceeds of the sale towards repayment of the debt secured by the property, I refused to wade into this development because it took place after the delivery of the judgment being appealed against. Although that development is not part of this appeal, it however shows quite plainly the futility of the hearing of this appeal in 1997 at the time when the subject matter of the appeal, the mortgaged property having been sold since December 1993 is no longer available nor under the control of any of the parties to the appeal to enable this court make any order on its disposition on the determination of the appeal. No wonder, because neither in the reliefs sought in the Notice of Appeal nor in the appellant's brief, did the appellant ask for any relief touching directly on the auction sale of the property declared null and void by the lower court in granting the 1st respondent's reliefs. The question therefore to be asked is whether in the absence of the property it was really worth the trouble for the parties to have embarked on the prosecution of this appeal and the ultimate result of saddling this court with the extra duty of having to hear the appeal, reserved and write this judgment, when in fact a simple and honest legal advice rendered to the parties by their respective learned counsel could have resolved the dispute between them amicably.

The 1st respondent is entitled to costs against the appellant which I assess at N1, 500.00 (one thousand, five hundred naira only).

ABDULLAHI, J.C.A.: I had the benefit of a preview of the judgment just delivered by my learned brother Mohammed, J.C.A.

I am fully satisfied that my learned brother had adequately treated all the issues that arose for determination in this appeal.

I agree with the reasons given and the conclusion reached. I adopt them as mine. I shall also dismiss the appeal in its entirety and affirm the decision of the lower court.

As my learned brother rightly observed, a little bit of diligent legal advice to the parties by the learned counsel involved could have saved a lot of time, energy and valuable resources of the parties, the learned counsel themselves and indeed, this court; which at the end of the day had to hear, reserve, prepare and deliver this judgment I urge learned counsel to be a little more considerate in situations like this.

I award N1500 costs to the respondent

OGEBE, J.C.A.: I read in advance the lead judgment of my learned brother Mahmud Mohammed J.C.A. just delivered and I agree with his reasoning and conclusion.

The appeal lacks merit and is a waste of precious judicial time. I dismiss it with costs of N1, 500.00 in favour of 1st respondent.

Appeal dismissed