

Doctrine of Incorporation By Reference – Conditions for its Application

In The Supreme Court of Nigeria
Holden at Abuja
On Friday, the 24th day of May, 2024

Before Their Lordships
Kudirat Motonmori Olatokunbo Kekere-Ekun
Mohammed Lawal Garba
Helen Moronkeji Ogunwumiju
Ibrahim Mohammed Musa Saulawa
Tijjani Abubakar
Justices, Supreme Court

SC. 834/2018

Between:

Mrs. Josephine Idongesit Mbat Appellant

And

<ol style="list-style-type: none">1. The Honourable Minister, Federal Capital Territory2. The Federal Capital Territory Administration3. Dr. Adeyinka Taiwo	}	Respondents
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(Lead judgement delivered by Honourable Ibrahim Mohammed Musa Saulawa, JSC)

Facts

The Appellant won the bid for the property known as D7A, Flat 2, Zone D, Apo District, FCT, Abuja, which contained terms of offer dated 13th December 2005, between the Federal Government of Nigeria as the Lessor and the Appellant as the Lessee. Upon expiration of the time the Appellant was expected to make the full and final payment, particularly the third instalment, the 1st and 2nd Respondents gave the Appellant a grace period of six months, but the Appellant still defaulted in making the final payment. Consequently, the 1st and 2nd Respondents withdrew

the offer and terminated the contract arising therefrom. The property was subsequently offered to the 3rd Respondent as a replacement to the property sold to her earlier, which had a defect. The 3rd Respondent accepted the offer by making full payment within the time stipulated in the letter of offer, and was issued a handover note. However, the 3rd Respondent could not take possession of the property as the Appellant had forcefully moved into the property without completing payment and without a handover note.

Given the above circumstances, the Appellant commenced an action against the Respondents at the High Court of the FCT, Abuja in respect of an alleged proprietary and possessory interest over the property which she claimed to have validly purchased from the 1st and 2nd Respondents having won the bid for the said property. The Appellant sought various declaratory and injunctive reliefs against the Respondents. The 3rd Respondent on her part, filed a Counter-claim.

At the end of the trial, the court decided in favour of the Respondents. Aggrieved by the decision, the Appellant unsuccessfully appealed to the Court of Appeal. This is a further appeal to the Supreme Court. At the Supreme Court, the 1st and 2nd Respondents challenged the competence of the Notice of Appeal on five distinct grounds.

Issues for Determination

The Supreme Court adopted all three issues formulated by the Appellant in its determination of the appeal, to wit:

- (a) Whether the learned justices of the Court of Appeal were right when they held that there is no clause in the Letter of Offer (Exhibit P1) incorporating the mortgage financing for the acquisition of the properties to be sold to career civil servants and that there is no clear manifestation of the intention of the parties that the mortgage financing be incorporated by reference in the Letter of Offer?
- (b) Whether from the totality of the documentary evidence before this court, as well as the facts and circumstances that culminated to the present action, the learned justices of the Court of Appeal were right when they held that Exhibit P4 could not be of any assistance to the Appellant because at the time Exhibit P4 was issued, the property had already been sold to the 3rd Respondent?

- (c) Whether the learned justices of the Court of Appeal did not err in law when they held that the findings of the trial court that the 3rd Respondent had discharged the burden on her in proof of her counter claim cannot be faulted and further held that there had been a valid sale of the property No. D7A Flat 7 APO District, Abuja, to the 3rd Respondent by the 1st and 2nd Respondents?

Arguments

Arguing the Preliminary Objection, the 1st and 2nd Respondents submitted that the grounds of appeal contained in the Appellant's Notice of Appeal were of mixed law and fact, and therefore required the leave of court before the appeal could be said to be valid or competent in law. It was submitted that the issue "whether an appeal from the Court of Appeal to the Apex Court is as of right or otherwise" is a constitutional matter by virtue of Section 233(2) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), and only grounds of law alone or any ground stated under Section 233 of the Constitution are appealable without the leave of court. The 1st and 2nd Respondents posited that the appeal is incurably incompetent and ought to be dismissed.

Regarding the substantive appeal, counsel for the Appellant argued that the letter of credit to the winning bidder issued to the Appellant must be construed with the approved guidelines which indicated that the successful bidders are entitled to mortgage access as arranged by the Federal Government. Counsel argued that where documents form part of a long-drawn transaction, such as in the instant case, they should be interpreted not in isolation but in the context of the totality of the transaction in order to fully appreciate their legal purport and impact – **ZUBAIRU v JOSEPH (2016) ALL FWLR (PT. 853) 1682 AT 1718**. He submitted that the Letter of Offer (Exhibit P1) issued to the Appellant cannot be construed without recourse to the Approved Guidelines which is the pivot for the sale of Federal Government Houses in the FCT and which made provision for the mortgage financing for civil servants through the Federal Mortgage Bank for purchase of the houses. He argued further that since the Federal Government breached the contract by its failure to fulfil its promise of mortgage financing, that entitles the Appellant to possession. More so, it was incumbent on the 1st and 2nd Respondents to comply with the extension granted by the Federal Government by Exhibit P4, which extended time till 31st December 2006 for all beneficiaries, and it was wrong for the said Respondents to refuse the payment made by the Appellant within the period of extension granted for the sale of Federal Government Houses. Counsel submitted that failure of the trial court and the Court of Appeal to take cognizance of Exhibit P4 resulted in miscarriage of justice.

The basis of the Respondents' arguments is that the 1st and 2nd Respondents did not breach the contract with the Appellant who admitted failure to make full and final payment within the period stipulated in Exhibit P1. And that the 3rd Respondent proved her Counter-claim at the trial.

Court's Judgement and Rationale

In determining this Preliminary Objection, the apex court held that *in determining whether a ground of appeal involves a question of law or fact, what is paramount is the essence and the reality of the complaint inherent in the ground vis-à-vis the particulars thereof.* Construing the Appellant's grounds of appeal *i.e. [a] on the misapplication of the law by the court below to the clear wordings of Exhibit P4; [b] the misapplication of the law by the Court below to ascertained, undisputed and/or admitted facts,* the Supreme Court found that the appeal was competent and therefore dismissed the Preliminary Objection.

Regarding the first issue on *correctness of the court below in holding that Exhibit P1 did not incorporate the mortgage financing for the acquisition of properties to be sold to career civil servants,* the Supreme Court noted that parties are in agreement that Exhibit P1 (*i.e. the letter of offer*) was freely entered into by the Appellant and the 1st and 2nd Respondents. Exhibit P1 was issued after the Appellant's application and subsequent bid to purchase the property. It was also clear from paragraph 5 of Exhibit P1 that the Appellant's acceptance of Exhibit P1 shall constitute an undertaking on her part to pay the full purchase price (*i.e. the sum of ₦10,503,000.00*) within *one hundred and ninety-four (194) days* – being the closing date. Their Lordships came to the conclusion that Exhibit P1 was therefore, a separate agreement between the aforesaid parties, which was distinct from the loan or mortgage financing agreement which the Appellant claimed was incorporated (by reference) to Exhibit P1. ***It was held that the provisions of Exhibit P1 are clear and that courts cannot impute into the provisions or words of a statute/document, what is not contained in them - PROFESSOR JERRY GANA v SDP (2019) LPELR-47153(SC) AT 27-28.***

Regarding the second issue on *whether the Court below was right in holding that Exhibit P4 did not assist the Appellant's case,* the Supreme Court stated that Exhibit P4 (*i.e. the Federal Government's approved Guidelines in Gazette No. 82 Vol. 92 of 15/8/2005*) was an instrument indicating governmental approval of Federal Government Houses in the FCT for deserving career civil servants. ***The immutable position of law is that the doctrine of "incorporation by reference" does not inure***

as a matter of natural consequences nor as a matter of course. Rather, for the principle to be called in aid, conditions must be shown to exist, to wit: (a) the secondary document must be shown to have been in existence as at when the primary document was made; (b) the primary document must describe with "particularity" the secondary document; (c) the primary document must carry and "express" intention that the secondary should be part of it (words of incorporation) - AWOLAJA v SEATRADE (2002) 4 NWLR (PT. 758) 66 AT 528. Relating the principle to the case at hand, the Supreme Court held that Exhibit P4 came into force after the property (in dispute) was sold to the 3rd Respondent following the Appellant's failure to make full payment (as required under Exhibit P1). Consequently, Exhibit P4 cannot operate retrospectively and it was of no assistance to the Appellant's case. The Appellant cannot hide under the cover of mortgage financing for her inability to make the final payment of the purchase price of the property, having accepted all the terms contained in the letter of offer, he is bound by the terms thereof.

Lastly, on the third issue of *whether the 3rd Respondent discharged the burden of proving her counterclaim*, the Supreme Court noted that **(a)** the 3rd Respondent put in evidence her letter of offer issued by the 1st and 2nd Respondents as regards the purchase of the property (Exhibit D1); and **(b)** the 1st and 2nd Respondents only issued Exhibit D1 to the 3rd Respondent upon failure of the Appellant to pay the full purchase price of the property within the one hundred and ninety-four days stipulated in Exhibit P1.

Their Lordships, therefore, unanimously dismissed the appeal of the Appellant. Parties to bear their respective costs.

Appeal dismissed.

Representation:

Solomon E. Umoh, SAN with Emmanuel Ekong, Esq. for the Appellant.

Betty A. Umegbulem, Esq. for the 1st and 2nd Respondents.

P.B. Daudu, Esq. for the 3rd Respondent.

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