

MICHAEL AROWOLO
V.
CHIEF TITUS IFABIYI
SUPREME COURT OF NIGERIA

SC/70/1995

ABUBAKAR BASHIR WALI, J.S.C. (Presided)
EMANUELOBIOMAOGWUEGBU, J.S.C.
UTHMAN MOHAMMED, J.S.C.
ANTHONY IKECHUKWU IGUH, J.S.C. (Read the Leading Judgment)
UMARU ATU KALGO, J.S.C.

FRIDAY, 15TH FEBRUARY, 2002

ACTION-Limitation of actions-Action founded on fraud- Whether limitation law applies thereto.

ACTION - Limitation of actions — when time begins to run for purpose of.

APPEAL - Evaluation of evidence by trial court - Attitude of appellate court thereto - When it will interfere therewith - When it will not.

APPEAL - Findings of fact - Concurrent findings of fact by High Court and Court of Appeal - Attitude of the Supreme Court thereto - When it will interfere therewith.

EVIDENCE - Evaluation of evidence by trial court - Attitude of appellate court thereto — when it will interfere therewith — when it will not.

EVIDENCE - Proof-Allegation of crime in civil proceedings -Standard of proof required thereof- Section 138(1), Evidence Act - Whether every allegation of crime needs be proved beyond reasonable doubt — Test.

EVIDENCE-Proof-Allegation of crime in civil proceedings -Use of the word "fraudulently" in the pleadings - Whether ipso facto raises issue of crime to require proof beyond reasonable doubt.

IMITATION LAW- Limitation of actions - Action founded on fraud - Whether limitation law applies thereto.

LIMITATION LAW - Limitation of actions - When time begins to run for purpose of.

PRACTICE AND PROCEDURE - Evaluation of evidence by trial court-Attitude of appellate court thereto - When it will interfere therewith - When it will not.

PRACTICE AND PROCEDURE - Findings of fact - Concurrent findings of fact by High Court and Court of Appeal-Attitude of the Supreme Court thereto- When it will interfere therewith.

PRACTICE AND PROCEDURE-Actions - Limitation of actions -Action founded on fraud - Whether limitation law applies thereto.

PRACTICE AND PROCEDURE-Actions - Limitation of actions -When time begins to run for purpose of.

PRACTICE AND PROCEDURE - Pleadings - Use of the word "fraudulently" therein - Whether ipso facto imputes an allegation of crime in a civil suit.

PRACTICE AND PROCEDURE - Proof- Allegation of crime in civil proceedings - Standard of proof required thereof- Section 138(1), Evidence Act - Whether every allegation 'of crime needs be proved beyond reasonable doubt - Test.

WORD AND PHKASES - "Fraudulently " - Use of in pleading. Whether ipso facto imputes an allegation of crime in a civil suit.

Issues:

1. Whether the Court of Appeal was right when it held that the trial court properly evaluated and ascribed probative value to the evidence led at the trial.

2. Whether the respondent proved his case as required by
3. Whether the Court of Appeal was right when it affirmed the decision of the trial court that the statute of limitation did not avail the appellant in the circumstances of this case.
4. Whether the Court of Appeal was right when it affirmed the decision of the trial court that the respondent's case was not based on an allegation of fraud or the commission of a crime which required proof beyond reasonable doubt.

Facts:

According to the respondent in this appeal, sometime in October 1978. He borrowed the sum of N4, 000.00 from the appellant on the condition that he would pay interest at the rate of N1, 000.00 for one year to the appellant. As security for the loan obtained, he surrendered his documents of title to his piece of land with the appellant. The respondent duly repaid the loan of N4.000.00 and the agreed interest of N1, 000.00 in September. 1979 and duly demanded. For the return of his documents of title from the appellant who endlessly made promises upon promises to the respondent that he would return the documents.

Between 1979 and 1987. The respondent persistently made both oral and written demands for the return of his documents of title from the appellant to no avail. He also made reports to diverse persons with regard to the non-return of the said documents by the appellant. It was not until June, 1987 when the respondent threatened to report the matter to the police that the appellant confessed for the first time that he had used the respondent's documents of title to raise a loan for himself from a bank, which was sued as the 2M defendant at the High Court.

Further investigations by the respondent revealed that the appellant had fraudulently used the respondent's documents of title to raise a loan of N 10.000.00 from the bank under the amorphous and fictitious name of Chief Titus Arowolo Ifabiyi and, in the process, executed a deed of mortgage dated 3rd October, 1978 with the respondent's building as security. It was also the case of the respondent that he never knew or consented to his building and documents of title being mortgaged by the appellant to the bank. Consequently, the respondent sued the appellant and the bank jointly and severally and claimed as follows:

- "1. A declaration that the defendants are not entitled to a lien on the plaintiff's building situate at Sabo Oke Ilorin by virtue of an alleged mortgage between the 1st and 2nd defendants in respect of the said building
2. An order that the defendants return to the plaintiff his Permit to alienate land No. 3633. Building plan, site plan, land agreement dated the 1M September. 1977 and tax receipts."

The appellant's case was that when the respondent approached him for a loan of N5, 000.00 he informed the respondent that he had no money but that he could arrange to secure a loan from the bank against the security of the respondent's uncompleted building together with the documents of title relating thereto. The appellant claimed that the respondent agreed to this proposition and surrendered his documents of title to him. The appellant stated further that the respondent was fully in agreement that the N10.000.00 loan should be obtained from the bank and that both the appellant and the respondent would each take N5.000.00 and each party would repay his own loan with interest to the bank and that-he, the appellant, duly obtained the loan of N 10,000.00 out of which he gave N5,000.00 to the respondent. The appellant asserted that the respondent had failed to pay his own portion of the loan with interest and that the respondent was fully aware that his documents of title were going to be used for the purpose of obtaining the loan of N10.000.00 from the bank. He admitted that he executed a mortgage deed with the bank. The appellant contended at the trial that the respondent's action was statute-barred because it was commenced outside the six years period limited therefor.

The bank, for its own part, confirmed that the respondent's documents of title were used as security to obtain a loan of N10, 000.00 by the appellant from it. The bank explained that the loan had not been liquidated. The bank asserted that the documents in issue would remain with it until the loan was fully repaid by the appellant. The bank admitted that it did not know the respondent and that it was the appellant who applied for the loan. It described as untrue that the respondent was known to the bank and confirmed that the loan transaction was between the appellant and itself.

At the subsequent trial, all the parties testified on their own behalf and the appellant called one witness. Several exhibits were also tendered by the respondent and the bank.

At the conclusion of hearing, the trial court was satisfied with the case that was presented by the respondent as against that of the appellant which it expressly rejected. It also held that the respondent's action was not statute-barred because the respondent only became aware in 1987 of the use of his documents of title as security for a loan taken by the appellant. Consequently, the trial court found that the respondent had proved his case and granted his claims.

The appellant was dissatisfied with the decision of the trial court and he appealed to the Court of Appeal which in a unanimous decision agreed with the findings of fact of the High Court and dismissed the appeal.

Aggrieved by the decision of the Court of Appeal, the appellant further appealed to the Supreme Court.

Held (Unanimously dismissing the appeal):

1. On Whether Statute of Limitation applies in cases founded on fraud -

The Statute of Limitation does not apply in cases of concealed fraud so long as the party defrauded re-mains in ignorance of the fraud without any fault of his own. In the instant case, the High Court and the Court of Appeal both found that the respondent was totally unaware that the documents he pledged with the appellant had been fraudulently used to secure a loan by the appellant from a bank and that the respondent did not know of the transaction between the appellant and the bank until June, 1987 consequent upon which he filed his suit in September, 1987. In the circumstance, the Statute of Limitation was inapplicable to bar the respondent's action. (Pp. 377, paras.E-F; 378, paras. C-E) Per IGUH, J.S.C. at pages 377-378, paras. B-D: "It is clear that the respondent only became aware for the first time in June, 1987 that the appellant surreptitiously and fraudulently made use of the respondent's title documents to mortgage the respondent's house for a loan from the 2nd defendant Bank. The respondent exactly three months thereafter filed the present action against both the appellant and the 2nd defendant bank. It seems to me clear under such circumstance that in equity, no length of time can be a bar to relief particularly in a case, such as the present, where concealed fraud is involved and no laches on the part of the person defrauded, in this case, the respondent, is established.

The above proposition of law was succinctly laid down in the case of *Bulli Coal Mining Co. v. Patrick Hill Osborne and Another* (1899) A.C. 351 at 363 (P.C.) where Lord James of Hereford delivering the judgment of Her Majesty's Privy Council in England put the matter thus: -

'Now it has always been a principle of equity that no length of time is a bar to relief in the case of fraud, in the absence of laches on the part of the person defrauded. There is, therefore, no room for the application of the Statute (of Limitation) in the case of concealed fraud, so long as the party defrauded remains in ignorance without any fault of his own.' (Words in brackets supplied for clarity) By way of elucidation, the noble Lord dealing with the rationale behind this principle of law went on: -

"The contention on behalf of the appellant that the statute is a bar unless the wrongdoer is proved to have taken active measures in order to prevent detection is opposed to common sense as well as the of equity. Two men, acting independently, steal a neighbor's coal. One is so clumsy in his operations, or so incautious, that he has to do something more in order to conceal his fraud. The other chooses his opportunity so wisely, and acts so warily, that he can safely calculate on not being found for many a long day. Why is the one to go scot-free at the end of a limited period rather than the other? It would be something of a mockery for courts of equity to denounce fraud as "a secret thing", and to profess to punish it sooner or later, and then to hold out a reward for the cunning that makes detection difficult or remote.

'I have given very close attention to the above observations of the learned Lord James of Hereford and must confess that I entirely agree with them as an accurate statement of the law on the subject. It is obvious from the concurrent findings of both courts below that the respondent was totally unaware that the documents he pledged with the appellant under circumstances lucidly testified to by him were surreptitiously used to secure a loan by the appellant from the 2nd defendant Bank. This surreptitious and unauthorized use of the respondent's title documents by the appellant was evidently a clear case of concealed fraud by the appellant against the unsuspecting respondent."

2. *On when time begins to run for purposes of limitation law -*
Time starts to run for the purpose of limitation of actions from the day the cause of action arose. In the instant case, the cause of action arose in June, 1987 when after continuous refusal by the appellant to return his documents to him, and he threatened to report the matter to the police, the respondent became aware for the first time that the appellant had used his land documents as security for a loan taken by the appellant. Then-alter, the respondent filed his suit in September, 1987, a period of 3 months' du-ration. In the circumstance, the respondent was not caught by the Statute of Limitation 1623 of England relied upon by the appellant, and which stipulates a limitation period of six years. (P.383, paras. A-D)
3. *On Standard of proof of crime where in issue in civil proceedings -*
Civil cases are decided on the preponderance of evidence or the balance of probabilities. However, by virtue of section 138(1) of the Evidence Act. If the commission of a crime by a party to any proceeding is directly in issue in any proceeding, civil or criminal, it must be proved beyond reasonable doubt. In the instant case, fraud which is a crime was never made the foundation of the respondent's case, whether from the pleadings or from his evidence before the court. He could easily prove his case, as he did, without alleging or proving fraud notwithstanding the fact that the adverb "fraudulently" was grammatically used to de-scribe the appellant's conduct or motive in the trans-action. In the circumstance, the respondent was not required to prove his case beyond reasonable doubt but on the balance of probabilities which he did [Ikohi v. Oh (1962) 1 SCNLR 307; Mogaji v. Odofin (1978) 4 S.C. 91; Nwankwerc v. Adewnmimi (1967) NMLR 45 referred to.] (Pp. 380-381, paras. E-B; 383, paras. E-G)
4. *On Whether every allegation of crime in civil proceedings must be proved beyond reasonable doubt -*
The provision of section 138(1) of the Evidence Act which prescribes proof beyond reasonable doubt of an allegation of crime in civil or criminal proceedings only comes

into play where the commission of a crime by a party is directly in issue in the proceedings, and not otherwise. In this case, the respondent's case was not founded on crime and therefore proof beyond reasonable doubt under section 138(1) of the Evidence Act

cannot apply. (P.3S1, paras. A-C)

5. On whether use of the word "fraudulently" in a civil suit necessarily raises allegation of crime –

IGUH, J.S.C at pages. 380-381, paras. H-C:

"I need perhaps add in the above regard that where a strong language is employed to describe one's conduct or motive in a transaction as was done in the present case by the use of the word "fraudulently", that does not ipso facto convert the basis of a claim to a crime. See *Godwin Nwankwere v. Joseph Adcwunmi* (1967) NMLR 45. I therefore entertain no doubt that the standard of proof required in the present case must be the balance of probability or preponderance of evidence and not on the basis of proof beyond reasonable doubt as provided for under section 138(1) of the Evidence Act. The application of the provisions of section 138(1) of the Evidence Act only comes into play where the commission of a crime by a party is directly in issue in any proceeding, civil or criminal, and not otherwise. I am in complete agreement with learned counsel for the respondent that the respondent's case was not founded on crime and proof beyond reasonable doubt under section 138(1) of the Evidence Act, 1990 cannot therefore apply in the present case."

6. On Attitude of appellate court to evaluation of evidence by trial court -

The evaluation of evidence and the ascription of probative value to such evidence are the primary functions of the court of trial which saw, heard and assessed the witnesses as they testified at the trial in the witness box. Where such court of trial unquestionably evaluates the evidence before it and justifiably appraises the facts, it is not the business of an appellate court to substitute its own views for those of the trial court. What the appellate court ought to do in such circumstance is to find out whether there is any evidence on which the trial court could have acted. Once there is such evidence on record before the trial court from which it arrived at its findings of fact, the appellate court cannot interfere. In the instant case, the trial court properly evaluated the evidence adduced by the parties before it. [*Akpagbue v. Ogu* (1976) 6 S. C. 63; *Odofin v. Ayoola* (1984) 11 S.C. 72; *Amadi v. Nwosu* (1992) 5 NWLR 273; *Woluchem v. Gudi* (1981) 5 S. C. 291 referred to.] (P372, paras. D-G)

7. On Attitude of the Supreme Court to concurrent finding of fact by the High Court and the Court of Appeal –

The Supreme Court will not interfere with the concurrent findings of fact of both the trial court and the Court of Appeal on essentially issues of fact except there is established special circumstances such as a miscarriage of justice or violation of some principles of law or procedure. In the instant case, no special circumstances exist to warrant the setting aside of the concurrent findings of fact of both the High Court and the Court of Appeal to the effect that the respondent proved his case against the appellant. [*NICON v. Power and Industrial Engineering Co. Ltd.* (1986) 1 NWLR (Pt.14) 1; *Mora v. Okonkwo*(1987) 3NWLR (Pt 60) 314 *igwego v. Ezeugo* (1992),6NWLR (Pt.249)561; *Kodilinye v. Odu* 2 WACA 336; *Woluchem v. Gudi* (1981) 5 S.C. 291; *Mogaji v. Odofin*, (1978) 4 S.C. 91 referred to.] (Pp. 374, paras. E-H; 383, paras. G-H)

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Nigerian Cases Referred to in the Judgment:

Kodilinye v. Odu (1935) 2 WACA 336

Ajasin v. Omoboriowo (1984) 1 SCNLR 108

Akpagbue v. Qgu (1976)6 S.C 63

Amadi v. Nwosu (1992) 5 NWLR (Pt.241) 273

Igwego v. ezeugo.(1992) 6 NWLR (Pt 249)561

Ikoku v. Oli (1962) 1 SCNLR307

Mogaji v. Odofofin (1978) 4 S. C. 91

Nwangwu v Okonkwo (1987) 3 NWLR (Pt 60) 314

Nicon v. power and Industrial Engineering Co. Ltd. (1986) 1NWLR (pt. 14) 1

Nwankwere v. Adewunmi (1967) NMLR 45

Nwobodo v. Onoh (1984) 1 SCNLR 1

Odofofin v. Ayoola (1984) 11 S.C. 72

Woluchem v. Gudi (1981) 5 S.C. 291

Foreign Case Referred to in the Judgment:

Bulli Coal Mining Company v. Osborne (1899) A.C. 351

Nigerian Statute Referred to in the Judgment:

Evidence Act, Cap. 112, Laws of the Federation of Nigeria 1990.S. 138(1)

Foreign Statute Referred to in the Judgment:

Statute of Limitation of England, 1623

Appeal:

This was an appeal against the decision of the Court of Appeal; which dismissed the appellant's appeal against the judgment of the High Court granting the respondent's claims. The Supreme Court]: in a unanimous decision, dismissed the appeal.

History of the Case:

Supreme Court:

Names of Justices that sat on the appeal: Abubakar Bashii Wali. J.S.C. (Presided);

Emanuel Obioma Ogwuegbu, J.S.C.; Uthman Mohammed, J.S.C.; Anthony

Ikechukwu Iguh. J.S.C. (Read the Leading Judgment); Umaru Atu Kalgo. J.S.C.

Appeal No.: S.C.70/1995

Date of Judgment: Friday, 15th February, 2002

Names of Counsel: A.O. Adelodun, Esq. (with him, S.A. Isan) -for the Appellant

Chief S.F.Odeyemi -for the Respondent.

Court of Appeal:

Division of the Court of Appeal from which the appeal was brought: Court of Appeal, Kaduna

Names of Justices that sat on the appeal: Umaru Abdullah J.C.A. (presided and read the leading judgment); muritala aremu okunola, J.C.A.

Appeal No.: CA/K/61/92

Date of Judgment: Thursday, 13th October, 1994

Names of Counsel: Y.O. Alii, Esq. -for the Appellant

Chief S. F. Odeyemi -for the Respondent

High Court:

Name of the High Court: High Court of Kwara State, Ilorin

Name of the Judge: Ibiwoye. J.

Suit No.: KWS/222/87

Date of Judgment: Thursday, 21st September, 1989

Names of Counsel: Chief S.F. Odeyemi -for the Plaintiff

Y.O. Alli, Esq. -for the 1st Defendant

Duro Adeyeye, Esq. -for the 2nd Defendant

Counsel:

A.O. Adelodun, Esq. (with him, S.A. Isan) -for the Appellant.

Chief S.F. Odeyemi -for the Respondent.

IGUH.J. S. C. (Delivering the Leading Judgment): By a writ of summons issued on the 14th day of September, 1987, in the Ilorin Judicial Division of the High Court of Justice, Kwara State, the plaintiff who is the respondent herein instituted an action jointly and severally against the 1st defendant, who is now the appellant, and the 2nd defendant claiming as follows:

1. A declaration that the defendants are not entitled to a lien on the plaintiff's building situate at Sabo Oke, Ilorin by virtue of an alleged mortgage between the 1st and 2nd defendants in respect of the said building.
2. An order that the defendants return to the plaintiff, his Permit to Alienate land No. 3633, building plan, site plan, land agreement dated the 1st September, 1977 and tax receipts.

Pleadings were ordered in the suit and were duly settled, filed and exchanged.

The case for the plaintiff is that sometime in the month of October, 1978, the 1st defendant lent the sum of N4, 000.00 to the said plaintiff to enable him complete the construction of his building Sabo Oke, Ilorin. As security for this loan, the plaintiff surrendered his documents of title now claimed to the 1st defendant. It was also a condition of the loan that the plaintiff shall pay interest at the rate of N1, 000.00 for one year to the 1st defendant in respect of the transaction.

As repayment of the loan with the accrued interest was due, on or about September, 1979, the plaintiff in fulfillment of the terms of the agreement paid N5, 000.00 to the 1st defendant whereof N4, 000, 00 was the principal amount borrowed and N1.000.00 represent the agreed interest thereon for one year. After payment of the said N5.000.00, the plaintiff duly demanded for the return of his documents of title from the 1st defendant who endlessly made promise upon promises to the said plaintiff that he would return the documents.

Between 1979 and 1987. The plaintiff persistently made both oral and written futile demands for the return of his documents from the 1st defendant. He also made reports to diverse persons with regard to the non-return of the said document by the 1st defendant. It was not until in 1987 when the plaintiff threatened to report matter to the Police that the 1st defendant, to the plaintiff's astonishment, confessed for the first time that he had used the plaintiff's said documents to raise loan for him from the 2nd defendant bank.

Further investigations by the plaintiff disclosed that the 1st defendant had fraudulently used his building and documents to raised a loan of N10, 000.00 from the 2nd defendant bank under the amorphous and fictitious name, Chief Titus Arowolo Ifabiyi, and, in the process, executed a deed of mortgage dated the 3rd October, 1978 with the plaintiff's said building as security. The plaintiff claimed that he never knew or consented to his building and document of title being mortgaged by the 1st defendant to the 2nd defendant to the 2nd defendant bank.

The 2nd defendant, for its own part, confirmed that the plaintiff's documents were used as security to obtain a loan of N1, 000, 00 By the 1st from its bank. It explained that the loan had not been liquidated as there remained outstanding debit balance of N55.646.36 being the principal

amount lent together with interest that had accumulated over the years. The 2nd defendant Bank asserted that the documents in issue would remain with it until the said outstanding debit balance was fully settled by the 1st defendant. The bank frankly admitted that it did not know the plaintiff and that it was the 1st defendant who applied for the loan and that an account was opened for him in that regard. It described as untrue that the plaintiff was known to the bank. It confirmed that the loan transaction was between the 1st and 2nd defendants only.

The 1st defendant's position is a total denial of the plaintiff's claims. He claimed that when the plaintiff approached him for a loan of N5,000.00, he informed the plaintiff that he had no money but that he could arrange to secure a loan from the 2nd defendant bank against the security of the plaintiff's uncompleted building together with the documents of title relating thereto. The 1st defendant claimed that the plaintiff agreed to his proposition and surrendered his documents of title to him. The 1st defendant stated that the plaintiff was fully in agreement that the N10,000.00 loan should be obtained from the 2nd defendant bank and that each of them would take N5,000.00 and repay his own loan with interest to the bank. He duly obtained the loan of N10,000.00 from the bank, took N5,000.00 out of it and gave the balance of N5,000.00 to the plaintiff. The 1st defendant asserted that the plaintiff had failed to pay his own portion of the loan with interest. He claimed that the respondent was fully aware that his documents of title were going to be used for the purpose of obtaining the loan of N10,000.00 from the bank. He admitted that he executed a mortgage deed with the 2nd defendant bank.

At the subsequent trial, all the parties testified on their own behalf and the 1st defendant called one witness. Several exhibits were also tendered by the plaintiff and the 2nd defendant bank. At the conclusion of hearing, the learned trial judge, Ibiwoye, J, after a careful review of the evidence on the 21st day of September, 1989 found for the plaintiff. He declared:-

“.....the 1st defendant merely used a clever device on the plaintiff to obtain exhibits 1, 2, 3 and 5 and secured a loan with the documents from the 2nd defendant. To my plaintiff has proved to the court that he is completely ignorant of the transaction between the 1st and 2nd defendants. I am of the view that it will not be in the best interest of justice to make the plaintiff a victim of a transaction he knows nothing of. For the foregoing reasons I am convinced that the plaintiff has proved his case to the satisfaction of the court. As such I hold that the plaintiff is entitled to the reliefs he sought and I give judgment for the plaintiff. Consequently I declare that the defendants are not entitled to a lien on the said plaintiff's building by virtue of the said mortgage deed. The defendants are hereby ordered to return to the plaintiff his (plaintiff) Permit to Alienate Land No. 3633, building plan, site plan, land agreement dated 1/9/77 and tax receipts.”

Dissatisfied with this decision of the trial court, the 1st defendant lodged an appeal against the same to the Court of Appeal, Kaduna Division which court in a unanimous decision on the 13th day of October, 1994, dismissed the appeal and affirmed the decision of the trial court. It concluded thus:

"It is my view that the evidence adduced by the respondent at the trial which in fact was accepted by the trial Judge is credible enough to entitle him to the declaration granted to him by the trial court. I have no reason to interfere with that finding.

On the whole, I find no merit in this appeal. The appeal fails and it is accordingly dismissed.

The decision of Ibiwoye J. dated 21/9/89 is hereby affirmed. I award N1,000,00 costs in favour of the respondent."

Aggrieved by this decision of the Court of Appeal, the 1st defendant has further appealed to this court. I shall hereinafter refer to the 1st defendant and the plaintiff in this judgment as the appellant and the respondent respectively.

Eight grounds of appeal were filed by the appellant against this decision of the Court of Appeal. It is unnecessary to reproduce them in this judgment. It suffices to state that the appellant, pursuant to the rules of this court filed his brief of argument in which three issues were identified for the determination of this appeal. These are set out as follows:

- "1. Whether the court below was right to have held that the trial court properly evaluated and ascribed probative value to the evidence led at the trial and whether the respondent proved his case as required by law or whether he discharged the onus of proof placed on him by law.
2. Whether the Court of Appeal was right to have endorsed the view of the trial court that the statute of limitation did not avail the appellant in the circumstances of this case.
3. Whether the Court of Appeal was right to have agreed with the trial court that the case of the respondent was not founded on an allegation of fraud or commission of crime which called for proof beyond reasonable doubt and whether the respondent could succeed on his claim if the allegation of fraud is expunged from his claim."

The above three issues were adopted by the respondent, in his own brief of argument as properly arising for the consideration of this appeal.

At the oral hearing of the appeal learned leading counsel for the appellant, A. O. Adelodun Esq. adopted the brief of argument filed on behalf of the appellant and highlighted the more important submissions therein made. His main contention under issue 1 is that both the trial court and the court below were wrong to have failed to evaluate properly the pieces of evidence tendered by the appellant. He argued that all the learned trial Judge did was to reproduce the evidence that was led at the trial without more and that he made no findings of fact on the salient issues that arose for consideration in the suit before his application of the law to the case. In particular, learned counsel argued that there was no finding on whether or not the loan had been repaid by the respondent to the appellant to warrant the return of the documents to the said respondent. He did however concede that none of the appellant's grounds of appeal specifically covered this complaint of the appellant that there was no finding on the issue of the repayment of the loan by the respondent.

Learned counsel for the respondent, Chief S. F. Odeyemi, in his reply on issue 1 submitted that the two courts below carefully evaluated the facts and the evidence before the court and held, rightly in his view that the respondent was entitled to judgment. He argued that the appellant failed to establish any special circumstance why this court should disturb the concurrent findings of the two court, below. He contended that from the totality of the findings of the learned trial Judge as affirmed by the court below, the respondent's version of the transaction between the appellant and himself was fully considered and accepted as established. This is as against the appellant's version which was at complete variance with that of the respondent. He stressed that the appellant's version of the transaction in issue was expressly rejected by the trial court and that the said

rejection was affirmed by the court below. He submitted that from the trend of the judgment of the trial court, it could not be doubted that the fact of the repayment of the principal loan of N4,000.00

with the accrued interest of N 1,000.00 by the respondent to the appellant was fully complied with as agreed to by the parties hence it proceeded to enter judgment for the respondent for the return of

his documents of title which the appellant was unlawfully withholding. He urged the court to resolve issue 1 against the appellant.

It is trite law that the evaluation of evidence and the ascription of probative value to such evidence are the primary functions of the court of trial which saw, heard and assessed the witnesses as they testified at the trial in the witness box. It is equally basic that where Such court of trial unquestionably evaluates the evidence before it and justifiably appraises the facts, it is not the business of the Court; of Appeal to substitute its own views for those of the trial court. What the Court of Appeal ought lo do in such circumstance is to find out whether there is any evidence on which the trial court could have acted once there is such evidence on record before the trial court from which it arrived at its findings of fact, the appellate court cannot interfere. See *Akpagbue v. Ogu* (1976) 6 S.C. 63, *Odojin v. Ayoola* (1984) 11 S.C. 12, *Amadi v. Nwosu* (1992) 5 NWLR (Pt.241) 273 at 280, *Woluchem v. Gudi* (1981)5 S.C. 291 at 320 etc. The question now is whether the trial court properly evaluated the evidence before it and appropriately ascribed probative value thereto, and, in particular, whether or not it made any finding on or was satisfied that the respondent duly repaid his loan of N4,000.00 with the agreed interest of N 1,000.00 to the appellant as the respondent claimed.

In this regard, I have already set out in some detail the case as presented by the parties before the trial court. To put it briefly but at he risk of repetition, the respondent's case is that in October 1978,the appellant lent him the sum of N4.000.00 with interest at the rate of 1,000.00 for one year. As security for this loan, the respondent surrendered certain documents, the subject-matter of this action to t appellant returnable on his repayment of the loan- The principal loan with the agreed interest was duly repaid to the appellant by the respondent in September, 1979 whereupon the respondent demanded the return of his title deeds from the appellant without success hence this action.

The appellant's defence is a total denial of the respondent's claim Again. briefly, his case is that both the respondent and himself jointly agreed to borrow and did borrow the sum of N 10,000.00 from the second defendant Bank on the security of the respondent's building, title deeds and/or documents. He claimed that the respondent failed to repay his half share of the loan to the bank. In particular he stated that the respondent was fully aware that his house and documents of title were used as security for the mortgage-transaction with the bank.

It is not in dispute that the trial court fully and extensively reviewed the two versions of the transaction between the parties as presented by them. Indeed, learned counsel for the appellant in his brief of argument frankly conceded that the learned trial Judge did reproduce in paraphrase form the various versions of the transaction between the parties as presented before the court. It is also plain from the record of proceedings that the trial court upon a close consideration of the aforesaid conflicting versions of the transaction between the parties adduced reasons why he was satisfied with the case that was presented by the respondent as against that of the appellant which he expressly rejected. Said he:-

“.....the 1st defendant merely used a clever de vice on the plaintiff to obtain exhibits 1,2,3, and 5 and secured a loan with the documents from the 2nd defendant. To

my mind the plaintiff has proved to the court that he is completely ignorant of the transaction between the 1st and 2nd defendants. I am of the view that it will not be in the best interest of justice to make the plaintiff a victim of a transaction he knows nothing of”

The learned trial Judge then concluded:-

“For the foregoing reasons I am convinced *that the plaintiff has proved his case to the satisfaction of the court.* As such I hold that the plaintiff is entitled to the reliefs he sought and I give judgment for the plaintiff.” (*Italics supplied for emphasis*)

And I ask myself whether it can be suggested with any degree of seriousness that the learned trial Judge was not satisfied with the respondent's version of the transaction between the appellant and himself and that he duly repaid the principal amount he borrowed with interest to the appellant as he claimed. I think not. This is because his claim before that court was precise and clear. The trial court in no mistaken terms was satisfied that the respondent had established the case he presented before it. It is plain that the learned trial Judge in the clearest possible terms had accepted the respondent's version of the transaction between him and the appellant and rejected the appellant's version which he described as a "clever device" on the part of the said appellant to obtain the respondent's title documents to secure a personal loan from the 2nd defendant bank. I think the Court of Appeal was clearly right when on this issue it observed thus:

"In the circumstances, I cannot subscribe to the complaint of the learned counsel for appellant that the learned trial Judge did not review and evaluate the evidence of the parties and failed to make any findings of facts on the evidence."

This court will not interfere with the concurrent judgments or findings of both the trial court and the Court of Appeal on essentially issues of fact except there is established special circumstances such as a miscarriage of justice or violation of some principles of law or procedure. See *National Insurance Corporation of Nigeria v. Power and Industrial Engineering Co. Ltd.* (1986) 1 NWLR (Pt. 14) 1 at 36, *Nwagwu v. Okonkwo* (1987) 3 NWLR (Pt. 60) 314 at 32, *Igwego v. Ezeuko* (1992) 6 NWLR (Pt. 249) 561 at 574 etc. No such special circumstance to warrant setting aside this concurrent finding of fact of both the two courts below has been established by the appellant. Issue 1 must accordingly be resolved against the appellant.

The question posed with regard to issue 2 is whether the Court of Appeal was right to have endorsed the view of the trial court that the English Statute of Limitation, 1623 did not avail the appellant. It is the contention of the appellant that the respondent's action was caught by the said statute and that it is therefore statute barred. The appellant's case is that there was evidence from the respondent himself that the transaction which is the subject-matter of the suit took place in 1978. The action that gave rise to this proceeding was filed on the 7th September, 1987, well over 6 years from the said 1978. The appellant therefore argued that the respondent's suit was statute barred.

The respondent, for his own part, contended that his action was not statute barred in that although the transaction between the parties took place in 1978, the facts constituting the cause of action in this suit did not manifest themselves until in 1987 when the respondent threatened to report the appellant to the Police whereupon the said appellant confessed for the first time and to the respondent's bewilderment that he had used the documents in issue to raise loan for himself from the 2nd defendant bank. The respondent's action was filed in the same 1987 immediately after the true facts constituting the cause of action in the suit were brought to his

knowledge by the appellant. In such circumstances, it was submitted that the respondent's action cannot be statute barred. In this regard, the trial court observed thus:-

"On the question of whether or not this suit is statute barred, the submission of Mr. Ali learned counsel for the 1st defendant that the action of the plaintiff is statute barred has no place in the circumstances of this case. It is obvious that the plaintiff was unaware that his documents were used to secure a loan from the 2nd defendant as revealed by the evidence of the plaintiff himself. In the absence of anything to the contrary the case of *Bulli Coal Mining Company v. Patrick Hill Osborne & Another (1899) A.C. 351 at 363* cited by Chief Odeyemi, learned counsel for the plaintiff is most appropriate."

It went on: -

"As the record shows in our present case on hand, the plaintiff cannot be said to be guilty of any laches and as such the 1st defendant cannot also be allowed to take advantage of his dubious conduct towards the plaintiff. I therefore agree with Chief Odeyemi that the transaction between the plaintiff and the 1st defendant is merely a pledge which cannot be statute barred. Since it was only in June, 1987 that the plaintiff became aware that his document was with the bank deposited as security for a loan, the plaintiff cannot be expected to institute on a cause unknown to him. I am therefore in full agreement with the learned counsel for the plaintiff that the plaintiff's case is not statute barred since it is a transaction in respect of title to land. Since the evidence of the plaintiff shows that he has been worrying the 1st defendant for his documents without success, I wonder what further evidence Mr. Ali required from the plaintiff to show that there was concealment. It is therefore my considered view that this court has jurisdiction to entertain this case. The plaintiff cannot be rightly said to have slept over his right....."

The Court of Appeal, for its own part, after a careful consideration of the issue commented thus:-"It is clear that the main reason given by the learned trial Judge in his finding that the action of the respondent was not statute barred was that the respondent only became aware for the first time, that his documents were used by the appellant to secure a loan from the bank in June 1987. In the circumstances, the action instituted in September, 1987 could not be caught by a Statute of Limitation."

It concluded: -

"I very much share the view of the learned trial Judge, that since the respondent only became aware that the appellant used the respondent's document to secure a loan from the bank in June 1987. the action filed by the respondent in September 1987 could not have been caught by the Statute of Limitation Act of 1963. The action is not statute barred."

I have given the above reasoning of the Court of Appeal on the issue of whether or not the respondent's present action is statute barred a close study and confess that I can find no reason to fault the same. On the finding of the learned trial Judge which was affirmed by the court below, it is plain that after repayment by the respondent to the appellant of the loan of N5,000.00, the respondent consistently made demands, both oral and written, for the return of his documents from the appellant without success. It was not until in June 1987 when the respondent threatened to report the matter to the Police that the appellant for the first time confessed his use of the respondent's house and documents to raise loan for himself from the 2nd defendant bank. It was following this confession that the respondent was obliged to file the present action against the appellant in September, 1987.

It is clear that the respondent only became aware for the first time in June, 1987 that the appellant surreptitiously and fraudulently made use of the respondent's title documents to mortgage the respondent's house for a loan from the 2nd defendant Bank. The respondent exactly three months thereafter filed the present action against both the appellant and the 2nd defendant bank. It seems to me clear under such circumstance that in equity, no length of time can be a bar to relief particularly in a case, such as the present, where concealed fraud is involved and no laches on the part of the person defrauded, in this case, the respondent, is established.

The above proposition of law was succinctly laid down in the case of *Bulli Coal Mining Co. v. Patrick Hill Osborne and Another* (1899) A.C. 351 at 363 (PC) where Lord James of Hereford delivering the judgment of Her Majesty's Privy Council in England put the matter thus: -

“Now it has always been a principle of equity that no length of time is a bar to relief in the case of fraud, in the absence of laches on the part of the person defrauded. There is, therefore, no room for the application of the Statute (of Limitation) in the case of concealed fraud, so long as the party defrauded remains in ignorance without any fault of his own.”

(Words in brackets supplied for clarity)

By way of elucidation, the noble Lord dealings with the rationale behind this principle of law went on:

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"The contention on behalf of the appellant that the statute is a bar unless the wrongdoer is proved to have taken active measures in order to prevent detection is opposed to common sense as well as the principles of equity. Two men, acting independently, steal a neighbour's coal. One is so clumsy in his operations, or so incautious, that he has to do something more in order to conceal his fraud. The other chooses his opportunity so wisely, and acts so warily, that he can safely calculate on not being found for many a long day. Why is the one to go scot-free at the end of a limited period rather than the other? It would be something of a mockery for courts of equity to denounce fraud as "a secret thing", and to profess to punish it sooner or later, and then to holdout -a reward for the cunning that makes detection difficult or remote."

I have given very close attention to the above observations of the learned Lord James of Hereford and must confess that I entirely agree with them as an accurate statement of the law on the subject. It is obvious from the concurrent findings of both courts below that the respondent was totally unaware that the documents he pledged with the appellant under circumstances lucidly testified to by him were surreptitiously used to secure a loan by the appellant from the 2nd defendant Bank. This surreptitious and unauthorized use of the respondent's title documents by the appellant was evidently a clear case of concealed fraud by the appellant against the unsuspecting respondent. It is also plain from the accepted facts of the case that no question of laches can operate against the respondent on the facts of the transaction in issue as it was not until in June, 1987 that the respondent became aware of the appellant's fraud against him. It was immediately thereafter, indeed in September, 1987 that the respondent filed the present action against the appellant. In these circumstances, I do not think it can be suggested with any degree of seriousness that there is any room in equity for the application of the Statute of Limitation, 1623 against the respondent's action when the respondent remained ignorant of what the appellant had done with his documents of title without any fault of his own. Issue 2 is hereby resolved against the appellant.

The gist of the complaint of the appellant under issue 3 is that the respondent having made fraud the foundation of his claim had the legal burden or duty to plead and prove the

alleged fraud beyond reasonable doubt since it imported the commission of a crime. In this regard, reliance was placed by the learned counsel for the appellant on the provisions of section 137(1) of the Evidence Act and the decisions of this court in *Nwobodo v. Onoh* (1984) 1 SCNLR1 at 4 and *Ajasin v. Omoboriowo* (1984) 1 S.C.N.L.R. 108. Learned counsel submitted that the respondent failed to prove the allegation of fraud raised by him beyond reasonable doubt or as required by law and that the courts below were in error to have entered judgment for the respondent on the basis of his ipse dixit alone.

Learned counsel for the respondent, for his part, contended that fraud was never the foundation of the respondent's case in this suit. He made reference to the reliefs claimed in the action and pointed out that the commission of any crime was not directly in issue for grant of the two reliefs claimed by the respondent. He submitted that the respondent could prove his case without any allegation of fraud he drew attention to the decision of this court in *Benson Ikoku v. Enoch OH* (1962) 1 SCNLR 307; (1962) 1 All NLR 194 and submitted that notwithstanding the fact that the adverb "fraudulently" was grammatically used to describe the appellant's conduct or motive in mortgaging the property in dispute, the commission of any crime was not directly in issue in the case. He further contended that where an adverb "fraudulently" language is used to describe motive, that fact alone does not automatically transform the basis of a claim to a crime. He argued that the standard of proof required in the present case is that of balance of probability. He added, in the alternative, that even if the basis of the respondent's claim is fraud, which is denied, the same was proved beyond reasonable doubt.

In dealing with the issue under consideration, the court below stated thus:-

"It is clear that from the writ of summons and the amended statement of claim of the respondent, the prime concern of the respondent was the return of his documents used by the appellant to secure a loan from the bank. See paragraph 23 of the amended statement of claim which reads as follows:-

23. Despite repeated demands the defendant refused to discharge his building and documents from mortgage and return his documents to him. Whereof the, plaintiff claims against the defendants as follows:

1. A declaration that the defendants are not entitled to a lien on the said plaintiff's building by virtue of the said mortgage deed.
2. An order that the defendants return to the plaintiff his Permit to Alienate land No. 3633, building plan, site plan, land agreement dated 1/9/77 and tax receipts.

The evidence given by the respondent had been on the same line. I am also of the view that commission of a crime is not directly in issue in the respondent's claim. The respondent merely described the scenario, appellant smartly obtained the documents from the respondent and used them to obtain loan from the bank. I also share the view of the learned trial Judge that the case of *Nvankwere* (supra) applied and was correctly followed by the learned trial judge. I also hold the view that the standard of proof required in this case is not proof beyond reasonable doubt as contended by the learned counsel for appellant.

There can be no doubt that the Court of Appeal was perfectly right when it held that the commission of a crime is not directly in issue in any of the reliefs claimed by the

respondent in the present action. The respondent's claims against the appellant and the 2nd defendant bank have been set out earlier on in this judgment. A close study thereof discloses in the clearest possible terms that they principally concern the return of the respondent's various documents together with the declaration in respect of his mortgaged property. None of those items of claims needed proof of the commission of any criminal offence to succeed.

Without doubt, the preponderance of evidence or the balance of probability constitutes sufficient ground for a verdict in civil cases. This general rule is however subject to the statutory provision in the former section 137(1). now section 138(1) of the Evidence Act to the effect that if the commission of a crime by a party to any proceeding is directly in issue in any proceeding, civil or criminal, it must be proved beyond reasonable doubt. See *Benson Ikoku v. Enoch Oli* ((1962) SCNLR 307; 1962) 1 All NLR 194. But as I have already observed, fraud was never made the foundation of the respondent's case whether from the pleadings or from his evidence before the court. The respondent in the present case could quite easily prove his case, as indeed he did, without alleging or proving fraud notwithstanding the fact that the adverb "fraudulently" was grammatically used to describe the appellant's conduct or motive in the transaction.

I need perhaps add in the above regard that where a strong language is employed to describe one's conduct or motive in a transaction as was done in the present case by the use of the word "fraudulently", that does not ipso facto convert the basis of a claim to crime. See *Godwin Nwankwere v. Joseph Adewunmi* (1967) NMLR 45 I therefore entertain no doubt that the standard of proof required in the present case must be the balance of probability or preponderance of evidence and not on the basis of proof beyond reasonable doubt as provided for under section 138(1) of the Evidence Act. The application of the provisions of section 138(1) of the Evidence Act only comes into play where the commission of a crime by a Party is directly in issue in any proceeding, civil or criminal, and not otherwise. I am in complete agreement with learned counsel for the respondent that the respondent's case was not founded on crime and a proof beyond reasonable doubt under section 138(1) of the Evidence Act, 1990 cannot therefore apply in the present case. Issue 3 is accordingly resolved against the appellant.

All the three issues having been resolved against the appellant this appeal fails and it is hereby dismissed with costs to the respondent against the appellant which I assess and fix at N10,000.00.

WALI, J.S.C.: I have had the privilege of reading before now the lead judgment of my learned brother Iguh, JSC and I entirely agree with his reasoning and conclusion for dismissing the appeal.

The appeal involves concurrent findings on fact and issues of law by the trial court and the lower court which I find not to be perverse. See *Kodilinye v. Odu* (1935) 2 WACA 336; *Woluchem v. Gudi* (1981) 5 SC 291 and *Mogaji v. Odojin* (1978) 4 SC 91.

I also find no substance in this appeal and I hereby dismiss it with N 10,000.00 costs to the respondent.

OGWUEGBU, J.S.C.: I have had the advantage of reading in advance, the judgment just delivered by my learned brother Iguh JSC with which I fully agree with his reasoning and conclusions.

I will dismiss the appeal with costs of N10,000.00 in favour of the plaintiff/respondent.

MOHAMMED, J.S.C.: I agree that this appeal has failed and ought to be dismissed. I have had the privilege of reading the judgment my learned brother, Iguh, J.S.C and I have nothing more to add to his opinion. I will also award N 10,000.00 costs to respondents.

KALGO, J.S.C.: I have read in draft the judgment just delivered by my learned brother Iguh JSC in this appeal and I entirely agree with him that there is no merit in the appeal. I will also dismiss the appeal for the reasons which he has fully and clearly given, in my view and which I hereby adopt as mine. I however wish to emphasise some of the points which have already been made in the lead judgment in the following paragraphs.

Iguh JSC has precisely set out the facts of the case which gave rise to this appeal. I do not intend to repeat them here. It is however obvious from the briefs of parties in this court that 3 issues arose for determination, which have direct bearing on:-

1. Evaluation of evidence by the trial court which was upheld by the Court of Appeal.
2. Application of the Statute of Limitation 1623;
3. Presence of criminal imputation or allegation requiring proof beyond reasonable doubt.

On issue 1, the respondent gave clear evidence of repayment of N5,000.00 to the appellant of the loan given to him in 1978 with interest. The evidence was uncontradicted and was accepted by the trial Judge who saw and heard the witnesses. The learned trial Judge rejected the appellant's version of the story and after considering the whole issue concluded that:-

"1st defendant merely used a clever device on the plaintiff to obtain exhibits 1. 2. 3 and 5 and secured a loan with the documents from the 2nd defendant. To my mind the plaintiff has proved to the court that he is completely ignorant of the transaction between the 1st and 2nd defendants. I am of the view that it will not be in the interest of justice to make the plaintiff a victim of a transaction he knows nothing of."

And the Court of Appeal agreed with the trial Judge when it found:-

"....at the evidence adduced by the respondent at the trial which in fact was accepted by the trial Judge is credible enough to entitle him to the declaration granted to him by the trial court."

After going through the evidence of the parties in the record of appeal, I cannot agree more with the findings of the trial court as affirmed by the Court of Appeal on this issue. Those findings cannot in my view be faulted and this issue must be resolved against the appellant.

Issue 2 deals with the period of limitation for filing an action court. The generally accepted principle is that the period starts to run from the day the cause of action arose. In this case, it is very dear that the respondent did not know that his documents which he earlier gave to the appellant for the loan given to him were not with the appeal or that the Appellant used them for other purposes. He only came to know this in June 1987, when after continuous refusal by the appellant to return the documents to him he threatened to report the matter the Police. And in September 1987 (three months later) he filed this action in the trial court. Under the Limitation Act 1623 of England, the period of limitation is 6 years. Here, the cause of action arose in June 1987 and the action was filed in September 1987, a period of 3 months duration. The action was clearly filed within a good time and the said statute of limitation did not apply. Issue 2 also fails.

On issue 3, I entirely adopt the treatment of that issue by Iguh JSC in the leading judgment. I have no doubt in my mind that the fact that the respondent used the word "fraud" in the conduct of the appellant in dealing with the documents in question did not mean that that was the main foundation of his claim or was directly in issue between them. Without using the word

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"fraud", the respondent can successfully prove his case as he did on the balance of probabilities or the preponderance of evidence at the trial, which is all what is required in a civil case such as this. The evidence necessary in this type of case is such that can support the relief claimed and which in the end, when put on the scale of justice, will tilt it in favour of the plaintiff. See *Mogaji v. Odofin* (1978) 4 SC 91. This makes the provision of S. 138 (1) of Evidence Act inapplicable in the circumstance.

Finally, I find that the decision of the trial court and the Court of Appeal in this case are concurrent findings or decisions which cannot generally be disturbed in the absence of special circumstances such as where the findings were perverse or there was miscarriage of justice or violation of some principles of law or procedure. This was not shown to have occurred in this appeal. This court will not before interfere with the decision of the Court of Appeal confirming that of the trial court. Accordingly, and for the detailed reasons given in the leading judgment, I find no merit in this appeal. I dismiss it with N10,000.00 in favour of the respondent.

Appeal dismissed.