IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA
ON FRIDAY THE 10TH DAY OF DECEMBER,2010
BEFORE THEIR LORDSHIPS

MAHMUD MOHAMMED	JUSTICE, SUPREME COURT
CHRISTOPHER MITCHELL CHUKWUMA-ENEH	JUSTICE, SUPREME COURT
OLUFUNLOLA OYELOLA ADEKEYE	JUSTICE, SUPREME COURT
SULEIMAN GALADIMA	JUSTICE, SUPREME COURT
BODE RHODES-VIVOUR	JUSTICE, SUPREME COURT

SC.294/2003

BETWEEN:

CLEMENT ODUNUKURE (for himself and on behalf of Anazodo Odunukwe family Nnewichi, Nnewi) — APPELLANTS

AND

1. DENNIS OFOMATA
2. OYIBOJIOBI OFOMATA — RESPONDENTS

JUDGMENT
(Delivered by Bode Rhodes-Vivour, JSC)

The Plaintiff for himself and on behalf of the Anazodo Odunukwe family of Nnewichi Nnewi, the Appellants in this appeal sued the Defendants, now Respondents, claiming jointly and severally as per paragraph 12 of their amended statement of claim as follows:-

(i) Declaration of title to all that piece or parcel of land situate at Obuofia Nnewichi Nnewi within the jurisdiction and more particularly delineated and verged Pink in the Survey Plan No.EC. 127/72 filed with this statement of claim.

(ii) £100 damages for wanton acts of trespass committed by the defendants on the said land.

(iii) Injunction to restrain the defendants, their servants, agents and privies from further entry on the said land."

Pleadings were filed and exchanged and, with leave of Court amended. The case accordingly proceeded to trial at which both sides led evidence in support of their respective case. Each side led evidence which showed that they relied on traditional history and positive acts of possession. At the conclusion of trial, and after closing speeches by learned counsel for both sides, the learned trial judge in a considered judgment delivered on the 7th of November 1994 dismissed the plaintiffs claims.

The Plaintiffs were displeased with this judgment and appealed to the Court of Appeal, Enugu Division. That Court dismissed the appeal. They have further appealed to this Court. Pursuant to Order 6 rules 5 (1)(a) and (2) of the Supreme Court Rules the appellants filed their briefs on the 12th day of January 2004 and a Reply brief on the 18th day of May 2009. An amended respondents brief was deemed duly filed on the 20th day of April, 2009.

The notice of appeal filed on the 1st of July 1999 contained five grounds of appeal from which the appellants counsel distilled four issues for determination of this appeal. Learned counsel for the

respondent extensively argued in the respondents brief a Preliminary objection. I will consider the Preliminary objection first. This is the correct procedure, because a preliminary objection is filed only when the respondent is satisfied that there is some fundamental defect in the appellants process. The sole purpose being to terminate the appeal usually on grounds of incompetence.

See **Ndigwe v. Nwude 1999 11NWLR pt.626 p. 314,**

NEPA v. Ango 2001 15 NWLR pt.737 p.627.

Nowadays, Preliminary objections are filed once a respondent notices any error in the appellants processes. This is wrong. Where the respondent complains of the competency of a ground/s of appeal as in this appeal, and the other ground/s are in order, and can sustain the appeal the respondent ought to file a motion on Notice to strike out the incompetent grounds and not a Preliminary objection. See

Muhammed v. Military Administrator Plateau State 2001 16 NWLR pt. 740 p. 524

NDIC v. Oranu 2001 18 NWLR pt. 744 p. 183

Finally and for emphasis, A preliminary objection is filed only against the hearing of the appeal and not against one or more grounds of appeal. I shall proceed to examine the objection wrongly couched as preliminary objection as I cannot brush it aside, it being fundamental, and in the absence of objection from learned counsel

for the appellant. Learned counsel for the respondents observed that Grounds 1 and 5 in the Notice of Appeal are grounds of mixed Law and facts, contending that both grounds are incompetent because leave of the Court of Appeal or this Court was not obtained before they were filed. Reliance was placed on Section 233 (2) (a) of the Constitution.

Ifediorah v. Ume 1988 2NWLR Pt. 74 p.5

Obijuru v. Ozims 1985 2NWLR pt. 6 p.167

He urged us to strike out both grounds of appeal. Responding, learned counsel for the appellant observed that ground 1 complains of misunderstanding of the Law and so it is a ground of Law. On ground 5 he argued that the complaint was that the learned trial judge was in error in dismissing the plaintiffs claim, contending that it is also a ground of law. Reference was made to

Ogbechie v. Onochie 1986 2NWLR pt.23 p.484

Nwadike v. Ibekwe 1987 4 NWLR pt.67 p.718

He urged this court to dismiss the Preliminary objection as the said Grounds 1 and 5 of the Grounds of Appeal are Grounds of Law. To distinguish between a ground of law and a ground of fact the appellation given by counsel is irrelevant. The ground of appeal and the particulars must be comprehensively examined. If the ground of appeal reveals a misunderstanding by the court below of the Law or a misapplication of the Law to the facts admitted or proved it is a

ground of Law. Where the ground of appeal questions evaluation of evidence before the application of the Law, it is a ground of mixed law and fact. A ground of appeal on a question of fact is obvious. See **Metal Construction (W.A.) Ltd v. Migliore 1990 1NWLR pt.126 p. 299**

Ogbechie v. Onochie 1986 2 NWLR pt.23 p.484.

The grounds of appeal and their particulars that are in issue are grounds 1 and 5 in the Notice of Appeal. They read thus:

GROUND 1

Their Lordships of the Court of Appeal erred in Law when on the issue of resolution of conflict in traditional evidence they held as follows:-
"Although learned Senior Advocate tried to show conflicts in traditional evidence of the respondents at pages 7 to 14 of his brief, I am in agreement with leraned counsel for the respondents that there was no real conflict of traditional evidence found by the trial court or apparent from this case to warrant invocation of the principle in Kojo's case."

PARTICULARS:

(i) Contrary to the above finding of the lower court the learned trial judge accepted that there was a material conflict in the traditional evidence of the parties.

(ii) The learned trial judge held that it is for the court at the end of the day to decide on a balance of probabilities and the impressions of the parties and their witnesses which version to believe as true or likely to be true.

(iii) In resolving the conflict in traditional evidence the learned trial judge resorted to demeanor and

credibility of witnesses.

(iv) Such conflict in the traditional evidence under the rule laid down in Kojo II v. Bonsie 1957 1WLR p.1223 can only be resolved by reference to acts of ownership and possession within recent times which the trial court failed to do.

(v) The lower court in resolving the above issue held that there was no real conflict of traditional evidence found by the trial court.

GROUND 5

The learned Justices of the Court of Appeal erred in Law when in dismissing appellants claim for a declaration of title they held as follows:

> "I now take the last issue and it is whether the learned trial judge was not in error in dismissing the plaintiffs claim. I should not waste anytime here. It is clear from the position I have taken above that the learned trial judge correctly dismissed the claim of the plaintiff who is the appellant. Accordingly, I dismiss the appeal and I do so by awarding N3,000.00 costs in favour of the respondents.

PARTICULARS

(i) Their Lordships of the lower court failed to consider the issue of dismissal of the appellants claim by the learned trial judge which was properly raised by the appeallant.

(ii) By the above quotation their Lordships of the lower court with the greatest respect approached the evidence called by the parties wrongly and the Supreme Court should intervene and allow this appeal.

Ground 1 questions the finding of the lower court that there was no real conflict in Traditional evidence. In the Particulars the appellant is of the view that there was conflict in the Traditional evidence. To determine if there were conflicts in Traditional evidence disputed facts must be considered. Consequently a ground which questions how conflicting evidence was resolved like ground 1 is one of mixed law and fact and it requires leave of the Court of Appeal or this court before it can be argued.

Ground 5 questions the dismissal of the appellants claim for declaration of title to land. The power to grant or not to grant a declaration is discretionary, and the exercise of courts discretion is an issue of fact and Law. Leave of the Court of Appeal or this Court must be obtained before it can be argued. Section 233 (2) (a) and 233 (3) of the Constitution are relevant provisions. They read:

> "233(2) An appeal shall lie from decisions of the Court of Appeal to the Supreme Court as of right in the following cases.
>
> (a) Where the ground of appeal involves questions of Law alone, decisions in any civil or criminal proceedings before the Court of Appeal.
>
> (3) Subject to the provisions of subsection (2) of this section, an appeal shall lie from the decisions of the Court of Appeal to the Supreme Court with the leave of the Court of Appeal or the Supreme Court.

The interpretation and effect of the above is that where the grounds of appeal are on facts, mixed law and facts, and grounds that are not on Law, and the appellant did not obtain leave, this court would have no jurisdiction to entertain the appeal. There would only be a valid appeal if the appellant obtains leave from the Court of Appeal or this court under section 233 (3) of the Constitution. See **Obatoyinbo v. Oshatoba 1996 5NWLR pt.450 p. 531.**

Tilbury Construction v. Ogunniyi 1988 2NWLR pt.74 p.64.

In the absence of leave ie permission Grounds 1 and 5 in the Notice of Appeal are hereby struck out. Issues 1 and 4 formulated from Grounds 1 and 5 are accordingly struck out since the Grounds from which they were formulated no longer exist. Issue 2 is formulated from Grounds 2 and 3, while Issue 3 is formulated from Ground 4. They sustain the appeal.

Issues 2 and 3 in the appellants brief reads as follows:-

ISSUE 2

> Was the Court of Appeal right in rejecting the Plaintiffs case for sole reason of being fair to the learned trial judge.

ISSUE 3

> Was the Court of Appeal right in resolving the issue on the applicability of Section 46 of the Evidence Act for the sole reason that

since one of the adjoining lands to the land in dispute belonged to Ezeagado that the requirement of the said Section were satisfied.

The respondents adopted the issues formulated by the appellant.

At the hearing of the appeal on the 11th of October 2010, learned counsel for the appellants, Chief O. Ugolo, SAN adopted Appellants brief and Reply brief and urged us to allow the appeal and set aside the High Court and Court of Appeal Judgments. C.A.N. Nwokaukwu, learned counsel for the respondents adopted Respondents amended brief deemed filed on the 20th of April, 2009 and urged us to dismiss the appeal and affirm concurrent judgments of the courts below. The appellants case is that the land in dispute is at Obiofia Nnewichi Nnewi which is Verged Pink in the Survey Plan, Exhibit A. The land in dispute is part of a large piece of land which belongs to the appellants ancestor, Dala Onyeogu. He had three children namely, Ezeuzo, Dim Umeanyo, Eze Nwajioku. Ezeuzo's mother was different from the mother of the other two. Before his death Dala Onyeogu divided his land into two. He gave one protion including his Obi to Ezeuzo and the land in dispute with the surrounding land to Dim Umenanyo and Eze Nwajioku. Dim Umeanyo and Eze Nwajiaku later subdivided their own portion. The land in dispute is part of Eze Nwajiaku's share of family land. On the death of Eze Nwajiaku his land and land in dispute was

inherited by his son Ezenwegbu. He farmed on the land throughout his life. On the death of Ezenwegbu his son Nruama inherited the land in dispute and all adjourning lands. He farmed the land and exercised acts of ownership on the land and was not disturbed by the respondents or anyone else.

On his death the land was inherited by his son Odunukwe. He exercised acts of ownership by farming, planting economic trees and letting portions of the land out. Apart from the three sons Dala Onyeogu had a daughter named Mgbafor Nnuaku who married a husband from Isu-Obia, she returned with her children to Obiofia Nnewichi and brother Dim Umeogu gave her a piece of land at Dala Onyeogu's farmland at Eyeghepu in Edoji. Mgbafor Nnuaku lost her children mysteriously. One survived. He is Efoagui. He left and went to Dala Otikpo a descendant of Dim Umeanyo who gave him land at Obiofia Nnewichi. Efoagui had three sons, namely Ofomata, Anyaebosi and Henry. On the death of Efoagui his three sons lived on the land granted to their father. Efoagui's line has been paying annual customary tribute to Anazodo Odunukwe the father of the appellant on adjoining land to the land in dispute.

The appellant averred that the respondents and their ancestors do not belong to Dala Onyeogu's lineage because the respondents and their ancestors were never chief priests of Ezemewi shrine; an office reserved for the oldest living member of Dala Onyeogu's

descendants at any given time, Henry Efoagui is the uncle of the 1st respondent. In 1953 the 1st respondent broke and entered the portion verged yellow on Exhibit A (ie the adjoining land and the land in dispute) and started moulding cement block preparatory to building on the land. Anazodo Odunukwe, the overlord protested to Efoagui, his tenant. The 1st respondent stopped. Anazodo Odunukwe died in 1966, and Efoagui died in 1969. In 1971 the 1st and 2nd respondents entered the land in dispute and the area verged yellow, cleared the bush and cut down economic trees, and commenced moulding blocks with a view to building on the land.

The respondents on the other hand said the land in dispute is in Obiofia Nnewichi which is verged Blue in the Survery plain, Exhibit B. That the appellants and respondents are from one ancestor, Dala Onyeogu who had four sons, namely Ezeuzo, Dim Umeanyo, Ezenwajiaku and Ezeangado. He had three wives. After his death his sons divided his land in accordance with Nnewi Customary Law. The land was divided into three protions representing the three homesteads (MKPUKES) of Dala Onyeogu's family. Dim Umeanyo and Ezenwajiaku from one homestead received one portion. The land in dispute was inherited by Ezeagado. He is the direct ancestor of the respondents. The respondents never paid tribute to the appellant or to anyone. Since the time of Ezeagado the 1st and 2nd respondents family have been in possession of the land

without interference from the appellant or anyone else. Ezeagado was succeeded by Ezenwabachilli who was succeeded by Ezemiogbo and then Efoagui, the father of the 1st and 2nd respondents. It was on the land in dispute that the 1st defendant buried his wife Patience Ofomata.

After reviewing evidence in detail the learned trial judge concluded thus:

> "On a totality of the evidence before me the plaintiff failed to show any contemporary event to lend support to his traditional evidence of the ownership of the land in dispute. He is seeking a declaration of customary right of occupancy and failed to discharge the onus of proof on him. I accept the defendants case that the land in dispute was granted to the 1st defendant by the

between fantasy and reality. The plaintiff's claim fails and it is dismissed with N5,000.00 costs to the defendants.

Evidence accepted by both courts below is that both sides claim title through a common predecessor in title. The position of the law is that the predecessors title is good and not in issue. In this case both sides tendered Exhibits A and B, their respective Survey Plans. In Exhibit A tendered by the appellant, the land in dispute is verged Pink while in Exhibit B tendered by the respondents the land in dispute is verged Blue. There is no dispute on the identity of the land in dispute. Ownership of land may be proved in any of the following five ways:

1. by traditional evidence
2. by production of documents of title which are duly authenticated;
3. by acts of selling, leasing, renting out all or part of the land, or farming on it or on a portion of it;
4. by acts of long possession and enjoyment of land; and
5. by proof of possession of connected or adjacent land in circumstances rendering it probable that the owner of such connected or adjacent land would, in addition be the owner of the land in dispute.

See **Piaro v. Tenalo 1976 12SC p. 31**

Idundun v. Okumagba 1976 9 – 10 SC p. 224

Omoregie v. Idugiemwanye 1985 2 NWLR pt. 5 p. 41

A party relying on any of the above would only succeed on the strength of his case and not on the weakness of the defence. The standard of proof required is preponderance of evidence. That is to say one sides position outweighs the other. In this case the appellant relies on Traditional History/Evidence and positive acts of possession for their claim to the land in dispute. The starting point are the pleadings. Genealogy must be pleaded. Averments in the pleadings must show a chain of devolution right back to the original owner. Both sides did so in this case. It was then the duty of the trial judge to examine both sides recollection of traditional history which they rely on to see which is to be preferred. **Kojo II v. Bonsie and anor 1957 1WLR p.1233** is only applicable where traditional history relied on by the parties is inconclusive to establish the plaintiffs title, then such traditional history must be tested by reference to the facts in recent years established by evidence. It is only then that the court can see which of the two competing histories is the more probable. Only two issues would be examined in this appeal in the light of my findings in the preliminary objection. I now address both issues seriatim.

1. Was the Court of Appeal right in rejecting the plaintiffs case for sole reason of being fair to the learned trial judge.

The above issue arose from the Leading Judgment of the Court of Appeal. Relevant extracts reads:

> "In attacking the evaluation of evidence by a trial judge, counsel has a duty to examine the totality of the evaluation and not pick pockets here and there to puncture or destroy the efforts of the Judge. With respect that is what Learned Senior Advocate for the Appellant has done. That is not acceptable to this court because it is not the legal position. In my humble view, Learned Senior Advocate emphasized out of proportion the so-called reliance on demeanour and credibility of the witnesses by the learned trial judge. Much as I concede to learned Senior Advocate of his traditional sentiments to the case of his client, I expected him to recognize the finding of the learned trial judge that the appellant failed to show any contemporary event to lend support to his traditional evidence of ownership of the land in dispute. Curiously learned counsel played down on this important finding and played up the so-called finding on demeanour and credibility of the witnesses. He is not fair to the learned trial judge. I have a duty to be fair to the learned trial judge and the only way to be fair to him is to reject the contention of the learned senior advocate on the issue. And I so reject it."

Learned counsel for the appellant observed that the trial judge did not evaluate the two versions of traditional evidence, and instead of the Court of Appeal so finding, the court failed to consider the appellants case and took issues with appellants counsel on his approach to the case, concluding in the process that appellants

counsel was not fair to the trial judge. He submitted that an appellate court has a duty to consider issues before it on their merits and when it fails to do so it is a miscarriage of justice. Reliance was placed on **Onwe v. Oke 2001 3NWLR pt.700 p. 406**.

He urged this court to evaluate the traditional evidence of the parties and allow the appeal on this ground. In response learned counsel for the respondents observed that the courts rejection of the appellants case was not for the reason of being fair to the learned trial judge but based on specific findings borne out by the evidence before the trial court. Concluding he further observed that the statement of the Court of Appeal about being fair to the learned trial judge was taken out of context by the appellant. I completely agree with learned counsel for the respondents. The statement by the Court of Appeal runs as follows:

> "I have a duty to be fair to the learned trial judge and the only way to be fair to him is to reject the contention of the learned senior advocate on the issue. And I so reject it."

In attacking evaluation of evidence by the learned trial judge, learned counsel for the appellant is of the view that the learned trial judge rejected the appellants case because he relied too much on the demeanour and credibility of witnesses.

Credibility precedes demeanour. In a long line of cases it has been said; that it would be wrong to resolve traditional history only by the demeanour of witnesses. See **Thanni v Saibu 1977 2SC p. 89 Ikpan v. Edoho 1978 6-7 SC p.221.**

The reason is simple. Traditional history is usually centuries old. It is passed down by word of mouth. Memories fade with time. There are bound to be unintentional mistakes when a witness says what he was told by his father or grandfather. The witness believes he is telling the truth. Surely demeanor cannot be of much use in such a situation. The learned trial judge did not reject the appellants case because he was not satisfied with the credibility and demeanour of witnesses. He rejected the appellants case because the appellant failed to show any contemporary event to lend support to his traditional evidence of ownership of the land in dispute.

Credibility and demeanour are relevant in tracing traditional history, but they are not strong points. The matter is settled when the plaintiff shows any contemporary event to lend support to his traditional evidence of ownership of the land in dispute. This the appellant failed to do.

The learned justice of appeal was correct to say he had a duty to be fair to the learned trial judge, because instead of learned counsel for the appellant addressing the fundamental point by showing any contemporary event to lend support to the appellants traditional

evidence of ownership of the land in dispute he was chasing shadows by blowing out of proportion demeanour and credibility of witnesses. In being fair to the learned trial judge the Court of Appeal reminded learned counsel for the appellant that his claims were rejected because he failed to show any contemporary event to lend support to the appellants traditional evidence of ownership to the land in dispute. His case did not fail because the learned trial judge relied only on the demeanor and credibility of the witnesses, a point learned counsel for the appellant relied on heavily and which if believed is being unfair to the learned trial judge.

2. Was the Court of Appeal right in resolving the issue on the applicability of Section 46 of the Evidence Act for the sole reason that since one of the adjoining lands to the land in dispute belonged to Ezeagado that the requirements of the said section was satisfied.

Section 46 of the Evidence Act states that-

> "Acts of possession and enjoyment of land may be evidence of ownership or of a right of occupancy not only of the particular piece or quantity of land, but also of other land so situated or connected therewith by locality or similarity that what is true as to the one piece of land is likely to be true of the other piece of land.

In **Okechukwu v. Okafor 1961 1ALL N.L.R. P.685.** It was held that by virtue of Section 45 (now 46) of the Evidence Act, acts of possession and enjoyment of land may be evidence not only of the

particular piece of land with reference to which the acts are done, but also of other lands so situated or connected therewith by locality or similarity that what is true as to one piece of land is likely to be true of the other piece of land. See also **Idudum v. Okumagba,** supra.

This section creates a probability and not conclusive proof of ownership of land. This is so because evidence adduced, and if believed by the court, would render the presumption in Section 46 improbable. Learned counsel for the appellant observed that the learned trial judge failed to consider and apply the provisions of Section 46 of the Evidence Act. Relying on **Karibo and others v. Grend and Anor 1992 3 NWLR pt.230 p. 426** he submitted that the Court of Appeal ought to have allowed the appeal. The argument canvassed by learned counsel for the respondents is that consideration of Section 46 of the Evidence Act would have made no difference to the outcome of the case. His reasoning being that there is no appeal from concurrent findings of the court on the failure of the appellants to show any contemporary event to lend support to his traditional evidence of ownership of the land in dispute.

As rightly pointed out by learned counsel for the appellant the learned trial judge failed to examine his submissions on Section 46. The Court of Appeal proceeded to examine arguments of learned counsel on the section as follows:

Relying on **Karibo and others v. Grend and anor supra** the Court of Appeal relied on an extract from the judgment. It reads:

> "I may observe, however, that sometimes the issues could be resolved on documentary evidence or other forms of evidence of such a permanent nature that the sense of hearing could be assisted by other senses. Such documents or other real evidence could be resorted to by an appellate court in order to resolve the issue by itself. In that case, there would be no need to order a retrial. Such is the situation also when there are conflicting oral testimonies as well as documentary evidence which supports one version of the conflict. Such a documentary evidence should, and ought to be used as hanger from which to test the veracity of the oral testimonies."

The Court of Appeal then said-

> Applying the above principle to this appeal, the relevant documentary evidence are the Survey Plans of the parties which are Exhibits A and B for the plaintiff and the defendants respectively. In this respect, the submission of learned counsel for the respondents in paragraph 37 of his brief, is most accurate. I should quote the submission for ease of reference.

The Court of Appeal proceeded to quote learned counsel for the respondents submissions thus-

> "Now, the plaintiffs plan showed that one of the adjoining lands to the land in dispute belonged to Ezeagado and learned trial judge had held that the Defendants are from the lineage of Ezeagado, a direct descendant of Dala Onyeagu. This very clearly displaces any inference that all the lands surrounding the land in dispute are so situated or connected with the land in dispute that the land in dispute may be presumed to belong to Odunukwe family of the plaintiff "

The Court of Appeal agreed entirely with learned counsel for the respondents and examined further the submissions of learned counsel for the respondent when he said:

> "In the circumstances of this case, when the substratum of the plaintiffs claim has totally collapsed by a finding that both the plaintiff and the Defendants are from the same stock of Dala Onyeagu the original owner of the entire land, the plaintiff cannot hope to succeed against any other member of Dala Onyeagu lineage on the basis of Section 46 of the Evidence Act alone.

The Court of Appeal agreed with learned counsel for the respondent and then said that in the light of the evidence in this case the submission of learned counsel for the appellant in respect of Section 46 fails.

Submissions of learned counsel for the appellant on the provisions of Section 46 of the Evidence Act were not examined by

the learned trial judge. No matter how trivial or irrelevant a submission of counsel may appear, the trial judge has a duty to examine it and rule upon it. In this case the Court of Appeal examined counsel submissions on the provisions of Section 46 of the Evidence Act extensively, and found no merit in it. Not commenting on the learned counsel submission on Section 46 of the Evidence Act by the learned trial judge does not affect the judgment of the trial court. Section 46 of the Evidence Act is not applicable to this case as it makes no difference to the outcome of the case.

Both courts below found and held that the appellants and the respondents have a common ancestor, named Dala Onyeagu. The appellant cannot succeed against any member of their common ancestors lineage solely on the basis of the section supra. The appellant failed to prove his claims because he was unable to show any contemporary event to lend support to his traditional evidence of the ownership of the land in dispute. The evidence of the witnesses called by the appellants was rightly rejected by the learned trial judge for good and sufficient reasons.

The Supreme Court would set aside concurrent findings of fact if such findings are not supported by credible and reliable evidence. See **Enang v Adu 1981 11-12 SC p.25**

Sosanya v. Onadeko 2005 8NWLR pt. 926 p. 185

Ibodo v. Enarofia 1980 5 – 7 SC p. 42

There is no appeal against the finding by the trial court, affirmed by the Court of Appeal, that the appellants failed to show any contemporary event to lend support to his traditional evidence of the ownership of the land in dispute. Concurrent findings of fact sustained on credible and compelling evidence are inviolate in the absence of an appeal.

In conclusion, this appeal lacks merit and the same is hereby dismissed. I make no order as to costs.

BODE RHODES VIVOUR
JUSTICE, SUPREME COURT

APPEARANCES:

Chief O. Ugolo, SAN for the Appellant, with him C. Ibemesi

C.A.N. Nwokenkwu for the Respondent

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

ON FRIDAY THE 10TH DAY OF DECEMBER, 2010

BEFORE THEIR LORDSHIPS

MAHMUD MOHAMMED	JUSTICE, SUPREME COURT
CHRISTOPHER MITCHELL CHUKWUMA-ENEH	JUSTICE, SUPREME COURT
OLUFUNLOLA OYELOLA ADEKEYE	JUSTICE, SUPREME COURT
SULEIMAN GALADIMA	JUSTICE, SUPREME COURT
BODE RHODES-VIVOUR	JUSTICE, SUPREME COURT

SC. 294/2003

BETWEEN:

CLEMENT ODUNUKWU
(For himself and on behalf of Anazodo Odunukwu Family of Newwichi, Nnewi) — PLAINTIFF/APPELLANT

AND

1. DENNIS OFOMATA
2. OYIBOJIOBI OFOMATA } DEFENDANTS/RESPONDENTS

JUDGMENT

(Delivered by Olufunlola Oyelola Adekeye, JSC)

I had read in draft the leading judgment of my Learned Brother Olabode Rhodes-Vivour JSC. The Respondents raised a preliminary objection that grounds I and 5 of the grounds of appeal from which Issues one and four for determination in this appeal were distilled, are incompetent and they must consequently be struck out. The ground for the objection, is that both grounds I and 5 are grounds of mixed law and fact for which leave of this court is required to sustain an appeal on them.

The appellant failed to obtain the requisite leave. The court agrees with this objection. Since the issue of obtaining leave in such circumstance is a condition precedent to adjudication first and foremost, before an appellant can exercise a right of appeal, this court is not competent to consider issues one and four of the issues for determination in the appellant's brief; they are hereby struck out. The appeal shall be heard on issues 2, 3, and 4 as formulated by the appellant in the appellant's brief.

My Learned Brother had meticulously considered these three issues in the leading judgment; I only wish to pass a few remarks by way of emphasis. This case had come a long way as it was commenced at the High Court of Onitsha in 1972 where judgment was delivered in 1980. The Court of Appeal in the former Eastern State ordered a retrial of the case in 1984. The case went back to the trial court and another judgment was delivered in November 1994. The appeal against the judgment went to the Court of Appeal, Enugu. The judgment of the lower court was delivered on 14/4/99. This appeal now before this court is against that judgment.

The claim of the plaintiff/appellant in the amended statement of claim are:-

1) Declaration of title to all that piece or parcel of land situate at Obofia, Nnewichi, Nnewi, within the jurisdiction and more particularly delineated and verged pink in the survey plan No. **EC/122/72** filed with this statement claim.

2) ₦100 damages for wanton acts of trespass committed by the defendants on the said land.
3) Injunction to restrain the defendants, their servants, agents and privies from further entry on the said land.

The graveman of this case is the resolution of the conflict in the traditional evidence of the parties as to whether the defendants now respondents, are direct descendants of Dala Onyeogu like the plaintiffs now appellants in this court.

Facts of the case were based on traditional history, Acts of long possession and section 46 of the Evidence Act – ownership of the land in dispute, as well as adjoining or contiguous lands, eloquently pleaded by the plaintiff/appellant and witnesses testified on them. The plaintiff/appellant contended that Dala Onyeogu, the undisputed ancestor of both parties had two wives, three sons and a daughter, Mgbafor Nnuaku – the defendants are the descendants of this daughter who married away from the family enclave but later returned with her children after the death of her husband and was settled into the family.

It was the defendants/respondents' case however that Dala Onyeogu had three wives and four sons and no daughter. The defendants/respondents were direct descendants of the fourth son of Dala Onyeogu – Ezeogado.

The learned trial judge rejected the plaintiff's version of traditional history, and further dismissed the evidence relating to acts of ownership and possession. The trial court held that the land in dispute devolved on the respondents' share of the lands of Dala Onyeogu. The court made specific findings on the credibility of the appellant based on traditional evidence before arriving at the conclusion that it was incredible. It is also when the court cannot find either of the two histories conclusive that it would proceed to declare both inconclusive and decide the case on the basis of numerous and positive acts of possession and ownership. The court found the traditional history of the defendants credible and relied on it. There is no doubt about it from the evidence before the court that parties inherited the land from a common ancestor, and the land belongs to both parties as a common heritage. Where an individual or a group claims exclusive ownership of land as against a community's claim, or is trying to dispossess a group of their claim, the onus is on the party or individual to prove exclusive ownership.

Olisa v. Asojo (2002) 1NWLR pt. 747 pg. 13
Akanbi v. Raji (1998) 12 NWLR pt. 578 pg.360
Shomefun v. Shade (1999) 12 NWLR pt. 632 pg. 531

Generally speaking, in a claim for declaration of title to land, the onus is on the plaintiff to establish his claim upon the strength of his own case and not upon the weakness of the case of the defendant.

The plaintiff must therefore satisfy the court that upon the pleadings and evidence adduced by him, he is entitled to the declaration sought.

Gbadamosi v. Dairo (2007) 3 NWLR pt. 1021 pg. 282
Dada v. Dosunmu (2006) 18 NWLR Pt. 1010 Pg. 134
Onissaodu v. Elewuju (2006) 13 NWLR pt. 998 pg. 517
Ajiboye v. Ishola (2006) 13 NWLR Pt. 998 Pg. 628

Where the plaintiff and the defendant anchor their case on traditional evidence in proving ownership of the land in dispute, the duty of the trial court in the circumstances is to weigh their evidence on the imaginary scale and determine which of the two is weightier.

Mogaji v. Odofin 1978 4 SC 91
Odofin v. Ayoola 1984 11 SC 32
Ibikunle v. Lawani (2007) 3 NWLR pt. 1022, Pg. 580
Okoko v. Dakolo (2006) 14 NWLR pt. 1000, pg. 401.

The learned trial judge performed this duty in respect of the traditional evidence led by the parties before the trial court, and the Court of Appeal saw no reason to disturb the findings of the trial court. There are five distinct ways of proving title to or ownership of land, and establishment of one of the five ways is sufficient proof of ownership. Where a claimant for title to land who pleads traditional history fails to prove his root of title by that means, he cannot turn round to rely on acts of ownership and possession to prove his title to the land.

As a matter of course, there would be nothing on which to found acts of ownership. In such a case, the court is obliged to dismiss the claimant's claim.

The lower court found the case of the appellants insupportable by upholding the various findings made by the trial court to that effect. The lower court did not make its findings for the reason of being fair to the learned trial judge. I must add that the appellant totally misconstrued the decision of the lower court and took the entire remarks in the lead judgment out of context. The Court of Appeal did not assume the position to be fair to the learned trial judge, while rejecting the plaintiff's case on the ground that the plaintiff's counsel was not fair to the learned trial judge. The lower court's remarks about the unnecessary attack by the learned Senior Advocate on the learned trial judge in the judgment, amounts to an obiter dictum which cannot form the basis for ground of appeal.

An obiter dictum is a statement made in passing which does not reflect the ratio deidendi, that is the reasoning or ground upon which a case is decided. An appeal is usually against a ratio decidendi and generally not against an obiter.

U. T. C Nigeria Limited v. Pamotei (1989) 2 NWLR pt. 103 pg. 244
Saude v. Abdullahi (1989) 4 NWLR pt. 116 pg. 387
Ede v. Omeke (1992) 5 NWLR pt. 242 pg. 428
Dakar v. Dapal (1998) 10 NWLR pt. 571, pg. 573
Abacha v. Fawehinmi (2000) 6 NWLR pt. 571 pg. 573

As rightly observed, Section 46 of the Evidence Act raises a mere probability and not a presumption of ownership.

Where the appellant could not establish ownership by traditional evidence, the court cannot go ahead to rely solely on Section 46 of the Evidence Act to grant a declaration of title to the appellant.

Finally, there are two concurrent findings of fact of the trial court and lower court in favour of the respondents. This court will not disturb such concurrent findings of fact – unless there is established a miscarriage of justice or violation of some principles of law or procedure or a substantial error apparent on the face of the record of proceedings as shown or where such findings are perverse.

Woluchem v. Gudi (1981) 5 SC 91

Mogaji v. Cadbury (1985) 2NWLR pt. 7 pg. 343

Ayoola v. Odofin (1984) 11 SC 72

Abusemwan v. Mercantile Bank of Nig. Ltd. (2002) (1987) 3NWLR pt. 60 pag. 196

Layinka v. Makinde (2002) 10 NWLR pt. 775 pg. 358

With fuller reasons given by my learned brother in the lead judgment, I also dismiss this appeal, and affirm the judgment of the Lower Court. I abide by the order as to costs.

Olufunlola Oyelola Adekeye
Justice, Supreme Court, CON

Chief O Ugolo SAN with him, C. Ibemesi for the Appellant.

C. A. N. Nwokenkwu for the Respondent.

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA
ON FRIDAY THE 10TH DAY OF DECEMBER, 2010
BEFORE THEIR LORDSHIPS.

MAHMUD MOHAMMED	JUSTICE, SUPREME COURT
CHRISTOPHER MITCHELL CHUKWUMA-ENEH	JUSTICE, SUPREME COURT
OLUFUNLOLA OYELOLA ADEKEYE	JUSTICE, SUPREME COURT
SULEIMAN GALADIMA	JUSTICE, SUPREME COURT
BODE RHODES-VIVOUR	JUSTICE, SUPREME COURT

SC. 294/2003.

BETWEEN:

CLEMENT ODUNUKWE
(For himself and on behalf of Anazodo Odunukwe Family of Nnewichi, Nnewi .. .. PLAINTIFF/APPELLANT

AND

1. DENNIS OFOMATA .. .. DEFENDANTS/RESPONDENTS
2. OYIBOJIOBI OFOMATA

JUDGEMENT
(DELIVERED BY SULEIMAN GALADIMA, JSC)

This case has a chequered history. I shall not bother myself to set in details all the facts of the case. They have been sufficiently exposed in the lead judgment of my Learned Brother RHODES-VIVOUR, JSC just delivered. In 1972, the Appellant as plaintiff filed their case at the Onitsha High Court of Anambra