

SUPREME COURT OF NIGERIA
23RD JULY, 1993. SC.15/1988
CORAM:- A. G. KARIBI-WHYTE, S. KAWU,
S. M. A. BELGORE, A. B. WALI, M. E. OGUNDARE, JJSC

SMART GABARI OGBIMI APPELLANT

AND

1. MRS. BEAUTY OLOLO)	
(Nee Gabari Ogbimi))	
2. MRS. FANNY EDEMA) RESPONDENTS
(Nee Gabari Ogbimi))	
3. SOFUN GABARI OGBIMI)	
4. ABIODUN GABARI OGBIMI)	

PLEADINGS - Claim by a party seeking order of court to modify agreement pertaining to a legacy - whether the claim is the same as one for just and fair sharing of the legacy

PRACTICE & - What amounts in law to a cause of action
PROCEDURE - when is a cause of action disclosed

FACTS

The parties are children of Late Chief Gabari Ogbimi who died intestate in 1963 leaving behind five children from three wives. The children are the parties hereto. Chief Ogbimi also left behind some real property including houses and plantations.

A disagreement arose among the children of Chief Gabari Ogbimi as to the sharing of his estate. The plaintiffs brought an action against the 1st defendant in 1966. The 1st defendant made moves to settle the matter out of court and in consequence, the Plaintiffs withdrew their action from court.

The houses were shared among the children on the basis of three branches they belong to and the sharing was embodied in an agreement, Exhibit 'A'.

The 2nd and 3rd Defendants not being satisfied with the sharing embodied in exhibit 'A' refused to sign same until the 1st Defendant allotted a building to them. On discovering the latest arrangement made behind them, the Plaintiffs insisted on having a building allotted to their bench too. When the 1st defendant did not budge Plaintiffs instituted this

action seeking the courts order to modify the agreements which they had signed, trial court found in favour of the Plaintiffs and entered judgment for them. The Defendants appealed unsuccessfully to the court of Appeal. On appeal to the Supreme Court, it had to determine inter alia, whether Appellant's claim disclosed any known cause of action in law or equity.

HELD (unanimously dismissing the appeal)

1. A claim for a declaration of a party's right clearly discloses a cause of action. (p.225 L 11)
2. Notwithstanding the judgment of the court below seeking to draw a difference between "modification" and "rectification", on the wording of the claims as endorsed on the writ of summons, a cause of action is disclosed. (p.225 L 14)
3. There is no doubt that the issue in controversy between the parties was as to the just and fair sharing of their late father's property. The first defendant clearly understood the action to be so. (p. 225 L 24)
4. The trial judge came to a just decision in the verdict he handed down in this case and the Court of Appeal was right to affirm it. (p.225 L 38)

REPRESENTATION

J. Y. Odebala, Esq., for the Appellant

A. A Omorodion 3rd and 4th Respondents unrepresented.

CASES REFERRED TO

1. Isikuru Uyovwekerhi v. Ibatere Afonughe (1976) 5 SC 85
2. Ransome-Kuti v. Attorney General (1985) 6 SC. 246
3. Chief Dr. Irene Thomas & 5 Ors. v. The most Reverend Timothy Omotayo Olufossoye (1986) 1 NWLR (pt. 18) 669.
4. Nosiru Bello & Ors. v. Attorney-General
Oyo State & ors. (1986) 5 NWLR 828.
5. Toriola v. Williams 12 WACA 505.
6. Onwonua v. Minaise 14 WACA 77
7. Auilu v. Fawehinmi (No.2) (1989) 2 NWLR 122.
8. Patkum Industries (Nig) Ltd. v. Niger Shoes (Mfg.) Co. Ltd.

LEAD JUDGMENT BY OGUNDARE JSC

The parties to the action leading to this appeal are children of late Chief Gabari Ogbimi who died intestate on 20/7/63 leaving behind five children (who are the parties to this action) and three wives. The plaintiffs are full blood sisters and children of one of the wives. The 1st defendant, their half-brother, is the eldest child born of another wife while the 2nd and 3rd defendants are full blood brothers born of the third wife. Chief Ogbimi also left behind some real property including houses and plantations. On his death, 1st defendant sat on his estate and when the plaintiffs could not get him to agree to a sharing of the estate, they sued him to court in 1966. 1st defendant made moves to settle the matter out of court in consequence of which the plaintiffs withdrew their action. The houses left behind were shared among the children on the basis of the three branches they belong to. The sharing was embodied in Exhibit 'A' which the 1st defendant made the plaintiffs to sign. It turned out, however, that the 2nd and 3rd defendants were dissatisfied with the sharing as embodied in Exhibit A and refused to sign same. 1st defendant went into negotiations with them as a result of which he gave up to them a building that was allotted to him in Exhibit A. On discovering re-arrangement carried out by the defendants behind their back. The plaintiffs protested to 1st defendants and insisted on having a building allotted to them as a branch too. When 1st defendant would not compromise with them, the plaintiffs instituted the action leading to this appeal claiming from the 1st defendant as follows:

1. *A declaration that the plaintiffs as children of late Gabari Ogbimi who died intestate at Sapele on 20th July, 1963 are entitled to inherit from his estate as beneficiaries.*
 2. *A declaration that the plaintiffs having benefited from the said estate by virtue of the consent agreement between the plaintiffs and the defendant in 1966 have the right to sue for modification of the said agreement for effective protection and enjoyment of their legacies.*
 3. *An order of court directing the modification of the agreement as herein under specified to enable the plaintiffs effectually and equitably administer and enjoy their legacies.*
1. *The shop at the left extreme of the sprayed block building on*

looking the road, the shop at the right extreme of the same block and one residential room and parlour of the same block'

TO READ: *The entire sprayed block building abutting the Adeola Road Identified as building No.1 in the Plan to be filed in the suit.*

2. *The first six room counting both sides of the block house behind the storey building'*

TO READ: *The entire building containing 12 rooms identified as building No.3 in the plan to be filed in this suit'*

3. *One room in the boys quarter.*

TO READ: *The entire boys quarters identified as building No.2 in the plan to be filed in this suit."*

Pleadings were filed and exchanged but before trial of the action the plaintiffs obtained leave of court to join the 2nd and 3rd defendants. Consequent on the joinder of the 2nd and 3rd defendants the plaintiffs filed and served an amended statement of claim. The 1st defendant also filed and served an amended statement of defence, 2nd and 3rd defendants, did not however file any statement of defence nor did they participate at the trial. Strangely enough a brief was filed on their behalf in the Court of Appeal. They were not represented by counsel at the hearing of the appeal in the court below even though 3rd respondent was present. And they have not also participated in this appeal.

At the trial of the action 2nd plaintiff and the 1st defendant only testified and after addresses by learned counsel appearing for them, the learned trial Judge, in a reserved judgment, found for the plaintiffs and entered judgment in their favour in terms of their claims. He made the following order:

"For the avoidance of doubt, I hereby order that the plaintiffs ("Gate 2") shall forthwith have exclusive ownership of Buildings 1, 2 and 3 in parcel A of Exhibit B as their own share of their late father's property. I further order that the defendants shall forthwith surrender to the plaintiffs the rooms which they own in the said buildings."

Being dissatisfied with the said judgment the 1st defendant unsuccessfully appealed to the Court of Appeal. He has further appealed to this court upon five grounds of appeal which, without their particulars, read:

- "(1) *The learned Justices of the Court of Appeal erred in law in formulating a claim for the plaintiffs when they held that purport of the plaintiffs' claim was for a just and fair sharing among the 3 gates of the property left by the late Chief Gabari Ogbimi of Sapele who was the father of all the parties to this case and/or that their claim was that they were entitled to a separate house of their own.*
- (2) *The learned Justices of Appeal erred in law in failing to allow the appeal of the appellant when the plaintiffs' claim formulated and/or based on modification of an agreement is not known to law and or equity.*
- (3) *The learned Justices of the Court of Appeal erred in law in referring to the error in the plaintiffs claim as formulated as mere technicalities and their so doing has led to a serious miscarriage of justice.*
- (4) *The learned Justices of the Court of Appeal erred in law when they held as follows:-*
'It is to be noted that the 1st and 2nd respondents, as plaintiffs in the court below, did not institute an action against the appellant to enforce any legal rights whatsoever in their case; also they did not base their claim upon any contract in writing as such. What the respondents claimed in the court below, technicalities aside, was that they as children of late Chief Gabari Ogbimi of Sapele who constitute "Gate 2" of their father's children were entitled to a separate house hold of their own just as the appellant took the buildings, parcels of land.....as members of "Gate 3".
These findings has led to a serious miscarriage of justice.
- (5) *The learned Justices of the Court of Appeal having held that the claim before the lower court was certainly not for rectification of Exhibit "A" and that there was in law no real consent to the agreement (Exhibit "A") ERRED in law in not allowing the appeal by dismissing or striking out the plaintiffs' claim."*

Learned counsel for the parties filed and exchanged their respective written briefs of argument. Mr. Odebala, for the 1st defendant set out 2 questions as calling for determination in this appeal, to wit:

- (i) Did the claim of the appellant as formulated disclose a known cause of action in law and or equity?
- (ii) Was the Court of Appeal right in holding that the claim of the 1st and 2nd respondents in the High Court was for a just and fair sharing of their late father's property."

Mr. Omorodion, for the plaintiffs, raised 3 issues in his own brief but for the purpose of determining this appeal, I shall confine myself to the questions raised in Mr. Odebala's brief.

QUESTION 1.

The main argument of learned counsel for the 1st defendant is that the claim of the plaintiffs - one for modification of an agreement - is unknown to law and equity. He criticized certain passages in the judgment of the Court of Appeal and submitted that "the claim for modification of an agreement as an equitable claim cannot be invented now merely to assist the 1st and 2nd respondents. To do this will mean creating a new equity", which according to learned counsel, could not be done. He cited some authorities in his support. He further submitted that "sentiment is not reason for a court to over-stretch a plaintiff's claim to give the court a jurisdiction." He relied on *Isikuru Uyovwekerhi v. Ibatere Afomighe* (1976) 5 SC 85 and *Ransome-Kuti v. Attorney-General* (1985) 6 SC. 246; (1985) 2 NWLR (Pt.6) 262.

Mr. Omorodion, for the plaintiffs, forcefully argued in his brief which he adopted at the hearing of this appeal, that having regard to the definition of "cause of action" as given by Obaseki, J.S.C. in *Chief Dr. Irene Thomas & 5 Ors v. The Most Reverend Timothy Omotayo Olufosoye* (1986) 1 NWLR (Pt. 18) 669 at 682 that the case of the plaintiffs as formulated in their amended statement of claim and evidence led in support of the claim sufficiently disclosed a cause of action.

To determine whether the plaintiffs' claim discloses a cause of action one has to have regard to the statement of claim. Paragraph 18 of the amended statement of claim reads:

"18. Wherefore the plaintiffs claim as follows:-

- (1) A declaration 'that the plaintiffs as children of late Gabari Ogbimi who died intestate at Sapele on 20th July, 1963, are entitled to inherit from his estate as beneficiaries.*

- (2) *A declaration that the plaintiffs having benefited from the said estate by virtue of the consent agreement between the plaintiffs and the 1st defendants in 1966 have the right to sue for modification of the said agreement for effective protection and enjoyment of their legacies.* 5
- (3) *An order of court directing the modification of the agreement as hereinunder specifically and equitable administer and enjoy their legacies."*

The first two claims seek declaratory reliefs whilst the 3rd claim is ancillary to these declaratory reliefs. I do not agree that a claim for a declaration of party's right discloses no cause of action. It clearly does. Notwithstanding the judgment of the court below, (per Omo-Eboh, J.C.A.) seeking to draw a difference between "modification" and "rectification" on the wording of the claims as endorsed on the writ of summons and as pleaded in paragraph 18 of the amended statement of claim a cause of action is disclosed and I, therefore, answer Question 1 in the affirmative. 10 15

QUESTION 2.' 20

I have considered the arguments proffered by Mr. Odebala in his brief and I dare say that the arguments do not support his complaint under this question. However, having regard to the pleadings and the finding of the learned trial Judge, I am in no doubt that the issue in controversy between the parties was as to the just and fair sharing of their late father's property. The 1st defendant clearly understood the action to be so. For in his evidence under cross-examination, he testified thus: 25

"I had building outside the compound in which I have exclusive interest. Gate 3 [that is, 2nd and 3rd defendants] also had buildings in which they had exclusive interest. The plaintiffs (Gate 2) have no exclusive interest in any of the buildings." 30

(Words in square brackets are supplied by me)

The learned trial Judge found (and there has been no appeal against this finding) that:

".....the partition as in Exhibit A was not done with the consent of all members of the family. Specifically, it was not done with the consent of the 2nd and 3rd defendants."

On the whole, I am satisfied that the learned trial Judge came to a just decision in the verdict he handed down in this case and that the

Court of Appeal was right to affirm his decision. I find no merit whatsoever in this appeal which I dismiss accordingly. The plaintiffs are entitled to the costs of this appeal which I assess at N1,000.00 against the 1st defendant/appellant.

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KARIBI-WHYTE JSC

I have read the judgment of my learned brother, Ogundare, J.S.C. in this appeal with which I entirely agree. I also will dismiss the appeal which completely lacks merit.

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My learned brother, Ogundare, J.S.C. has set out the facts comprehensively. I will and hereby adopt them. I also agree with the issues for determination he has adopted in his judgment. The issues are those formulated by Mr. Odebala for the appellants. They raise two questions, namely,

15 "1. *Did the claim of the appellant as formulated disclose a known cause of action in law or equity?*

2. *Was the Court of Appeal right in holding that the claim of the 1st and 2nd respondents in the High Court was for a just and fair sharing of their late father's property."*

20 Of course a successful submission that a plaintiff's claim discloses no cause of action terminates the action in limine. Hence the submission is one of critical importance in any action before the court. Mr. Odebala based his submission on the ground of plaintiff's claim for modification of an agreement, which he contended is unknown to the law. He argued that
25 the claim for modification of an agreement is an equitable claim which cannot now be invented to assist the 1st and 2nd respondents. It was argued that to do this will mean creating a new equity which could not be done. It was also submitted that jurisdiction cannot be conferred on courts on the basis of sentiments. Mr. Odebala cited and relied on *Ransome-Kuti*
30 *v. Attorney-General* (1985) 6 SC. 246; (1985) 2 NWLR (pt.6) 211 and *Isikuru Uyowekerhi v. Ibatere Afomighe* (1976) 5 SC.85 both decisions of this court.

Now, it is important to consider this issue first. This is because as I have adumbrated above the appeal rests on its success or failure. To
35 determine whether a plaintiff's claim discloses a cause of action suitable to be tried, it is necessary only to have regard to the claim of the plaintiff which alone determines whether the claim brought before the court is justifiable.

In this case plaintiff's claims are for a declaration that as children of

late Gabari Ogbimi who died intestate at Sapele on 20th July, 1963, they are entitled to inherit from his estate as beneficiaries. They also sought for a declaration that they having benefited from a consent agreement with 1st defendant they had the right to seek modification of that agreement. They finally sought for an order directing the modification of the agreement.

It is clear from the reliefs claimed that the first two are declaratory actions, and the third is ancillary to the first and to give effect to them.

The contention of appellant, simply put is that those reliefs do not give rise to a cause of action. What is a cause of action has been defined in judgments of this court. Only a few years ago in *Nosiru Bello & Ors v. Attorney-General, Oyo State & Ors.* (1986) 5 NWLR (Pt.45) 828 a cause of action was defined.

Although in the earlier decisions of the West African Court of Appeal of *Toriola v. Arewa* (1949) 12 WACA. 505, and *Onwonka v. Minaise* (1952) 14 WACA. 77, the question of whether there was a cause of action was decided, it was in the recent cases of *Nosiru Bello & Ors. v. A-G of Oyo State* (supra); *Akilu v. Fawehinmi* (No.2) (1989) 2 NWLR (Pt. 102) 122; *Patkun Industries (Nig.) Ltd v. Niger Shoes (Mfg.) Co. Ltd* (1985) 5 NWLR 138 among several others, that this court defined what constitutes a cause of action.

In *Nosiru Bello & Ors v. A-G Oyo State* (supra) a cause of action was defined as the bundle of aggregate of facts which the law will recognize as giving the plaintiff a substantive right to make the claim against the relief or remedy being sought. Thus the fact that situation on 'which the plaintiff to support his claim must be recognised by the law as giving rise to a substantive right capable of being claimed or enforced against the defendant, in other words, the factual situation relied upon must constitute the essential ingredients of an enforceable right.

Concisely stated, any facts relied upon by the plaintiff resulting from the act of the defendant which gives rise to a justifiable complaint is a cause of action.

Again in *Akilu v. Fawehinmi* (No.2) (supra) this court citing and relying on *Nosiru Bello & Ors. v. Att-Gen. of Oyo State* (supra) defined a cause of action to mean.

"every fact which is material to be proved to entitle the plaintiff to succeed, or all those things necessary to give a right to relief in law or equity."

The cause of action in the instant case is the right of the plaintiffs to the declarations sought, which intrinsically raises their right to the equitable

distribution between them and the Defendants of the estate of their father who died intestate. The inequitable dealings by the 1st defendant with the estate despite and regardless of the agreement between them is the cause of complaint. I therefore find it somewhat difficult to appreciate why it has been argued that these facts do not give rise to a cause of action. They are
 5 complaints against the acts of the 1st defendant in respect of which relief is being claimed. The claims relate to declaration of substantive rights in the plaintiff. They clearly give rise to a cause of action.

I therefore agree with the submission of Mr. Omorodion for the respondents that the case of the plaintiffs as formulated in their statement
 10 of claim, and the evidence led in support, sufficiently disclose a cause of action.

Now to the second issue, that is: whether the Court of Appeal was right in holding that the claim of the 1st and 2nd respondents was for a just and fair sharing of the estate of their late father's property.

15 A careful reading of Mr. Odebala's brief of argument and hearing him orally, confirmed my understanding of the issue before the court was only as to the just and fair sharing of the estate of their late father. A little excursion into the facts of this case reveals that the matter had earlier been settled in a consent agreement between respondents and the 1st defendant
 20 as to their share of the estate. It was after 1st defendant had compromised and made concessions to the 2nd & 3rd defendants, their paternal brothers, by increasing their share of the estate, did respondents decide eventually to seek a more equitable distribution of the estate. This was why they sought for a modification of the consent agreement. It is clear from the
 25 proceedings that 1st defendant so understood the action. The finding of the learned trial Judge, against which there has been no appeal was that,

".....the partition as in Exhibit A was not done with the consent of all the members of the family. Specifically, it was not done with the consent of the 2nd and 3rd defendant."

30 I think the learned trial Judge arrived at a correct, fair and just decision in this case. The Court of Appeal was also right in affirming the decision.

I therefore find no merit whatsoever in this appeal. The appeal is accordingly dismissed with cost assessed at N1,000 against 1st defendant/
 35 appellant.

KAWU JSC

I have had the privilege of reading, in draft, the lead judgment of my

learned brother, Ogundare, J.S.C., which has just been delivered. I am in complete agreement with his reasoning and his conclusion that the appeal lacks merit and should be dismissed. I see no justification in our interfering with the concurrent findings of the two lower courts. I too will dismiss the appeal with the costs assessed at N1,000.00 against the appellants.

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BELGORE JSC

To posit that there was no cause of action in this matter as it was at trial court is a wrong assumption. Manifestly clear in the claim is the controversy as to the estate of Chief Gabari Ogbimi, the father of all the parties to this action. What the plaintiffs sought as remedy is the equitable distribution of the estate and thus a clear and valid cause of action has been disclosed for the trial court to resolve. [Chief Dr. Irene Thomas & 5 Ors. v. The Most Reverend Timothy Omotayo Olufosoye (1986) 1 NWLR (Pt.18) 669 at 682. The first defendant/appellant was rightly found by the trial court to have unconscionably dealt with the estate without consent of first and second plaintiffs/respondents and Court of Appeal was right to have affirmed this decision by dismissing the appeal.

For the fuller reasons in the judgment of Ogundare, J.S.C., which I wholly adopt as mine and the above reasons, I also dismiss this appeal as totally lacking in merit. I also award N1,000.00 as costs of this appeal against the appellant in favour of the respondents.

WALI JSC

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I have had a preview of the lead judgment of my learned brother, Ogundare, J.S.C. and I agree with his reasoning and conclusion for dismissing the appeal.

For those same reasons stated in the lead judgment, I also dismiss this appeal and abide by the consequential orders made therein, that of costs inclusive. Appeal dismissed.

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