

SUPREME COURT OF NIGERIA
5TH MARCH, 1993. SC. 129/1988
CORAM:- S.M.A. BELGORE, A.B. WALI, I.L. KUTIGI
E.O. OGWUEGBU, S.U. MOHAMMED, JJSC.

ALHAJI AMUSA AKINTOLA DEFENDANT/APPELLANT
(For himself and on behalf of Elesade people)
AND
CHIEF SALAMI OYELADE PLAINTIFF/RESPONDENT
(For himself and on behalf of Ilofe people)

LAND LAW - customary tenant-right of user-subject to overlords re version - when reversion can take place.

LAND LAW - Trespass - whether customary tenant in possession can succeed against overlord.

LEGISLATION - Land use Act 1978, - vesting of land in the Governor - whether tantamount to abrogation of right of use - correct customary implications

FACTS

The Plaintiff, now Respondent sued the Appellant as Defendant before the High Court of Oyo State claiming a declaration of title to a piece of land, damages for trespass and an injunction to restrain the Defendants from committing further acts of trespass on the land. The Plaintiff's people are Appellant's customary tenants who held the land in dispute subject to Appellant's right to reap fruits of certain trees.

Pleadings were filed and exchanged and the case proceeded to trial. The trial court in its judgment dismissed the plaintiff's claims. The Plaintiff appealed to the court of Appeal, Ibadan division where his appeal was allowed.

The Court of Appeal set aside the Judgment of the trial court entered Judgment in favour of the Plaintiff, in respect of the damages, and injunction sought. It wrongfully held that the right of an overlord has been abrogated by the Land Use Act and that the Plaintiff's/Respondent's right of possession as customary tenants of the Defendant/Appellant has been violated.

26 AKINTOLA V. OYELADE (1993) 3 KLR 25; (1993) 3 NWLR

It is the Court of Appeal's award of damages for trespass to the Respondent being customary tenant that caused the Appellant to now appeal to the Supreme Court.

HELD (unanimously allowing the appeal)

1. Where the Plaintiff/Respondent and his people are Appellant's customary tenants, they are entitled to possession and occupation of the land in dispute. (p. 31 L. 11)

2. Customary Tenants, right of user is only subject to the Overlord's right of reversion exercisable if and when they deny the title of their grantor or fail to comply with the terms of the grant and forfeiture is ordered against them or if they abandon the land. And the Landlord has no right to determine their tenancy or occupation of the land otherwise than as stated above. (p. 31 L. 13)

3. The Plaintiff/Respondent as a tenant in possession of the disputed land cannot successfully claim for trespass against his Overlord, the Appellant and his men when they entered the land in dispute in exercise of their customary right to cut palm trees without destroying Respondent's crops. (p. 31 L. 33)

4. The Court of Appeal was wrong in holding that the Appellant being Respondent's Overlord was liable in damages for trespass, when the fact is that the Respondent remained a customary tenant subject to any customary right of use and control operating in the area where the land is situated. (p. 32 L. 26)

5. The provision of s. 1 of the Land Use Act that vested land in the Governor merely takes away the freehold title vested in individuals or communities but not the customary right of use and control of the land. (p. 32 L. 29)

6. A customary tenant is subject to the condition attached to the customary tenancy. In this case the conditions include the Overlords right to reap fruits of the palm trees, locust bean trees and shea nut trees and the payment of Ishakole as and when due. That was ex-

actly what the Appellant did in this case by going into the land. He could not therefore have committed any act of trespass on the said land. (P. 32 L. 35)

REPRESENTATION

Kolawole Alawode, for the Appellant
O. Odunlade, for the Respondent.

CASES REFERRED TO

1. Bello v. Kassim (1969) NMLR 148
2. Sagay v. Independence Rubber Co. Ltd (1977) 5 SC 143
3. Lawani v. Tadeyo 10 W.A.C.A. 37
4. Oye v. Chiabolo (1950) 19 NLR 107
5. Akinkuowo v. Fatimaju (1965) N.M.L.R 349
6. Onwuka & ors v. Ediola & anor (1989) 1 NWLR (pt 96) 182
7. Garba Abioye & ors v. Saad Yakubu & ors (1991) 5 NWLR (pt.190)
8. Ogunleye v. Oni (1990) 2 NWLR (pt. 135) 745

STATUTES REFERRED TO

Land Use Act 1978 ss. 36 (1), 7 (2).

LEAD JUDGMENT BY KUTIGI JSC

We allowed this appeal on the 7th day of December, 1992 after hearing counsel on both sides. We awarded costs of N1,000 to the appellant and adjourned to give our reasons for the decision today which I now do.

The plaintiff who is now the respondent claimed against the defendant/appellant as follows -

“1. Declaration that the plaintiff and his people are the persons entitled to possession and deemed to be in continued possession of all that farmland situate, lying and being at Ilofe,

via Ogbomoso, Annual rental value of farmland is about N100.00.

2. *N500.00 (Five hundred Naira) damages for trespass committed by the defendants their people, servants, agents and privies particularly on the 7th and 8th day of April, 1981*
 5 *respectively when the defendants and their said people, servants, agents and privies unlawfully entered into the said land and started to harvest palm fruits, cut down cocoa and orange trees, destroy sprouting yams, vegetable, okro etc. belonging to the plaintiff and his people, and for continuing trespass.*

3. *Injunction:- to restrain the defendants, and their people, servants agents and privies from further entering into the said land to harvest palm-fruits, cut down cocoa and orange trees, and destroy sprouting yams, vegetables, okro etc. of the plaintiff and his people, and to do any other thing whatsoever on the said land."*
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After the exchange of pleadings, the case proceeded for trial before Ademakinwa J. who in a reserved judgment dismissed the claims of the plaintiff/respondent in their entirety.
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The plaintiff was dissatisfied with the judgment of the trial court and so he appealed to the Court of Appeal, Ibadan where his appeal
 25 was allowed. The judgment and order for costs of the trial court were set aside and judgment entered for the plaintiff/respondent in respect of the declaration sought, N50 damages for trespass and an injunction. The plaintiff/respondent was also awarded costs of N700 and N300
 30 respectively in the court of trial and the Court of Appeal.

Dissatisfied with the judgment of the Court of Appeal, the defendant/appellant has now appealed to this Court.

35 The facts of the case can be summarised as follows. The land in dispute forms part of a large tract of farmland granted from time immemorial to appellant's ancestor OLAMURO by one OLUGURO OLAIGBE of the Oluguro Chieftaincy family. After the Fulani wars one AKINSUWON from Ogbomosho, an ancestor of the plaintiff/

respondent, approached appellant's fore-father OTEBOLAKE, then the Elesade of Esade, for a grant of land for farming purposes. The land in dispute is part of the land consequently granted to plaintiff/respondent's ancestor for farming subject to payment of Ishakole. As a condition of the grant appellant's family also reserved the right to reap the fruits of the palm trees, locust bean trees and the emi trees on the land. The Ishakole originally payable was 4 loads of yams, 4 loads of dried yams (elubo) and N5.00 per annum. The Ishakole has since been reduced to a flat payment of N 10.00 per annum. The plaintiff/respondent's people, the Ilofe people, complied with these conditions until recent times and whenever they failed to do so, the representatives of defendant/appellant's people, the Elesade family, had taken legal actions against them. It was as a result of a boundary dispute between the Ilofe and Esade people resulting in destruction of crops planted on the land in dispute by the Ilofe people which has given birth to the present action.

In a reserved judgment the learned trial Judge after evaluating the evidence and making findings of facts on the issues raised before him dismissed plaintiffs case.

In the Court of Appeal, the respondent challenged the trial court's decision upon the following grounds of appeal -

1. The learned trial Judge erred in law and on the facts by failing to enter judgment in favour of the plaintiff as per his Writ of Summons under the provisions of the Land Use Act, 1978.

Particulars of Error

(a) There was ample and uncontroverted evidence that the plaintiff and his people were, have been, are still in possession and occupation of the land in dispute using it for agricultural purposes not only immediately before and after the promulgation of the Land Use Act, 1978 but also from time immemorial.

(b) There was no allegation either on the pleadings, and or in the evidence before the court, of the plaintiff and his people being at any time in unlawful possession of the land in dispute.

2. The judgment is against the weight of evidence” The Court of Appeal carefully considered these grounds and allowed the appeal as explained earlier.

On behalf of the appellant in this court, eleven grounds of
5 appeal were filed and nine issues were raised in the brief for determination. In the respondent’s brief only five issues were submitted for determination. However, before this appeal was allowed on 7th December, 1992, Mr. Kolawole Alawode learned counsel for the appellant stated before us that he was only interested in that part of the
10 judgment of the Court of Appeal which awarded damages for trespass against the defendant/appellant. He referred to the judgment of the Court of Appeal page 161 lines 12-18 and submitted that the right of an overlord had not been abrogated by the Land Use Act,
15 1978. He said the right of an overlord to harvest palm fruits, locust bean trees and the like, did not cease to exist when the Land Use Act came into being; and that the Court of Appeal was wrong to have found the appellant liable in damages for trespass.

20 On this issue it is important to state that although the learned trial Judge dismissed plaintiff/respondent’s case, it was one of his findings of facts that the plaintiff/respondent’s family had been the tenants of the defendants/appellant’s family in respect of the land in dispute. And Mr Alawode has no quarrel with the finding. There has
25 been no appeal against it. On pages 115 to 116 of the record, the learned trial Judge found thus -

*“There is evidence that until the plaintiffs installation as Onilofe in 1978 by the Soun of Ogbomosho, his family had been
30 paying Ishakole to the family of the defendants in respect of the land in dispute. Whenever the plaintiffs family refused or failed to pay ‘Ishakole’, the defendants’ family had instituted actions for the recovery of same and they had invariably succeeded both at the court of first instance or (if the plaintiffs family had appealed) on appeal. Exhibits ‘E’, ‘F’, ‘G’ and
35 ‘H’ are certified true copies of such judgments that the defendant’s family had obtained against the plaintiff’s family in this regard.*

There is no doubt whatsoever that the plaintiff's family had been the tenants of the defendants' family in respect of the land in dispute and that the former up to sometime in 1978 had been paying 'Ishakole' to the latter for the tenancy. The plaintiff's allegation that his family had been paying 'Ishakole' to the defendant's family, not to be retained by the family, but for onward transmission to the Soun of Ogbomoso has not been established before me."

The Court of Appeal rightly in my view relied on these findings of facts and on which there was no appeal as stated above.

Clearly if the plaintiff/respondent and his people are appellant's customary tenants, they are certainly entitled to possession and occupation of the land in dispute. Their right of user is only subject to the overlord's right of reversion exercisable if and when they deny the title of their grantor or misbehave by failing to comply with the terms of the grant and forfeiture is ordered against them or if they abandon the land. The landlord has no right to determine their tenancy or their occupation of the land otherwise than as stated above. (See *Bello v. Kassim* (1969) 1 NMLR 148, *Sagay v. New independence Rubber Co. Ltd* (1977) 5 SC. 143. But even where there is an act occasioning forfeiture, forfeiture is not automatic. The proper remedy for an overlord in such a case is to ask the court to forfeit the interest of the tenant, and to make an order for possession. (See *Lawani v. Tadeyo* (1944) 10 W.A.C.A. 37; *Ogbakumanmu v. Chiabolo* (1950) 19 NLR 107; *Akinkuowo v. Fafimoju* (1965) NMLR 349).

The Court of Appeal also rightly in my view found that there was positive evidence before the trial court to show that the respondent and his people to whom the land was granted, have remained in possession from 1900 until this action was commenced on 23/7/1981, and that they used the land for farming purposes only.

So the simple question is - if the plaintiff/respondent as a tenant is in possession of the disputed land can his claim for trespass succeed against his overlord, the appellant? The answer is certainly in

the negative. There was unequivocal evidence before the trial court that the appellant and his men entered the land in dispute allegedly in exercise of their customary right to cut palm trees, locust beans and sheanut trees and that they did not destroy any of the crops belonging to the respondent. The Court of Appeal per Omo J.C.A. (as he then was) concurred by Omololu-Thomas and Sulu-Gambari JJ.C.A.), treated the issue on page 161 of the judgment thus -

“But what about bare trespass? Were the defendants/respondents exercising a right known to the law when they went on the land in 1981 particularly, and reaped fruits therefrom? The answer must be in the negative. With the coming into operation of the Land Use Act, the only interest, besides that of the Local Government in respect of rural agricultural land, is that of the person in actual user/possession vide S. 36(2) of the Land Use Act. What he has is a customary right of occupancy. The right of an overlord to harvest palm or locust bean trees ceased to exist. Any forcible entry by such a land lord, like the defendant/respondents, will therefore constitute a breach of the right of possession and which can be compensated by damages in an action for trespass. The plaintiff/appellant is therefore entitled to very nominal damages for bare trespass. It having been admitted by the defendants/respondents that they went on the land to harvest palm fruits etc. I assess damages at N50.00 only”

The Court of Appeal with respect, was completely wrong in so holding. It had lost sight of the fact that the respondent remained a customary tenant subject to any customary right of use and control operating in the area where the land is situated. When the suit herein was filed on 23/7/1981 the Land Use Act 1978 had become applicable to all the land in this county: and by virtue of Section 1 of the Act same has been vested in the Governor of Oyo State on that date. That provision takes away the freehold title vested in individuals or communities, but not the customary right of use and control of the land. A customary tenant remains a customary tenant subject to the condition or conditions attached to the customary tenancy. In this

case the conditions include the overlord's right to reap fruits of the palm tress, locust bean trees and sheanut trees, etc. and payment of Ishakole as and when due. That was exactly what the appellant did in this case by going in to the land. He could not therefore have committed any act of trespass on the said land. (See for example Onwuka & Ors. v. Ediala & Anor (1989) 1 NWLR (Pt.96) 182. Section 36(1) & (2) of the Land Use Act reads thus -

"36. (1) The following provisions of this section shall have effect in respect of land not in an urban area which was immediately before the commencement of this decree held or occupied by any person.

(2) Any occupier or holder of such land, whether under customary rights or otherwise howsoever, shall if that land was on the commencement of this decree being used for agricultural purpose continue to be entitled to possession of the land for use for agricultural purposes as if a customary right of occupancy had been granted to the occupier or holder thereof by the appropriate Local Government and the reference in this subsection to land being used for agricultural purposes includes land which is, in accordance with the customary law of the locality concerned, allowed to lie fallow for purposes of recuperation of the soil."

It is for the above reasons that the appeal succeeded and was allowed. The orders made by the Court of Appeal awarding N50.00 damages and an injunction against the defendant/appellant are therefore set aside. Plaintiff's claims (2) and (3) are hereby dismissed.

BELGORE JSC

Since the decision of this Court in Garba Abioye & Ors. v. Saad Yakubu & Ors. (1991) 5 NWLR (Pt.190) 130, the position of the traditional landlord and his tenants vis-a-vis Land Use Act has been fully explained. The case amplified the situation explained in Ogunleye v. Oni (1990) 2 NWLR (Pt.135) 745 to assert that the rights of the original landlords have not been extinguished; rather they are put in more meaningful Control.

For the reasons in the judgment of Kutigi J.S.C., which I entirely agree with, I allowed this appeal with the above reasons also.

WALI JSC

I have had the opportunity of reading in advance, the draft
lead Reasons for Judgment of my learned brother Kutigi. J.S.C. and
5 I entirely agree with it. It was for those same reasons ably stated in the
lead Reasons for Judgment, which I hereby adopt as mine that I
allowed the appeal on 7th December 1992.

I adopt the consequential orders contained in the lead Rea-
10 sons for Judgment.

OGWUEGBU JSC

15 On 7th December, 1992 after hearing arguments from both
learned counsel, we allowed this appeal with N1 ,000.00 costs in favour
of the appellants and adjourned to give our reasons today.

The rights reserved by the overlord to harvest palm trees and perform
other acts on the land were not extinguished by Section 36 (2) of the Land
20 Use Act, 1978.

The appellant could not have committed any act of trespass on
the land on the facts of the case and the law.

I abide by the consequential orders made by my learned brother.
Kutigi, JSC. in the lead judgment.

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S.U. MOHAMMED JSC also agreed with the lead judgment.

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