

SUPREME COURT OF NIGERIA
4TH FEBRUARY, 1994. SC 235/1990.
CORAM:- M. L. UWAI, I. L. KUTIGI, M. E. OGUNDARE,
U. MOHAMMED, Y. O. ADIO, JJSC.

ISHAU OLORUNFUNMI & 2 OTHERS

(For themselves and on behalf PLAINTIFFS
of Olorunfunmi - Madarikan family)

AND

BASHIRU SAKA & 3 OTHERS

(For themselves and on behalf DEFENDANTS
Omotorisha branch of Madarikan family)

ACCOUNTS - Family Lands Sales - Proceeds therefrom - counter claim for account by defendants - plaintiffs held not to be accountable - proper accountable party

APPEALS - Land Law - Sale of Family Land - Modification of trial court's order as to power to sell - by the Court of Appeal - held to be correct

LAND LAW - Sale of Family Land - Power of Attorney to some family members to handle sales - executed by the family head and majority of principal family members - whether void

LAND LAW - Family Land - Declaration that the defendants are not entitled to sell family land alone - when rightly granted by the trial court.

FACTS

The Plaintiffs filed an action against the 1st and 2nd Defendants who are of one family with the Plaintiffs, in respect of an alleged sale of family land to the 3rd and 4th Defendants. They sought a declaration that the Defendants alone are not entitled to sell the family land. The family, made up of six branches had earlier executed a Power of Attorney by which the family head and principal members of four out of the family branches had empowered some family members to handle transactions relating to the family land. The

donees of the Power of Attorney have been sharing proceeds from sales made per family which those who receive on behalf of the various branches should now share among members of their respective branches. The Defendants denied selling the land in question to anybody, felt it was their father's property, set up alternative counter claims against the Plaintiffs for account and setting aside the Power of Attorney as being void, amongst other claims.

The learned Trial Judge granted all the Plaintiffs' claim and dismissed the Defendants' claims. The Defendant's appeal to the Court of Appeal was allowed and all Plaintiffs claims were dismissed except the order for perpetual injunction which was varied. The aggrieved Plaintiffs have now appealed to the Supreme Court whilst 1st and 2nd Defendants have also cross-appealed. The 3rd and 4th Defendants were never seen at any stage of the proceedings nor were they represented. The Plaintiff urged the Court to determine, inter alia, whether the learned trial Judge's finding that the Power of Attorney is valid is perverse. The Defendants in their cross-appeal sought to know whether the Court of Appeal was right in modifying the injunction granted by the trial court instead of setting it aside completely.

HELD (unanimously allowing the Plaintiffs' appeal and dismissing the Defendants' cross appeal)

1. Where all the six branches of the family authorised the preparation and execution of the Power of Attorney which was found to have been executed by the family head and principal members of four branches of the entire family, the Power of Attorney was a valid document as found by the trial court and the Court of Appeal was in error to have declared it null and void. (p.29 L25)
2. The trial court's findings that the Plaintiffs are not accountable to the Defendants is supported by overwhelming evidence and the Court of Appeal was wrong in reversing that finding. This does not mean that nobody is accountable to the Defendants, for those who admitted collecting the proceeds meant for their branch of the family are accountable to the Defendants. (p.31 L23)
3. The trial court was right in granting the declaration sought (that 1st and 2nd Defendants alone are not entitled to sell the family land) in the circumstances of this case. The declaration was clearly in the interest of the whole family and

the Court of Appeal was wrong to have set it aside (p.33 L18)

4. The Court of Appeal was right in modifying the trial court's order which it replaced with an order that the 1st and 2nd Defendants can only alienate the land with the consent or authority of principal members of the family only. (p.35 L16)

REPRESENTATION:

A. Thompson for the Plaintiffs.

B. O. Ogundipe with B. R. Fashola for the 1st and 2nd Defendants.

CASES REFERRED TO

1. Lujinle v. Adeagbo (1988) 2 NWLR (pt.75) 238
2. Elabanjo v. Tijani (1986) 5 NWLR (pt.46) 952
3. N.I.C.O.N v. Power & Industrial Eng. Co. Ltd. (1986) 1 NWLR (pt.14) 1
4. Ekpendu v. Erika 4 FSC 79
5. Atunrase v. Sunmola (1985) 1 SC 349
6. Ewarami v. A.C.B. Ltd. (1978) 4 SC 99
7. Umoffin v. Udem (1973) 12 SC 69 at 75
8. Shell B. P. v. Abedi (1974) 1 All NLR 1 at 16
9. Total (Nigeria) Ltd. v. Nwoko (1975) 5 SC 1 at 17
10. Ibinga v. Usanba (1972) 5 SC. 103 at 122 - 126.

BOOKS REFERRED TO

1. Boustead on Agency 15th Ed. Art. 51 page 191
2. Atkins Court Forms Vol. 1 pp. 186 & 230
3. Halsburys Laws of England 3rd Ed. Vol. 21 para. 745.

LEAD JUDGMENT BY KUTIGLJSC

In this suit which began in the Ikeja Judicial Division of the High Court of Lagos State, the plaintiffs sued the defendants claiming the following reliefs:-

"(a) A declaration that the 1st and 2nd defendants alone as members of the Omotorisha family are not entitled to sell Olorunfunmi land alone;

(b) *A declaration that any such sale is void and in particular the sale to the 3rd and 4th defendants;*

(c) *An injunction restraining the defendants from selling or in any way alienating Olorunfunmi family land or acting on any illegal sales by the*
5 *1st and 2nd defendants."*

The 1st and 2nd defendants also counter-claimed against the plaintiffs as follows:-

"(i) *A declaration that the Power of Attorney dated 17th day of*
10 *February, 1978 and purportedly registered as No. 16 at page 16 in volume 1681 of the Register of Deeds in the Lands Registry in the office kept at Lagos is void.*

IN THE ALTERNATIVE TO (i) above-

(ii) *An order setting aside the said power of attorney.*

15 *IN THE ALTERNATIVE TO (i) and (ii)*

(iii) *An account of all monies collected by the plaintiffs in respect of the said sales by the plaintiffs.*

AND

(iv) *Payment over to the 1st and 2nd defendants of the balance of*
20 *the said proceeds adjudged to be due to them.*

IN THE FURTHER ALTERNATIVE TO (i) - (iv) above

(v) *An order for partition and/or sale of the land*

AND

(vi) *such further and/or other orders and directions of this Honourable*
25 *Court for vesting in the 1st and 2nd defendants their just shares."*

The record shows that although the four defendants were served with the Writ of Summons and the Statement of Claim, only the 1st and 2nd defendants entered appearance and counter-claimed. The 3rd and 4th defendants neither entered appearance nor filed any statement of defence and were
30 not represented by anyone at the trial.

At the trial in the High Court nine witnesses testified on behalf of the plaintiffs while four testified for the defendants. It was common ground that the parties belong to the same family which owns the land even though the plaintiffs gave the name as "Olorunfunmi-Madarikan" family, while the defen-
35 dants call it simply "Madarikan" family.

The plaintiff's case was that ownership of the family land remained in the family which had by the Power of Attorney (Exhibit C in the proceedings), donated its power of management and sale to named individuals therein and consequent upon which the named individuals sold portions of family land.

They said the proceeds of sales had been shared between the six branches of the family. That the 1st and 2nd defendants had without authority sold part of the family land to the 3rd and 4th defendants which they had put into use. The defendants on the other hand contended that each branch of the family owns its own separate allotment which it can treat in anyway it likes. That the alleged power of attorney was not donated by all the branches of the family and that the plaintiffs were selling portions of the family land which belonged to the defendants' branch of the family by allotment. The 1st and 2nd defendants denied selling portions of the family land to the 3rd and 4th defendants. 5

After due hearing the learned trial Judge in a reserved judgment granted all the claims of the plaintiffs and dismissed the counter-claims of the defendants thus:- 10

"In the result all the defendants' counter-claims fail and are hereby dismissed. On the other hand the plaintiffs' three claims succeed. Accordingly it is hereby declared that:- 15

(i) 1st and 2nd defendants alone as members of Omotorisha branch of Madarikan family are not entitled to sell Madarikan family land alone.

(ii) Any such sale of family land to anybody including 3rd and 4th defendants is void. 20

It is also ordered that the defendants, their servants and or agents be and are hereby restrained from selling or in anyway alienating Madarikan family land verged green and also verged red in the Survey Plan No. CK/LS/1012 dated 28th May, 1985 prepared by Chief A.O. Coker Licensed Surveyor." 25

Dissatisfied with decision of the trial court the defendants appealed to the Court of Appeal, Lagos Division. In its judgment delivered on the 16th day of January, 1990, the Court of Appeal allowed the appeal. All the plaintiffs' claims were dismissed except the order of perpetual injunction which was modified or varied. As to the counter claim of the 1st and 2nd defendants, the Power of Attorney (Exhibit C) was set aside and the plaintiffs were then ordered to render an account to the defendants. 30

Aggrieved by the decision of the Court of Appeal, the plaintiffs have now appealed to this court. And further dissatisfied the 1st and 2nd defendants have also cross-appealed. The parties filed and exchanged briefs of argument. They were adopted at the hearing. Oral submissions were also made in addition. 35

The appeals will be taken separately. But before I start I would like to set out the following finding of facts by the trial court which were not disputed by the parties herein -

5 1. The proper name of the family is Madarikan family and that the land in dispute is Madarikan family land.

10 2. The plaintiffs and the 1st and 2nd defendants are all members of Madarikan family.

3. There was no dispute as to the identity of the land which was not allotted to any branch of the family.

15 4. There are six branches of the Madarikan family namely: (1) Olorunfunmi (2) Ilo (3) Omotorisha (4) Odunsi (5) Dada Ori, and (6) Fashesan.

20 5. Proceeds of sale of family land by the donees of the power of attorney (Exh. C) had been distributed to the six branches of the family.

6. The entire Madarikan family land had not been partitioned and members of the family did not want partition.

25 7. One Ishau Olorunfunmi was the head of the Madarikan family in 1978 when the power of attorney was prepared and executed.

PLAINTIFFS' APPEAL

Mr. Thompson learned counsel for the plaintiffs has submitted in his brief four issues for determination in the appeal as follows:-

30 *"(i) Whether or not the learned trial Judge's finding that the representatives of the six branches of the family gave their consent for the Power of Attorney (Exhibit C) to be prepared and executed is perverse.*

(ii) Whether or not there was sufficient evidence to support the learned trial Judge's finding that Dada Ori and Fasesan branches although
35 *not represented in Exhibit C consented to the execution of the document.*

(iii) Whether or not from the totality of evidence adduced at the trial, the entire Madarikan family is an accounting party to the defendants.

(iv) Whether or not the plaintiffs are entitled to a declaration that

the 1st and 2nd defendants are not entitled to sell the family land alone."

Issues (i) and (ii) which relate to the power of attorney (Exhibit C) can conveniently be taken together. Mr. Thompson submitted that the finding of the trial court that the representatives of all the six branches of Madarikan family gave their consent for the preparation and execution of the power of attorney was supported by the uncontradicted evidence adduced by plaintiffs' witnesses and that the Court of Appeal was wrong when it came to the conclusion that Exh. C was defective simply because it was of the view that four of the branches which executed it were not represented by their principal members. He said the important thing here was the authority and consent of the family and that it was immaterial whether or not those whose names appear in the Power of Attorney are head or principal members of the family. As the entire family herein gave its consent for the preparation and execution of Exh. C, it is a valid document as found by the trial court. We were referred to the evidence of plaintiffs' witnesses numbers 1- 8.

It was also submitted that the defendants case at the trial was simply that the donees of Exh. C who purported to represent the Omotorisha branch of the family were not principal members or accredited representatives of the branch and that they never challenged the appointment of the representatives of the other five branches of the family. He said the Omotorisha branch was represented by Sanni Agbaje and Muibi Buraimoh as donors and Amida Omotorisha and Biiaminu Omotorisha as donees. The burden was therefore on the defendants to prove that those named as representing the Omotorisha branch of the family or any branch at all were not principal members or accredited representatives. This they failed to do and the Court of Appeal was wrong to have shifted the burden onto the plaintiffs. He said the learned trial Judge having found that the representatives of at least, five out of the six branches of the family gave their consent to the preparation and execution of Exh. C was right when he concluded that the will of the majority must prevail. The Court of Appeal was clearly wrong to have arrived at the conclusion which portrayed the defendants as challenging the preparation and execution of Exh. C by the entire family when from their pleadings their disagreement with Exh. C was centred only on the choice of persons whose name appear as representing the Omotorisha branch. Since parties are bound by their pleadings the defendants would not be allowed to set up a case different from what they pleaded. We were referred to paragraphs 20 & 21 of the Further Amended

Statement of Defence and Counter Claim on page 234 of the record, the power of attorney (Exh. C) on pages 356-357, and the cases of Olujinle v. Adeagbo (1988) 2 NWLR (Pt.75) 238; Elabanjo v. Tijani (1986) 5 NWLR (Pt.46) 952; NICON v. Power & Industrial Eng. Co. Ltd. (1986) 1 NWLR (Pt.14) 1.

5 Responding Mr. Ogundipe submitted that the defendants' case challenging the Power of Attorney (Exh. C) was two-fold :

1. The persons appearing as donors and donees in Exh. C did not
10 represent the family. He referred to paragraph 16 of the Further Amended Statement of Defence and Counter-Claim, and

2. The persons purporting to be donors and donees on behalf of the Omotorisha branch of the family were not the head or principal members thereof
15 as per paragraphs 20 & 21 of the Further Amended Statement of Defence etc.

He said the learned trial Judge having found that there was no clear evidence that the persons who represented four out of six branches of the family which consented to the donation of Exh. C were not principal members
20 of their branches ought to have set aside the power of attorney. It was clear enough that Exh. C was not duly authorised by the family. The onus was on the plaintiffs to establish that the persons who donated Exh. C on behalf of the family including Omotorisha branch were principal members. This the plaintiffs failed to do. He said there was evidence also that Fasesan and Dada Ori
25 branches of the family did not sign Exh. C. That although P.W.S 4 & 5 testified respectively on behalf of the two branches, their evidence did not show that they consented to selling and leasing of family land as per Exh. C. They only agreed and appointed people to administer the land. In the circumstances the Court of Appeal was right to have set aside the power of attorney (Exh. C).
30

Now, the plaintiffs pleaded in paragraphs 16 & 17 of their First Amended Statement of Claim thus:-

35 *"16. The defendants without the consent of the family purported to sell family land to various persons and threatened to continue to sell the same unless restrained.*

17. The defendants claim to have sold the land in the Plan No.

OGEK. 1763/84. The plaintiff will rely on the said Plan at the trial."

In reply the defendants pleaded in paragraphs 15, 16, 17, 20 & 21 of their Further Amended Statement of Defence and Counter-Claim as follows:-

"15. The 1st and 2nd defendants deny paragraphs 16 & 17 of the First Amended Statement of Claim and put the plaintiffs to the strictest proof thereof.

16. With further reference to paragraphs 16 & 17 of the First Amended Statement of Claim the 1st and 2nd defendants further aver that whereas they have not sold Madarikan family land to anyone, it is the plaintiffs themselves who have erroneously held themselves out as Olorunfunmi land-owning family, and have in that capacity, and without the valid consent and authority of the other branches of the Madarikan family (including the Omotorisha branch to which the 1st and 2nd defendants belong) sold or purport to sell Madarikan family land to various third parties on the ground or pretext, which is mistaken and misconceived that the said land is Olorunfunmi family land.

FURTHER AMENDED COUNTER-CLAIM

17. The 1st and 2nd defendants repeat paragraphs 1-16 of their Further Amended Statement of Defence and Counter Claim.

20. The 1st and 2nd defendants will further contend at the trial of this action that the said donees of the Power of Attorney who purport to represent the Omotorisha branch of the Madarikan family are neither the head and or principal members, nor were they ever validly appointed or appointed at all to so act by the head and or principal members or accredited representatives of the said Omotorisha branch of the Madarikan family.

21. In the premises the 1st and 2nd defendants aver that the names of the persons who purport to represent the Omotorisha branch of the Madarikan family in relation to the said Power of Attorney have been illegally and improperly procured and that in the result the power of attorney is void or alternatively voidable."

It is thus clear from the pleadings as submitted by Mr. Ogundipe that the defendants did not only challenge the Power of Attorney on the ground that the persons named as donors or donees therein on behalf of Omotorisha branch of the the family were not head or principal members of the branch but also on the ground that the persons appearing as donors or donees did not represent the family. The learned trial Judge who had the singular opportunity

of watching the witnesses testify in the case found in the judgment as follows:-

"I have found in the case in hand that the plaintiff Ishau Olorunfunmi was the head of Madarikan family at the time Exhibit C was signed as claimed by the plaintiffs. He is a "donee of power of attorney (Exhibit C)". He was not only present at the family meeting but he also gave his consent for the document to be signed. The document cannot therefore be declared void. Fasesan who was said to be the head of Madarikan family by the defendants has indeed denied it.....

10 There was no evidence that the Power of Attorney Exhibit C was falsely or fraudulently made. Four of the six branches of Madarikan family were represented as donors and donees of Exhibit C.....

15 There is no evidence that members of Ilo and Omotorisha branches of the family who are donors or donees of the Power of Attorney are principal members of the family. The fact remains however that they are members of each of the two branches of the 20 family.

Members of Dada Ori and Fasesan branches of the family are not represented on the document. They were however present at the meeting consenting to execution of Exhibit C. They were not donors or donees of the Power of Attorney. For this the representatives of the two branches gave 25 reason which I have accepted as good. The position is that representatives of the six branches of the family gave their consent for the Power of Attorney to be prepared and executed.....

A careful perusal of the record shows that the above findings of the learned trial Judge were amply supported by the evidence led by the plaintiffs 30 at the trial. For example: P.W.3 on page 157 lines 15-23 said:-

"The representatives of the six branches of the family met and chose Ishau Olorunfunmi as the head of the family. For the purposes of dealing with the land the family prepared a document. It is called Power of Attorney. I am one of the donees of the Power of Attorney Exhibit C. The donees of the 35 Power of Attorney are Mudasiru Olorunfunmi and Ishau Olorunfunmi from Olorunfunmi branch, Surakatu Ilo and Rasaki Ilo from Ilo branch, Billiaminu Omotorisha and Amida Omotorisha from Omotorisha branch. I am Amida Omotorisha. Rasaki Odunsi from Odunsi branch."

Also P.W.2 on page 153 lines 28-31 stated:-

"There is a Power of Attorney given to some members of the family to administer the land. All the six branches of the family met and gave the Power of Attorney to some members of the family. Exhibit C is the Power of Attorney. I am one of the donees of the power."

5

The Court of Appeal on the other hand was of the view that the trial court having found that *"there was no clear evidence to show the principal members of the Ilo, Fasesan, Dada Ori and Omotorisha branches of the family in 1978"* ought to have come to the conclusion that the Power of Attorney (Exhibit C) was defective in the sense that members of the four branches of the family out of the six branches were not the principal members of their branches. With due respect I do not think the Court of Appeal was right in its conclusion. First of all as demonstrated above, it was not correct to say that Dada Ori and Fasesan branches of the family were not represented in Exh. C by their principal members. The finding of the trial court was that the two branches were not represented in Exh. C for reasons adduced by the two branches and, which the court accepted. According to the evidence of P.W.s 4 & 5 the two branches were present at the meeting which authorised the preparation and execution of Exh. C. These witnesses also confirmed that the two branches have been receiving their own share of the proceeds of sale of family land. It was only the Ilo and Omotorisha branches of the family that the trial court found not to have been represented in Exh. C by their principal members even though the two were represented at the meeting which authorised the preparation and execution of the Power of Attorney. I think under these circumstances where all the six branches of the family authorised the preparation and execution of the Power of Attorney which was found to have been executed not only by the head of the family but by the principal members of four branches of the entire family, the learned trial Judge must be right when he said thus:-

"It has to be remembered that the consent of majority of principal members of the family is only required and not that of every member for alienation of family property."

35

In addition it is settled law that sale or lease of family land by principal members of the family without the consent of the head of the family is void while such sale or lease of family land by head of the family without the consent of principal members of the family is only voidable. (See Ekpendu &

Ors. v. Erika 4 FSC 79; (1959) SCNLR 186; Atunrase & Ors. v. Sunmola & Ors. (1985) 1 S.C. 349), (1985) 1 NWLR (Pt. 1) 105.

I am therefore clearly of the view that the Power of Attorney was a valid document as found by the trial court and that the Court of Appeal was in error to have declared it null and void. Issues (i) and (ii) are therefore resolved in favour of the plaintiffs.

Issue (iii) is whether or not the entire Madarikan family is an accounting party to the defendants. Plaintiff's counsel submitted that from the totality of evidence adduced at the trial, the Madarikan family cannot be said to be accountable to the defendants for the proceeds of sale of family land. That the Court of Appeal erred when it held that the rendering of an account by the plaintiffs would afford the 1st and 2nd defendants the opportunity to know what has been done and what is due to them and other branches of the family. He said the 1st and 2nd defendants did not file the counter-claim for and on behalf of the family or any branch of the family. He also said that there was no evidence before the trial court that members of other branches of the family apart from the Omotorisha branch, demanded an account or are complaining about non-receipt of the proceeds of sale of family land.

He said there was abundant evidence showing that all the branches of the family have been receiving their own share of the proceed of sale which were shared out on IDI-IGI (per stripes) basis. Counsel referred the court to the evidence of P.W.s 2 & 3 who are donees of the Power of Attorney from the 1st and 2nd defendants' Omotorisha branch of the family showing that they received the branch's share from the head of the family. He said the entire family having discharged its obligation to the branches cannot be held accountable by individual members of the branch.

Mr. Ogundipe in reply submitted that the relationship of principal and agent existed between the plaintiffs and the 1st and 2nd defendants, and both in law and equity, an agent has a duty to account to his principal. He said the plaintiffs are not merely agents but also trustees of family land and are clearly accountable to the entire members of the family who owned the land. That even if the plaintiffs have distributed the proceeds to the six branches of the family, the defendants as beneficiaries are entitled to ask the plaintiffs to render an account. He referred to Boustead On Agency, 15th Edition, Article 51 on page 191 and to Atkins Court Forms Vol. 1 pages 186 & 230.

The issue here resolved itself on the facts established at the trial. Let

me first of all clear the capacity in which the defendants were sued and therefore counterclaimed. The record shows on pages 1, 3, 7, 279, 290 and 318 that the defendants sued for themselves and on behalf of Omotorisha branch of Madarikan family.

Now, the trial court in its judgment had this to say:-

"As pointed out by learned counsel for the plaintiffs evidence reveals that proceeds of sales of family land were distributed among the family on IDI-IGI basis. The representatives of each branch received the money due to that branch and distributed it at the meeting of that branch. How the share was distributed among the members of one branch is not the business of another branch (see Taiwo v. Lawani (1961) 1 All NLR 703. Biliamina Alli (D.W.2) a representative of Omotorisha branch said he got the money for his branch, consulted Ibosi Agbaje who asked him to distribute it among the members of the branch and he did

..... Also P.W.2 and P.W.3 admitted receiving share of proceeds of sale due to Omotorisha branch Evidence that proceeds of sales of Madarikan family land were shared among the members of each of the six branches of the family is overwhelming. I believe the evidence. When the family as I have found have received proceeds of sales of family land and shared among the members of the family, there is no justification for them to be called upon to account for the money or to pay to the defendants balance of the share due to them as claimed."

I think the learned trial Judge was right. His findings and conclusion are once again supported by overwhelming evidence adduced at the trial. On the available evidence the plaintiffs are not accountable to the defendants. This is not however to say that no one is accountable to them. Certainly those individuals who admitted collecting the proceeds meant for the Omotorisha branch of the family (to which the defendants belong) are accountable to the defendants. The Court of Appeal was therefore wrong when it reversed the trial court on this issue of account.

The fourth and final issue is whether the plaintiffs are entitled to a declaration that the 1st and 2nd defendants are entitled to sell the family land alone.

Plaintiffs' counsel submitted that the learned trial Judge was right in granting the declaration that the 1st and 2nd defendants are not entitled to sell family land alone having made the finding that the 1st and 2nd defendants "had been nourishing erroneous impression that the portion of the family land

which they occupy belong to them exclusively". He said the finding was not perverse as it was supported by the evidence of D.W.4 and of the Licensed Surveyor (D.W.1) who prepared the Survey Plan (Exhibit H) on the instructions of the 1st and 2nd defendants. It was submitted that the Court of Appeal set aside the declaration because of the wrong impression it formed that the trial court granted it because there was evidence that the 1st and 2nd defendants had been selling family land. The trial court clearly found that there was no evidence that the 1st and 2nd defendants sold any family land. He referred to page 346 lines 28-30 of the record. He said since the declaratory relief granted by the trial court was not unlawful or inequitable the Court of Appeal should not have interfered with it. He referred to the case of *Ewarami v. A.C.B. Ltd.* (1978) 4 S.C. 99.

The defendants' counsel responding submitted that the learned trial Judge was wrong to have interpreted the evidence of D.W.4 and exhibit H as an attempt to sell. That D.W.4 merely stated that the 1st and 2nd defendants had a right to sell whereas Exhibit H was merely a plan showing the land in question as belonging to their father Saka Awinle as opposed to Madarikan family. He said since there was no evidence of sale or attempted sale by the defendants and that there was no claim before the court that the defendant had no exclusive ownership of the land in question, the declaration sought ought to have failed. The Court of Appeal was therefore correct in holding that there was no basis for granting the relief sought. The following cases were cited:-

Umofia v. Ndem (1973) 12 S.C. 69 at 75, *Shell B.P. v. Abedi & Ors.* (1974) 1 All NLR (Pt.1) at 16, *Total (Nig.) Ltd. v. Nwako & Anor.* (1975) 5 S.C. 1 at 17, *Ibanga v. Usanga* (1982) 5 S.C. 103 at 122-123.

The learned trial Judge dealt with this issue on pages 346 & 347 of the record where he observed thus:-

"Surely the defendants have all along been nourishing erroneous impression that the portion of Madarikan family land they are occupying belong to them exclusively. The hard fact is that the land belongs to Madarikan family and it cannot be alienated without the consent of the family. As shown in Exhibit H the defendants carved out a portion of the family land as the land belonging absolutely to their father Saka Awinle. The defendants led evidence to that effect. What is more D.W.4 said clearly and categorically under cross examination that 1st and 2nd defendants had right to sell family land allocated to their father....."

..... *A sale of family land without the consent of the appropriate members of one family is not only illegal but also against the interest of the family. I am satisfied that the declaration sought is to protect the interest of the family and it should be granted. The first claim of the plaintiffs succeed."*

The Court of Appeal on its own part observed on page 474 thus:-

"By a strange reasoning the learned trial Judge decided that on the evidence he was satisfied with the declaration sought by the respondents in his first part of the claim must succeed. In my view this is wrong. What the respondents set out to prove was that the appellants have sold part of the land to the 3rd and 4th defendants. This they have failed to prove. It is not necessary as the learned trial Judge seemed to have held that the appellants had a notion that the land belonged to them or that they have made Exhibit H which does not prove that they want to sell the land."

There is no dispute on record about the failure by the plaintiffs to prove that the 1st and 2nd defendants sold portions of family land to the 3rd and 4th defendants or anybody at all. And the learned trial Judge did not come to the conclusion anywhere in his judgment that Exhibit H proved any sale by the defendants. But the learned trial Judge was right in my view when he stated that the defendants have all along been nourishing erroneous impression that the land belonged to them exclusively in the light of the evidence of D.W.4 and Exhibit H wherein the defendants had carved or marked out a portion as belonging to their father, one Saka Awinkle. In addition there was undisputed evidence before the trial court that the Madarikan family land had not been partitioned. I think the trial court was in the circumstances right to have granted the declaration sought. The declaration was clearly in the interest of the family as a whole which includes the defendants as well. The Court of Appeal was with respect therefore wrong to have set aside the declaration order made by the learned trial Judge. Issue (iv) is therefore resolved in favour of the plaintiffs.

All the issues having been resolved in favour of the plaintiffs, the appeal therefore succeeds and it is hereby allowed.

1ST & 2ND DEFENDANTS' CROSS-APPEAL

The only issue for determination in the cross-appeal is whether the Court of Appeal was right in modifying the terms of injunction granted by the learned trial Judge instead of setting aside the order of injunction completely.

Mr. Ogundipe learned counsel for the defendants submitted that though the defendants invited the Court of Appeal to vary the terms of injunction granted by the learned trial Judge in terms which the Court of Appeal so varied the order, it was only an alternative submission on the footing that the main submission that the order of injunction ought not to have been granted at all failed. He said the Court of Appeal accurately reproduced the submissions of counsel on the issue on page 467 lines 16-26 of the record. Accordingly when the arguments upon which it was concluded that, the order of injunction ought to have been set aside found favour with the Court of Appeal, that court ought to have adverted itself to this and set aside the order of injunction having regard to the facts and circumstances of the case.

It was further submitted that the Court of Appeal having agreed that there was no basis for the order of injunction against the defendants was in error when it proceeded to modify same without any evidence.

Responding, Mr. Thompson said the Court of Appeal was right in modifying the terms of injunction granted by the trial court particularly since the order as framed was as suggested by the 1st and 2nd defendants themselves. He said there was no dispute that the land is Madarikan family land since the 1st and 2nd defendants' prayer for partition failed. The learned trial Judge also found that there was a threatened invasion of plaintiffs' legal rights by the 1st and 2nd defendants.

That finding was not disturbed by the Court of Appeal. It automatically follows therefore that if the land is family land and evidence is led showing that some members of the family nursed the impression that they can alienate the land without the consent of the family, the court should not hesitate to grant an injunction. He referred to **Halsburys Laws of England 3rd Edition Vol. 21 para. 745.**

It seems to me from the submissions of defendants' counsel that the foundation of the cross-appeal is the erroneous impression that the Court of Appeal found favour with the argument that the order of injunction ought not to have been made by the trial court. Page 471 lines 16-26 referred to by defendants' counsel in his brief only reproduced the submissions of counsel for the 1st and 2nd defendants in that court and nothing else. The only conclusion arrived by the Court of Appeal on this issue is to be found on page 471 second paragraph as follows:-

"It appears to me that the conclusion reached by the learned trial Judge in respect of the none ordering a partition of the family land is not being questioned in this appeal. The appellants also have no quarrel with the order of injunction made by the learned trial Judge provided it is so done in the modified form as suggested by them." 5

Thereafter it proceeded to make the following order on page 475 of the record:-

"The injunction granted against the 1st and 2nd defendants is modified to read:- 10

The appellants, their servants and agents are hereby restrained from using or in anyway alienating Madarikan family land verged green and also verged red in Survey Plan No. CKLS 1012 dated 28th May, 1985 prepared by Chief C.K. Coker Licensed Surveyor, unless with the consent or authority of the principal members of the branches of the Madarikan family.' 15
"

I think the Court of Appeal was right. Under the modified order the 1st and 2nd defendants can only alienate the land with the consent or authority of principal members of the family only. That is as it should be. The evidence at the trial clearly indicated that the legal rights of the plaintiffs in the family land were being threatened by the acts of the 1st and 2nd defendants. The rights of the plaintiffs and other members of Madarikan family in the land are now fully protected by the order made. There is clearly no merit in the cross-appeal. It therefore fails. It is dismissed. 25

CONCLUSION

Plaintiffs' appeal succeeds while the 1st and 2nd defendants' cross-appeal fails. The judgment of the Court of Appeal delivered on the 16th day of January, 1990 (with the exception of the modified order of injunction as indicated above) is hereby set aside. The judgment of the Ikeja High Court delivered by Hotonu J. on the 21st day of April, 1987 subject as above is restored. 30

The plaintiffs are entitled to the costs of the appeal and the cross-appeal which are assessed at Two Thousand Naira (N2,000.00)only. 35

UWAIS JSC

I have had the opportunity of reading in draft the judgment read by my learned brother Kutigi, J.S.C. I entirely agree.

Accordingly the main appeal is allowed and the cross-appeal is dismissed. I adopt the orders contained in the said judgment.

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OGUNDARE JSC

I have had the advantage of reading in draft the judgment of my learned brother Kutigi, J.S.C. just delivered. I agree entirely with him that the
10 main appeal be allowed and the cross-appeal dismissed.

I may add, however, that in respect of the 1st and 2nd defendants' counter claims for an account, the learned justices of the court below overlooked the fact that that claim was in the alternative to claims (i) & (ii) and as that court granted the said claims (i) & (ii), (though erroneously as it now
15 turns out to be), it could not proceed to grant the alternative claim (iii) for an account as that claim would be inconsistent to claims (i) and (ii). Indeed, if the power of attorney were declared void as claimed by the 1st and 2nd defendants, all the purported sales made by virtue of the power by the donees would be null and void and there would be no question of the donees or the
20 plaintiffs accounting for all monies collected in respect of the said purported sales.

In the same vein, having granted claim (i), the court below was in error to grant claim (ii) because by the grant of claim (i) that court had declared void the power of attorney. It could not at the same time set aside what it had
25 already declared void. Claim (ii) was raised in the alternative to claim (i) whilst claims (iii) and (iv) were raised in the alternative to claims (i) and (ii). In my respectful view even if the defendants had made a valid case in support of their case, they would only have been entitled to judgment on only one of the alternative claims proved by them.

30 For the reasons given by my learned brother in his judgment which I hereby adopt as mine, I too set aside the judgment of the court below, except as to the variation by it of the order for injunction granted by the learned trial Judge and restore the judgment of the trial High Court subject, as stated above, to the variation of the order of injunction made by the court below. I
35 also subscribe to the order for costs made in the lead judgment.

MOHAMMED JSC

I have had the advantage of reading the judgment of my learned

brother, Kutigi, J.S.C., in draft and for the reasons given I shall also restore the judgment of Hotonu, J., of Lagos High Court. My learned brother has considered all the salient issues raised in this appeal and has left nothing which would invite any useful contribution from me.

Accordingly, I hereby allow the appeal and dismiss the respondents cross-appeal. I abide by the order and assessment of costs made in the lead judgment. 5

ADIO JSC

I have had the privilege of having, in advance, a preview of the judgment just read by my learned brother, Kutigi, J.S.C. and I agree with it. The appeal of the plaintiffs/appellants, to the extent stated in the lead judgment, succeeds and I too allow it. The cross-appeal of the defendants/respondents fails and I too dismiss it. I abide by the consequential orders, including the order for costs. 10 15

Appeal allowed.

Cross-appeal dismissed.

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