

SUPREME COURT OF NIGERIA
FRIDAY 13TH JANUARY, 1995. SC. 176/1988
CORAM:- M. L. UWAIS, A. B. WALI, I. L. KUTIGI,
M. E. OGUNDARE, U. MOHAMMED, JJSC

ELEKWAUWAANERO & 5 OTHERS **APPELLANTS**

(For themselves and on behalf
of the members of Umukikpe
family of Umueze Umuogba,
Etche, Ahaoda Division)

AND

EBURUNOBI EZE & ANOTHER **RESPONDENTS**

(For themselves and on behalf of
members of Umualika family of
Umueze Umuogba, Etche,
Ahaoda Division)

APPEALS - Issue - Based on an additional ground of appeal - For which
no leave was obtained - Whether the issue will be struck out.

APPEALS - Issue - Formulation thereof - When found to knock the
bottom off the defendants' appeal.

LAND LAW - Findings of fact in land dispute - Whether supported by
evidence before the trial court.

FACTS

The Respondents as plaintiffs filed an action against the Appellants before the Rivers State High Court claiming declaration of title, damages for trespass and perpetual injunction in respect of the land in dispute. The parties descended from a common ancestor from whom they inherited their separate portions of land. Each party claimed they granted portions of the land in dispute to two other parties. Testimony of one of the parties was to the effect that it was the Respondents and not the Appellants that gave him the land on which he built his store.

The trial court found in favour of the Respondents and granted

all their claims. Appellants' appeal to the Court of Appeal was dismissed by a two to one majority judgment. Being dissatisfied, the Appellants have further appealed to the Supreme Court to determine inter alia, whether the court below was right in finding that the trial judge properly assessed the evidence adduced at the trial.

HELD (Unanimously dismissing the appeal per lead judgment of **OGUNDARE JSC**)

Findings of fact in land dispute

1. These findings of facts are amply supported by the credible evidence before the learned trial Judge. (p. 148 G)

Whether issue not based on a valid ground will be struck out

2. At the end of Appellants' Brief it is there stated that at the hearing of the appeal leave would be sought to argue an additional ground of appeal. No such leave was sought nor granted. Had this been done issue (iii) would have been covered by a ground of appeal. As things stand, there is no ground of appeal on which issue (iii) could stand. As this issue is not covered by any ground of appeal, issue (iii) is hereby struck out. (p. 151 B)

Issue - Formulation thereof

3. Issue (iv) as formulated appears to knock the bottom off issues (i) and (ii). For Ogundare JCA was ad idem with his colleagues on the findings of fact. If as postulated in issue (iv) Ogundare, JCA's judgment reflects correctly the "position of the law having regard to the facts," then that is the end of the appeal, (p. 151 G)

NOTABLE POINTS OF INTEREST

WALI JSC

1. Whether findings of trial court were perverse

The appellants have failed to demonstrate that the findings of the learned trial judge, as affirmed by the learned justices of the Court of Appeal were perverse. The entire appeal seems to relate to issues of fact. I have had a painstaking study of the proceedings before the lower courts and I find nothing to show that the findings therein are erroneous or perverse. (p. 153 A)

2. Technical procedural misnomer in the trial of a case

Where there is a technical procedural misnomer in the trial of case, an appellate court will not interfere with the decision of the trial court unless it is of the opinion that there is a miscarriage of justice (p. 153 H)

REPRESENTATION

A. Kalu Esq. with C.B. Onwuekwe and O. Egwu for the Appellants.
N. Nwanodi Esq. for the Respondents.

CASE REFERRED TO

Lawal v. Dawodu (1972) 1 All NLR (Pt. II) 270

LEAD JUDGMENT BY OGUNDARE JSC

This is a further appeal by the defendants from the judgment of the Court of Appeal (Enugu Division) where by a majority decision (Phil-Ebosie, J.C.A. and Olatawura, J.C.A. as he then was with Ogundare, J.C.A. (dissenting) the defendants' appeal from the judgment of the High Court of Rivers State (Allagoa, J., as he then was) was dismissed. The plaintiffs' representing the Umualika family of Umueze-Umuogba, Etche in Ahaoda Division, had in an action instituted in 1971 sued the defendants as representing the Umukikpe family of Umueze-Umuogba claiming as per. Paragraph 9 of their statement of claim:-

“(a) Declaration of title to the said piece of land known as and called ‘Ama-Ogwugwu’ .

(b) 200 (Two hundred pounds) (N400.00) damages for trespass.

(c) An order of injunction permanently to restrain the defendants, their servant and agent from further acts of trespass into the land aforesaid. “

Pleadings having been filed and exchanged, the action proceeded to trial at the end of which, after addresses by learned counsel for the parties, the learned trial Judge, in a considered judgment, found the plaintiffs' case proved and entered judgment in their favour in terms of all their claims.

The facts simply are: The parties descended from a common ancestor called Ozeh who owned a large tract of land. This grand ancestor had four sons, namely, Isiahia, Alika, Egwu and Ikpe. Alika was the ancestor of the plaintiffs through whom they claimed the land in dispute.

Ikpe was the ancestor of the defendants through whom they claimed the said land. Ozeh, in his life time, divided his land among his four sons. The families of these sons had remained in possession of the portion given to their respective ancestors. Each party claimed the land in dispute as being part of the land Ozeh allocated to its respective ancestor. Each also claimed to be in possession and to exercise rights of ownership on the land. Both parties claimed to have granted portions of the land to one B.W. Anyamele to erect a store and to the Anglican Mission (St. Mark's Church Umuogba). Plaintiffs also claimed, and led evidence in support, that one Johnson Egbe and Niebedim Ejimapa, 5th defendant's relatives were their tenants on part of the land. 5th defendant did not testify to deny this assertion.

All the boundary men testified in favour of the plaintiffs. Similarly, Anyamele gave evidence to the effect that it was the plaintiffs, and not the defendants, that gave him the land on which he built his store. The learned trial Judge found:-

"On the evidence therefore before me I find that the land in dispute is as testified by the plaintiffs and their witnesses Ama-Ogwugwu verged pink on the plan of the plaintiffs and that defendants have no land called Okwuhi shown on their plan Exhibit 'D'.

On the next question who is the landlord of B.W. Anyamele and the Anglican Mission which notwithstanding my finding as to the ownership of the land Ama-Ogwugwu I propose to deal with separately, the defendants have categorically averred that they put Mr. B.W. Anyamele on the land.

Mr. Anyamele was called by the plaintiffs. He produced an agreement dated 15th May, 1967 made between him as tenant and plaintiffs' family as landlord for the letting of a portion of Land near one market. I had to reject the document since it was not registered under the Land Regulation Law. (sic) The witness however gave oral testimony acknowledging the plaintiff as his landlord within the area in dispute to the North. In spite of defendants averment it was not suggested to him that he was the tenant of the defendants. Also as to the tenancy of the Anglican Mission on the area verged green although the defendants in paragraph 7 of the Statement of Defence pleaded they are the landlords, they did not indicate on the plan where the site of this Church is located. 3rd defendant under cross-examination admitted he did not take the surveyor to the area because it was bushy and because he did not traverse the whole

of the new road with the surveyor. To say that he did not take the surveyor to this road is false because further on along that road is the area, verged yellow which is indicated on Exhibit 'D' as the area defendants gave the plaintiffs to live. It was the plaintiffs who called Rev. Archdeacon Chukwuigwe who identified Exhibits 'A' and 'B' concerning the letting
 B and surrender of the holding by the Anglican Mission on the land in dispute. Although, it was suggested that the land in question belonged to the whole of Umueze the evidence of Paul Dick makes it clear that it was plaintiffs' head of the family Ommeh who gave the lands to B.W. Anyamele and Anglican Mission. I believe has (sic) testimony (which if not true
 C would be against the interest of Isiahia family) that if the land given to the Mission belonged communally to Umueze that the family of Isiahia which is the head in the affairs of Umueze would have also signed the agreement. I therefore find that the tenant B.W. Anyamele who still re-
 D sides on the land in dispute is the tenant of the plaintiffs and "that it was plaintiffs not the defendants who put the Anglican Mission on the land."

He also found:-

"On the last question of acts of ownership on the land in dispute. I have to observe that although the plaintiff averred and called
 E witnesses in support of their case that the defendants were given the area verged yellow and in particular the 5th defendant was given an adjoining area indicated on Exhibit 'C' where he had erected a building on the strength of a written agreement dated 15th May, 1967; the 5th defendant was not called to deny this fact. Although for technical reasons I did not
 F admit this agreement I am satisfied from the evidence of Paul Dick and Egonu Nwokoba that it was the plaintiffs who gave the yellow portion and the area which 4th and 5th defendants now reside to them and reject the defendants unsupported evidence that they gave plaintiffs some portions of their land. The admission of 3rd defendant that as against three
 G portions of land the plaintiffs have five pieces, makes the suggestion less probable."

On Ownership, the learned Judge finally found:

"On the whole I am satisfied and find that the land known and
 H called Ama-Ogwugwu situate in Umualika Umueze is the land of the plaintiffs and rejected the defendants' version that they own a larger portion of which the land in dispute is part."

These findings of facts are amply supported by the credible evidence before the learned trial Judge.

On appeal to the Court of Appeal, all the 3 Justices that sat on the appeal

agreed with the findings of the learned trial Judge. Ogundere, J.C.A. (who dissented on another issue canvassed in the appeal) observed:

“In this regard where the decision of the trial Judge is based substantially on his assessment of the quality and credibility of witness who testified before him, a Court of Appeal cannot, and must not, substitute its own credibility of witnesses for that made by the trial Judge, except where the trial court has been shown to be obviously perverse, and it must go beyond a mere entertainment of doubts as to whether the decision of the trial court based on the credibility of witnesses was right, the Court of Appeal must be convinced beyond doubt that it was in fact wrong. See the speech of Lord Kingsdown in the Julia, (1860) 14 M.o.o. p.cc 210 at 235. Please see also the opinion of Idigbe, J.S.C. at page 294-295 of Woluchem’s case above; Lawal v. Dawodu (1972) 1 All NLR (Pt. 11) p. 270 at p. 276. In sum, I have nothing to criticize in the way the learned trial Judge considered the evidence of the parties in this case. Ground 2 accordingly fails.”

Olatawura, J.C.A. in his own judgment, said:

“I have had the advantage of the preview of the judgment of my learned brother Ogundere, J.C.A. I agree with him in his conclusions on grounds 1, 2 of the grounds of appeal. I am firmly of the view that these grounds of appeal must fail.”

Phil-Ebosie, J.C.A. who presided, agreed with Olatawura, J.C.A. The two grounds of appeal on which the three Justices agree read:

“1. That the judgment is wrong in law in that the plaintiffs did not discharge the onus on them to prove clear title to and or precise boundaries of the land in dispute.

2. That the learned trial Judge erred in law by shifting the onus on the defendants of proving clear title to and or boundaries of the land in dispute instead of deciding the matters in dispute on the strength of the plaintiffs’ case rather than on the weakness of the defendants’ case.

Now, the two grounds on which Ogundare, J.C.A. parted ways with his fellow Justices are grounds 6 and 9 which read:

6. *“That the learned trial Judge erred in law as follows:-*

(a) by granting leave to the plaintiffs to call the 12th witness for the plaintiffs after the parties had closed their respective cases.

(b) that the decision was influenced adversely against the defendants by the admission of inadmissible evidence or extraneous matter i.e. the evidence of the 12th witness for the plaintiffs and the document Exhibit E tendered by this witness which the learned trial Judge saw and

9. *That the judgment is against the weight of evidence.*”

OGUNDARE, J.S.C. in allowing the appeal on ground 9, notwithstanding his having dismissed grounds 1 and 2, observed:

B *“The final ground is that the judgment is against the weight of the evidence. The admission of the evidence of PW 12 as stated above may have tilted the scale of justice in favour of the plaintiffs, and it cannot be said having regard to the foregoing that the plaintiff has proved his case by a preponderance of evidence. In the circumstances, ground 9 is upheld.”*

C Commenting on this ground of appeal, Olatawura, J.C.A. whose judgment can now be said to be the Court’s lead judgment said:

D *“Ground 9 is about the weight of evidence, there was enough evidence before the learned trial Judge for him to have found in favour of the respondent. Ogundere, J.C.A. has used ground 6 as a basis for the conclusion reached by him on ground 9. I have read through the proceedings and as ably shown by Ogundere, J.C.A. when dealing with grounds 1 and 2, I will come to the conclusion that ground 9 also fails.”*

In the appeal to this Court, the defendants rely on four grounds of appeal which, without their rather verbose and argumentative particulars, read as follows:

E *“(1) The learned Justices of Appeal who constituted the majority erred in law when they affirmed the decision of the High Court of Rivers State of Nigeria, holden in Port-Harcourt, to the effect that the respondent in this Court (and in the Court of Appeal) and the plaintiffs in the aforesaid High Court had proved title to the land in dispute when*
F *in fact they had not.*

G *(2) The Court of Appeal misdirected itself when it held that the trial Judge was right in placing reliance on Exhibits A and B tendered at the trial when the said Exhibits could not prima facie lead to the conclusion reached by the trial Judge.*

(3) The learned Justices of the Court of Appeal misdirected themselves in law when they held that the learned trial Judge had properly assessed the evidence adduced at the trial and had not shifted the onus of proving title to the appellants (defendants) in the court below.

H *(4) The judgment of the Court of Appeal is against the weight of evidence. “*

In their brief of argument, they set out the following four issues:

“(i) Whether the court below was right in holding that the plaintiffs/respondents had conclusively proved their title to the land in dispute.

(ii) Whether the trial Judge in his judgment did not unwillingly

(iii) *Whether the evidence of PW12 at the trial had not one way or the other influenced the trial Judge and thus the court below in holding as they did, that the plaintiffs/respondents were entitled to the reliefs sought.*

(iv) *Whether the minority judgment of Ogundere, J.C.A. -does not reflect the correct position of law having regard to the facts of this case.”*

At the oral hearing of the appeal, Mr. Kalu, learned counsel for the defendants/appellants abandoned ground 2 which was accordingly struck out. When learned counsel’s attention was drawn to issue (iii) he argued that that issue could be subsumed in ground 1 of the grounds of appeal.

I think it is better at this stage to dispose of that issue. I do not agree with Mr. Kalu that issue (iii) is subsumed in ground 1. I notice that at the end of appellants brief it is there stated that at the hearing of the appeal leave would be sought to argue an additional ground of appeal to wit:

“Error in law

The learned Justices of the Court of Appeal erred in law when they held that the trial court was entitled to call PW12 after the parties had closed their respective cases.

Particulars of Error

After the parties had let (sic) their respective witnesses in evidence and closed their cases, the learned trial Judge, upon application by the plaintiffs allowed the plaintiffs to call additional evidence on a matter not pleaded and received Exhibit E in evidence even though it was equally not pleaded. By affirming this procedure, the court below erred in law.”

No such leave was sought nor granted. Had this been done issue (iii) would have been covered by a ground of appeal. As things stand, there is no ground of appeal on which issue (iii) could stand. As this issue is not covered by any ground of appeal, issue (iii) is hereby struck out. It is interesting to observe that that was the issue on which the court below split.

Issue (iv) as formulated appears to knock the bottom off issues (i) and (ii). For Ogundere, J.C.A. was ad idem with his colleagues on the findings of fact. If as postulated in issue (iv) Ogundere, J.C.A.’s judgment reflects correctly the “position of the law having regard to the facts” then that is the end of the appeal.

In the net result, I find that this appeal is completely devoid of any merit and I accordingly dismiss it. I affirm the judgment of the Court below and award to the plaintiffs costs of this appeal which I assess at N1,000.00.

UWAIS JSC

I have had the opportunity of reading in draft the judgment read by my learned brother Ogundare, J.S.C. For the reasons contained therein, I agree that this appeal has no merit. Accordingly, it is hereby dismissed with N1,000.00 costs to the respondents.

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WALI JSC

I have had a preview of the lead judgment of my learned brother, Ogundare, J.S.C. and I agree with it in its entirety.

At the beginning of his oral submissions in elaboration of the brief of argument he filed, learned counsel for the appellants abandoned ground 2 of his grounds of appeal and same was struck out.

Issue III is hinged to the proposed addition on ground of appeal and since learned counsel did not move his application on page 25 of his brief for leave to file and argue the said additional ground same is presumed to have been abandoned, both the proposed additional ground and issue III of the appellants' brief are hereby struck out.

On issues I and IV which are related to the proof of the plaintiffs' claim, by preponderance of evidence in the trial court, Ogundere, J.C.A. in his judgment observed thus:-

"The burden on the plaintiffs as regards onus of proof in cases like the one in hand has been settled in many cases from Kodilinye v. Odu 2 WACA 336 at 337-338; Mogaji & Ors v. Odofin and Ors; Woluchem & Ors v. Gudi & Ors, both cited above; and especially in Kaiyaoja & Ors v. Egunia (1974) 12 SC p. 55....."

In this regard where the decision of the trial Judge is based substantially on his assessment of the quality and credibility of witnesses who testified before him, a Court of Appeal cannot, and must not, substitute its own credibility of witnesses for that made by the learned trial Judge, except where the trial court has been shown to be obviously perverse, and it must go beyond a mere entertainment of doubts as to whether the decision of the trial court based on the credibility of witnesses was right, the Court of Appeal must be convinced beyond doubt that it was in fact wrong. See the speech of Lord Kingsdown in the Julia, (1860) 14 M.o.o. p.cc 210 at 235. Please see also the opinion of Idigbe, J.S.C. at p. 294-295 of Woluchem's case above; Lawal v. Dawvdu (1972) 1 All NLR (Pt. 11) p. 270 at p. 276. In sum, I have nothing to criticize in the way the learned -trial Judge considered the evidence of the parties in this

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case.” Both Olatawura, J.C.A. (as he then was) and Phil-Ebosie, J.C.A., agreed with the conclusion (supra) by Ogundere, J.C.A. This shows that the judgment of Ogundere, J.C.A. was in total support of findings by the learned trial Judge that the preponderance of evidence was in favour of the plaintiffs. The appellants have failed to demonstrate that the findings of the learned trial Judge, as affirmed by the learned Justices of the Court of Appeal were perverse. B

The entire appeal seems to relate to issues of fact. I have had a painstaking study of the proceedings before the lower courts and I find nothing to show that the findings therein are erroneous or perverse. See Lucy Onowan & Anor v. Iserhien in Re Lucy Onowan (1976) 9 to 10 S.C. 95; Woluchem v. Gudi (1981) 5 S.C. 291 and Otitoju & Ors v. Governor of Ondo State & Ors (1994)4 NWLR (Pt.340) 518; (1994) 16 LRCN 49. C

Issues I and IV therefore fail and are dismissed. D

Issue II attacked the procedure adopted by the learned trial Judge as regards the shifting of onus of proof on the appellants (defendants).

The answer to this issue had been adequately provided in the judgment of Ogundere, J.C.A. (with which Olatawura and Phil- Ebosie, J.C.A. both agreed) where he said:- E

“So seems to me that what the learned trial Judge did was first to put the case for the defendants on one side of the scale of justice. He then proceeded as quoted on p. 7 of this judgment to put the case of the plaintiff on the other side of the scale whereupon he finally found that the evidence of the witness of the plaintiffs were more credible . F

In my view, therefore, since it is obvious from the records of the findings of the learned trial Judge quoted above that he had put the case by each party on each side of the scale of justice before making a final determination, the mere fact that he first put the case for the defendants on the scale first, in my view, cannot vitiate the reasoning process of the learned trial Judge.” G

The learned Justice of the Court of Appeal cited and quoted from the decisions of this Court in Chief Victor Woluchem & Ors v. Gudi & Ors (1981) 5 S.C. 291 and Kaiyaoja & Ors v. Egunla (1974) 12 S.C. 55 to mention but only two, in support of his conclusion (supra). H

Where there is a technical procedural misnomer in the trial of a case, an appellate court will not interfere with the decision of the trial court unless it is of the opinion that there is a miscarriage of justice.

In *Woluchem v. Gudi* (supra) this court, (as per Idigbe, J.S.C.) opined thus:

“Judges, naturally, must differ in the procedure and manner in which they approach their consideration of the entire evidence in any given case; some may prefer to begin with a consideration of the entire evidence in any given case; some may prefer to begin with a consideration of the entire evidence led for the defence because they find it more convenient to do so; others may prefer to begin with a consideration of the plaintiff’s case.”

The only point of difference between the lead majority judgment of Olatawura, J.C.A. (as he then was) and the minority judgment of Ogundere, J.C.A. is related to the evidence of P.W. 12 who was called with the leave of the trial court, after the parties had closed their respective cases. The additional ground involving this point was by implication, abandoned by the appellants since the application to file it was not moved. The application as well as issue (III) hinged to the proposed additional ground of appeal have been struck out earlier on. And with this issue, the remaining minority judgment of Ogundere, J.C.A. is in accord with the majority judgment of Olatawura, J.C.A.

The issues properly raised and argued having all failed, the appeal fails in its entirety and is accordingly dismissed.

It is for these and the fuller reasons contained in the lead judgment of my learned brother, Ogundare, J.S.C. that I hereby also dismiss this appeal.

The judgment of the Court of Appeal is confirmed with N1,000.00 costs to the respondents.

KUTIGI JSC

I agree with my learned brother, Ogundare, J.S.C. whose judgment I had been opportune to read before now, that there is no substance in this appeal. I would also dismiss it with costs as assessed.

MOHAMMED JSC

I agree with my learned brother, Ogundare, J.S.C. that this appeal is without merit and ought to be dismissed. It is clear from the issues raised by the learned counsel for the appellant that the counsel is confused as to the import of the decision of the Court of Appeal.

Having disclosed in issue (IV) that he agrees with Ogundere, J.C.A., in his opinion on the position of the law, having regards to the

facts of this case, the learned counsel for the appellants has joined Olatawura, J.C.A. (as he then was) and Phil-Ebosie, J.C.A. in accepting that grounds 1 and 2 before the Court of Appeal had failed. If that is so then issues (i) and (ii) must also fail. Since issue (iii) has been found to be incompetence this has brought this appeal to an abrupt end.

It seems to me that the learned counsel for the appellants has B
checkmated himself in an attempt to strike a balance between the judgment of Ogundere, J.C.A. and that of Olatawura, J.C.A. (as he then was) and Phil-Ebosie, J.C.A. I therefore agree that this appeal has failed and it is dismissed. Appeal dismissed.

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