

SUPREME COURT OF NIGERIA
2ND APRIL, 1996. SC. 208/1990
CORAM:- A. B. WALI, I. L. KUTIGI, E. O. OGWUEGBU,
Y. O. ADIO, A. I. IGUH, JJSC.

MIDFORD EDOSOMWAN APPELLANT

AND

KENNETH I. OGBEFUN RESPONDENT

APPEALS - Preliminary objection - Lacks substance - As grounds of appeal does not offend the provisions of Supreme Court Rules.

APPEALS - Preliminary objection - Where Counsel's contention is a clear misconception of issues raised - Preliminary objection lacks substance

EVIDENCE - Onus of proof - facts pleaded in the statement of claim - Where no evidence is led in proof of them - No onus is cast on the other party - To disprove facts not established.

EVIDENCE - Admissibility of document - Copy of document sought to be tendered - Whether properly rejected - Where no foundation was laid for its admission.

EVIDENCE - Admissibility - Statement made by a party in civil proceedings - Adverse to his case - Is admissible against him.

EVIDENCE - Cross examination - Contents of rejected document - Whether statement of plaintiff's witness under cross examination - Can be construed as giving evidence of contents of the rejected document.

JUDGMENTS - Verdict - Of trial Court as affirmed - Is sustainable - Even without the oral evidence complained of.

LAND LAW - Title - Burden of proof rest squarely on plaintiff- The weakness of respondent's case - Is no substitute to the onus on the plaintiff.

FACTS

The appellant, as plaintiff, claimed against the Respondent, then defendant, in his statement of claim the following reliefs - A declaration that he is entitled to grant of Statutory Right of Occupancy of the land in dispute, N2,000.00 as damages for trespass and an order of perpetual in-

junction restraining the respondent from committing further acts of trespass on the land. The respondent denied the claim and the matter proceeded to trial. At the trial both appellant and respondent claimed ownership of the land in dispute tracing their claim to allocation to them of the same land by one of the two Plot Allocation Committees in the area and also, approval by the Oba of Benin. They all presented evidence both oral and documentary.

The appellant's witness under cross-examination made a statement buttressing the contents of a document earlier sought to be tendered by the respondent but was rejected. The Statement was however adverse to the appellant's case and was admitted by the trial court. At the conclusion of trial and on evidence considered, the trial court dismissed appellant's claim. Dissatisfied with the decision of the trial court, the appellant appealed to the Court of Appeal Benin Division which dismissed the appeal and affirmed trial court's decision. The appellant has further appealed to the Supreme Court raising 2 issues.

ISSUES FOR DETERMINATION

1. *Whether or not the Court of Appeal was right in the view it took on the onus of proof.*
2. *Whether oral evidence of the document marked EXHIBIT "X" rejected, is admissible in the circumstances of this case."*

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

Preliminary objection - Lacks substance

1. I have examined the three grounds of appeal strictly and I find no substance in the preliminary objection. The three grounds of appeal, though inelegantly drafted all complained against the decision of the Court of Appeal confirming the judgment of the trial Court. None of the grounds offends the provisions of sub-rules (1) - (5) of Order 2 of the Supreme Court Rules, 1985. The fact that the appellant did not file additional ground of appeal as indicated in prayer (4) of the Notice of Appeal has no effect on the validity of the Notice of Appeal itself. (p. 587 B)

Counsel's contention is clear misconception

2. It is a clear misconception by learned counsel for the respondent to contend that none of the two issues raised by the appellant in his brief is related to any of the grounds of appeal. The purport of ground 1 is that the Court of Appeal erred in affirming the decision of the trial court that the onus is on the plaintiff to prove that the land in dispute is within Egua - Edaiken as he has alleged and asserted in paragraph 3 of his Statement of Claim, while

issue 2 is related to grounds 2 and 3 in which learned counsel for the appellant attacked the reliance put by both the trial court and the Court of Appeal, on the oral evidence of content of a letter which was rejected and marked “Exhibit X rejected” in reaching their decisions. There is no substance in the attack lodged by the respondent on these issues. (p. 588 G)

Where facts pleaded were not proved

3. In the instant case the appellant did not adduce evidence in proof of the averments in paragraphs 3 and 9 of the Statement of Claim. The law is that where a fact or facts are pleaded and no evidence was led to prove them no onus is cast on the other party to disprove the fact or facts not established (p. 593 A)

Title - Burden of proof

4. In a case for a declaration of title to land the burden of proof squarely rests on the plaintiff, and where he fails to do so, the proper order is one of dismissal of his case. The appellant is seeking for a declaratory order to the land in dispute, the ownership of which he has failed to prove. The weakness of the respondent’s case if there is any, should not be a substitute to the onus of proof which the appellant has failed to discharge. There is no substance in Issue 1 which is tied to Ground 1 of the Ground of Appeal. It therefore fails. (p. 593 B)

Document properly rejected

5. The facts averred in the paragraph (supra) put both the appellant and his Vendor on notice that the respondent would rely on the letter or its copy in proof of the falsity of the appellant’s claim to the land in dispute. Unfortunately the appellant in whose possession the original of Exhibit “X” rejected”, was alleged to be was neither put on notice to produce the original, nor cross-examined as to whether such a letter was written to him. On this point I agree with learned counsel for the appellant that no foundation was laid by the respondent for admission of its copy in possession of the respondent and was properly rejected. See s. 90 of the Evidence Act. (p. 594 G)

Statement made by a party adverse to his case

6. The issue as I see it is not that the appellant was cross-examined on Exhibit “X” rejected” to prove its contents, but to establish that the appellant was not saying the truth in his evidence on the issue as regards his title to the land in dispute. In short he was making a statement adverse to his interest through his own witness, P.W. 2; his Vendor. The general principle

of law on the issue is that a statement oral or written (expressed or implied) made by a party in civil proceedings and which statement is adverse to his case, is admissible against him of the truth of the facts asserted in the Statement. (p. 595 F)

Contents of rejected exhibit

7. P. W.2, the person from whom the appellant derived his title to the land in dispute made a statement under cross-examination adverse to the appellant's interest who called him as a witness to prove his case. He made a statement under cross-examination in which he admitted that he had no title in the land in dispute which he could have passed to the appellant as this was contrary to what the appellant pleaded in the Statement of Claim. This can by no means be construed as giving evidence of the contents of Exhibit "X" rejected." So the case of *Alayi v. Fisher* (supra) cannot apply to the present situation and it is not apposite. I have seen nothing wrong in the observation and conclusion of the Court of Appeal on the issue. (p. 595 H)

Verdict is sustainable

8. Even without the oral evidence of P.W. 2 referred to above, the evidence relied upon by the trial court is enough to sustain its verdict. I entirely agree with conclusion of the Court of Appeal when it stated: "*Without the evidence complained of the learned trial judge could have come to the same conclusion he arrived.*" There is no substance in his appeal. Both the trial court and the Court of Appeal considered and appraised the evidence and arrived at the correct decisions. (p. 596 F)

NOTABLE POINT OF INTEREST

WALI JSC

1. Benin Customary law on allocation of land

It is the settled customary law that all land in Benin before the Land Use Act, 1978, was vested in the Oba of Benin and it was he alone that could approve the allocation of a plot of land through the appropriate Plot Allotment Committee. (p. 589 A)

REPRESENTATION

Appellant absent not represented

P. O. Ige for Respondent

CASES REFERRED TO

Onobruhere v. Esigine (1986) 1 NWLR (Pt. 19) 799

Noibi v. Fikolati (1987) 1 NWLR (Pt. 52) 619

Elias v. Suliemon (1973) 1 ANLR (Pt. 2) 282

Kodilinye v. Odu 2 WACA 336

Agbaje v. Agboluaje (1774) 1 All NLR 21

Nwokafor v. Udegbe (1963) 1 All NLR 104

B Ibrahim v. Shagari (1983) 9 SC at 64 - 65 and 96

Atuanya v. Onyejekwe (1975) 3 S.C. 161

STATUTES & RULES REFERRED TO

Evidence Act, Cap. 112 LFN, 1990, ss. 24, 90, 96, 97, 98 and 227(1)

C Supreme Court Rules, 1995, O.6, r. 5(1); O. 8, r.2(1) - (5)

LEAD JUDGMENT BY WALI JSC

The plaintiff's claims against the defendant as finally settled in paragraph 25 of his Statement of Claim are as follows:-

D *"(1) A declaration that the plaintiff is entitled to the grant of a Statutory Right of Occupancy in respect of the parcel of land measuring 100 feet by 100 feet situate at Uselu, Ward 23/L, Egua - Edaiken, Benin City which said parcel of land is delineated in Pink on Survey Plan No. MWC/163/82 filed with this Statement of claim.*

E *(2) N2,000.00 being damages for trespass in that on or about 17/7/81 and 9/10/81 the defendant, his servants and/or agents went into the land in peaceful possession of the plaintiff, committed various acts of trespass details of which have been furnished above in this statement of claim.*

F *(3) An order for perpetual injunction restraining the defendant, his servants and/or agents from committing further acts of trespass on the said land."*

G These claims were denied by the defendant. At the end of the hearing of the case, Oki, J (as he then was) after a thorough and painstaking consideration of the evidence adduced, dismissed the plaintiff's claims in their entirety.

Dissatisfied with the judgment of the trial court, the plaintiff appealed to the Court of Appeal, Benin Division. The appeal was unanimously dismissed by the Court of Appeal which affirmed the decision of the trial court. The plaintiff has now further appealed to this court.

H Both the plaintiff and the defendant will be referred to as the appellant and the respondent respectively in this judgment.

The facts of the appellant's case as revealed in the evidence presented before the trial court are as follows-

Sometime in 1975 the appellant approached P.W.2, Unwensuyi Edosomwan, to purchase part of the land which the latter said he had ac-

quired in 1962 under Benin Customary Law by applying through the Egue-Edaiken Plot Allotment Committee Ward 23/L and which the Oba of Benin finally approved in October, 1962. The land acquired by PW.2 is situate along Ufumwen Street Uselu, Benin City and measured 160 yards by 160 yards, lying within the area of authority of Ward 23/L Plot Allotment Committee, Egue-Edaiken Benin City. It is particularly demarcated by ward beacons nos. 2551, 21, 143, 23, 133, 69 and 11/3. The land in dispute which is within the larger parcel of land acquired by PW.2 measures 100 feet by 100 feet. The appellant bought from PW.2, the land in dispute. See paragraph 5 of the Statement of Claim. B

Having purchased the land, the appellant cleared it and started planting food crops in it. He got it surveyed, mauled some cement blocks therein and began constructing a building of 12 bedrooms. When the building was at its foundation level, the respondent came into the land accompanied by some mobile police, drove out the appellant and his workers, covered the 12 room foundation; and constructed a wall round the land in dispute. The appellant complained to Emina Obaseki and some other elders of the community, but before the elders could settle the dispute, the respondent caused the police to search the appellant's house. During the search the police removed some vital documents belonging to the appellant which were however not related to the land in dispute. C D E

The facts of the respondent's case as revealed by his pleading and evidence are however briefly as follows:

The respondent applied through the Egun Iyoba Plot Allotment Committee in charge of Ward 23/L for the allocation of a parcel of land measuring 200 yards by 200 yards within the area of the Committee's jurisdiction. With the assistance of Alex Obude (D.W.2) and a member of Egun Iyoba Plot Allotment Committee in 1971 charge of Ward 23/L the parcel of land he was applying for was identified. D.W.2 reported back to the Committee. The respondent then completed the application form in quadruplicate which were thereafter signed by the members of the Allocation Committee. The respondent took it to the Oba for approval of the grant which was a condition precedent for any valid customary grant of land. Having obtained the approval of the Oba, the respondent paid 'a350 (fifty pounds) to D.W.2 as compensation for the latter's rubber trees on the parcel of land. The respondent then engaged a surveyor for the survey of the land granted to him, and after the survey plan was produced, he engaged the services of a lawyer who prepared a deed of conveyance by which the parcel of land was conveyed to him. F G H

After the execution of the deed of conveyance, the respondent cut

down all the rubber trees on the land and that was in 1974. In 1975, he sold part of the land measuring 100 ft by 100ft to Albert Evbomwa (D.W.4), and in 1976 he also sold another portion of the same land to one Emmanuel Edeghere leaving him with 100 ft by 200 ft. These transactions were carried out by the respondent without any challenge from any person.

In 1980 the respondent said he started developing a portion of the land, measuring 100 ft by 100 ft by laying foundation of a house of 4 (four) flats. At that time, he was living and serving in Benin. After the foundation had reached D.P.C. level he was transferred to Lagos in 1980.

In May, 1981 the respondent visited Benin and on inspection of his land, he met the appellant cutting down the remaining big tree he left on the land. The respondent then reported the matter to the police.

Learned counsel for the appellant and for the respondent filed and exchanged briefs in compliance with Rules of this court.

Mr. A.O. Alegeh, learned counsel for the appellant has formulated in his brief two issues for determination in this appeal and which are:-

"1. Whether or not the Court of Appeal was right in the view it took on the onus of proof.

2. Whether oral evidence of the document marked Exhibit "X" rejected, is admissible in the circumstances of this case."

On his part. P.O. Ige, Esq., of learned counsel for the respondent, raised in the respondent's brief, the following 3 issues for consideration and determination in this appeal and which are reproduced hereunder.

"a. Whether the learned justices of the Court of Appeal ought to have placed onus of proof in a declaration of title to land on the defendant/respondent before the onus of proof of the plaintiff/appellant.

b. Whether (in any event) the learned justices of the Court of Appeal were right in upholding the decision of the trial court that the oral admission of 2nd PW. that he at the time caused his Solicitors to write in 1981 to plaintiff/appellant that he (PW.2) had no title to the land he sold to the plaintiff, was admissible and that it seriously weakened the plaintiffs/appellant's case.

c. On who has the onus of proof in a declaration of title to land and especially where title to land is claimed under Bini Native Law and Custom."

Issue 1 of the appellant's brief covers issues (a) and (c) of the respondent's brief while issue 2 of the appellant's brief equally covers issue (b) of the respondent's brief.

Before dealing with the substantive issues raised in this appeal, it is pertinent to consider the preliminary objection raised by the respondent

in his brief of argument. The objection of the respondent is that all the three grounds of appeal are incompetent as Notice of Appeal does not contain or state the exact relief sought. He submits that they are in breach of Order 8 Rule 2(1) - (5), of the Supreme Court Rules, 1985. He also contends that none of the grounds of appeal complained against the Court of Appeal decision but that all are directed against the decision or findings of the trial court. B

I have examined the three grounds of appeal strictly and I find no substance in the preliminary objection. The three grounds of appeal, though inelegantly drafted all complained against the decision of the Court of Appeal for confirming the judgment of the trial court. None of the grounds offends the provisions of subrules (1) - (5) of Order 2 of the Supreme Court Rules, 1985. The fact that the appellant did not file additional ground of appeal as indicated in prayer (4) of the Notice of Appeal has no effect on the validity of the Notice of Appeal itself. C

Issue 1 is covered by ground one of the appellant's ground of appeal. It was the submission of learned counsel for the appellant under this issue that since it was the respondent who raised the issue that the land in dispute was not within the jurisdiction of Egua-Edaiken, as pleaded by the appellant, the burden of proving the contrary lay on the respondent. He submitted that the lower court erred when it held that the onus of establishing the jurisdiction of Ward 23/L Egua-Edaiken Land Allocation Committee over the area in dispute rested on the appellant. He cited and relied on the following cases to support his submissions - *Onobruhere v. Esigine* (1986) 1 NWLR (Pt.19) 799; *Noibi v. Fikolati* (1987) 1 NWLR (Pt.52) 619; and *Elias v. Sulieman* (1973) 1 ANLR (Pt.2) 282. D E F

It was the contention of learned counsel for the respondent that none of the issues formulated in the appellant's brief is related to any of the grounds of appeal. He therefore urges this court to discountenance all submissions made in the appellant's brief and to strike out the three grounds of appeal. He cited and relied on a number of decided cases and also Order 6 Rule 5(1) of the Supreme Court Rules, 1985 (as amended). G

In case he is over-ruled in his above submissions, learned counsel presents the following arguments -

It was his contention that the first issue as framed in the appellant's brief "raises entirely new matter" as it has no relevance with any of the grounds of appeal. He said what the appellant is quarrelling with in ground 1 is the failure of both the trial court and the Court of Appeal to place the onus of proof on the respondent when in fact there was no appeal against the decision of the lower court that was affirmed by the Court of Appeal that " H

in an action for declaration of title the onus of proof is clearly on the party (plaintiff) seeking declaration who must succeed on the strength of his own case and not on the weakness of the defendant's case." He submits that since the appellant has failed to adduce cogent and credible evidence to support his case, the respondent has no burden to discharge; and that he can only rely on the strength of his own case to succeed but not on the weakness of the respondent's case. He cited and relied on the leading case on the issue to wit: *Kodilinye v. Odu* (1935) 2 WACA 336, particularly at Pp. 337-338.

On issue 1 (b) in the respondent's brief which is also covered by issue (2) of the appellant's brief, learned counsel submits that since the appellant admitted writing such a letter and that he has not recalled the effect of same, it was unnecessary for the respondent to even tender the letter in question, and that with or without proving the actual letter itself, his oral admission is enough. He referred to and relied on sections 24, 96, 97, 98 and 227(1) of the Evidence Act, Laws of the Nigeria 1990 (Cap.112). He concluded his submission on Exhibit "X" as follows in his brief:-

"The evidence of 2nd PW. reproduced on page five (5) of the appellant's brief that he wrote the letter falling from the lips of the appellants own witness cannot be expunged from the record. PW.2 was not found in the court of trial to admit that fact in open court (assuming but without conceding that he was forced to write the letter under reference). His further evidence under cross-examination that he has not retracted the content of the letter further strengthened the position taken by the trial court and the lower court that he voluntarily caused his solicitor to write the letter to the plaintiff that he (PW.2) had no title to the land."

Learned counsel cited and relied further on the following cases - *Ezeoke v. Nwagho* (1988) 1 NWLR (Pt.72) 616; 630(A.B.); *Umeojiako v. Ezenamuo* (1990) 1 NWLR (Pt.126) 253 at 270 (E-G) and *Monier Construction Co. Ltd. v. Azubuike* (1990) 3 NWLR (Pt.136) 74 at 88 (D - F).

He urges the court to dismiss the appeal and affirm the unfaulted concurrent findings of fact of the lower court.

It is a clear misconception by learned counsel for the respondent to contend that none of the two issues raised by the appellant in his brief is related to any of the grounds of appeal. The purport of ground 1 is that the Court of appeal erred in affirming the decision of the trial court that the onus is on the plaintiff to prove that the land in dispute is within Egua - Edaiken as he has alleged and asserted in paragraph 3 of his Statement of Claim, while issue 2 is related to grounds 2 and 3 in which learned counsel for the appellant attacked the reliance put by both the trial court and the Court of Appeal, on the oral evidence of content of a letter which was

rejected and marked "Exhibit X rejected" in reaching their decisions.

There is no substance in the attack lodged by the respondent on these issues.

It is the settled customary law that all land in Benin before the Land Use Act, 1978, was vested in the Oba of Benin and it was he alone that could approve the allocation of a plot of land through the appropriate Plot Allotment Committee. The crux of the dispute in this case was as to which of the Ward Allotment Committee had jurisdiction to recommend to the Oba for approval of the land in dispute. It was the case of the appellant as plaintiff, as averred in paragraph 3 of his Statement of Claim, that "the land in dispute is situate along Ufumwen Street, Uselu, Benin City within the area of 'authority' of Ward 23/L Plot Allotment Committee Egua Edaiken, Benin City". This was denied by the respondent in paragraph 3 of the amended statement of claim and specifically in paragraph 14 in which he averred thus:-

"The defendant will at the trial put the plaintiff to strict proof as to his averment that the said land in dispute is within Egua - Edaiken Plot Allotment Committee Ward 23/L Benin City.

Where pleadings were filed and exchanged as a result of which a material fact was affirmed by one of the parties but denied by the other, the question that was raised as a result therefore was an issue of fact. See Lewis and Peat (N.R.I) Ltd. v. A.E. Akhimien (1976) 7 SC 157 at 162.

In the present case, it was the appellant's assertion that the land in dispute was within the jurisdiction and authority of Ward 23/L Plot allotment Committee Egua - Edaiken, Benin City and that he would adduce evidence to prove that. See paragraphs 3 and 9 of the Statement of Claim. This was denied by the respondent.

On this issue the appellant as plaintiff testified thus:-

"the land is situate at Ufumwen Street, in Egua - Edaiken Ward 23/L Uselu quarters in Benin City."

When he was cross-examined, he said:

"I know Uselu Quarters in Benin City. I know that Uselu Quarters consist of Egua - Iyoba and Egua - Edaiken."

It is to be noted that the appellant did not say throughout his evidence that Egua Edaiken Plot Allotment Committee Ward 23/L had jurisdiction to allocate a plot of land either in Egua - Iyoba quarters or Egua - Edaiken Quarters; except that he knew the existence of Egua-Edaiken Plot Allotment Committee.

P.W.2 in his evidence asserted that he had a plot measuring 480ft by 480ft in the Egua - Edaiken Plot Allotment Committee area, and in June

1975 he transferred to the appellant by sale, a portion of the said land measuring 200 ft by 100ft. It was also the evidence of P.W.2 that he applied in 1962, through the Egua - Edaiken Plot Allotment Committee, for the allocation of the said land and the Oba approved his application in the same year. After the approval of the Oba, the Egua - Edaiken Plot Allotment Committee *"delegated two of their pointers and whose name he could no longer remember to show him the land allocated to him"*, which he said they did.

When cross-examined. P.W.2 said:-

"I know as a fact that there is an Egua Edaiken Plot Allotment Committee and Egua -Iyoba Plot Allotment Committee. When one leaves Benin City and is going along the road towards Lagos; one first comes to Egua-Iyoba and thereafter to Egua-Edaiken. I agree that each Committee is enjoined by custom to allocate only plots within its area of jurisdiction."

XXXX

"I know that there has been boundary disputes between Egua and Egua -Iyoba, but not in respect of the portion involved in this case."

XXXX

The land being claimed by the defendant is 200 feet by 200 feet and therefore extends beyond the portion I sold to plaintiff and yet all within my land.

Till today I have not sued the defendant in respect of my land which he is claiming. At the time I meet Emina Obaseki on the land: he was just about to start fencing. He had not done so yet. I visited the land about two to three months ago, and found that the land had not yet been fenced by Obaseki. The fencing I saw was done by plaintiff.

It is true that apart from the area of 200 feet by 100 feet which I sold to plaintiff the defendant has developed part of the 200 feet by 100 feet I reserved for myself."

P.W.3 the Secretary to Egua - Edaiken Plot Allotment Committee testified under cross-examination as follows:-

"Apart from our Committee of Egua - Edaiken there is also Egua Iyoba Plot Allotment Committee in Urelu. I agree that each Committee appointed by the Oba was to recommend plots of land within its area of jurisdiction. It is true that in the past the Oba also looked into boundary disputes between the Committees, apart from the courts.

In 1976 there was a boundary dispute between Egua- Edaiken and Egua -Iyoba and it was settled. It was settled by the present Oba of Benin who was then the Edaiken of Urelu. It is true that there were disputes

pending in courts between the two Plot Allotment Committees at that time. That was why the Edaiken went into the matter. I agree that the Edaiken's intervention was the first settlement between Egua-Edaiken and Egua - lyoba.

We gave Edosomwan 160 yard by 160 yards for building and for sundry purposes. As far as I can remember, this was the only plot that we gave to Edosomwan."

xxxx

P. W.5 also said under cross-examination:-

"I know that there was also an Egua-Iyoba Plot Allotment Committee whose area of jurisdiction had boundary with our own area of jurisdiction.

I do not know the boundary between Egua-Edaiken and Egua Iyoba. I did not ask. At the time the boundary was demarcated, I was ill and on admission to the University of Benin Teaching Hospital. When I was discharged I did not ask to know the boundary that was demarcated."

.... The Committees of Egua - Edaiken and Egua - Iyoba were acting jointly in the allocation of plots to Applicants before they came to be divided into two separate Wards for the purposes of land allocation.

I know that there had been a series of boundary disputes between the two Plot Allotment Committees before the Edaiken of Uselu intervened to demarcate the boundary between them."

None of the witnesses that testified in support of the appellant's case slated the boundary between Egua - Edaiken Plot Allotment Committee Ward 23/L and Egua - Iyoba Allotment Committee Ward 23/L -P.W.5. though he was a member of the Egua - Edaiken Plot Allotment Committee admitted that he did know its boundary. He further admitted that before the two committees were separated. i.e. Egua and Egua -Iyoba, they were acting jointly in the allocation of plots within the area. He did not however mention the date the two committees were separated.

The learned trial Judge after considering the evidence as a whole came to the following inevitable conclusions:-

"A close examination of the evidence shows the plaintiff himself did not know whether the land in dispute was in Egua - Edaiken. Indeed he said under cross-examination that he did not even know that there were two Plot Allotment Committees in Uselu. This shows that he was in no position to know whether the land in dispute is in Egua-Edaiken or in Egua-Iyoba which are the constituent wards of Uselu. Again, although P.W.2 was aware that there were two Plot Allotment Committee Uselu and that they had a boundary dispute between them, he did not show by evidence that the land in dispute was within Egua - Edaiken. He only asserted under cross-examination that the boundary dispute was not in respect of the por-

tion involved in this case. Worse still, even P.W.5 (Ogiemware Osifo) who was a member of the Egua - Edaiken Plot Allotment Committee and who joined in recommending P.W.2's application to the Oba for approval said clearly under cross-examination that he did not know the boundary between Egua-Edaiken and Egua Iyoha, although he knew that they had a common boundary.

Plaintiff had also alleged in paragraph 9 of his Statement of Claim reproduced above, that there was a lay-out plan of part of the land in Egua - Edaiken and that the portion granted to P.W.2 was within that area. He went further to say that he would found on that layout plan at the hearing. Yet at the hearing plaintiff called no evidence on this issue and took no steps to tender the layout plan in evidence. Even plaintiff's survey plan (Exhibit D) only shows the land in dispute without actually showing that it is within the Egua-Edaiken side of Uselu.

In short, plaintiff has not succeeded in showing that the land in dispute is within Egua-Edaiken Ward which the Egua-Edaiken Plot Allotment Committee had jurisdiction to recommend to the Oba for approval for someone requiring a parcel of land."

The Court of Appeal in affirming the learned trial Judge's decision (supra) said:

"In an action for declaration of title the onus of proof is clearly on the party (plaintiff) seeking the declaration who must succeed on the strength of his own case and not on the weakness of the defendant vide *Kodilinye v. Mbanefo Odu & Ors* 2 WACA 336.

That is the law as correctly stated by the learned trial Judge. The case of the plaintiff is that the land in dispute was allocated to him by the Egua-Edaiken Plot Allotment Committee. The onus of proof is on him to establish this fact. If that committee had no jurisdiction/power to allocate that piece of land then even the subsequent approval which his predecessor-in-title got from application to the appropriate Committee and thence to the Oba of Benin's seal of approval must be in order, before a proper grant under Benin customary law can be obtained vide *Arase v. Arase* (1981) 5 S.C. 33; *Atiti Gold v. Osaseren* (1970) 1 ANLR 132; *Aigbe v. Edokpolor* (1977) 2 S.C. 7; *Bello v. Eweka* (1981) 2 S.C. 101. The onus is therefore squarely on the appellant to establish this vital chain in the link from his application to the ultimate approval of the Oba of Benin. The fact that the jurisdiction of another Allotment Committee has been raised by way of a defence by the respondent, does not shift the onus on the appellant to first prove what he asserts - that the Egua-Edaiken Allotment Committee had the jurisdiction to and therefore properly allotted

the land in dispute to him. It only makes proof more difficult. Whether taken as a preliminary issue is on the appellant; and on his failure to discharge same, he can only be entitled to have his claim dismissed."

In the instant case the appellant did not adduce evidence in proof of the averments in paragraphs 3 and 9 of the Statement of Claim. The law is that where a fact or facts are pleaded and no evidence was led to prove them no onus is cast on the other party to disprove the fact or facts not established: See *Kate Enterprises Ltd. v. Daewoo Nigeria Ltd.* (1985) 2 NWLR (Pt.5) 116. B

In a case for a declaration of title to land the burden of proof squarely rests on the plaintiff, and where he fails to do so, the proper order is one of dismissal of his case. The appellant is seeking for a declaratory order to the land in dispute the ownership of which he has failed to prove. The weakness of the respondent's case if there is any should not be a substitute to the onus of proof which the appellant has failed to discharge. See *Quo Vadis Hotels & Restaurants Ltd. v. Commissioner of Lands Mid-Western State & Ors.* (1973) 6 S.C. 72; *Agbaje v. Agboluaje* (1974) 1 All NLR 21 and *Nwokafor & Ors. v. Nwankwo Udegbe & Ors.* (1963) 1 All NLR 104, particularly at 107 where this court re-emphasized the principle thus: C D

"The decision in Kodilinye v. Odu (1935) 2 WACA 336 is authority for saying that the proper judgment in which a plaintiff claiming a declaration of title fails to prove his case is one of dismissing the claim." E

There is no substance in issue 1 which is tied to ground 1 of the grounds of appeal. It therefore fails.

Issue 2 is tied to grounds 2 and 3 of the appellants grounds of appeal. F

It was the submission of learned counsel for the appellant that both the trial court and the Court of Appeal fell into serious error when they held that the oral evidence of the contents of a letter that was found to be inadmissible, *"was admissible as it was an oral admission of the contents of a document."* He said P.W.2 did not admit the contents of the document marked "Exhibit 'X' rejected." G

It was also his submission that the letter itself i.e. Exhibit "X" rejected" was sought to be proved against P.W.2 and not against appellant who was never confronted with this issue when he testified and that since the original document was not in possession of P.W.2. secondary evidence of its contents is therefore inadmissible under s.96 of the Evidence Act. H

He cited *Ajayi v. Fisher* (1956) SCNLR 279 in support and urged that the appeal be allowed.

Counsel for respondent in reply to submissions above submitted

thus in his brief:

B *“The learned Justices (of the Court of Appeal) did not hold that the learned trial Judge was right in relying on the oral evidence of the content of a document already marked Rejected “X”. The trial court did not at all rely on the contents of rejected “X” in arriving at his decision that the oral admission of P.W.2 was fatal to the case of the appellant.”* In what seems to be an alternative submission on Exhibit “X” Rejected” learned counsel for the respondent said in his brief:

C *“The Court of Appeal found that from sequence of events at the trial court it cannot be said that the learned trial Judge was wrong in relying on a voluntarily admission of 2nd P.W. because he (P.W.2) had already admitted that fact before the respondent tried to tender a photocopy of the letter containing similar admission by P.W.2. The lower court after examining sections 97 and 23 of the Evidence Act Cap. 112 Laws of the Federation of Nigeria, 1990, came to the conclusion that the oral evidence of P.W.2 under cross-examination (not contents of a rejected document) admitting that he had once written that he was not the owner of the land in dispute*
D *“qualifies for admission in evidence.”*

E Learned counsel submitted that the appellant was bound by the evidence of his witness including any admission made by the witness in such evidence. He referred to *Waziri Ibrahim v. Alhaji Shehu Shagari* (1983) 9 S.C. 59 at 64 - 65 and 96; (1983) 2 SCNLR 176 at 183 and 196 in support.

In paragraph 8 of the Amended Statement of Defence it was in part pleaded thus:

F The vendor Mr. Edosomwan caused a letter to be written to the plaintiff to confirm his mistake as to having any title or claim to the said land which he purported transferring to plaintiff to the effect that he (i.e. the vendor) was prepared to give an alternative land to the plaintiff in place of the one now still claimed by the plaintiff or to refund his purchase money to him. A copy of the said letter reflecting the above written to plaintiff was
G sent to the defendant by the Vendor. The said letter or its copy will be produced and relied upon at the trial.”

H The facts averred in the paragraph (supra) put both the appellant and his vendor on notice that the respondent would reply on the letter or its copy in proof of the falsity of the appellant’s claim to the land in dispute. Unfortunately the appellant in whose possession the original of Exhibit “X” rejected”, was alleged to be was neither put on notice to produce the original nor cross-examined as to whether such a letter was written to him. On this point I agree with learned counsel for the appellant that no foundation was laid by the respondent for admission of its copy in possession of the

respondent and was properly rejected. See s. 90 of the Evidence Act.

On the other hand, PW.2 admitted giving instruction to his lawyer to write a letter to the appellant with a copy of the same sent to the respondent. PW.2 was the Vendor who sold the land in dispute to the appellant and this had been so much admitted by the appellant. He was cross-examined as to the validity of title he passed on to the appellant. His answer under cross-examination was as follows:-

"I know Barrister S.O. Omokaro. It is not correct to suggest that after a dispute arose between me and defendant I caused Mr. Omokaro to write to the plaintiff retracting the sale I had made to him on the alleged ground that I had found out that the land I sold to plaintiff actually belonged to the defendant. I now say that I wrote a letter of that nature to the plaintiff; but I was forced to write it. The defendant forced me to write that letter. The letter I was forced to write was in fact by my lawyer. I instructed the lawyer to write it..... I have not retracted that letter."

The learned trial Judge after considering the evidence that the appellant had been forced and intimidated to write the letter, found as follows:

"PW.2 tried to show in court that he was under threat by the defendant when he instructed his solicitor to write the letter. Yet he admitted in court that up to the date of his evidence in court, he had not written another letter to counter-act the earlier letter his solicitor wrote to the plaintiff and endorsed it. I reject entirely PW.2's suggestion that he caused the letter to be written for him by a solicitor because he was being intimidated or threatened by the defendant."

This is a finding of fact against which there was no appeal.

The issue as I see it is not that the appellant was cross-examined on Exhibit "X" rejected" to prove its contents but to establish that the appellant was not saying the truth in his evidence on the issue as regards his title to the land in dispute. In short he was making a statement adverse to his interest through his own witness. PW.2: his Vendor. The general principle of law on the issue is that a statement oral or written (expressed or implied) made by a party in civil proceedings and which statement is adverse to his case, is admissible against him on the truth of the facts asserted in the Statement: Seismograph Service (Nigeria) Ltd. v. Chief Keke Ogbenegweke Eyuafe (1976) 9 and 10 S.C. 135 at 146 and Slatterie v. Pooly 151 Exch. 579.

PW.2. the person from whom the appellant derived his title to the land in dispute made a statement under cross-examination adverse to the appellant's interest who called him as a witness to prove his case. He made a statement under cross-examination in which he admitted that he had no

title in the land in dispute which he could have passed to the appellant as this was contrary to what the appellant pleaded in the Statement of Claim. This can by no means be construed as giving evidence of the contents of Exhibit "X" rejected." So the case of Ajayi v. Fisher (supra) cannot apply to the present situation and it is not apposite.

B I have seen nothing wrong in the observation and conclusion of the Court of Appeal on the issue that:-

C *"The further question that arises from this sequence of events is whether the evidence already led voluntarily by P.W.2 under cross-examination, set out earlier, which was properly received, is rendered inadmissible because a photocopy of a copy of a letter purporting to say something similar was not admitted in evidence. The usual case in which the rule that oral evidence of a written document is not admissible in evidence arises where the very party giving the oral evidence now seeks to back it up with a document which is then found to be inadmissible in evidence. He is then*

D *precluded from relying on whatever oral evidence he had given before, even if it was unchallenged, on the ground that oral evidence i.e. secondary evidence, of a written document cannot be given except in certain circumstances. And that proof of a document must be by primary evidence vide section 95 of the Evidence Act.*

E *It would seem however that the oral evidence in this case comes under one of the exceptions envisaged by section 96 of the Evidence Act particularly as it qualifies as an admission under section 24 of the Act."*

xxxx

F *"The oral admission of P.W.2 therefore qualifies for admission in evidence. The submission that it is inadmissible is therefore wrong. "*

Even without the oral evidence of P.W.2 referred to above, the evidence relied upon by the trial court is enough to sustain its verdict. I entirely agree with conclusion of the Court of Appeal when it stated:

G *"without the evidence complained of the learned trial Judge could have come to the same conclusion he arrived. "*

There is no substance in this appeal. Both the trial court and the Court of Appeal considered and appraised the evidence and arrived at the correct decisions. These decisions are affirmed and the appeal is therefore dismissed with N1,000.00 costs to the respondent.

H _____

KUTIGI JSC

I have had the privilege of reading in advance the judgment just delivered by my learned brother Wali, J.S.C. I agree with him that the appellant having failed to prove amongst others that the land in dispute is

within the area of authority of WARD 23/L Plot Allotment Committee Eguae-Edaiken, Benin City as asserted in para.3 of his Statement of Claim and denied by para. 3 of the Amended Statement of Defence, the action ought to have failed as it did. I also agree that the action would still have failed even without the evidence of P.W.2 and the rejected Exhibit "X".

I accordingly dismiss the appeal with costs as assessed.

B

OGWUEGBU JSC

I have had the advantage of reading in draft the judgment just delivered by my learned brother, Wali, J.S.C. I agree entirely with it and will dismiss the appeal for the reasons stated in that judgment. The appellant failed to discharge the burden of proof cast on him to entitle him to a declaration of title sought.

C

There is one aspect of the judgment on which I would like to add my own comments. The plaintiff/appellant in paragraph 3 of his statement of claim filed on 25:2:82 averred as follows:

D

"3. The land in dispute is situate along Ufumwen Street, Uselu, Benin City within the area of authority of Ward 23/L Plot Allotment Committee Eguae-Edaiken, Benin City."

In paragraphs 9 and 14 of the amended statement of defence, the defendant/respondent averred as follows:

E

"9. The defendant specifically avers and will establish at the trial that he acquired the parcel of land in dispute within a larger parcel of land situate in Ward 23/L Eguae-Iyoba Allotment Committee, Uselu, Benin City."

14. The defendant will at the trial put plaintiff to strict proof as to his averment that the said land in dispute is within Eguae-Edaiken Plot Allocation Committee Ward 23/L, Benin City,""

F

The respondent raised the issue that the land was within the jurisdiction of Eguae-Iyoba Plot Allocation Committee Ward 23/L, Benin City and not Eguae-Edaiken Plot Allocation Committee Ward 23/L, Benin City. The learned appellant's counsel submitted that the onus of proving this issue is on the respondent and that he failed to discharge it.

G

I agree with the courts below that the onus is on the appellant in this case to show that the land in dispute is under the jurisdiction of Eguae-Edaiken Plot Allotment Committee which recommended it to the Oba for his approval for P.W.2 from whom the appellant bought. If the Eguae-Edaiken Plot Allotment Committee had no jurisdiction to allocate the land to P.W.2, any subsequent approval which P.W.2 got from the Oba of Benin will not avail him. All the processes from application to the appropriate Committee and thence to the approval by the Oba of Benin must be in order

H

before there can be a valid grant under Bini Customary Law, See *Arase v. Arase* (1981) 5 S.C. 101 and *Afiti Gold v. Oseseren* (1970) 1 All NLR 125 and *Bello v. Eweka* (1981) 1 S.C. 101.

The mere fact that the issue of jurisdiction of another Allotment Committee - (Egua-Iyoba Plot Allotment Committee) was raised by the respondent did not relieve the appellant of the onus to prove his assertion in paragraph 3 of his statement of claim.

The onus lies on the plaintiff to satisfy the court that he is entitled on the evidence brought by him to a declaration of title. The plaintiff must rely on the strength of his own and not on the weakness of the defendant's case. If this onus is not discharged, the weakness of the defendant's case will not help him and the proper judgment is for the defendant. See *Kodilinye v. Odu* (1935) 2 WACA 336 at 337-338; *Akunwata Nwaghogu v. Chief M.O. Ibesiako* (1972) E.C.S.L.R. (Pt.1) 335 and *Atuanya v. Onyejekwe & Or.* (1975) 3 S.C. 161.

I hereby dismiss the appeal with costs as assessed in the judgment of my learned brother, Wali, J.S.C.

ADIO JSC

I have had the benefit of a preview of the judgment just delivered by my learned brother, Wali, J.S.C. and I am in agreement with it. There is no merit in the appeal and I dismiss it. I abide by the order for costs.

Apart from the damaging admission made by one of the vital witnesses who testified for the appellant, the appellant did not lead evidence to show that the land in dispute was in an area that was within the jurisdiction of the Committee the purported to recommend the application pertaining to it to the Oba of Benin. The Onus is on a plaintiff claiming a declaration of tile to lead evidence to prove that he is entitled to the declaration sought by him. If he fails to discharge the onus, his claim should be dismissed. See *Kodilinye v. Oba* (1935) 2 WACA 336 it is for the foregoing reasons and the fuller reasons given by my learned brother in the lead judgment that I agree that the appeal has no substance. I too dismiss it and abide by the order for costs.

IGUH JSC

I have had the privilege of reading in draft the lead judgment just delivered by my learned brother, Wali, J.S.C. and I agree entirely with him that this appeal is without substance and should be dismissed.

For the same reasons advanced by him which I adopt as mine, I too dismiss this appeal and abide by the order as to costs therein made.