

SUPREME COURT OF NIGERIA
TUESDAY 28TH MAY, 1996. SC. 254/1993
CORAM:- M. L. UWAIS, M. E. OGUNDARE,
E. O. OGWUEGBU, U. MOHAMMED, Y. O. ADIO, JJSC

JOSEPH N. OMEREDE APPELLANT
(For himself and as
representing Ekebedi Community)
AND
OGBONAYA ELEAZU & 3 OTHERS RESPONDENTS
(For themselves and as representing
Obunta kindred)

ACTIONS - *Locus standi* - Where plaintiff prosecuted an action on behalf
x of a community - His evidence on matters that were not pleaded - Can-
not make him to say he lacked locus standi.

ACTIONS - *Dismissal* - Reasons for dismissing the plaintiff's action - Prop-
erty clarified.

EVIDENCE - *Inconsistency* - Where plaintiff's evidence was found contra-
dictory and unreliable - Whether the issue of plaintiff's lack of locus standi
arose.

FACTS

In 1970, one James Agbara in a representative capacity filed an action against the defendants/respondents claiming declaration of title to the land in dispute which is situate in Umuahia Division. In the course of the trial the said Agbara died and upon the present plaintiff/appellant's application, he was substituted for the deceased. At the conclusion of the trial, the learned trial judge found inter alia, that the plaintiff's evidence on user was contradictory and unreliable, that the plaintiff has failed to prove his claim which was accordingly dismissed.

Being dissatisfied with the trial court's judgment the plaintiff appealed unsuccessfully to the Court of Appeal. Plaintiff has further appealed to the Supreme Court contending that he has no locus standi to prosecute the suit because he is not a member of the Obuola family that "Owned the land in dispute." The Supreme Court had to determine the appeal on the main point canvassed in issue (4) raised by the appellant.

ISSUE FOR DETERMINATION

“4. Whether the court of Appeal in all the circumstances of this case properly exercised its role as an Appellate court in affirming the decision of the trial court, dismissing the suit on the premise that the proper plaintiff was not before it, rather than substituting an order striking out the suit.”

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

Evidence - Inconsistency

1. In the light of the seeming inconsistencies in the evidence of the Plaintiff it is not surprising that the learned trial Judge found it contradictory and unreliable. It is on this unreliable evidence that he now claims that he had no locus standi to prosecute the action. This is not a case of locus standi, it is simply a case of a plaintiff leading evidence that is not only inconsistent with his pleadings but is equally intrinsically contradictory. In one breadth, he pleaded and testified that the land in dispute belonged to the Ekebedi community in common. In another breath, he claimed that it belonged to Obuala kindred exclusively. (p. 960 H)

Actions - Locus standi

2. It does not now the in his mouth to say that he lacked locus standi to prosecute the action which he did on behalf of the Ekebedi community and on the authority of that community. Defendants are “non-Ekebedi persons.” His evidence, and any other evidence to the like effect, that the land in dispute belonged to the Obuala kindred as against the Ekebedi community goes to no issue as this fact is only not pleaded but derogates as well from the pleadings. The evidence should be disregarded. This knocks the bottom off the Plaintiff’s contention in this appeal. (p. 961 C)

Reasons for dismissing the plaintiff’s action

3. The reasons for dismissing the action are to be found in the four findings of fact and observation of the learned trial Judge on the case for the defence set out by me at the early stage of this judgment. The action was not dismissed because there was a finding that Obuala kindred owned the land and that a wrong person sued. If that had been the case, Plaintiffs contention in this Court would have been tenable. The authorities relied on by him are just not apposite to the facts of his case. His action was dismissed because it lacked merit. In conclusion, I find no merit in this appeal. (p. 961 E)

NOTABLE POINT OF INTEREST

OGWUEGBU JSC

1. Whether plaintiff is the proper plaintiff

It is quite strange that a plaintiff who applied to the court to be substituted for a deceased plaintiff and who prosecuted the case to the end and lost, should turn round and say that he is not the proper plaintiff. This is deceit fill to say the least. The plaintiff/appellant appeared to forget the pleadings filed, the affidavit and oral evidence led by him. (p. 962 E)

REPRESENTATION

C A. O. Olufon for the Plaintiff/Appellant

Respondents not present and not represented

CASES REFERRED TO

Oloriode v. Oyebi (1984) 15 NSCC 286

Onwunalu v. Osademe (1971) 1 ALL NLR 14

Emegokwe v. Okadigbo (1973) 4 S.C. 113

Okafor v. Ifionu (1978) 4 SC 1, 7-8

Idahosa v. Oronsaye (1959) 4 FSC 166

NIPC v. Thompson Organisation (1969) 1 ALL NLR 138

George v. Dominion Flour Mills Ltd (1963) 1 All N.L.R. 71

A.C.B. Ltd v. Nigerian Dredging Road & General Works Ltd. (1977) 5 S.C. 235

LEAD JUDGMENT BY OGUNDARE JSC

The question for determination in this appeal lies within a small ambit. Sometime in December 1970, one James Agbara issued out a writ of summons claiming from the Defendants in their individual capacity declaration of title to a piece or parcel of land (hereinafter is referred to as the land in dispute) 100pounds damages for trespass and an injunction. James Agbara sought and obtained leave of court to prosecute the action in a representative capacity that is to say for himself and as representing the Ekehedi Community of Oboro in Umuahia Division. Pleadings were filed and exchanged and subsequently amended. In the court of the trial James Agbara died and on the application of the present plaintiff, Joseph Nkpoku Omerede he was substituted for the deceased James Agbara. The defendants also sought and obtained leave of court to defend the action for themselves and on behalf of Obunta Community.

At the conclusion of the subsequent trial and after addresses by learned counsel for the parties, the learned trial Judge- Amadi-Obi. J., in a reserved judgment found -

(1) *"The plaintiff's evidence on user is therefore contradictory and*

unreliable.”

(2) *“The Court has no reason from the evidence before it to prefer the story of one of the two witnesses against the other on the question of the outcome of the arbitration. The plaintiff has therefore failed to prove that the arbitration found in his favour.”*

(3) *“..... not only did the plaintiff fail to prove by traditional evidence his ownership of the land in dispute since he not only did not trace his ancestry to Ekebedi he did not show how Obuala Kindred alone of the kindreds that make up Ekebedi came to own the land in dispute according to his evidence. He led no evidence to prove his possession and user of the land in dispute. In (sic) the contrary he admits that the defendants are in possession and resident on the land in dispute and that they farm on the land in dispute with their permission. But he failed to prove his grant or refusal of such permission at any time:*

(4) *“..... the plaintiff has failed to prove by either traditional evidence or user that he is the owner of the land in dispute or that he was ever in possession of the said land.”*

The learned trial Judge also observed:

“The defendants identified the land in dispute by its names and boundaries, and gave the name of their ancestor who founded the land. They traced their genealogy to their said ancestor Nzegbu Atuonwu. Their possession and user of the land in dispute is not very much in issue except that the plaintiff claims without proof that the defendants make use of the land with his permission.”

He finally found that *“the plaintiff has failed to prove his claim which is hereby dismissed.”*

Being dissatisfied with this judgment the plaintiff appealed unsuccessfully to the Court of Appeal. He has now further appealed to this Court. The main point canvassed in this appeal is as stated in Issue (4) set out in the Appellant’s Brief. That is to say:

“4. Whether the Court of Appeal in all the circumstances of this case properly exercised its role as an appellate court in affirming the decision of the trial court dismissing the suit on the premise that the proper plaintiff was not before it, rather than substituting an order striking out the suit,”

I may mention that the Defendants/Respondents did not file a Brief nor were they present nor represented by counsel at the oral hearing of the appeal.

The Plaintiff contends that he has no locus standi to prosecute the suit because he is not a member of the Obuala family that “owned the land in dispute.” He also contends that in the circumstance where the proper plaintiff was not before the Court, the proper order to make is one striking

out the case rather than dismissing it. He finally contends that the dismissal of the suit is prejudicial to the Obuala kindred. He cites the following authorities in support of his contentions: Oloriode & Ors. v. Oyebe & Ors. (1984) 1 SCNLR 390; (1984) 15 NSCC 286: Adaja v. Apoti Digest of Supreme Court Cases. Volume 9. at p. 677; Adesanya v. President of Nigeria (1981) 2 NCLR 358; (1981) 5 S.C. 112; Onwunali & Ors. v. Obadeke Osademe (1971) 1 All NLR 14; Ekpere & Ors. v. Aforije & Ors. (1972) 1 All NLR 220, 232; Otapo v. Sunmomu (1987) 2 NWLR (Pt.58) 587 and Muo Okafor v. Sylvanus Ifionu (1978) 4 SC. 1, 7-8.

On the death of the original plaintiff, James Agbara, the Plaintiff/Appellant applied to the trial court to be substituted. In the affidavit in support of the application he deposed as follows:

"1. That I know the plaintiff- deceased - in the above suit who died at Ekebedi Ohoro in Ikwuano/Umuahia Local Government Area on 11th August, 1978,

2. That I know the defendants named herein and the land in dispute in this suit between the Ekebedi Community and the defendants which land is known as and called 'Mgbe Apunta' and situate at Ekebedi Oboro.

3. That I am a member of Ekebedi Community - and the said Community own the said "Mgbe Apunta" land. That as a co-owner of the said land I have interest in the subject matter of this suit i.e. .. the "Mgbe Apunta" land as well as its outcome.

4. That following the death of the plaintiff - James Agbara - named herein and who until his death represented my community - Ekebedi - as plaintiff in this, the people of my community Ekebedi held a meeting at Ekebedi Oboro village square on 27th September, 1978 and unanimously agreed and selected me to apply to Court for the Court to accept me in substitution to the deceased plaintiff - James Agbara - in order to enable me carry on the prosecution of this suit against the defendants for myself and as representing the Ekebedi Community, Oboro.

5. That I was present at aforesaid meeting, and accepted the said authorization. Amongst others who were also present at the meeting are:- (i) Ugboaja Nwagbara; (ii) Ugoala Okaranwolu; (iii) Umegbu Nwagbara; (iv) Sunday Ezma. The said authorisation was further evidenced in writing which I exhibit herein and mark exhibit "A"."

On the strength of the above facts and the exhibit attached to the affidavit the learned trial Judge granted the application. In the amended statement of claim filed by James Agbara before his death he pleaded thus:

"1. The plaintiff is a farmer and a member of Ekebedi community in Oboro clan, Umuahia Division, and brings this action for himself and as representing the community of Ekebedi, Oboro in Umuahia Division afore-

said. x x x x x

5. *The plaintiff and his people are the owners in possession of the said piece of land known as and called "Mgbe Apunta" and have so been from time immemorial. The said land having been founded by Ekebedi, the great ancestor of the plaintiff and his people seven generations ago. The said land has descended from generation to generation uninterrupted till the present. As owners in possession, the plaintiff and his people have been and are still putting the land to diverse uses without let or hinderance, such as farming, collecting palm fruits, collecting firewood, collecting sticks for building, exploiting timber, taking shelter there in times of war, and fetching water for use and fishing from the many streams on the land.*

x x x x

11. *The plaintiffs people have allowed the defendant's people to continue to live on the area verged yellow and have had any (sic) intention of driving them out of the land even after redeeming the land from them since the plaintiff's people and the defendants' people are from the same clan, Oboro."*

Thus both by the pleadings and the affidavit of Joseph Omerede, the land in dispute was claimed to belong to the Ekebedi Community.

In evidence at the trial Plaintiff/Appellant testified thus:

"The land in dispute belongs to my people of Ekebedi who are in possession of the said land in dispute. We inherited the land in dispute from our ancestors.

Further in his evidence, he added:

"Mgbe Apunta land was owned by Ekebedi who is our ancestor. We descended from Ekebedi. My generation is the seventh generation from Ekebedi. Since the time of Ekebedi no one has disturbed our ownership of the land in dispute. Since then my people have been farming on the land in dispute, cutting tree from it for building and firewood, harvesting palm trees therein, cutting timber from it and tapping palm wine from palm trees therein."

On arbitration pleaded by him, Plaintiff testified:

"The councillors decided that the land belonged to Ekebedi people and that the defendants should not enter it again."

Cross-examined he deposed:

"There are four kindreds in Ekebedi, namely Oboala, Ohodom, Umunkwota and Umoro. I belong to Obodom kindred. There is only one juju for the whole of Ekebedi and it is called Ogwuma."

Further cross-examined, the witness deposed:

"It is true that each kindred in Ekebedi has its own separate land.

The land in dispute belongs to the whole of Ekebedi people in common.
(Underlining is mine).

To further questions, he answered:

B *“Each kindred in Ekebedi has its own distinct land irrespective of the area it is situated. The portion belonging to a kindred belongs exclusively to that kindred. If a non-Ekebedi person interferes with the right of any kindred over its portion of the land, it is not that kindred that can take action against that stranger. It is the whole of Ekebedi that should take action. But if a kindred in Ekebedi interferes with the right of another kindred over that kindred’s portion of land, the injured kindred can take action against the kindred so interfering with its right. Mgbeapunta land in dispute is not a common land, but each kindred in Ekebedi has its own distinct and exclusive land in the land in dispute called Mgbeapunta. “*

Later in his testimony, however, he said:

D *“It is not true that I do not know the history of the land in dispute. My father used to take me there to farm. Obuala kindred own the portion of the land in dispute on which the defendants live. Obuala kindred also own the portion of the land in dispute forming the subject matter of this action. The land in dispute belongs to Obuala kindred. James Agbara took*
E *out this action. I am his witness, James Aghara is dead. He came from Obuala. I was authorised by the Amalas of Ekebedi to prosecute this case. The authority was given to me after the death of James Agbara. A similar written authority was given to James Agbara. The two authorities are filed in this court. I was coming to court with James Agbara in his life time in*
F *connection with this case.”* (Underlining is mine).

He further explained:-

..It is not true that I was not authorised by Ekebedi people to prosecute this case. I received two authorities to prosecute this case, one from Ekebedi people and the other from Obuala. The authority I received from Obuala kindred was not in writing. I got the written authority from Ekebedi people first before the oral authority from Obuala kindred, Obuala is Ekebedi. By saying that I received an authority from Obuala kindred I mean that the one given to me by Ekebedi people includes the Obuala people as they form part of Ekebedi. I never received any separate authority from Obuala kindred as a separate body.’

H In the light of the seeming inconsistencies in the evidence of the Plaintiff it is not surprising that the learned trial Judge found it contradic

tory and unreliable. It is on this unreliable evidence that he now claims that he had no locus standi to prosecute the action. This is not a case of locus standi. It is simply a case of a plaintiff leading evidence that is not only inconsistent with his pleadings but is equally intrinsically contradictory.

In one breadth, he pleaded and testified that the land in dispute belonged to the Ekebedi community in common. In another breadth, he claimed that it belonged to Obuala kindred exclusively. On his evidence that-

“if a non-Ekebedi person interferes with the right of any kindred over its portion of the land, it is not that kindred that can take action against that stranger. It is the whole of Ekebedi that should take action”

it does not now lie in his mouth to say that he lacked locus standi to prosecute the action which he did on behalf of the Ekebedi community and on the authority of that community. Defendants are “non-Ekebedi persons.” His evidence and any other evidence to the like effect, that the land in dispute belonged to the Obuala kindred as against the Ekebedi community goes to no issue as this fact is only not pleaded but derogates as well from the pleadings - *Idahosa v. Oronsaye* (1959) SCNLR 407; (1959) 4 FSC 166; *Nigerian Fishing Co. v. WNHC* (1969) NMLR 164,166-167, *NIPC Ltd. v. Thompson Organisation* (1969) 1 All NLR 138; (1969) 1 ANLR 136, The evidence should be disregarded. This knocks the bottom off the Plaintiff’s contention in this appeal.

The reasons for dismissing the action are to be found in the four findings of fact and observation of the learned trial Judge on the case for the defence set put by me at the early stage of this judgment. The action was not dismissed because there was a finding that Obuala kindred owned the land and that a wrong person sued. If that had been the case, Plaintiff’s contention in this Court would have been tenable. The authorities relied on by him are just not apposite to the facts of his case. His action was dismissed because it lacked merit.

In conclusion, I find no merit in this appeal. For the reasons given by the trial Judge and affirmed by the court below the action was rightly dismissed. I accordingly dismiss this appeal and affirm the judgment of the court below. As the defendants took no part in this appeal, I make no order as to costs.

UWAIS CJN

I have had the opportunity of reading in draft the judgment read by my learned brother Ogundare, J.S.C. I entirely agree that this appeal has no merit and that it should be dismissed.

Accordingly I too hereby dismiss the appeal with no order as to costs

since the Respondents neither filed brief of argument nor appeared or be represented by counsel.

OGWUEGBU JSC

B I have had a preview of the judgment just delivered by my learned brother Ogundare, J.S.C., and I entirely agree with him that the appeal lacks merit and should be dismissed.

C The learned counsel for the plaintiff/appellant submitted in the appellant’s brief that a person who is not a member of a family has no locus standi to sue on behalf of such a family in a claim for a declaration of title to land. He also contended that the land in dispute belongs to Obuala kindred of Ekebedi Community and that Joseph Omerede (PW.1) the substituted plaintiff, is a member of the Obodom kindred and not of the Obuala kindred.

D He further contended that the P. W.1 is not a proper person to prosecute the claim since he does not have an interest in the land in dispute.

Counsel argued that the courts below should have struck out the suit instead of dismissing it. We were urged to allow the appeal and make an order striking out the suit.

E It is quite strange that a plaintiff who applied to the court to be substituted for a deceased plaintiff and who prosecuted the case to the end and lost, should turn round and say that he is not the proper plaintiff. This is deceitful to say the least. The plaintiff/appellant appeared to forget the pleadings filed, the affidavit and oral evidence led by him.

F James Agbara, now deceased instituted the action leading to this appeal for himself and as representing Ekebedi Community. He claimed against the defendants jointly and severally. Both James Agbara as plaintiff and the defendants obtained leave to prosecute and defend the action in representative capacities.

G Paragraphs 1, 3 and 5 of the statement of claim filed on 17:2:71 read thus:

“1. *The Plaintiff is a farmer and a member of Ekebedi Community in Oboro clan, Umuahia Division, and brings this action for himself and as representing the community of Ekebedi Oboro in Umuahia Division aforesaid.*

H 2. *The land, the subject matter of this suit and on which the trespass herein complained of was committed is known as and called “MGBE APUNTA” situate at Ekebedi Oboro in Umuahia Judicial Division*

.....

5. *The plaintiff and his people are the owners in possession of the*

said piece of land known as and called Mgbe Apunta and have so been from time immemorial, the said land having been founded by Ekebedi the great ancestor of the plaintiff and his people, seven generations ago.” (Underlining is for emphasis).

The above averments were repeated in paragraphs 1,3 and 5 of the amended statement of claim filed on 23:2:72. In paragraph 2 of a further affidavit of James Agbara sworn to on 27:3:72 in support of an application for judgment by reason of the failure of the defendants to file their statement of defence, he deposed as follows:

“2. That the land the subject-matter of this suit known as and called “Mgbe Apunta” situate at Ekebedi Oboro, aforesaid is owned and possessed from time immemorial by Ekebedi Community.”

In the affidavit of Joseph Omerede, the appellant deposed to on 14:9:78 in support of an application for an order to be substituted for the deceased plaintiff - James Agbara, he deposed as follows:

“2. That I know the defendants named herein and the land in dispute in this suit between Ekebedi Community and the defendants which land is known as and called “Mgbe Apunta” and situate at Ekebedi Oboro.

3. That I am a member of Ekebedi Community - and the said community own the said “Mgbe Apunta” land. That as a co-owner of the said land, I have interest in the subject matter of this suit i.e. the “Mgbe Apunta” land as well as its outcome.” (the Italics is for emphasis only),

In his evidence in chief, the plaintiff/appellant (Joseph Omerede) who testified as P.W. 1 stated as follows:

“I am suing in this case with leave of court for myself and as representing Ekebedi community. I know the land in dispute. It is called Mgbe Apunta land and situate at Ekebedi in Oboro in Umuahia Judicial Division .

..... The land in dispute belongs to my people of Ekebedi who are in possession of the said land in dispute. We inherited the land in dispute from our ancestors.”

When subjected to cross-examination by the learned defendants’ counsel, he stated:

“The land in dispute belongs to the whole of Ekebedi people in common. I am prosecuting the case for myself and as representing Ekebedi people. Each kindred in Ekebedi has its own distinct land irrespective of the area it is situated. The portion belonging to a kindred belongs exclusively to that kindred. If a non-Ekebedi persons (sic) interferes with the right of any kindred over its portion of land, it is not that kindred that can take action against that stranger. It is the whole of Ekebedi.

..... Mgbeapunta land in dispute is not a common land, but each kindred in Ekebedi has its own distinct and exclusive land in the land in dispute called Mgbeapunta Obuala kindred own the portion of the land in dispute on which the defendants live. Obuala kindred also own the portion of the land in dispute forming the subject matter of this action.

B The land in dispute belongs to Obuala kindred. James Agbara took out this action. I am his witness. James Agbara is dead. He came from Obuala. I was authorised by the Amalas of Ekebedi to prosecute this case.”

In the foregoing pleadings and affidavits of James Agbara and Joseph Omerede, the land in dispute was stated as owned and possessed by Ekebedi Community from time immemorial. The evidence of Joseph C Omerede (PW. 1) is contradictory and in conflict with the statement of claim. The learned trial judge found these to be so. See *Emegokwue v. Okadigbo* (1973) 4 S.C 113, *George v. Dominion Flour Mills Ltd.* (1963) 1 SCNLR 117; (1963) 1 All NLR 71 and *A.C.B Ltd v. Nigerian Dredging Roads General Works Ltd.* (1977) 5 S.C. 235.

D Since the evidence of the ownership of the land in dispute by Obuala as advanced in evidence by the appellant “as disregarded the foundation on which the appellant built the issue of locus standi disappeared as was shown in the pleadings and evidence set out above.

The learned trial judge did not dismiss the action on the premise E that the proper plaintiff was not before him. Rather, the learned trial judge dismissed the action for the following reasons:-

1. The plaintiff’s evidence on user was contradictory and unreliable.

2. The plaintiff failed to prove his case by traditional evidence. He F did not trace his ancestry to Ekebedi.

3. He led no evidence to prove his possession and user of the land in dispute. On the contrary, he admitted that the defendants are in possession of the land in dispute, resident on the land and farm on it with their permission but failed to prove the grant or refusal of such permission at any G time.

In my view, the court below rightly performed its function as an appellate court in affirming the decision of the learned trial judge in dismissing the suit. The plaintiff having failed to prove his case, the proper order was that of dismissal. See *Olayioye v. Oso* (1969) 1 All NLR 281 at 284.

H It is for the above reasons and the detailed reasons contained in the lead judgment of my learned brother Ogundare, J.S.C., that I, too, dismiss the appeal. I also make no order as to costs.

MOHAMMED JSC

I entirely agree with my Lord Ogundare, J.S.C., for the reasons given in the lead judgment just read that this appeal has no merit at all. The concurrent findings of the two lower courts are unassailable. The appeal is dismissed.

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ADIO JSC

I have had the opportunity of reading in draft, the judgment just read by my learned brother, Ogundare, J.S.C., and I agree that this appeal lacks merit. I too dismiss it, and affirm the judgment of the court below. I make no order as to costs.

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