

SUPREME COURT OF NIGERIA
24TH JANUARY, 1997. SC. 128/1994
CORAM:- S. M. A. BELGORE, A. B. WALI, E. O. OGWUEGBU,
S. U. ONU, Y. O. ADIO, JJSC.

OBILASO ANABARONYE & 3 ORS	DEFENDANTS/
(For themselves and as representing	APPELLANTS
Umundebunwa Family)	
AND	
NELSON NWAKAIHE	PLAINTIFF/
(For himself and as representing	RESPONDENT
Umundowaram Family)	

ACTIONS - *Representative action - Objection to being sued in representative capacity - Should be raised at the preliminary stage*

LAND LAW - *Trespass - Where appellants relied on trespass committed by members of their family - They cannot complain that they were sued wrongfully.*

LAND LAW - *Traditional history evidence - Led by each party - Where made the basis for the judgment - Issue of effect of oath taken by the parties - Is immaterial.*

PLEADINGS - *Land matter - Necessary material facts - Where pleaded and established by evidence - Respondent can succeed on his traditional history evidence.*

PARTIES - *Necessary parties - Whether two members of appellants' family - Were necessary parties to this suit.*

FACTS

Before the Imo State High Court, the plaintiff/respondent filed an action against the defendants/respondents and their family in a representative capacity. Respondent claimed title in respect of the land in dispute. He relied on traditional history evidence and said that members of his family granted part of the land in dispute to two members of Appellants' family. Members of appellants' family entered the land in dispute and erected bungalow buildings without respondent's permission and committed other acts of trespass.

The appellants' in denying the claim also relied on traditional history evidence. The trial court found for the respondent. Appellants appeal to the Court of Appeal was dismissed. Being dissatisfied, appellants have further appealed to the Supreme Court raising 3 issues.

ISSUES FOR DETERMINATION

“(1) Was the Court of Appeal right in affirming the decision of the High Court on the plaintiff’s claim as formulated against the defendants the Umundebunwa family having regard to the plaintiffs complaint on their pleadings and the evidence led by the plaintiffs? Etc, see p. 194

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

Appellants cannot complain of being sued wrongfully

1. What happened was that the appellants’ family pleaded and relied on the erection of the buildings on the land in dispute as acts of ownership or of possession of the family of the land in dispute. The appellants’ family having adopted the trespass committed by some members of the family as its own, could not rightly complain that it was sued because of the wrong committed by members of the family which it had adopted as its own. (p. 194 H)

Necessary parties

2. As the appellants’ family had been sued it was not necessary for the determination of the case to make Joel and David Uzowulu parties to the case. They were not necessary parties to the present case. A necessary party to a case is a person whose presence is necessary for the effectual and complete adjudication of the questions involved in the cause or matter. (p. 195 D)

Objection to being sued in representative capacity

3. The authority of a person to bring a representative action can be challenged by way of preliminary objection on motion and not by way of defence. In any case, in the present case, if the appellants wanted to raise an objection to their being sued in a representative capacity, that is, for and on behalf of their family, they ought to have raised the objection as a preliminary objection, and should not have filed a statement of defence containing averments purporting to defend the action or led evidence to defend the suit for and on behalf of their family. In any case, failure to obtain leave to sue in a representative capacity does not vitiate the validity of the action. (p. 196 C)

Traditional history evidence

4. The inconclusiveness of the effect or result of the “juju” oath taken by the parties, therefore, did not matter. Each of the parties led evidence of traditional history at the trial court. The learned trial Judge after due consideration of the evidence and the submissions made by the learned counsel for the parties, preferred the evidence led by the respondent and accepted it. It was consequently the basis of the judgment which was given in favour of the respondent. (p. 196 H)

Pleading of necessary and material facts

5. If, as founded by the learned trial Judge and affirmed by the court below, respondent pleaded the necessary material facts and led sufficient evidence to prove them, then the learned trial Judge was right to hold and the court below was in order to affirm that the evidence of traditional history led by the respondent was enough to discharge the burden on the respondent to prove his claim. Where evidence of traditional history is not contradicted or in conflict, and found by the court to be cogent, it can support a claim for declaration of title. (p. 198 D)

REPRESENTATION

Chief G. O. K Ajayi, SAN with Mr. E. L. Ideh) for the appellants
Mr. O. A. R. Ogunde for the respondent

CASES REFERRED TO

Elias v. Omo-Bare (1982) 5 S.C. 25
Uke v. Okumagba (1974) 3 S.C. 35
Ifonwu v. Egbuyi (1982) 9 S.C. 145
Otapo v. Sunmonu (1987) 2 N.W.L.R. (Pt. 58) 587 at p. 600
Kodilinye v. Odu, 2 W.A.C.A. 336
Abisi v. Ekwealor (1993) 9 KLR 99
Onwugbufor v. Okoye (1996) 1 KLR (Pt 37) 1
Ijebu v. Oso (1972) 5 S.C. 143
Okolo v. Uzoka (1978) 4 SC 77
Ebba v. Ogodo (1984) N.S.C.C. 255
Abusomwan v. Mercantile Bank (Nig.) Ltd. No. 2 (1987) 3 NWLR (Pt.60) 196

LEAD JUDGMENT BY ADIO JSC

The claim of the respondent against the appellants in an action

instituted in the High Court of Imo State of Nigeria, Oguta Judicial Division was for a declaration of statutory right of occupancy over a parcel of land known as “Oboro Ndowaram” situate at Umuekwe. Mgbidi. He also claimed the sum of N10,000.00 being damages for trespass and injunction.

The evidence led by the respondent was that one Ekwe, the great ancestor of the parties while living at Imeoha, Mgbidi, had six sons, namely, Ndebunwa (the ancestor of the defendants), Ochea, Maram, Ndowaram (ancestor of the plaintiff). Oparaukwu and Iremgbidi. Ekwe’s six sons and his brother Uzurumike crossed from Imeoha and occupied a vacant adjoining piece of land called Oboro and settled thereon. The land in dispute was one of the four portions of the land occupied by Ndowaram, the great ancestor of the respondent’s family. He lived and farmed on them and, on his death, the land in dispute and his other parcels of land devolved on his male children as family land under Mgbidi customary law.

The family, as owners in possession, made use of the land in dispute for farming and made permanent grants of some portions of it to other people for residential purposes, including two members of the appellants family. At the end of the civil war, while, the principal members of the respondent’s family were at Oyo State, members of the appellants’ family took advantage of their absence, entered the land in dispute and erected bungalow buildings without the respondent’s permission. They committed other acts of trespass including the sharing among themselves of the land in dispute, which resulted in the bringing of the present action.

The appellant alleged that their own ancestor, Ekwe, had six sons. Two brothers from the appellants section, Dinwanyi and Oledibe, sons of Ndekuwa, as powerful warriors, drove away “orsu” people, occupied the land in dispute and renamed it “Oboro Dinwanyina-Oledibe “. They also alleged that portions of the land were allocated to the other sons of Ekwe, including the ancestor of the respondent who still retained his own portion of the land. The appellants further alleged that they were descendants of Dinwanyi and Oledibe, the owners of the family, including the respondent’s section and that they enjoyed and exercised maximum acts of ownership and possession over the whole land, including the portion now in dispute. They conceded that they engaged in swearing by “juju” with the respondent and alleged that they abided by the specification of one year.

After due consideration of the evidence led by the parties and the submissions of their learned counsel, the learned trial Judge gave judgment for the respondent. Dissatisfied with the judgment, the appellants lodged an appeal against it to the Court, of Appeal, which affirmed the

findings of the learned trial Judge and dismissed the appeal. Dissatisfied with the judgment of the court below, the appellants have lodged a further appeal to this court.

In accordance with the rules of this court, the parties duly filed and exchanged briefs. The appellants set down three issues for determination in their brief. The respondent too set down three issues for determination in his own brief. In my view, it is possible to use the issues for determination set down in the appellants' brief for the determination of this appeal. I will, therefore, do so and they are as follows:

“(1) Was the Court of Appeal right in affirming the decision of the High Court on the plaintiff’s claim as formulated against the defendants the Umundebunwa family having regard to the plaintiff’s complaint on their pleadings, and the evidence led by the plaintiffs?”

(2) Was the Court of Appeal right in taking the view that the trial court properly held that the Eze-in-Council found that the defendants had violated the “juju” Oath?

(3) Should the Court of Appeal have affirmed the judgment granting the plaintiff’s claims having regard to the fact that there was no conclusion or acceptable finding by the trial court that the defendants violated the ‘juju’ oath?”

The question raised under the first issue will now be dealt with. It was argued for the appellants that the court below ‘ought not to have given judgment for the respondent because though the land in dispute was described by the respondent as the area edged yellow in the respondent’s survey plan (Exhibit “A”), the pleadings and evidence showed that the alleged trespass was committed on the area edged pink in the land in dispute edged yellow. It was also argued for the appellants that two of the members of the appellants’ family who committed the alleged trespass by erecting buildings or putting cement blocks on certain portions of the land in dispute were known and there was no evidence that they did what they did for and on behalf of their family. It was, therefore, contended that it was wrong for the respondent not to have sued the two known individuals alone. On the contrary what the respondent did was not to make the two individuals parties to the present suit.

The two members of the appellants family who were identified as the persons who erected building on portions of the land in dispute were David Uzowulu and Joel Uzowulu. **What happened was that the appellants family pleaded and relied on the erection of the buildings on the land in dispute as acts of ownership or of possession of the family of the land in dispute. The appellants’ family having adopted the trespass committed by**

some members of the family as its own, could not rightly complain that it was sued because of the wrong committed by members of the family which it had adopted as its own.

With reference to the complaint that the judgment of the learned trial Judge, which the court below affirmed, related to the vast area edged yellow, the position was that the area edged black, on which the trespass was committed, was within the land in dispute edged yellow. The respondent averred in the Amended Statement of Claim that the land in dispute was the area edged yellow in his survey plan (Exhibit "A") and the parties joined issue on it. The portion or portions on which the alleged trespass was committed had to be clearly shown on the survey plan because in law, the portion of the land C trespassed upon must be clearly defined, See Elias v. Omo-Bare. (1982) 5 S.C. 25. In any case, the respondent averred in the amended statement of claim and there was averment in the appellants' pleading that the land which was subject of the dispute between the parties edged yellow on the survey plan (Exhibit "A") was shared among members of the appellants' family for fan- D ning purposes. David Uzowulu and Joel Uzowulu were members of the family of the appellants. **As the appellants' family had been sued it was not necessary for the determination of the case to make Joel and David Uzowulu parties to the case. They were not necessary parties to the present case. A necessary party to a case is a person whose presence is necessary for the effectual and complete adjudication of the questions involved in the cause or matter.** See Uku v. Okumagha (1974) 3 S.C 35; and Awan & Ors. v. Erejuwa II & ors. (1976)11 S.C. 307. E

It was argued for the appellants that the alleged trespass was committed by two members of the appellants' family, as individuals and not for and F on behalf of the appellants' family. Accordingly, it was submitted for the appellants that the court below was, therefore, wrong to affirm the judgment of the learned trial Judge which was given for the respondent against the appellants. It was alleged that the court did not authorise the respondent to sue the appellants on behalf of the appellants family, and that the appellants did not G lay claim to the land in dispute as members of that family.

It is not correct to state, as the appellants had done, that the appellants did not lay claim to the land in dispute for and on behalf of the appellants' family. The true position was that they claimed the land in H dispute on behalf of the appellants family and they defended this suit for and on behalf of their family. They averred in the Amended Statement of Defence and led oral evidence purporting to show how two of the ancestors of the members of the family founded or acquired a large parcel of land, which included the land in dispute and how, according to them, the

aforesaid parcel of land descended on members of the family from time to time until today. There were also averments in their statement of defence and oral evidence of the alleged acts of possession or of ownership which members of the family exercised as members of the family from time to time on the land in dispute. For example, the averment. in paragraph 4(1) of the Amended Statement of Defence was as follows:-

“4(1) There are graves of ancestors; shrines of ancestors. and other features to evidence defendants’ ownership and possession of the whole land as on their plan including the portion in dispute, upon which the defendants will found at the trial.”

What was noticeable was that it did not appear that the appellants really had a definite defence to the claim of the respondent, which was pursued with vigour and consistency. The matters mentioned above which were raised as issues or questions were being raised for the first time in this court; they were not raised in the courts below. **The authority of a person to bring a representative action can be challenged by way of preliminary objection on motion and not by way of defence. See Melifonwu v. Egbuji, (1982) 9 S.C. 145. In any case, in the present case, if the appellants wanted to raise an objection to their being sued in a representative capacity, that is, for and on behalf of their family, they ought to have raised the objection as a preliminary objection, and should not have filed a statement of defence containing averments purporting to defend the action or led evidence to defend the suit for and on behalf of their family. In any case, failure to obtain leave to sue in a representative capacity does not vitiate the validity of the action.** *Otapo v. Sunmonu (1987) 2 NWLR (Pt.58) 587 at P. 600. I will deal further with issue (1) later.*

I now take the questions raised by the second and the third issues above together since the questions concerned the taking of “juju” oath ostensibly for the determination of the land in dispute. It was common ground, having regard to all the circumstances, including the contention of the parties, that the finding of the learned trial Judge on the matter was not conclusive. The result was that the finding, if any, in the circumstance, cannot be used for the purpose of the determination of the question of the ownership of the land in dispute. The contention of the respondent, with which I agree, was that the case of the parties was based primarily on traditional evidence. **The inconclusiveness of the effect or result of the “juju” oath taken by the parties, therefore, did not matter. Each of the parties led evidence of traditional history at the trial court. The learned trial Judge after due consideration of the evidence and the submis-**

sions made by the learned counsel for the parties, preferred the evidence led by the respondent and accepted it. It was consequently the basis of the judgment which was given in favour of the respondent. The question then was whether the judgment in favour of the respondent could be sustained.

In a claim for a declaration of a statutory right of occupancy to a parcel of land, the burden is on the plaintiff to satisfy the court that he is entitled, on the evidence brought by him, to the declaration which he has claimed. The plaintiff must rely on the strength of his own case and not on the weakness of the defendant's case. If the burden on the plaintiff is not discharged, the weakness of the defendant's case will not help him and the proper judgment is for the defendant. So, if the whole evidence in the case be conflicting and somewhat confused, and there is little to choose between the rival traditional histories the plaintiff fails in the decree which he seeks, and judgment must be entered for the defendant. See *Kodilinye v. Odu* (1935) 2 WACA 336; and *Abisi v. Ekwealor*, (1993) 6 NWLR (Pt.302) 643. Also, where evidence of tradition is relied on in proof of declaration of title to land, the burden is on the plaintiff to plead and prove facts such as: (a) who founded the land, (b) how did he found the land and (c) particulars of the intervening owners through whom he claims. See *Onwugbufo v. Okoye*, (1996) 1 NWLR (Pt.424) 252, at page 280. The court below set out and examined the findings of fact made by the learned trial Judge in the light of the evidence led by the respondent and pointed out that there was nothing in the appellant's brief showing that they were perverse, unsound or contrary to well established exceptions warranting an interference by the court below. The findings of fact aforesaid made by the learned trial Judge which were affirmed by the court below were based on the material facts pleaded by the respondent. They were set out in the judgment of the court below. The court below stated in its judgment, inter alia, as follows:

"On his part, learned counsel for the respondent, Mr. Ohanyere in his brief submits that the material facts of traditional history are pleaded in paragraphs 6 and 7 of the amended statement of claim and evidence led in support thereof and confirmed by the appellants' witness D.W.IO. The learned trial Judge preferred the traditional history of the respondent based on the findings of fact.

On the contention by the learned S.A.N. for the appellants that material facts were not pleaded by the respondent, it is pertinent to note that it is common ground, that the great ancestor of the parties was one Ekwe who had six sons. He was not the founder of the land which is the subject-matter of the present suit. But it was pleaded in paragraphs 6 and 7 of the amended statement of claim that Ekwe's six sons (which includes

(sic) Ndowaram, and his brother, Nzurumike ‘crossed over from Imeoha where they were living and took possession of the adjoining piece of land called (Oboro) occupied by nobody and settled thereat’. It was also averred in paragraph 7 that the land in dispute was one of the four portions of the said Oboro land in the possession of Ndowaram, the great ancestor of B the plaintiff’s family, where they lived and farmed on the said Oboro land, that at his death the land in dispute and his other lands descended unto his male children, Umundoweram family, as their family land in accordance with Mgbidi customary law. The facts of ownership and possession from Ndowaram up to the present plaintiff’s family are also C pleaded in paragraph 7.....

It is significant that the paragraph referred to also includes the mode of acquisition, followed by the next paragraph which pleaded how Ndowaram acquired portions of land and how they descended through male children according to Mgbidi customary law up to the present respondent. In the light of this, coupled with my earlier observation, I am D unable to accept the contention that material facts were not pleaded and evidence given thereof goes to no issue”.

If, as found by the learned trial Judge and affirmed by the court below, the respondent pleaded the necessary material facts E and led sufficient evidence to prove them, then the learned trial Judge was right to hold and the court below was in order to affirm that the evidence of traditional history led by the respondent was enough to discharge the burden on the respondent to prove his claim. Where evidence of traditional history is not contradicted or F in conflict, and found by the court to be cogent, it can support a claim for declaration of title. See Ogbeide Aikhionbare Ohen-Eriaria of Evboriaria & Ors. v. Uyiekpen Omoregie-Enogie of Evbuoba-Ohen village & Ors., (1976) 12 S.C. 11 at 27 and Olujebe of Ijebu v. Oso (1972) 5 S.C. 143.. In the circumstance, the court below was right in affirming G the decision of the High Court on the respondent’s claim. The answer to the question raised under issue (1) above is in the affirmative.

This appeal lacks merit. It is hereby dismissed with N1,000.00 costs to the respondent.

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BELGORE JSC

I had the advantage of reading before now the judgment of my learned brother, Adio, J.S.C. and I agree with his reasons and conclusion that this appeal has no merit. I adopt that judgment as mine in dismissing

this appeal and I abide as to his orders as to costs.

WALI JSC

I have the privilege of reading before now, the lead judgment of my learned brother Adio, J.S.C. and I agree with his reasoning and conclusion for dismissing the appeal. B

The appeal involved primarily issues of fact which were sufficiently dealt with by both the lower court and the court below and correctly too. No convincing arguments were advanced in this appeal as to why the concurrent findings should be disturbed. See Okolo v. Uzoka (1978) 4 S.C. 77; Fashanu v. Adekoya (1974) 1 All NLR (pt.1) 35; Ebba C v. Ogodo (1984) N.S.C.C. 255; (1984) 1 SCNLR 372; and Abusomwan v. Mercantile Bank (Nig.) Ltd. (No.2) (1987) 3 NWLR (Pt.60) 196.’

It is for this reason and the more comprehensive reasons contained in the lead judgment that I also hereby dismiss the appeal with N1,000.00 costs to the respondent. D

OGWUEGBU JSC

I have had the advantage of the lead judgment just read by my learned brother Adio, I.S.C. I agree with him that the appeal has no merit and should be dismissed. E

The appeal turned on issues of facts and the learned trial Judge made specific findings on them. The court below upheld those findings of facts. The position is that there are two concurring findings of facts by two lower courts. F

This court in its numerous decisions has laid down a principle that it should not interfere with two concurring findings except in exceptional circumstances and no such circumstance has been shown in this appeal by the defendants/ appellants.

The appellants have urged us to allow the appeal and dismiss the plaintiff’s claim or in the alternative, order a re-trial based on their misconception that the non-resolution by the learned trial judge of the conflict in the evidence of the parties as to what the Eze-in -Council did or said on the question of the violation of the customary swearing as crucial to the whole case. The plaintiff and the defendants in the trial court based H their case mainly on traditional evidence. The learned trial Judge found that the respondent established his traditional history and this was affirmed by the court below. Traditional evidence is one of the five well established legal ways of proving title to land. See Idundun & Ors. v.

Okumagba & Ors.(1976) 1 NMLR 200. Each is independent of the other. See Nwosu v. Udejaja (1990) 1NWLR (Pt.125) 188.

Therefore, the resolution of the issue of what the Eze-in-Council said or did in respect of the violation of the oath taking is not material for the determination of the case.

B The principles governing an order of retrial are very well settled and I need only refer to the following cases: Ezeoke v. Nwagbo (1988) 1NWLR (Pt.72) 616 at 629; Total Nigeria Ltd. v. Nwako (1978) 5 S.c. 1 at 14; Okpiri & Ors. v. Jonah & Ors. (1961) 1 SCNLR 174; (1961) 1 All NLR 112 and Shell-BP Petroleum Development Co. of Nigeria Ltd. v. C Cole & Ors. (1978) 3 S.C. 183 at 194-195. I am satisfied that the order of a retrial is inappropriate in this case.

Accordingly, the appeal is hereby dismissed. I abide by all the orders including order as to costs made by my learned brother Adio, J.S.C.

D

ONU JSC

I had the privilege to read in draft the judgment just read by my learned brother Adio, J.S.C. I am in complete agreement with him that this appeal lacks merit and it ought therefore to fail. I therefore have no E hesitation in dismissing it while I make the same consequential orders inclusive of those as to costs contained therein.

Appeal dismissed

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