

SUPREME COURT OF NIGERIA
10TH OCTOBER, 1997. SC. 110/1991
CORAM: M. L. UWAIS CJN, A. B. WALL, I. L. KUTIGI, E. O.
OGWUEGBU, U. MOHAMMED, JJSC.

1. IGBINO GHODUA OGIGIE & 2 ORS.

(For themselves and on behalf of the APPELLANTS
Uhumwun Community

4. OMO N'OBAN'EDO, UKU AKPOLOKPOLO

EREDIAUWA, OBA OF BENIN

(To defend by his attorney, Mr. Ayo Aiwerioghene)

AND

A. I. OBIYAN RESPONDENT

ACTIONS - *Judicial division for trial - High Court Rules of Bendel State 0.6 rr. 2 & 6 - Case commenced in a wrong judicial division - Legal implications.*

ACTIONS - *Venue for trial - Objection by the defendant - Must be raised timeously.*

ACTIONS - *Judicial division - That was newly created without posting any judge - Trial of the matter within another judicial division of the same state high court - Is not a nullity.*

APPEALS - *Issue - That was properly raised - Court of Appeal misdirected itself - In holding that the issue was not subject of any ground of appeal.*

APPEALS - *Issue - That was erroneously not determined by the Court of Appeal - Will be considered by the Supreme Court - Since it is based on point of law only.*

APPEALS - *Interlocutory appeal - Where included within the main appeal - Leave to appeal out of time must be obtained.*

FACTS

Before the High Court of the defunct Bendel State, the plaintiff/respondent filed an action against the defendants/appellants claiming declaration of title, damages for trespass and perpetual injunction. The respondent led evidence as to how he acquired the land in dispute from the relevant Plot

Allotment Committee, how more land was granted to him and how the Oba of Benin later granted his approval to the grant made to the respondent. The appellants denied the claim.

The case which should have been heard before the Iguobazuwa judicial division was tried at the Benin judicial division as there was no judge posted to the then newly created Iguobazuwa division. It was after 4 witnesses had testified for the respondent that the appellant raised objection to the venue of trial pursuant to O.6 rr. 2 and 6 of the Bendel State High Court Rules. The trial court rejected the objection and subsequently found in favour of the respondent. Appellants' appeal to the Court of Appeal was dismissed in part. Being dissatisfied, the appellants have further appealed to the Supreme Court raising 2 issues.

ISSUES FOR DETERMINATION

"1. Whether the Learned Justices of the Appeal Court (sic) were right in holding that the learned trial judge was right in adjudicating over the land in dispute when he had no jurisdiction to do so.

2. Whether the learned Justices of the Appeal Court (sic) were right in failing to pronounce on the issues canvassed before them."

HELD (Unanimously dismissing the appeal per lead judgment of **UWAIS CJN**)
Case commenced in wrong judicial division - Legal implications

1. It is clear to me that the provisions of Order 6 rule 2 are directory despite the word "shall" therein. Order 6 rule 6 provides that where a case is commenced in contravention of the directive under Order 6 rule 2 in a Division where the subject of dispute is not situated, the trial judge has the discretion to hear it, the mistake as to venue notwithstanding, or alternatively the defendant may specifically plead objection to the jurisdiction. This he must do at a specified time. That is either at the time when he is required to state his answer or to plead in such case. Time is therefore prescribed and is of the essence if the defendant proposed to challenge the venue where the case was instituted. In the present case the objection was specially pleaded not in the Statement of Defence or Amended Statement of Defence but in a Further Amended Statement of Defence, and what is more after four plaintiff's witnesses had testified. (p. 1923 A)

Objection against venue for trial - Must be raised timeously

2. It seems to me that the Rule requires the objection to be raised in the pleadings at the time of filling the Statement of Defence so that the Judge and the Plaintiff may be spared inconvenience and waste of time. In the present case this did not happen until four witnesses for the plaintiff had testified

before the learned trial Judge. In this regard I quite agree with the Court of Appeal that the objection to the venue in question was not raised as early as possible. As a result it was not raised timeously. (p. 1923 D)

Judicial division - That was newly created

3. It follows that in the present case the suit should have been heard in Iguobazuwa Judicial Division but then there was no Judge posted to the Division even though it (the Division) had been created. It was, therefore, not possible to have the case heard in Iguobazuwa Judicial Division: consequently the facts of this case are distinguishable from those of Ukpai's case (supra). Since there was only one High Court for the whole of Bendel State it did not matter if, for reason of inconvenience, the case was heard at Benin Judicial Division, as was in fact the case, instead of the new division at Iguobazuwa. I, therefore, agree with the learned trial judge when he held that the trial before him was not a nullity by reason of the case having been heard in Benin instead of Iguobazuwa Judicial Division. I too so hold. As a result I see no merit in this issue for determination. (p. 1924 E)

Issue - That was properly raised

4. It is quite clear from the foregoing that the Court of Appeal misdirected itself when it held that the issue whether the land in dispute was an "urban" or "rural" land in accordance with the provisions of Land Use Act was not raised or was not the subject of any ground of appeal. Additional ground of Appeal No. 1 (above) is very clear on this. (p. 1926 F)

Issue - That was erroneously not determined

5. Be that as it may, since the Court of Appeal failed to consider the issue and the point involved raises only question of law and not fact, the question is: what step should be taken by this Court on the issue? Should the case be remitted to the Court of appeal for the issue ignored to be taken by that Court or should this Court exercise its discretion under Section 22 of the Supreme Court Act, Cap. 424 to dispose of the matter? In my opinion, since the point raised by the issue is based on a point of law only and does not involve any issue of fact or the taking of additional evidence, then this Court should consider the issue as no miscarriage of justice will be occasioned. To send back the case to the Court of Appeal merely for the point of law at stake to be resolved will lead amongst other things to a multiplicity of litigation, inconvenience to the parties and add to the costs which the parties will have to bear. (p. 1926 G)

Interlocutory appeal

6. Although a party can include an appeal against a ruling in an interlocutory application when he comes to appeal against the final judgment, and this is to be encouraged in order to avoid unnecessary delay by appealing separately, there is a procedure to be followed in order to meet the unavoidable technicalities involved. By section 25 subsection (2) (a) of the Court of Appeal Act, 1976, the period prescribed for appealing against an interlocutory decision is 14 days; while the time prescribed for appealing against a final decision is three months. In order to marry the two appeals together one has to obtain leave to appeal out of time against the interlocutory ruling. Clearly, this has not been done in this case. Therefore, the appeal against the ruling of the learned trial judge, which contains the point about the applicability of the Land Use Act and Legal Notice No. 22 of 1978 as to whether the land in dispute is situate in an urban area or rural area so as to determine the trial judge's jurisdiction, is incompetent. (p. 1928 G)

REPRESENTATION

D. Oye with M. Memedia (Mrs.) for the Appellants.
Chief F. O. Esangbedo with M. O. Okumhale for the Respondent

CASES REFERRED TO

Alade v. Alemuloke (1988) 1 N.W.L.R. (Part 69) 201 at p. 204
Salati v. Shehu (1986) 1 N.W.L.R. (Part 15) 198
Ukpai v. Okoro (1983) 2 SCNLR 381
Onifade v. Olayiwola (1990) 7 N.W.L.R. (Part 161) 130 at p. 1606
Dweye v. Iyomah (1983) 8 S.C. 76 AT PP. 85-86
Pan Asian Co. Ltd. v. NICON (1982) 9 SC. 1
Oyeniran v. Egbetola (1997) 5 NWLR (Pt. 504) 122

G STATUTES & RULES REFERRED TO

Bendel State High Court (Civil Procedure) Rules 1976 O.6 rr. 2&6
Constitution of Nigeria 1979 ss. 234, 236
High Court Law of Imo State ss. 41, 42
High Court of Imo (Civil Procedure) Rules (Laws of Eastern Nigeria, 1963) O. 7 rr. 4 & 5
Supreme Court Act Cap. 424 s. 22
Court of Appeal Act s. 25 (2) (a)

LEAD JUDGMENT BY UWAI SCJN

The Respondent, as plaintiff, brought a Suit in 1984 in the High Court of the then Bendel State sitting at Benin City. The Appellants were jointly the Defendants to the action. The plaintiff's claim as per his further amended Statement of Claim, which was filed on the 18th June, 1996 was as follows:

"(1) A declaration that the plaintiff has possessory title under Bini Customary Law and therefore entitled to apply for and obtain a Certificate of occupancy in respect of his piece of land lying situate at Iguosa Village along the Benin/Lagos Road, Benin City which is particularly delineated in pink in Survey Plan No. OSA/1678/BD 85 filed with this Statement of Claim into which the defendants have trespassed.

(2) N10,000.00 (Ten thousand naira) being special and general damages for the defendants' act of trespass on the land and

(3) A perpetual injunction to restrain the defendants and their servants or agents from any further acts of trespass on the land.

Particulars of Damages**special Damages**

160 Orange trees at N2.00 each N320.00

52 Pine-apples at N1.00 each 52.00

95 Plantains at N2.00 each 190.00

N562.00

General Damages N 9, 438.00

Total N10,000.00"

The Appellants filed a joint Further Amended Statement of Defence denying the Respondent's claim. At the trial both parties called witnesses and the learned trial judge (Gbemudu J.) gave a considered judgment on the 2nd day of June, 1987, in which he entered judgment for the Respondent.

Being aggrieved by the decision, the Appellants filed a notice of appeal to the Court of Appeal on 8th June, 1987 initially raising five grounds of appeal. On 19th August 1988 the Appellants brought a motion on notice in the Court of Appeal, inter alia praying for leave to file additional grounds of appeal. The motion was granted as prayed on 27th September, 1988. Briefs of argument were filed by the parties. At the conclusion of arguments, judgment was reserved and considered judgments were delivered by the Court of Appeal (Ogundare, J.C.A., as he then was, Salami and Ejiwunmi JJ.C.A.). In the lead judgment delivered by ejiwunmi, J.C.A. with which the other Justices concurred, the appeal was dismissed in part.

Still dissatisfied, the Defendants appealed further to this Court. Briefs of argument were filed by the parties. Two issues to be considered by us were

formulated in the Appellants' brief. The Respondent, for his part, adopted the first issue and formulated a second issue of his own. The appellants' issues are as follows:-

"1. Whether the Learned Justices of the Appeal Court (sic) were right in holding that the learned trial judge was right in adjudicating over the B land in dispute when he had no jurisdiction to do so.

2. Whether the learned Justices of the Appeal Court (sic) were right in failing to pronounce on the issues canvassed before them."

The second issue formulated by the Respondent reads:-

"2. Whether the learned Justices of the Appeal Court (sic) were C right in failing to pronounce on the issue of the Land Use Decree raised by the Appellants in their Brief."

Now, the facts of the case are briefly as follows. Sometime in 1962, the Respondent acquired a piece of land measuring 200ft by 200ft from the elders and the Odionwere of Iguosa Village. Before the piece of land was D granted to him by them two representatives of theirs took the Respondent to the land in question so that the Respondent might have a thorough inspection of the land. After the inspection, the Respondent, as well as the representatives of the Odionwere and the elders of the village did not find any sign which indicated that the piece of land had at any time been previously allocated. At the hearing before Gbemudu J. the Respondent tendered Exhibits 2 E and 3 as evidence showing that the land in dispute was granted to him. Exhibit 2 dated 9th September, 1962 was issued by the Chairman and three members of the Plot Allotment Committee of Ward 1A of the village. Exhibit 3 is a letter dated 12th September, 1962 written by the Respondent addressed to F the Secretary/Treasurer, of Iyekuselu District Council, Ekiadolor, through the hands of the Chairman and Members of the Plot Allotment Committee. Exhibit I was also tendered to show that the land in dispute was surveyed and beacons planted by a surveyor. The approval given by Iyekuselu District Council was also tendered by the Respondent who said that it was after the approval was given to him that he took possession of the land by farming on it G and planting thereon pineapples, oranges and yams.

In 1973 the Respondent applied to the authorities of the village for more land. This was granted and the length of the piece of land earlier granted to him was extended from 200 feet to a length of 641 feet and 6 inches. The H width of the land remained at 200 feet. Before the extension was granted a thorough inspection of the land was conducted as with the earlier grant. Once more the land was resurveyed and the Respondent paid compensation for the rubber trees on the annexed land.

In 1975 the Oba of Benin, Akenzua 11 granted his approval to the

grant made to the Respondent by Iyekuselu District Council. The Respondent continued to be on the land since then without disturbance, until the 1st, 2nd and 3rd Appellants entered the land. They did this by using a bulldozer to construct a road through the land. As a result they destroyed some of the crops on the land. The Respondent made a report to the Police of the incident. When the Oba of Benin made inquiries about the trespass the Odionwere of Iguosa confirmed to him that the village of Iguosa granted the land in dispute to the Respondent. However the people of Okwumwun alleged that their community gave the same land to the late Oba of Benin. It was when the dispute could not be settled that the Respondent decided to sue the Appellants.

The case for the Appellants was that the land in dispute belonged to Okhunmwun people and that the people of Iguosa village, who made the grant to the Respondent, were their subjects. That it was in exercise of their right as owners of the land in dispute that in 1971 they granted a piece of land measuring 500 feet to Oba Akenzua 11, thus rendering the land in dispute as a stool land. That the 1st, 2nd and 3rd Appellants defend the suit as representatives of the community of Okhunmwun Village.

Arguing the Appellants' first issue for determination, it is contended that paragraph 32 of their Further Amended Statement of Defence specifically pleaded that in view of the provisions of Order 6 rules 2 and 6 of the Bendel State High Court (Civil Procedure) Rules, 1976, the learned trial judge sitting in Benin Judicial Division, had no jurisdiction to adjudicate over the case since the land in dispute is situated in Iguobazuwa Judicial Division. In considering the preliminary objection, the learned trial judge held thus:

"The rule of venue is a rule of convenience aimed at facilitating a speedy despatch of court business. While it is desirable that suits should be commenced in the proper judicial division, failure to do so is not fatal. The proceedings in a suit instituted, prosecuted or adjudicated in a wrong judicial division are not a nullity."

and the Court of Appeal (per Ejiwunmi JCA) observed as follows-

"I agree entirely with the submissions of the learned counsel for the Respondent that the objection to the jurisdiction of the court to hear the suit in the Benin Judicial Division was not raised timeously."

Learned counsel for the Appellants argued in the brief of argument that the reasoning by the Court of Appeal is erroneous in view of the several decisions of the Supreme Court that the issue of jurisdiction could be raised at any time and even in the Supreme Court. He contended that when a court lacks jurisdiction it lacks the necessary competence to try the case; and that a defect in competence is fatal as the proceedings are null and void ab initio. He

cited the following cases in support - Alade v. Alemuloke, (1988) 1 N.W.L.R. (part 69) 201 at p. 204; Alhaji Tukur v. Government of Gongola State, (1989) 4 N.W.L.R. (part 117) 517 at p. 521; Salati v. Shehu, (1986) 1 N.W.L.R. (part 15) 198 and Oloba v. Akpereja, (1988) (part 84) 508 at p. 510. He emphasized that at the time the Appellants further amended their Statement of Defence, the Respondent had not closed his case.

Replying, learned counsel for the Respondent conceded in the Respondents brief of argument that the Appellants specifically pleaded the issue of lack of jurisdiction in paragraph 32 of their further amended Statement of Defence, but that the averment was controverted in paragraph 37 of the Respondent's Further Amended Statement of Claim. He contends that the issue of jurisdiction raised by the Appellants relates to the venue of trial and not the subject matter of the dispute, which is a declaration of right of occupancy. He canvassed that under Sections 234 and 236 of the Constitution of the Federal Republic of Nigeria, 1979 (Cap. 62) States' High Courts have unlimited jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue. Therefore, the learned trial judge sitting in Benin Judicial Division had the jurisdiction to hear the case. He contended that the rule as to the venue of trial is a rule of convenience aimed at facilitating a speedy despatch of court business. All the cases cited by the Appellants in support of their contention are not apposite because they dealt with the issue of jurisdiction as to the venue which is not the issue in question in the case in hand. It was finally argued that at the time this suit was brought in the Benin Judicial Division there was neither a High Court Judge nor a Customary Court in Iguobazuwa Judicial Division and, therefore, the Respondent had no choice but to file this suit in the Benin Division.

Now Order 6 rule 2 of the Bendel State High Court (Civil Procedure) Rules, 1976, provides -

"2. All suits relating to land, or any mortgage or charge thereon, or any other interest therein, or for any injuries thereto, and also all actions relating to personal property distrained or seized for any cause, shall be commenced and determined in the Judicial Division in which the land is situated, or the distress or seizure took place."

and rule 6 thereof states:-

"6. In case any suit shall be commenced in any other Judicial Division than that in which it ought to have been commenced, the same may, notwithstanding, be tried in the Judicial Division in which it shall have been so commenced, unless the Court shall otherwise direct, or the defendant shall plead specifically in objection to the jurisdiction before or at the

time when he is required to state his answer or to plead in such cause."

It is clear to me that the provisions of Order 6 rule 2 are directory despite the word "shall" therein. Order 6 rule 6 provides that where a case is commenced in contravention of the directive under Order 6 rule 2 in a Division where the subject of dispute is not situated, the trial judge has the discretion to hear it, the mistake as to venue notwithstanding, or alternatively the defendant may specifically plead objection to the jurisdiction. This he must do at a specified time. That is either at the time when he is required to state his answer or to plead in such case. Time is therefore prescribed and is of the essence if the defendant proposed to challenge the venue where the case was instituted. In the present case the objection was specially pleaded not in the Statement of Defence or Amended Statement of Defence but in a Further Amended Statement of Defence, and what is more after four plaintiff's witnesses had testified. The question is: when is the time to raise an objection to a case being heard at a wrong venue? In my view it is at the time of filing a Statement of Defence by the defendant. However, this view is not without an exception. For instance, the defendant may, by the Rules of Court, as is mostly the case, be at liberty to amend his pleadings after obtaining the leave of the Court. **It seems to me that the Rule requires the objection to be raised in the pleadings at the time of filling the Statement of Defence so that the Judge and the Plaintiff may be spared inconvenience and waste of time. In the present case this did not happen until four witnesses for the plaintiff had testified before the learned trial Judge. In this regard I quite agree with the Court of Appeal that the objection to the venue in question was not raised as early as possible. As a result it was not raised timeously**

Be that as it may, I think the most important question in the contention is not the timing of the objection to the venue but the effect of determining the case in the wrong venue; that is in the wrong Judicial Division.

In reaching its decision on this point the Court of Appeal relied on the decision of this Court in the case of Ukpai v. Okoro, (1983) 2 SCNLR 381; (1983) 11 S.C. 231 which is binding on it and the lower court. In that case the provisions of sections 41 and 42 of the High Court Law of Imo State, which inter alia deal with the creation of divisions of the High Court for convenient dispatch of the business of the Court, were considered together with the provisions of Order V11 rules 4 and 5 of the High Court of Imo (Civil Procedure) Rules (Laws of Eastern Nigeria, 1963) which provide:

"4. All other suits may be commenced and determined in the Judicial Division in which the defendant resides or carries on business

5. In case any suit shall be commenced in any other Judicial Division than that in which it ought to have been commenced, the same may,

notwithstanding, be tried in the Judicial Division in which it shall have been so commenced, unless the Courts shall otherwise direct, or the defendants shall plead specifically in objection to the jurisdiction before or at the time when he is required to state his answer to plead in such cause."

It follows, therefore, that Order 6 rule 6 of the Bendel State High Court (Civil Procedure) Rules is in pari materia with order VII rule 5 of the Imo State High Court (Civil Procedure) Rules, both of which have been quoted above. In interpreting the latter in Ukpai's case. (Supra), Eso J.S.C. who wrote the lead judgment of this Court, held thus:

"The Rule has made a special distinction between commencement (of a case) and trial in a Judicial Division on one hand and plea to jurisdiction on the other..... In my view, the High Court sitting at Umuahia was right to have held it had jurisdiction in the matter as there is only one High Court in, and with jurisdiction throughout the State. The decision of the Federal Court of Appeal to the effect that there are High Courts of the Judicial Divisions is entirely misconceived. There is only One High Court in Imo State with jurisdiction all over the State though the practice and procedure which the Constitution (S. 239) enjoins that High Court to follow, makes it obligatory that in exercising that jurisdiction, the Petition should have been heard in a convenient place, in this case in Afikpo E , in Afikpo Judicial Division." (parenthesis mine)

It follows that in the present case the suit should have been heard in Iguobazuwa Judicial Division but then there was no Judge posted to the Division even though it (the Division) had been created. It was, therefore, not possible to have the case heard in Iguobazuwa Judicial Division: consequently the facts of this case are distinguishable from those of Ukpai's case (supra). Since there was only one High Court for the whole of Bendel State it did not matter if, for reason of inconvenience, the case was heard at Benin Judicial Division, as was in fact the case, instead of the new division at Iguobazuwa. I, therefore, agree with the learned trial judge when he held that the trial before him was not a nullity by reason of the case having been heard in Benin instead of Iguobazuwa Judicial Division. I too so hold. As a result I see no merit in this issue for determination.

With regard to issue No.2 I prefer the one formulated by the Respondent, which is more detailed and specific, than that raised by the Appellants.

The Appellants contend that the issue of the applicability of the Land Use Act to the case was raised in one of the 2 additional grounds of appeal before the Court of Appeal and also referred to in issue No.6 in their brief of argument before the Court of Appeal; but that the Court of Appeal

failed to consider the point. They refer to the observation in the lead judgment of Ejiwunmi JCA, wherein he stated as follows:-

"I also wish to note that in the Appellants' brief, it was argued that the respondent did not establish whether the land in dispute was not made the subject of any ground of appeal, and in any event was not part of the issues formulated, it does not deserve any comments and that concludes that aspect of the matter." B

and the concurring judgment of Ogundare, J.C.A. (as he then was) which states:-

"As to whether the land in dispute is in an urban area or not is irrelevant: it was never made an issue by the parties nor did the trial judge make any finding on it. The respondent claimed a declaration Law (sic) and therefore entitled to apply for an (sic) obtain a certificate of Occupancy in respect (sic). He has not indicated the nature of the occupancy, that is, whether statutory or customary. In any event, this point is not covered by any ground of appeal and cannot rightly be raised in this appeal." D (underlining mine)

It was argued that by this misdirection the learned Justices of the Court of Appeal had denied the Appellants fair hearing.

Replying the Respondent contends that the issue of Land Use Act, 1978 was not properly canvassed in the Court of Appeal and therefore the Appellants were not denied fair hearing as alleged. Consequently there has been no miscarriage of justice in the decision of the Court below. E

There is no doubt that after they filed the notice of appeal against the decision of the High Court, the Appellants sought leave of the Court of Appeal to file additional grounds of appeal. The motion on notice was heard by the Court of Appeal (Ogundare, Achike and Ejiwunmi, JJ.C.A.) on 27th day of September, 1988 and it was granted. The ruling of Ogundare JCA reads - F

"Solo Eghobamien moves in terms of the motion paper - leave to file additional grounds of appeal and to deem the additional grounds of appeal as filed and served. Application granted as prayed with N100.00 costs to the respondents." G

The additional grounds deemed by the Court of Appeal to have been properly filed and served read as follows:-

"ADDITIONAL GROUNDS OF APPEAL

1. *The learned trial judge erred in law and misdirected himself on the facts in granting title to the land in dispute to the respondent under Bini Customary Law in complete disregard to Section 36 (4) of the land Use Act, 1978 enshrined in the Constitution of (the) Federal Republic of Nigeria, 1978.* H

PARTICULARS OF ERROR AND MISDIRECTION

The learned trial Judge grossly erred in law and misdirected himself on the facts when he held "the land is not Iguosa Village, Benin-Lagos Road, Benin City. Ex facie the land is in Benin..... (sic) in rural area, and my view Section 41 of Act No. 6 of 1978 does not apply. Defendants' counsel B simply cited Bendel State Legal Notice No. 22 (of) 1978 without more. In my view that notice shows more that (sic) Iguosa in Ovia Local Government Area is and urban area than it is not, (sic) particularly when there is no evidence of a surveyor or map tendered to explain the area designated "urban area" as contained in Bendel State Legal Notice No. 22 of 1978.

C 2. The learned trial Judge erred in law and on the facts when he did not give to the appellant a right of fair hearing as enshrined in Section 33 of the Constitution of the Federal Republic of Nigeria, 1979.

The learned trial Judge failed to evaluate the evidence adduced by DW1 and DW3 and was neither put on any scale nor weight (sic) at all D before the learned trial Judge found for the plaintiff/respondent (sic).

3. The judgment is against the weight of evidence."

The Appellants raised 6 issues for determination by the Court of Appeal. Of these only issue No. 6 thereof is relevant to the complaint at hand and it reads.

E "6. Whether the learned trial Judge was right to hold that the land being in Iguosa village ex facie the land is in Benin City and not in rural area without the evidence of a surveyor or a map tendered to explain the area designated "urban area" as contained in Bendel State Legal Notice No. 22 of 1978."

F It is quite clear from the foregoing that the Court of Appeal misdirected itself when it held that the issue whether the land in dispute was an "urban" or "rural" land in accordance with the provisions of Land Use Act was not raised or was not the subject of any ground of appeal. Additional ground of Appeal No. 1 (above) is very clear on this. What is not clear is issue G No. 6 which does not specifically raise the issue of the jurisdiction of the High Court to hear the case by reason of its being situated in a rural and not urban area as designated by Bendel State Legal Notice No. 22 of 1978.

Be that as it may, since the Court of Appeal failed to consider the issue and the point involved raises only question of law and not fact, the H question is: what step should be taken by this Court on the issue? Should the case be remitted to the Court of appeal for the issue ignored to be taken by that Court or should this Court exercise its discretion under Section 22 of the Supreme Court Act, Cap. 424 to dispose of the matter? In my opinion, since the point raised by the issue is based on a point of law only and does not

involve any issue of fact or the taking of additional evidence, then this Court should consider the issue as no miscarriage of justice will be occasioned. To send back the case to the Court of Appeal merely for the point of law at stake to be resolved will lead amongst other things to a multiplicity of litigation, inconvenience to the parties and add to the costs which the parties will have to bear. In *Onifade v. Olayiwola*, (1990) 7 N.W.L.R. (part 161) 130 at p. 1606 B Nnaemeka-Agu, J.S.C. observed as follows:-

"It has been suggested that the justice of the situation demands that I should remit the appeal to the Court of Appeal for a hearing de novo so that it could consider the merit or otherwise of those grounds. No, doubt, in a proper case, failure of the High Court or the Court of Appeal to deal with a point material to a party's case may result in an order for retrial or hearing de novo. But in deciding whether or not to so order, we ought to bear in mind the fact that we operate an adversary system of administration of justice. Under the system, a party succeeds or fails from the strength or otherwise, in terms of evidence and procedure, of the case he places before the court. On appeal his success depends on the content and quality of his grounds of appeal and his argument thereon. If he, on appeal, gets up a substantial issue or issues and argues them, but the intermediate Court of Appeal fails to consider any of them, it is a ground for allowing the appeal and ordering a rehearing, unless, of course, the issue or ground is such that this Court can properly resolve it upon a view of the printed evidence."

(Underlining mine)

I am, therefore, inclined to consider the issue which the Court of omitted to consider, particularly as the parties argued the point in their briefs of argument in the Court of Appeal.

Now the Appellants argument in that Court runs thus. The learned trial judge made reference to the Land Use Act, 1978 on page 24 lines 27 and 28 of the record of appeal. It is argued that the learned trial judge shifted the burden of proof to the defendants (now Appellants) when he held on page 29 lines 11 to 17 that the land in dispute was not situated in a rural area and therefore the provisions of Section 41 of the Land Use Act, 1978 did not apply. The learned trial judge further held that counsel for the defendants merely cited Bendel State Notice No. 22 of 1978 without more and that Notice No. 22 of 1978 merely showed that Iguosa village in Ovia Local Government Area was more of an urban area than rural area. The Appellants then argued in their brief of argument that it was the duty of the Respondent to adduce evidence to show that the land in dispute was in urban area. And that this they should have done by either producing a map or adducing evidence by a surveyor to show that the land fell within an area designated urban area, as contained in

Bendel State Legal Notice No. 22 of 1978. They cited the case of Dweye v. Iyomah, (1983) 8 S.C. 76 at pp. 85-86 in support of the argument.

In the reply, contained in his brief of argument filed in the Court of Appeal, the Respondent stated as follows: The statement on page 24 lines 27 to 28 of the record of appeal referred to by the Appellants is a record of the Appellants' submission which was made by their counsel as a reply to the Respondent's counsel's submission in an application for the grant of interlocutory injunction brought by the Respondent to restrain the Appellants from entering the land in dispute and doing or constructing anything on it or any part thereof pending the determination of the suit. It was not a statement by the learned trial judge as alleged by the Appellants. Similarly the statement on p. 29 line 13 and not lines 11 to 17 of the record of appeal. The Respondent pointed out that the ruling in the application in question was delivered on 31st May, 1984 and is contained on pp. 26 to 29 of the record of appeal. The Appellants did not appeal against the ruling to the Court of Appeal but against the final judgment of the learned trial judge which was delivered on 2nd June, 1987 and is contained on pp. 138 to 158 of the record.

It is quite correct, as submitted by the Respondent, that the reference made by the Appellants to pp. 24 and 29 of the record are references to the ruling given by the learned trial judge in the interlocutory application by the Respondent for injunction to restrain the Appellants. Therefore, the references were not based on the final judgment delivered by the learned trial judge.

The notice of appeal filed by the Appellants on the 8th day of June 1987 is contained on pp. 178 to 181 of the record. The notice complains against the decision of the learned trial judge delivered on the "3rd day of May, 1984." Similarly, the additional grounds of appeal were not filed as additional notice of appeal but simply part of a motion for leave and were deemed to be part of the original notice of appeal as the ruling of the Court of Appeal, quoted above, suggests.

Now, no reference was made throughout the judgment of the trial Judge to the issue of applicability of Land Use Act or Bendel State Legal Notice No. 22 of 1978. Such references were made only in the ruling delivered on the 31st May, 1984. Can the Appellants, therefore, raise such interlocutory issue in the appeal against the judgment? I respectfully think not. **Although a party can include an appeal against a ruling in an interlocutory application when he comes to appeal against the final judgment, and this is to be encouraged in order to avoid unnecessary delay by appealing separately, there is a procedure to be followed in order to meet the unavoidable technicalities involved. By section 25 subsection (2) (a) of the Court of Appeal Act, 1976, the**

period prescribed for appealing against an interlocutory decision is 14 days; while the time prescribed for appealing against a final decision is three months. In order to marry the two appeals together one has to obtain leave to appeal out of time against the interlocutory ruling. Clearly, this has not been done in this case. Therefore, the appeal against the ruling of the learned trial judge, which contains the point about the applicability of the Land Use Act and Legal Notice No. 22 of 1978 as to whether the land in dispute is situate in an urban area or rural area so as to determine the trial judge's jurisdiction, is incompetent. Accordingly the additional ground of appeal No. 1, before the Court of Appeal is hereby struck out, so also Appellants' issue No. 6 before that Court since there is no ground of appeal to which it can be hinged.

In the final result this appeal fails and it is hereby dismissed. The decision of the Court of Appeal is affirmed though for different reasons with regard to issue No. 2 in the appeal herein. Costs assessed at N10,000.00 is hereby awarded in favour of the Respondent against the Appellants.

WALI JSC

I am privileged to have read in advance, a copy of the judgment of my learned brother Uwais, CJN and I entirely agree with his reasoning and conclusion.

For the same reasons contained in the lead judgment which I hereby adopt as mine, I also dismiss this appeal with N10,000.00 costs to the Respondent against the Appellants:

KUTIGI JSC

I read before now the judgment just delivered by my learned brother, Uwais, CJN. I, however, wish to comment briefly on the second issue, that is:-

"Whether the learned Justices of the Appeal court were right in failing to pronounce on the issue (meaning the Land Use Act) canvassed before them."

(words in bracket supplied by me).

I agree with the lead judgment that the Court of Appeal was clearly in error when it held that the issue of whether or not the land in dispute was situated in an urban or rural area "was not made the subject of any ground of appeal and in any event was not part of the issues formulated, it does not deserve any comment". The point was certainly covered by ground 1 of the Additional grounds of Appeal and issue (6) which was argued along with

issue (5) in the appellants' brief in the Court of Appeal. There is no doubt that the issue of jurisdiction of the trial High Court to try the suit was raised. Ordinarily and under the Land Use Act, lands in rural areas are subject only to the jurisdiction of Customary or Area Courts, while those in urban areas come under the jurisdiction of the High Courts. It is settled that the issue of jurisdiction can be raised at any stage of the proceedings up to the final determination of an appeal by the highest court of the land. This is so because it is an issue which goes to the root of the matter as to sustain or nullify the order or decision already made. It is equally settled that the judge or court can also raise the matter suo motu at any stage (see for example OBIKOYA v. REGISTRAR OF COMPANIES & ANOR (1975) 4 SC. 31, PAN ASIAN CO. LTD v. NICON (1982) 9 SC. 1, TUKUR v. GONGOLA STATE (1989) 4 NWLR (pt. 117) 517). The issue is therefore clearly in my view a weighty one which deserves comment.

If the Court of Appeal had considered the point it would have disclosed, I believe, that the learned trial judge had in his ruling on pages 28 - 29 of the record, properly and effectively disposed of the issue when he said:-

"Counsel for respondents argues vehemently that the land in dispute is in a rural area and therefore the Customary Court has jurisdiction and not the High Court. He has not said how he came to know that the land is in a rural area. He even cited Section 39(1) of Act No. 6 of 1978 and LN 22/78. The first arm of the writ of summons says -

"A declaration that the plaintiff has possessory title under Bini Customary Law and therefore entitled to apply for and obtain a certificate of occupancy in respect of his piece of land lying situate at Iguosa village along the Benin/Lagos road, Benin City into which the defendants have broken and entered without the plaintiff's permission or consent."

The land is "at Iguosa village Benin/Lagos road, Benin City." Ex facie the land is in Benin City and not in rural area and in my view Section 41 of Act No. 6, 1978 does not apply.

Defendants' counsel simply cited Bendel State Legal Notice No. 22 of 1978 without more. In my view that Notice shows more that Iguosa in Ovia Local Government Area is an urban area than it is not. In any case, there are no Customary Courts now. Where there is a cause there must be a remedy. High Courts may hear such cases now. See Section 64 of Customary Courts Law 1978".

This Court recently in the case of OYENIRAN v. EGBETOLA (1997) 5 NWLR (pt. 504) 122, a case not dissimilar from the present one, held that under section 41 of the Land Use Act, the High Court of a State has no original jurisdiction in proceedings in respect of land situate in a rural area except the

Customary or Area Courts. It also held that in a place where there is no Area or Customary Court, the High Court would have jurisdiction in such a situation and not otherwise. So that in this case where as clearly stated by the learned trial judge above that there were no Customary Courts anywhere in Bendel State, then the High Court had jurisdiction regardless of whether or not the land is situated in an urban or rural area. The trial High Court therefore had jurisdiction to have entertained the suit as it did.

The appeal therefore fails and is dismissed with costs as assessed.

OGWUEGBU JSC

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I have had the privilege of reading the judgment of my learned brother, Uwais, C.J.N. in this appeal.

I agree entirely with his reasoning and conclusion that this appeal should be dismissed. I will for the same reasons in the judgment dismiss the appeal and endorse the order as to costs made by my learned brother, Uwais, D C.J.N.

MOHAMMED JSC

I entirely agree with the opinion of my learned brother, Uwais, CJN, E delivered in the judgment just read that this appeal has not succeeded. I have nothing more I can usefully add. The appeal is dismissed. I also award N10,000.00 costs to the respondent.

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