

SUPREME COURT OF NIGERIA
28TH FEBRUARY, 1997. SC. 220/1992
CORAM: - M. L. UWAI S CJN, S. M. A. BELGORE, A. B. WALI,
E. O. OGWUEGBU, Y. O. ADIO, JJSC.

ANTHONY IDESOH & ANOR APPELLANTS
AND
CHIEF PAUL ORDIA & 5 ORS. RESPONDENTS

ACTIONS - *Family - Representative action on behalf of the family - What an individual did will not be binding on the family.*

LAND LAW - *Trespass and injunction - Claim of ownership by the defendant - Plaintiff has to prove not only possession but better title.*

LAND LAW - *Traditional evidence - Whether trial court's findings - Were rightly affirmed by the lower court.*

LAND LAW - *Title - Burden on appellants - Cannot be discharged - By alleging that their ancestors' graves and shrines were on the land - Without proving the averment by evidence.*

LAND LAW - Title - *Failure to prove title and possession - Appellants will not be entitled to damages for trespass or injunction.*

PLEADINGS - *Averments - Where not proved by evidence - Are useless - And may be deemed abandoned.*

FACTS

Before the Warr High Court, the plaintiffs/appellants sued the defendants/respondents claiming damages for trespass and perpetual injunction in respect of the land in dispute. The appellant on one hand and the 3rd to 6th respondents on the other hand pleaded and relied on traditional history and acts of ownership and possession to support the contention that the land in dispute belonged to them.

The trial court found appellants' traditional evidence unsatisfactory and entered judgment for the respondents. Appellants' appeal to the Court of Appeal was dismissed. They have further appealed to the Supreme Court raising 2 issues to which the apex Court added a 3rd issue.

ISSUES FOR DETERMINATION

“(1) Whether the Court of Appeal was right in rejecting the appellants’ complaint about the manner in which the learned trial Judge rejected a document offered by them in evidence.

(2) Whether the Court of Appeal could rightly hold that the appellants did not prove any acts of possession on the land in dispute. “

(3) Whether the appellants proved that they were entitled to the reliefs claimed by them. “

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

Trespass and injunction

1. Where a plaintiff claims damages for trespass and injunction and the defendant alleges that the land belongs to him, the plaintiff, in order to succeed, has to prove not only that he was in possession of the land when the trespass was committed on it but also that his own title to the land in dispute is better than that of the defendant. This is because, in the circumstance, title to the land in dispute is put in issue. Therefore, in order to succeed, the appellants in this case had the burden of proving not only that they were in possession when the alleged trespass was committed by the respondents but also that their own title to the land in dispute was better than that of the respondents.

(p. 464 A)

Traditional evidence

2. Whereas in this case, a trial court unquestionably evaluated the evidence and appraised the facts, it is not the business of the appellate court to reverse and/or substitute its own views for the views of the trial court. An appellate court will reverse the findings of fact made by the trial court when they are perverse or not supported by evidence. The court below was, therefore, right in Affirming the findings of the learned trial Judge on traditional evidence.

(p. 465 C)

Averments - Where not proved by evidence

3. It is not enough for a party to make averments in pleadings. Averments which on the face of them appear impressive are useless if no evidence is led to prove them. Mere averment in pleadings without proof of the fact pleaded is no proof if the averment is not admitted. Also, failure to give evidence in support of an averment means that the averment in question has been abandoned. Further, an assertion by a party or his witness is one thing and the production or giving of evidence to prove the assertion is another. An assertion may properly be described as an allegation. It will remain as an allegation

unless it is proved by evidence. Therefore, the onus, of proving a particular fact is on the party who asserts it. (p. 466 E)

Title - Burden on appellants

4. It was, therefore, not enough for the purpose of discharging the burden on the appellants, to prove their case, merely to aver in their Amended Statement of Claim or for any of them or their witness or witnesses to allege that the grave of their ancestor or certain shrines being worshipped by them were in the land in dispute, without leading any credible evidence to prove the averment or assertion. It was as if the averment or assertion had been abandoned by them. (p. 466 H)

Representative action on behalf of the family

5. The present action was instituted by the appellants as representatives of their family against the respondents also in a representative capacity. A person's family is a body consisting of the members of the family and it is a legal entity which is separate and distinct from each member of the family. So, as rightly pointed out by the learned trial Judge and rightly affirmed by the court below, what Tobi Onomiruren did or said would *not* be binding on the Onomiruren family. (p. 467 F)

Failure to prove title and possession

6. The appellants did not discharge the burden on them to prove that they had any title to the land in dispute which was better than that of the respondents. Indeed, the evidence before the learned trial Judge did not show that the appellants were in possession of the land in dispute when the alleged trespass was committed on it. They were, therefore, not entitled to damages. It was not shown that the appellants had any right in relation to the land in dispute requiring protection by an injunction. In any case, there was no evidence of the boundaries of the area or areas within the land in dispute on which the respondents allegedly trespassed. An injunction can only be binding when the boundaries of area or areas to be affected are ascertained, well-known and properly described. (p. 467 G)

NOTABLE POINT OF INTEREST

ADIO JSC

1. Title - Plaintiff to rely on the strength of his own case

The burden is on the party, who is claiming that a parcel of land belongs to him, to satisfy the court that he is entitled, on the evidence brought by him, to a declaration that the land belongs to him. He has to rely on the strength of his

own case and not on the weakness of the case of the defendant. If the burden is not discharged, the weakness of the defendant's case will not help the plaintiff and the proper judgment is for the defendant. (p. 464 D)

REPRESENTATION

B Parties absent and unrepresented

CASES REFERRED TO

Ogunbiyi v. Adewumi (1988) 5 N.W.L.R. (Pt. 93) 215

Amakor v. Obiefuna (1974) 2 S.C 67

C Ogbecchie v. Onochie (1988) 1 N.W.L.R. (Pt 70) 370

Abisi v. Ekwealor (1993) 6 N.W.L.R. (Pt. 302) 643

Kojo 11 v. Bonsie 14 W.A.C.A 242

Bamgboye v. Olanrewaju (1991) 4 N.W.L.R. (Pt 184) 132

Ike v. Ugboaja (1993) 9 KLR 62

D

LEAD JUDGMENT BY ADIO JSC

The reliefs sought in the action instituted by the appellants against the respondents in the High Court of Justice of the defunct Bendel State of Nigeria, Warri Judicial Division, were as follows:-

E “ (1) As against the 1st, 3rd, 4th, 5th and 6th defendants jointly and severally the sum of N10,000.00 (ten thousand naira) damages for trespass in that between the month of August, 1969, and 31st March, 1971 without the plaintiffs' consent first obtained they broke and entered plaintiff's piece of land lying and situate on Udu Road in Kolokolo village and committed various acts of trespass within the jurisdiction of this Honourable Court.

(2) An order for perpetual injunction restraining the said defendants, their agents, servants, and privies from committing any further acts of trespass on the/plaintiffs' piece of land aforesaid.

G (3) As against the second defendant only an order for perpetual injunction restraining it, his (sic) servants and agents from entering plaintiff's piece of land lying and situate on Udu Road in Kolokolo village near Enerhen village and/or committing any acts of trespass thereon.”

H The evidence led by the appellants was that they were the owners of the land in dispute which they called Kolokolo land which was near Enerhen village. The 3rd to the 6th respondents claimed that the land in dispute belonged to them according to the respective portions owned by their respective families. The 1st respondent relied on separate grants he got from the families of the 3rd to 6th respondents in respect of the portions of the land in

dispute which he said were made between 1966 and 1971. The 2nd respondent got an assignment of an unexpired lease of a parcel of land within the land in dispute. The appellant's father, Chief Sam Warri Essi, in his claim to the land and following the 1st respondent's activities thereon, seemed to have made efforts to assert ownership. He claimed to represent Egborodje family of Igbudu; The appellants on the one hand and the 3rd to 6th respondents on the other hand pleaded and relied on traditional history and acts of ownership and possession to support the contention that the land in dispute belonged to them.

The learned trial Judge gave consideration to the evidence led by both parties and the submissions of their learned counsel. He entered judgment for the respondents. He rejected a document tendered by the appellants and held that the traditional evidence led by the appellants was unsatisfactory but that the traditional evidence adduced on behalf of the 3rd to 6th respondents was reasonably cogent enough to support their defence. In his view, as far as the appellants were concerned, there was no proof of any act of ownership. He held that the evidence in support of the respondent's case on acts of ownership was numerous and positive enough to warrant the inference that they were the owners of the land in dispute.

Dissatisfied with the judgment of the learned trial Judge, the appellants lodged an appeal against it to the Court of Appeal. The court below dismissed the appeal and the appellants have lodged a further appeal to this court.

The parties, in accordance with the rules of this court filed and exchanged briefs. Two issues were raised in the appellants' brief and one issue was set down in the respondents brief for determination. The two issues set down in the appellant's brief for determination and the third, one formulated by me are reasonably sufficient for the determination of this appeal. They are as follows:-

"(1) Whether the Court of Appeal was right in rejecting the appellants complaint about the manner in which the learned trial Judge rejected a document offered by them in evidence.

(2) Whether the Court of Appeal could rightly hold that the appellants " did not prove any acts of possession on the land in dispute."

(3) Whether the appellants proved that they were entitled to the reliefs claimed by them.

The appellants claim was for damages for trespass and injunction. Trespass is an unlawful interference with land in the possession of another. See *Ogunbiyi v. Adewunmi* (1988) 5 NWLR (Pt.93) 215. What is, however, involved in the present case is far more than mere proof of possession of the

land at the time that trespass was committed on it. **Where a plaintiff claims damages for trespass land injunction and the defendant alleges that the land belongs to him, the plaintiff, in order to succeed, has to prove not only that he was in possession of the land when the trespass was committed on it but also that his own title to the land in dispute is better than that of the defendant.** See Amakor v. Obiefuna (1974) 3 S.C 67. This is because, in the circumstance, title to the land in dispute is put in issue. See Ogbechie v. Onochie (1988) 1 NWLR (Pt.70) 370. Therefore, in order to succeed, the appellants in this case had the burden of proving not only that they were in possession when the alleged trespass was committed by the respondents but also that their own title to the land in dispute was better than that of the respondents. One . can, therefore, understand why the parties in this case engaged themselves in leading evidence on traditional history and evidence of acts of ownership and of possession. There was also controversy on the question of the boundaries of the land in dispute.

I think that since in dealing with the question raised under the third issue one will have to consider and resolve the questions raised under the first and the second issues, it is better to deal with issues (1), (2), and (3) together. The burden is on the party, who is claiming that a parcel of land belongs to him, to satisfy the court that he is entitled, on the evidence brought by him, to a declaration that the land belongs to him. He has to rely on the strength of his own case and not on the weakness of the case of the defendant. If the burden is not discharged, the weakness of the defendant's case will not help the plaintiff and the proper judgment is for the defendant. See Kodilinye v. Odu (1935) 2 WACA 336; and Abisi v. Ekwealor, (1993) 6 NwLR (Pt.302) 643. There are different ways or methods of acquiring title or ownership of land. See Piaro v. Tenalo (1976) 12 S.C 31.

Evidence of traditional history is one of them, if evidence of traditional history is not contradicted or in conflict and found by the court to be cogent, it can support a claim for a declaration of title. See Olujebu of Ijebu v. Osho (1972) 5 S.C 143. If, in a case, evidence of traditional history is not conclusive then the court should give consideration to the evidence, if any, of recent acts of possession or of ownership. See Kojo II v. Bonsie (1953) 14 WACA 242; and Motunwase v. Sorungbe (1988) 5 NWLR (Pt. 92) 90.

H The learned trial Judge evaluated the evidence led by both parties. In doing so, he meticulously examined and gave consideration to the evidence given by the parties and their witnesses. He applied the relevant legal principles and came to the conclusion that the evidence of tradition led by the appellants was not satisfactory and that the traditional evi-

dence led by the respondents was cogent and he was more impressed by it. The court below gave consideration to the matter and came to the following conclusion:-

“The next point to consider is whether there is evidence on record to support the learned Judge’s preference of the traditional history brought by the respondents. This is pleaded in paragraphs 8(1) (a-d) of the relevant Statement of Defence.

Indeed, the learned trial Judge observed minor contradictions in the evidence of the 4th and 5th respondents but he considered them negligible. He was, however, more impressed by the traditional evidence given by the 3rd to the 6th respondents on record.

I find this conclusion amply supported by the evidence on record, direct and inferential, and will therefore not disturb it.”

Where, as in this case, a trial court unquestionably evaluated the evidence and appraised the facts, it is not the business of the appellate court to reverse and/or substitute its own views for the views of the trial court. See *Bamgboye v. Olarewaju*, (1991) 4NWLR (Pt. 184) 132. **An appellate court will reverse findings of fact made by the trial court when they are perverse or not supported by evidence.** See *Lengbe v. Imale* (1959) SCNLR 640; and *Fatuade v. Onwoamanam* (1990) 2 NWLR (Pt. 132) 322. **The court below was, therefore, right in affirming the findings of the learned trial Judge on traditional evidence.**

Notwithstanding the nature and/or the legal effect of the findings of the learned trial Judge on traditional evidence, he went on to consider the evidence led by the parties on acts of possession and of ownership. In this connection, the findings of the learned trial Judge, which the court below affirmed, were supported by evidence. The findings were against the appellants and no one who has read the record of proceedings, and I have done so, would be surprised by the findings which the court below affirmed. I will deal later with the question whether the court below was right in affirming the ruling of the learned trial Judge in rejecting a document tendered by the appellants, it is sufficient, for the present purposes, to state that in affirming the findings of the learned trial Judge the court below stated, *inter alia*, as follows:-

“On acts of possession, it was on record that the appellants claimed to have buried their ancestor on the land. Certain shrines they worshipped were located there. None of the grants or lease claimed to have been made by the appellants were proved.....The appellants in the present appeal did not produce credible evidence with reference to the facts in recent years to tilt the traditional history in their favour. The purported grants of

leases of very many portions of the land to one Chief Edewor which transactions as claimed by the appellant were documented were not established The alleged development of the land by the appellants was not in evidence nor was a single grave on the land shown. (See paragraphs 6 and 7 of the statement of claim). There was also no evidence of farming on the land by any of the appellants. The respondents established very many and definite acts of possession exercised by them on the land The conclusion that the respondents proved many acts of possession is supported by the evidence on record. There will be no justification therefore to interfere with such findings of fact by the trial court."

The submission made for the appellants was that it was their ancestor who first settled on the land in dispute and granted the 3rd respondents family permission to use the land in dispute but that 3rd respondent's [family] turned round to make illegal grants to, inter alia, the 1st respondent. According to the appellants, that was what the document rejected in the ruling of the learned trial Judge was intended to show. Consequently, all the documents produced could not have legally put others in possession of what it did not have. The submission made for the respondents was, inter alia, that the appellants did not give evidence in support of the alleged acts of possession pleaded by them and in respect of which issues were joined on the pleadings. It was, therefore, argued that the appellants failure in this respect was fatal to their case.

There appears to be a misconception on the part of the appellants. **It is not enough for a party to make averments in pleadings. Averments which on the face of them appear impressive are useless if no evidence is led to prove them. Mere averment in pleadings without proof of the fact pleaded is no proof if the averment is not admitted. See Adegbite v. Ogunfaolu (1990) 4 NWLR (Pt.146) 578. Also, failure to give evidence in support of an averment means that the averment in question has been abandoned.** See: Omoboriowo & Ors v. Ajasin (1984) 1SCNLR 108; (1984) 1 S.C 206 at p.202, and Balogun v. Amubikanhun (1985) 3 NWLR (Pt.11) 27 at pp. 36 &37. Further, an assertion by a party or his witness is one thing and the production or giving of evidence to prove the assertion is another: An assertion may properly be described as an allegation. It will remain as an allegation unless it is proved by evidence. Therefore, the onus of proving a particular fact is on the party who asserts it. See Okubule v. Oyagbola (1990) 4 NWLR (Pt.147) 723; and Ike v. Ugboaja (1993) 6 NWLR (Pt.301) 539. **It was, therefore, not enough for the purpose of discharging the burden on the appellants, to prove their case, merely to aver in their Amended State-**

ment of Claim or for any of them or their witness or witnesses to allege that the grave of their ancestor or certain shrines being worshipped by them were in the land in dispute, without leading any credible evidence to prove the averment or assertion. It was as if the averment or assertion had been abandoned by them. The foregoing principles apply in this case. The answer to the question raised B under issue (2) is in the affirmative.

With reference to the document tendered by the appellants which was rejected in the ruling of the learned trial Judge, affirmed by the court below, though the ground upon which the learned counsel for the respondents objected to its admissibility was wrong, in rejecting it, the learned trial C Judge gave a valid reason for its rejection which the court below rightly affirmed. He stated, inter alia, as follows:-

“There is no evidence that this witness knows the writing or signature of the said Tobi Onomiruren nor that the said Tobi was literate at all Secondly, Tobi Onomiruren is not a defendant in this case as such but the D family of Onomiruren is sued in a representative capacity. Whatever Tobi Onomiruren may have allegedly done or said in his personal capacity does not bind his family. Thirdly, the letter does not acknowledge that Chief Essi was the owner of all the land in Kolokolo village but only that Chief Essi had land in Kolokolo village along Udu Road. As for admissions made by E party to proceedings, See Section 20(1) (2) and (3) of the Evidence Law. I rule that this letter is not an admission by any parties to this action or their agent. It is therefore irrelevant and inadmissible. It is rejected and marked rejected”.

The present action was instituted by the appellants as representa- F tives of their family against the respondents also in a representative capacity. A person’s family is a body consisting of the members of the family and it is a legal entity which is separate and distinct from each member of the family. So, as rightly pointed out by the learned trial Judge and rightly affirmed by the court below, what Tobi Onomiruren did or said would not be binding on the G Onomiruren family. The answer to the question raised under issue (1) is in the affirmative.

The appellants did not discharge the burden on them to prove that they had any title to the land in dispute which was better than that of the respondents. Indeed, the evidence before the learned trial Judge did not show H that the appellants were in possession of the land in dispute when the alleged trespass was committed on it. They were, therefore, not entitled to damages. It was not shown that the appellants had any right in relation to the land in dispute requiring protection by an injunction. In any case, there was no

evidence of the boundaries of the area or areas within the land in dispute on which the respondents allegedly trespassed. An injunction can only be binding when the boundaries of area or areas to be affected are ascertained, well-known and properly described. The answer to the question raised under issue (3) is in the negative. The B appellants did not prove that they were entitled to the reliefs claimed by them.

The appeal has no merit. The judgment of the court below affirming the judgment of the learned trial Judge is hereby confirmed. The appeal is hereby dismissed with N1,000.00 costs to the respondents.

C _____

UWAIS CJN

I have had the opportunity of reading in draft the judgment read by my learned brother Adio, J.S.C. I entirely agree that the appeal lacks merit. I too D hereby dismiss it with N1,000.00 costs to the respondents.

BELGORE JSC

I read in advance the judgment of my learned brother Adio JSC with E which I am in complete agreement. For the reasons contained therein I also dismiss this appeal with N1,000.00 costs to respondents.

WALI JSC

F I have had a preview of the lead judgment of my learned brother, Adio, JSC and I agree with his reasoning and conclusion for dismissing the appeal.

For the reasons ably stated by Adio JSC in the lead judgment which I hereby adopt as mine, I also hereby dismiss the appeal and adopt the conse- G quential orders in the lead judgment.

OGWUEGBU JSC

I have had the advantage of a preview of the judgment just delivered H by my learned brother Adio, J.S.C. and I am in full agreement with his treatment of the issues canvassed in this appeal. I too would dismiss the appeal and I also endorse the order as to costs made in the said judgment.

Appeal dismissed