

SUPREME COURT OF NIGERIA

18TH JULY, 1997. SC. 65/91

**CORAM:-A. B. WALL, M. E. OGUNDARE, E. O. OGWUEGBU,
U. MOHAMMED, S. U. ONU, JJSC.**

HARRISON OKONKWO & ANOR. PLAINTIFFS/APPELLANTS
AND
GODWIN UDOH & ANOR. DEFENDANTS/RESPONDENTS

EVIDENCE - *Retrial - Improper consideration of evidence by trial court - And where plaintiffs' case has not failed in toto - Retrial will be ordered.*

PRACTICE AND PROCEDURE - *Retrial - Where a court of trial fails to advert its mind to and treat all issues in controversy - And there is insufficient material before the Appeal Court - The proper order to make is one of retrial.*

PRACTICE AND PROCEDURE - *Miscarriage of justice - To reach a conclusion that a miscarriage of justice has taken place - It does not require a finding that a different result would have been reached.*

FACTS

The Plaintiffs/Appellants had sued the Defendants/Respondents for a declaration of title at the High Court of Anambra State at the Onitsha Judicial Division. At the conclusion of hearing and address by counsel for the parties, the trial Judge gave judgment in favour of the plaintiffs and granted all the reliefs claimed. The defendants appealed against it to the Court of Appeal. The Court of Appeal held there was a grave misdirection in the judgment of the trial court as that court failed to consider the testimony of the two defendants and one of their witnesses.

That Court however failed to order a retrial but did set aside the judgment of the trial High Court. The plaintiffs have now appealed to the Supreme Court.

HELD (Unanimously allowing the appeal per lead reasons for judgment of **MOHAMMED JSC**)

Practice and procedure - Retrial

1. The learned justice, knew that this court had once held in Awote v. Owodunni (1987) 2 NWLR (pt. 57) 366 that where a court of trial fails to advert its mind to and treat all issues in controversy fully, and there is insufficient material be-

fore the appeal court for the resolution of the matter, the proper order to make is one of retrial. If an appeal court says that a trial judge has committed both misfeasance and non feasance, during trial which he presided over, it would mean that the decision of that court amounted to miscarriage of justice. (p. 1725 G)

Miscarriage of justice

2. What will constitute a miscarriage of justice may vary, not only in relation to the particular facts, but also with regard to the jurisdiction which has been invoked by the proceedings in question; and to reach the conclusion that a miscarriage of justice has taken place does not require a finding that a different result necessarily would have been reached in the proceedings said to be affected by the miscarriage. It is enough if what is done is not justice according to law. (p. 1726 A)

Improper - Consideration of evidence

3. The two learned counsel in this appeal, agree that the trial High Court did not consider properly the evidence which disclosed an admission by the defendants that the plaintiff's father lived on the land in dispute. They both agree that the proper thing to do is to send the case back for retrial. The Court of Appeal saw these irregularities but still declined to order for retrial of the suit. I am satisfied that the plaintiffs' case has not failed in toto in this action and that the irregularities seen in the proceedings before the court warrant an order for retrial. (p. 1726 B)

NOTABLE POINT OF INTEREST

ONU JSC

1. Misdirection - When does it occur

A misdirection, it ought to be remembered, occurs when on the issues of fact, the case for the plaintiff or for the defence, or the law applicable to the issues raised, were not fairly submitted for the consideration of the jury. Where, however, the Judge sits without a jury, he misdirects himself if he misconceives the issues, or summarizes the evidence inadequately or incorrectly or makes a mistake of law; provided there is some evidence to justify a finding it cannot properly be described as a misdirection. (p. 1729 H)

REPRESENTATION

A. I. Ani, for the appellants

Vincent Agbata, for the respondents

CASES REFERRED TO

Awote v. Owodunni (1987) 2 NWLR (Pt. 57) 366
Ayoola v. Adebayo (1969) 1 ALL NLR 159 at 162
Chidiak v. Laguda (1964) NMLR 123 at 125
Nwadike v. Ibekwe (1987) 4 NWLR (Part 67) 718

STATUTE REFERRED TO

Court of Appeal Act 1976 (cap. 43), s. 16

LEAD REASONS FOR JUDGMENT BY MOHAMMED.JSC

This appeal was heard on 26th May, 1997. During the oral arguments in elaboration of the briefs already filed, the attention of the two learned counsel, Mr. Ani and Mr. Agbata, was drawn to the piece of evidence in which the two defendants, who are respondents in this appeal, and DW2, testified to the fact that the plaintiffs, who are appellants here, once pleaded with the defendants either to be given an access way in the respondent's land or be allowed to purchase the land in dispute from them (respondents). Both approaches were turned down by the respondents. This vital evidence had not been challenged by the appellants and the learned trial judge did not consider these testimonies or made any finding in respect of them in his judgment.

Both counsel agreed that there was, by implication, an admission and that since the learned trial judge did not make any finding in respect of that evidence, after observing the lapses in the trial court's judgment, to have declined to order for a retrial. By consent, the two respective counsel for both parties urged us to allow the appeal and order for a retrial of the plaintiffs' claim. For these reasons I allowed the appeal and ordered for the retrial of the plaintiffs' claim before another judge. I indicated then that I would give my reasons today. I now do so.

My task has been made easy, this being a consent judgment. Both counsel in their respective briefs made submissions on the issue of retrial of this suit. Learned counsel for the appellant formulated issue 4 on this subject. He questioned whether dismissal of the suit in the circumstances of this case, was the proper order to make in the interest of justice. Learned counsel submitted that since the plaintiffs/appellants have proved their case on balance of probabilities and there is no irregularity of a substantial nature apparent in the record, the judgment of the High Court should be restored.

Mr. Enechi Onyia, further argued in the alternative, that if there is

reasonable doubt in the mind of this court as to the proof of the averments in the statement of claim, this court may order for a retrial. He submitted further that the Statement of Defence is defective as regards the answer to paragraphs 3 - 13 of the Statement of Claim.

Mr. Okafor, learned counsel for the respondents, submitted that the proper order to make in this case was to dismiss the appeal for reasons fully set out by the Court of Appeal and not sent the case back for retrial. However, in trying to give reason for his submission, learned counsel disclosed what, in my view, was nothing short of a mistrial bordering on miscarriage of Justice committed by the trial High Court. One of such submissions is where learned counsel, in the respondent's brief, said as follows:

"The Court of Appeal did not go beyond its function to oversee, superintend, or review the way the issues arising from the case in the trial court were tried. It did not itself make findings of fact, but rightly came to the conclusion that the trial court had not properly evaluated the evidence before it, because it ignored crucial pieces of evidence apparent on the record, and therefore came to a wrong decision.

The learned trial Judge erred in giving judgment for the plaintiffs, and the Court of Appeal was therefore right in setting it aside, because apart from the vital pieces of evidence which the learned trial Judge ignored, which the Justices of the Court of Appeal pointed out, there were also other pieces of evidence - apparent on the record which the learned trial Judge equally failed to make a finding upon, such as, the statement in paragraph 3 of the statement of claim that "the land in dispute is a portion of a larger area of land known as and called "Ngwulu be Okonkwo" and forms part of the ancestral compound of plaintiffs".

The learned Justice of the Court of Appeal, Ogundere, JCA, strongly criticized the decision of the learned trial judge and fell short of saying that he committed miscarriage of justice in the trial of the case in hand. The observation of the learned justice reads thus:

"In this case the trial court was positively wrong in the two instances cited above, the first being misfeasance, and the second being non-feasance, each of which has affected the judgment of the lower court in a most crucial manner."

The learned justice, knew that this court had once held in **Awote v. Owodunni** (1987) 2 NWLR (pt. 57) 366 that where a court of trial fails to advert its mind to and treat all issues in controversy fully, and there is insufficient material before the appeal court for the resolution of the matter, the proper order to make is one of retrial. If an appeal court says that a trial judge has committed both misfeasance and non feasance, during trial which

he presided over, it would mean that the decision of that court amounted to miscarriage of justice.

What will constitute a miscarriage of justice may vary, not only in relation to the particular facts, but also with regard to the jurisdiction which has been invoked by the proceedings in question; and to reach the conclusion that a miscarriage of justice has taken place does not require a finding that a different result necessarily would have been reached in the proceedings said to be affected by the miscarriage. It is enough if what is done is not justice according to law - See Wilson v. Wilson (1969) A.L.R. 9.

The two learned counsel in this appeal, agree that the trial High Court did not consider properly the evidence which disclosed an admission by the defendants that the plaintiff's father lived on the land in dispute. They both agree that the proper thing to do is to send the case back for retrial. The Court of Appeal saw these irregularities but still declined to order for retrial of the suit. This court in Ayoola v. Adebayo (1969) 1 All NLR 159 at 162 held:

"An order for retrial inevitably implies that one of the parties usually the plaintiff is being given another opportunity to relitigate the same matter and certainly before deciding to make such an order, we think that the appellate tribunal should satisfy itself, that the other party is not thereby being wronged to such an extent that there would be a miscarriage of justice. We do not propose, as the matter had not been fully argued before us, to lay down any hard and fast rule as to the circumstances that would justify the exercise of the power to order a retrial but we must and do point out that an order for a retrial is not appropriate where it is manifest that the plaintiffs' case has failed in toto and that no irregularity of a substantial nature is apparent on the records or shown to the court."

I am satisfied that the plaintiffs' case has not failed in toto in this action and that the irregularities seen in the proceedings before the court warrant an order for retrial.

For these reasons this appeal succeeds and it is allowed. The judgments of the two lower courts are set aside. I hereby order that the plaintiffs' claim be retried de novo before another judge. I award N1000 costs to the appellant.

H **WALI JSC**

On 26th May, 1997 the appeal came up for hearing and on that day after hearing learned counsel on their respective briefs which they orally elaborated on, this court unanimously agreed to allow the appeal with an order for a retrial of the case before another Judge having jurisdiction. I indicated on

that day I would give my full reasons today which I now proceed to do.

I have the privilege of reading before now the lead Ruling of my learned brother Uthman Mohammed, JSC and entirely agree with it. I have nothing more useful to contribute.

I abide by the consequential orders contained in the Lead Ruling.

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OGUNDARE JSC

When this matter came before us for oral hearing on 26/5/97 I allowed the appeal and ordered a retrial of the action before the High Court . I indicated then that I would give reasons for my judgment today. I have read in advance the reasons given by my learned brother Mohammed JSC for allowing the appeal. I entirely agree with the reasons given by him which I hereby adopt as mine. I have nothing more to add.

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OGWUEGBU JSC

I have the advantage of reading in draft the reasons for judgment just delivered by my learned brother Mohammed, J.S.C. and I agree with them. It was for the same reasons that I allowed the appeal of the appellants on 26:5:97 and made an order for a retrial by another Judge of the High Court of Anambra State.

ONU JSC

On the 26th May, 1997 I allowed this appeal and I indicated that I would give my reasons today. I will now do so.

When learned counsel for both sides to the appeal, Messrs. Ani and Agbata, in this case of claim for title, trespass and injunction agreed that there was by implication an admission that since the learned trial Judge did not make any finding in respect of the evidence proffered by the defendants/ respondents (hereinafter referred to simply as respondents) and D.W.2 to the effect that the plaintiffs/appellants (in the rest of this judgment referred to as appellants) once pleaded with the respondents either to be given access way in their (respondent's) land or be allowed to purchase same, this vital piece of evidence was not challenged by the appellants. Be it known that the dispute centered on the boundary of the appellants' and the respondents' land since both have land adjoining that in dispute. In this regard, I wish firstly to advert to the paragraph 13 of the Statement of Defence before the trial court wherein the respondents had pleaded thus:

"13. *The allegations of the plaintiffs in paragraphs 3-13 (of the Statement of Claim) are utterly false and will be subjected to the strictest proof at the trial. And the plaintiffs claims in paragraphs 14 sub 1-3, are untenable and the defendants shall at the trial use all legal and equitable defences against the plaintiffs to forestal their false claim and recover what-
B ever was given to them gratuitously.*"

The Statement of Claim in paragraphs 3-13 referred to above alleged to have been traversed by paragraph 13 (ibid) pleaded substantially as follows:-

(3) *That the land in dispute is a portion of a larger area of land of
C the plaintiffs*

(4) *That the land in dispute is bounded by land of Ugochukwu and the land of the plaintiffs, public motorable road and the compound of Udo Okpaka.*

(5) *The land in dispute was owned by Ndubuisi who begot the
D plaintiffs' father*

(6) *That the plaintiffs inherited the land from their father.*

(7) *That the plaintiffs and their ancestors from time immemorial had been in exclusive possession and built a house on the land about the year 1900. The plaintiffs' father died and was buried in the land.*

(8) *After 1946, the plaintiffs built a permanent house packed into
E it and the house in the land was abandoned.*

(9) *Acts of ownership and possession.*

(10) *Defendants' father walled off his own land and put up a gate and concrete wall fence.*

(11) *Every Alor person who had a compound had Eziamu under
F Alor Custom and tradition*

(12) *In or about January, 1980 the defendants trespassed into the land and overnight constructed a dwarf wall across a portion of the land in dispute and the plaintiffs demolished the wall.*

(13) *Intention of the defendants is to continue trespass."*

After the High Court of Anambra State, Onitsha Judicial Division (Coram Obiesie, J.) had heard both parties and gave judgment in favour of the appellants for all the reliefs claimed, the respondents feeling aggrieved appealed to the court below. The court below after considering the case of either side
H based upon their briefs of argument and the addresses of counsel, allowed the respondents' appeal by stating inter alia as follows:-

"The last point on which I would like to say a word is in respect of paragraph 8 of the Statement of Defence which states as follows:-

"On 29th December, 1979 the plaintiffs in company of Patrick

Nwora and Emmanuel Nwoke, went to the premises of the defendants and asked for the extension of the area allowed them as access road from the time of their father. All the parties went to the land and a further extension was made by 14ft. and some obstructing trees were felled by labourers at the expenses of the first defendant. As if this was not enough the plaintiffs sought from the defendants to purchase the land in dispute, but we were made to understand that the portion had been given to the 1st defendant who had already built a small zinc store in the centre of the land where he would pack building equipments. This was duly attested to by 1st defendant - Godwin Udoh....." (Underlining is for emphasis).
 After stating that the evidence of 1st and 2nd respondents as well as that of C D.W.2 supported the averments in paragraph 8 of the Statement of Defence, the Court below further held:

"Significantly, this material evidence of these three witnesses remained unchallenged."

Unfortunately, the court below in exercising its powers under section 16 of the Court of Appeal Act, 1976 (Cap.43) failed to consider the evidence of the appellants in denial; of the averment in paragraph 8 of the Statement of Defence, when they testified to the effect that -

"On the 29th December, 1979 I did not go there i.e. to the defendants with palm wine and kola nut for an extension of access road to my house or for the sale of the land now in dispute. I was not told that the land in dispute has already been given to Godwin Udoh. The defendants never extended our piece of land by 14 feet. They never agreed to cut down some economic trees in order to give us road access. No trees were cut down by Paul Okoroji and Benji Okunwa at the instance of the 1st defendant. I did not discuss anything pertaining to the land with the defendants. I never had any access road except the place where I have already stated."

In the light of all the arguments proffered before it based on the traditional history and the exercise of rights of ownership over the land in dispute adduced before the trial court, the court below (per Ogundere, JCA) G strongly criticized the decision of the trial court when it held inter alia as follows:-

"The misdirection is so grave as to have occasioned a substantial miscarriage of justice."

A misdirection, it ought to be remembered, occurs when on the issues of fact, H the case for the plaintiff or for the defence, or the law applicable to the issues raised, were not fairly submitted for the consideration of the jury. Where, however, the Judge sits without a jury, he misdirects himself if he misconceives the issues, or summarizes the evidence inadequately or incorrectly or

makes a mistake of law; provided there is some evidence to justify a finding it cannot properly be described as a misdirection. See Wahid Chidiak v. A.K.J. Laguda (1964) NMLR 123 at 125 and Nwadike v. Ibekwe (1987) 4 NWLR (part 67) 718.

While I am not prepared to hold that a misdirection or a grave miscarriage of justice was caused in the instant case, I am prepared to hold that a reasonable doubt was created as to the proof of the averments in the appellants' Statement of Claim in view of the fact that the Statement of Defence of the respondents is defective in some material particulars as regards the answers to paragraphs 3-13 of the Statement of Claim in paragraph 13 of the Statement of Defence. Learned counsel for both sides cognizant of the above have each consented to a retrial to put matters straight. I cannot agree more as the appellants' case had not thereby failed in toto.

It is for these reasons and the fuller ones contained in the Reasons for judgment of my learned brother Mohammed, JSC, a preview of which I had before now, that I too am of the view, that the consensus of the Counsel on both sides be upheld, to wit: that this appeal be and is hereby allowed and that the case be remitted to the trial court of the Anambra State High Court for trial de novo before another High Court Judge. I award the same consequential orders inclusive of those regarding costs as in the Reasons for judgment of my learned brother.

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