

SUPREME COURT OF NIGERIA
23RD JANUARY, 1998. SC. 220/1994
CORAM:- A. B. WALI, I. L. KUTIGI, M. E. OGUNDARE,
E. O. OGWUEGBU, S. U. ONU, JJSC.

ALHAJI YINUSA DAODU APPELLANT
(Trading under the name and style of
Alhaji Yinusa Daodu & Sons)

AND

1. NIGERIAN NATIONAL PETROLEUM CORPORATION
2. BOUYGUES NIGERIA LIMITED
3. DEGREMOUNT NIGERIA LIMITED RESPONDENTS
4. FEDERAL HOUSING AUTHORITY

***APPEALS** - Issues - Formulation by court - Court of Appeals observation on visit to the locus in quo - Does not amount to formulating issues for the parties.*

***EVIDENCE** - Prima facie case - Where not made out by plaintiff against the defendants - Plaintiff's claims against them ought to be dismissed - Without hearing the case of the defendants.*

***EVIDENCE** - Burden of proof - Rests on the plaintiff who asserted the affirmative - And he failed to discharge it in this case.*

***TORTS** - Public nuisance - Right of action - Of a private individual - Is available if he can prove that - He has sustained particular damage other than and beyond what might have been suffered by the general public.*

FACTS

The plaintiff commenced this action claiming jointly and severally against the defendants the sum of N1,250,000.00 (One million, two hundred and fifty thousand naira) as general and special damages suffered by the plaintiff when the defendant dug a trench blocking the access road to

the plaintiff's place of business at Ono-Okò Oponu Street Idimu, Agege in Alimosho Local Government Area of Lagos State. The 1st defendant in its statement of defence mentioned the 2nd and 3rd defendants as the companies responsible for the digging of the trench which also exposed its oil pipe-lines. Thereupon, the plaintiff by motion on notice caused the 2nd and 3rd defendants to be joined as co-defendants. The 3rd defendant joined the Federal Housing Authority who awarded the contract to it as the 4th defendant.

At the conclusion of trial, the learned trial judge dismissed the claim against the 1st and 4th defendants. He found the 2nd and 3rd defendants jointly and severally liable in the sum of N1,175,200.00 as special damages. Dissatisfied, the 2nd and 3rd defendants separately appealed to the Court of Appeal. The plaintiff cross-appealed. The Appeal of the 3rd defendant was allowed and that of the 2nd defendant was dismissed for failure to file its brief of argument as required by the Rules of that court. The claim of the plaintiff and the cross-appeal were dismissed. The plaintiff has further appealed to the Supreme Court. Three issues were identified by the plaintiff/appellant for determination.

ISSUES FOR DETERMINATION

"(1) Whether an Appellate Court can rightly pronounce on an Interlocutory Order of a Trial Court which is not subject of appeal before it or rightly formulate issues arising from a dismissed appeal in the determination of a separate appeal in the same case. (Grounds 1, 2 and 3).

(2) Whether the Appellant suffered wrong and proved special damages as required by law. (Grounds 4 and 7).

(3) Whether there was conclusive evidence on record to support the liability of the 1st Defendant/Respondent (Grounds 5 and 6)."

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

Issues - Formulation by Court

1. I must first point out that the court below did not formulate any issue touching on the refusal of the learned trial judge to visit the locus in quo as erroneously contended by the learned appellant's counsel. What hap-

pened was that the court below in the course of its assessment of the evidence adduced by the plaintiff in relation to what he should have proved in order to succeed in an action for public nuisance, the court below had to draw attention to the fact that a visit to the locus in quo would have been of immense assistance to the learned trial judge, more so, when the 2nd defendant prayed the court to do so. (p. 174 H)

Public nuisance - Right of action

2. It is clear that the court below was considering the entire evidence adduced by the appellant and his witnesses in order to determine whether he, as a private individual had suffered over and above what might have been suffered by the general public through the obstruction of the highway, otherwise, such an action would lie at the suit of the Attorney-General by way of relator action. An obstruction of a public highway or hindering the free passage of the public along the highway is a public nuisance and a private individual has a right of action if he can prove that he has sustained particular damage other than and beyond the general inconvenience and injury suffered by the public and that the particular damage which he sustained was direct and substantial. See Adeshina v. Lemonu (1965) ALL N.L.R. 245 and Boyce v. Paddington Borough Council (1906) A.C. 1. (p.175 H)

Failure to make a prima facie case

3. From the pleadings and the evidence, the appellant maintained that he had no claims against the 2nd, 3rd and 4th defendants. His evidence was a radical departure from his case as pleaded. The claim against the 2nd, 3rd and 4th defendants failed at the close of the plaintiff's case as no prima facie case was made out against those three defendants and the plaintiff's claim as against them ought to have been dismissed at that stage. The need to hear the case of the three defendants did not therefore arise and a consideration of the case of three of the defendants could not have arisen until the plaintiff had led evidence showing, prima facie, that they caused injury to him by causing the obstruction. See Aromire & Ors. v. Awoyemi (1972) 2 S.C. 1 at 10-11 and Olowu v. Olowu (1985) 2

N.W.L.R. (Pt. 1) 272 at 376. (p. 177 G)

Failure to discharge burden of proof

4. I agree with the court below that even without the bar the plaintiff's
 B trucks could not have gained access to the garage and the plaintiff failed
 to lead evidence as to whether the bar or the trench obstructed the high
 way. There were other issues militating against the plaintiff in this case.
 There was the evidence that the 2nd defendant provided a diversion and
 C the opportunity lost to the court when it declined to visit the locus in quo.
 In civil cases, proof is based on balance of probabilities. The procedure
 for determining where the evidence preponderates is as outlined in the
 case of Mogaji & Ors. v. Odojin & Ors. (1978) 4 S.C. 91 at 94. The
 D burden of proof in this case rested on the plaintiff who asserted the
 affirmative and he did not discharge it. See Lewis & Peat (N.R.I.) Ltd.
v. Akhimien (1976) 7 S.C. 157 at 169 and Elias v. Omobare (1982) 5 S.C.
 25. On the state of the evidence adduced on behalf of the plaintiff, he
 E made out no case in support of his claim against the 1st defendant that he
 suffered damages as a result of the act of the 1st defendant. He did not
 also lead evidence against the other defendants. Above all, the plaintiff
 failed to established that as a private individual, he suffered over and
 above what might have been suffered by the general public through the
 F obstruction of the highway. (p. 180 F)

REPRESENTATION

Segun Onakoyo Esq. for the Appellant

O. S. Sowemimo, Esq. for the 1st Respondent

G J. A. Kester, Esq. for the 3rd Respondent

CASES REFERRED TO

Bamgboye v. Olanrewaju (1991) 4 N.W.L.R. (Pt. 184) 132 at 144

H Adeniji v. Adeniji (1972) ALL N.L.R. 301 at 307

Graham v. Esamai (1984) 11 S.C. 123

Ogbu v. Urum (1981) ALL N.L.R. 324 at 331

Adeshina v. Lemonu (1965) ALL N.L.R. 245

Aromire v. Awoyemi (1972) 272 at 376

Mogaji v. Odofin (1978) 4 S.C. 91 at 94

Elias v. Omobare (1982) 5 S.C. 25

LEAD JUDGMENT BY OGWUEGBU JSC

B

This appeal is brought by the plaintiff against the judgment of the Court of Appeal, Lagos Division delivered on 28th April, 1994. The plaintiff's claim as endorsed in his amended writ of summons reads:

"The plaintiff's claim jointly and severally against the defendants for the sum of N1,250,000.00 (One million, two hundred and fifty thousand naira) being general and special damages suffered by the Plaintiff when the Defendants dug a trench blocking the access road to the Plaintiff's place of business at Ono-Okò Oponu Street, Idimu, Agege, in Alimosho Local Government Area of Lagos State."

D

In his amended statement of claim, the plaintiff averred that on 7-4-82, he discovered that the only access road leading to his motor garage at Ono-Okò Oponu Street, Idimu had been blocked by a trench constructed by the 1st defendant and this made it impossible for his lorries to park in the garage or move in and out of the said garage. He protested to the 1st defendant and informed it that at the time the road was blocked, he had ten of his commercial vehicles in the garage. It was further averred that the obstruction was only removed on 3-10-82 by the 1st defendant. The Nigerian National Petroleum corporation was the sole defendant. The Nigerian National Petroleum Corporation filed its statement of defence and mentioned the 2nd and 3rd defendants as the Companies responsible for the digging of the trench which also exposed its oil pipe-lines.

G

Thereupon, the plaintiff by motion on notice caused the 2nd and 3rd defendants to be joined as co-defendants. The 2nd defendant in its statement of defence alleged that it was awarded a contract by Messrs. Degremount (Nig.) Ltd. (3rd defendants) who were main contractors of the Federal Housing authority for sewage treatment and affluent disposal, that where it carried out the excavation work was no where near the vicinity of Ono-Okò Oponu Street, Idimu and that it did not dig any

H

trench on the road as alleged. The 3rd defendant joined the Federal Housing authority who awarded the contract to it as the 4th defendant. All these caused the plaintiff to amend and further amend his Writ of summons and the statement of claim. He claimed jointly and severally from the four defendants.

At the close of pleadings, the case proceeded to trial. At the conclusion of the evidence and after the addresses of counsel, the learned trial judge in a considered judgment dismissed the claim against the 1st and the 4th defendants. He found the 2nd and 3rd defendants jointly and severally liable in the sum of N1,175,200.00 as special damages.

Dissatisfied with the decision, the 2nd and 3rd defendants separately appealed to the Court of Appeal, Lagos Division. The plaintiff cross-appealed. The 2nd and 3rd defendants prayed the court below to set aside the judgment of the High Court and enter judgment for each of them. The plaintiff prayed that he be awarded general damages against the 2nd and 3rd defendants or in the alternative, to set aside the judgment of the High Court and enter judgment in his favour against the defendants.

The Court of Appeal heard the appeal and in a reserved judgment allowed the appeal of the 3rd defendant and dismissed the claim of the plaintiff. The appeal of the 2nd defendant was dismissed pursuant to Order 6 rule 10 of the Court of Appeal Rules, the 2nd appellant having failed to file its brief of argument as required by the rules of that court. The cross-appeal of the plaintiff was dismissed. He has further appealed to this court. He will from now be referred to as the appellant in this judgment and the defendants will be referred to as the respondents.

Briefs of argument were filed and the following three issues were identified by the appellant for determination by the court:

"(1) Whether an Appellate Court can rightly pronounce on an Interlocutory Order of a Trial Court which is not subject of appeal before it or rightly formulate issues arising from a dismissed appeal in the determination of a separate appeal in the same case. (Grounds 1, 2 and 3).

(2) Whether the Appellant suffered wrong and proved special damages as required by law. (Grounds 4 and 7).

(3) Whether there was conclusive evidence on record to support the liability of the 1st Defendant/Respondent (Grounds 5 and 6)."

In its own brief, the 1st respondent formulated two issues as arising for determination:

"(1) Were the Learned Justices of the Court of Appeal right in dismissing the cross-appeal on the grounds that the evidence led by the Plaintiff/Appellant in support of its claims was most unsatisfactory.

(2) Were the Learned Justices of the Court of Appeal right in holding that the Plaintiff/Appellant had not sufficiently established its claim for special damages."

The 3rd respondent on its part identified the following issues as arising for determination in the appeal, namely:

"(i) The action, being one for damages for alleged public nuisance, whether the Learned Justices of the Court of Appeal were right in holding that the plaintiff/appellant had failed to prove that he suffered damage over and above the general public. (Grounds 1, 2 and 3)

(ii) Whether Learned Justices of the Court of Appeal were right in allowing the substantive appeal of the 3rd defendant/respondent on the ground that on the preponderance of evidence adduced before the trial Court no case was established against the said 3rd defendant, the evidence adduced on behalf of the plaintiff/appellant being at variance with their pleadings, contradictory, challenged and contradicted by the defence. (Grounds 5 and 6).

(iii) Whether Learned Justices of the Court of Appeal were right in holding that the plaintiff/appellant had not established its claim for special damages. (Grounds 4 and 7)".

The 1st and 3rd defendants filed briefs. The other defendants did not.

Apart from the first issue identified by the appellant herein which was not reflected in the issues identified by the 1st and 3rd respondents, the other issues formulated by the parties overlap. In the circumstance, I will determine the appeal on the issues formulated by the appellant with necessary emphasis on the questions raised by the 1st and 3rd respondents where appropriate.

As to the issue of visit to the locus in quo, the learned counsel for

the appellant submitted in the appellant's brief that it was the Court of Appeal that formulated that issue which had no bearing with the grounds of appeal filed by the 3rd defendants. It was further submitted that the court below should have confined itself to the issues formulated by the parties which arose from the grounds of appeal filed and should not have ventured to raise issues for the parties. The following cases were referred to the court. Bamgboye & Ors. v. Olanrewaju (1991) 4 N.W.L.R. (Pt. 184) 132 at 144, Adeniji & Ors. v. Adeniji & Ors. (1972) ALL N.L.R. 301 at 307, Oke Bola & Ors. v. Molake (1975) 12 S.C. 61 at 71 and Graham v. Esamai (1984) 11 S.C. 123.

It was further submitted on behalf of the appellant that the refusal of the learned trial judge to visit the locus in quo was not canvassed by the 3rd defendant/appellant in the court below and that it was wrong for that court to have considered an interlocutory order made by the learned trial judge on the visit when there was no appeal on it. Continuing on this issue, the learned appellant's counsel submitted that where an appellate court formulates issues not raised by the parties as in this case or examines complaints in a dismissed appeal and on which no brief was filed, the result is a denial of justice to the other party - the appellant. Reliance was placed on the case of Ogbu v. Urum (1981) ALL N.L.R. 324 at 331.

In their reply to the appellant's first issue, it was contended by the 1st and 3rd respondents in their respective briefs of argument that it was in the course of highlighting the unsatisfactory nature of the plaintiff/appellant's case that the court below was compelled to observe that given the conflicting nature of the evidence before the trial court, there was at that stage a compelling need to visit the locus in quo and that such a visit would have provided the trial court with a first hand knowledge of the exact situation of the excavation work and assisted it in properly evaluating the evidence of the parties.

I must first point out that the court below did not formulate any issue touching on the refusal of the learned trial judge to visit the locus in quo as erroneously contended by the learned appellant's counsel. What happened was that the court below in the course of

its assessment of the evidence adduced by the plaintiff in relation to what he should have proved in order to succeed in an action for public nuisance, the court below had to draw attention to the fact that a visit to the locus in quo would have been of immense assistance to the learned trial judge, more so, when the 2nd defendant B prayed the court to do so.

The court below per Pats-Acholonu, J.C.A. stated as follows:

"Against their story of immobility caused by complete blockage, the defendants/appellants said that in fact they created a diversion. The important thing here is whether that trench really and truly (sic) caused an obstruction of such magnitude that the plaintiff's business suffered gravely. The necessary inference from this application for the court to go to the place in contention is to ascertain how and where the trench was dug and whether it really could have hindered mobility of the plaintiff's vehicles as to render them useless from the point of view of the pleadings and evidence of the plaintiff and his cohorts. It will equally enable him no doubt to see whether there is in fact any diversion as the appellants claimed." D E

On the same issue, Uwaifo J.C.A. in his concurring judgment said:

"As the case was constituted, therefore, at the close of the plaintiff's case, no prima facie case was made against the 2nd, 3rd and 4th defendants or at all. The need to hear the case of the said defendants did not then arise and the claim should have been dismissed as against them: See Aromire v. Awoyemi (1972) 2 S.C. 1 at 10-11. To make the plaintiff's case even worse, P.W. 3 said in re-examination: "There is another road leading to our Garage apart from Ono-Okoko Oponu Street." The plaintiff himself however said Ono-Okoko Oponu Street was the only road leading to his place of business. The 2nd defendant later moved the court to visit the locus in quo for the purpose of assessing the evidence led by the plaintiff that his vehicles were immobilised as a result of the blockade of Ono-Okoko Oponu Street. This was, quite surprisingly, opposed by the plaintiff and the trial court agreed and saw no need for a visit. I think a useful opportunity was missed." F G H

From the above excerpts, it is clear that the court below was

considering the entire evidence adduced by the appellant and his witnesses in order to determine whether he, as a private individual had suffered over and above what might have been suffered by the general public through the obstruction of the highway, otherwise, such an action would lie at the suit of the Attorney-General by way of relator action.

An obstruction of a public highway or hindering the free passage of the public along the highway is a public nuisance and a private individual has a right of action if he can prove that he has sustained particular damage other than and beyond the general inconvenience and injury suffered by the public and that the particular damage which he sustained was direct and substantial. See Adeshina v. Lemonu (1965) ALL N.L.R. 245 and Boyce v. Paddington Borough Council (1906) A.C. 1.

It was in the course of the determination of the liability of the 2nd and 3rd respondents and whether or not the appellant could maintain an action of public nuisance that the question of a visit to the locus in quo was considered by the court below. The fact that the appeal of the 2nd appellant in that court had been dismissed did not preclude the court from ascertaining the liability of the 3rd appellant in the said court. I therefore see no merit in the first issue for determination identified by the appellant.

This being an action for damages for alleged public nuisance, the next question is whether the appellant proved that he suffered damage over and above the general public. Assuming without conceding that he suffered the particular damage, who among the defendants caused the said injury? In his further amended statement of claim the appellant averred as follows:

"4. On or about the 7th day of April, 1982 the Defendants wrongfully heaped up earth on the said Ono-Okò Oponu Street, Idimu, Alimosho Local Government Area of Lagos State.

5. The Defendants closed the said road which is a public road serving the inhabitants of the area without regard to the Plaintiff's business.

6. *That the Plaintiff avers that the said Ono-Okon Oponu Street, Idimu was and still is the only access to the Plaintiff (sic) place of business and notwithstanding this knowledge the Defendants deliberately closed the said road on the 7th day of April, 1982.*"

In his evidence, the appellant testified as follows:

"I remember 7th April, 1982, I met some of my trailer lorries about five of them which returned overnight. They were parked on the main road near my garage. They were supposed to be parked in my garage at Ono-Okon Oponu Street, Idimu. There was a signboard that nobody should cross the road. I sounded the horn of my car to draw attention. Soon after eight N.N.P.C. Officials came out. I asked why the road was blocked. They informed me that N.N.P.C. was doing some work down the road. A trench was also dug across the road. I do not know the 2nd to 4th Defendants. I am not claiming anything from the 2nd to 4th Defendants. (Underlining is for emphasis)

The 3rd plaintiff's witness Jubril Dogho was the General Manager of the plaintiff. In his evidence-in-chief he stated:

"I know the 1st Defendant, N.N.P.C. as the Federal Oil Company of Nigeria. I don't know the 2nd to 4th Defendants. It was the 1st Defendant which raised the point about the 2nd to 4th Defendants."

In answer to cross-examination by Miss Bassey, learned counsel for the 2nd defendant/respondent, P.W.3 stated:

"I read the statement of defence of the First Defendant in 1983. We instructed the Lawyer to join the 2nd to 4th Defendants. We have no personal claim against the 2nd to 4th Defendants; and we do not know them." (the underlining is for emphasis).

From the pleadings and the evidence, the appellant maintained that he had no claims against the 2nd, 3rd and 4th defendants. His evidence was a radical departure from his case as pleaded. The claim against the 2nd, 3rd and 4th defendants failed at the close of the plaintiff's case as no *prima facie* case was made out against those three defendants and the plaintiff's claim as against them ought to have been dismissed at that stage. The need to hear the case of the three defendants did not therefore arise and a con-

sideration of the case of three of the defendants could not have arisen until the plaintiff had led evidence showing, prima facie, that they caused injury to him by causing the obstruction. See Aromire & Ors. v. Awoyemi (1972) 2 S.C. 1 at 10-11 and Olowu v. Olowu (1985) 2 N.W.L.R. (Pt. 1) 272 at 376.

The learned counsel for the appellant conceded before us at the hearing of the appeal that the appellant did not make out any case against the 2nd, 3rd and 4th defendant/respondents. The case against them was rightly dismissed by the court below even though the learned trial judge dismissed the case against the 1st and 4th defendants only at the close of the case of the plaintiff's case.

The claim against the 2nd, 3rd and 4th defendants/respondent is accordingly dismissed by me.

Turning to the 1st defendant/respondent, the learned trial judge dismissed the claim against it and this was affirmed by the court below. The Court of Appeal in holding the 1st respondent not liable stated as follows:

"In this case the 1st defendant made it clear that it put a bar to protect its pipes which were dangerously exposed to varying elements which could be destructive to those pipes indicating that it was not responsible for the trench which exposed the pipes. Was it the bar or the trenching that caused the obstruction. It must be stated without any fear of equivocation or contradiction that even without the bar put up by the 1st defendant, the plaintiff could still not gain any access to avail his trucks a passage way if indeed he was so barred. By so posturing, the 1st defendant passed the buck to the plaintiff or for that matter any party that seeks to attribute to it the cause of the complaint that gave rise to the lis. It must be realised that in rebutting a presumption it is not necessary to produce preponderance evidence to overcome it. A presumption is overcome if sufficient evidence is introduced to balance the presumption. In my view, therefore the 1st defendant was definitely not liable."

Paragraphs 4 and 6 of the further amended statement of claim alleged wrongful heaping of earth which closed Ono-Okò Oponu Street,

Idimu by the defendants. In paragraph 8 thereof, the plaintiff averred:

"8. However, nothing was done to cover the trench for months despite repeated protests by the plaintiff to the 1st defendant at the Agege site of the excavation and the pipelines division at Sagamu."

In paragraph 5 the appellant averred as follow:

"5. The defendants closed the said road which is a public highway serving the inhabitants of the area without regard to the plaintiff's business."

In paragraphs 7, 8, 9, 10 and 11 of its further amended statement of defence, the 1st defendant averred:

"7. The 1st Defendant avers that on or about the 31st March, 1982 it noticed that some of its pipelines had been dug up and exposed at KM 38/40 in the said Agege Area, Lagos."

8. The 1st Defendant avers that on further inquiry it was discovered that the digging up of the pipelines were carried out by Bouygues Nigeria Limited who were the main contractor for the Federal Housing Authority."

9. The 1st Defendant states that it was also discovered that its pipelines were dug as a result of work on a big drainage pipe which was being carried out for Federal Housing Authority in respect of the Ipaja Housing Estate."

10. The 1st Defendant avers that the said excavation by Bouygues Nigeria Limited was at right angle to the 1st Defendant's pipelines passing underneath."

11. The 1st Defendant directed Bouygues Nigeria Limited to carry out necessary repair to its damaged pipelines before covering up their excavation works."

The 2nd defendant averred as follows in paragraphs 3, 4 and 5 of its statement of defence:

"3. The 2nd Defendant admits paragraph 3 of the Amended Statement of Claim only to the extent that it was employed by Degremont (Nigeria) Limited (The 3rd Defendant) who were the main contractors for the Federal Housing Authority, Lagos, to perform sewage treatment plant/Effluent Disposal Works at the Federal Housing Authority Estate"

Ipaja, Agege, Lagos.

4. *With particular reference to paragraph 4 of the Amended Statement of Claim the 2nd Defendant avers that it did not carry out excavation works around the vicinity of Ono-Okoro Oponu Street, at Idimu and therefore could not have heaped up earth on the said road as alleged by the plaintiff.*

5. *That the 2nd Defendant avers that in the areas where it carried out excavation works in accordance with its contract with the 3rd Defendant referred to in paragraph 3 hereof diversion roads were opened before the said excavation works were commenced."*

Both the 1st and the 2nd defendants led evidence which was in line with their pleadings. In its evidence, the 2nd defendant testified as follows:

"In April, 1982, I opened a trench in the bush area at Idimu. I spent four months from 7/4/82 on the works. I dug trenches under N.N.P.C. pipelines at Idimu Area which was bush land at the material time. I came across the first road on 15/5/82 and I opened a trench and closed it the same day 25/5/82. I made diversion to allow traffic to pass while I opened a trench. I did not come across any garage or premises at the site."

From the pleadings and the evidence, the 1st appellant made it clear that it put a bar to protect its pipelines which were exposed by the excavation done by the 2nd appellant. It disclaimed responsibility for digging the trench which exposed its pipelines. **I agree with the court below that even without the bar the plaintiff's trucks could not have gained access to the garage and the plaintiff failed to lead evidence as to whether the bar or the trench obstructed the highway. There were other issues militating against the plaintiff in this case. There was the evidence that the 2nd defendant provided a diversion and the opportunity lost to the court when it declined to visit the locus in quo.**

In civil cases, proof is based on balance of probabilities. The procedure for determining where the evidence preponderates is as outlined in the case of Mogaji & Ors. v. Odofin & Ors. (1978) 4 S.C.

91 at 94. The burden of proof in this case rested on the plaintiff who asserted the affirmative and he did not discharge it. See Lewis & Peat (N.R.1.) Ltd. v. Akhimien (1976) 7 S.C. 157 at 169 and Elias v. Omobare (1982) 5 S.C. 25.

On the state of the evidence adduced on behalf of the plaintiff, he made out no case in support of his claim against the 1st defendant that he suffered damages as a result of the act of the 1st defendant. He did not also lead evidence against the other defendants. Above all, the plaintiff failed to established that as a private individual, he suffered over and above what might have been suffered by the general public through the obstruction of the highway.

In the final result, the appeal is dismissed by me. The plaintiff's claim against all the defendants is dismissed in to to. Costs of the appeal in this court is assessed at N10,000.00 to each of the 1st and 3rd respondents.

WALI JSC

I have read in advance the lead judgment of my learned brother Ogwuegbu, JSC and I entirely agree with his reasoning and conclusion for dismissing the appeal. I adopt the reasons as mine.

The entire appeal lacks merit and I hereby dismissed it with N10,000.00 costs to the 1st and 3rd respondents jointly.

The judgment of the Court of Appeal is accordingly affirmed.

KUTIGI JSC

I read in advance the judgment just delivered by my learned brother, Ogwuegbu, JSC. I agree with it. There is clearly no merit in the appeal. The plaintiff/appellant woefully failed to prove his claim before the trial court. I will therefore dismiss the appeal and endorse the order for costs.

OGUNDARE JSC

I agree entirely with the judgment just read by my learned brother Ogwuegbu JSC; I have nothing more to add. For the reasons given by him in the said judgment, this appeal fails and it is accordingly dismissed by me too. I also order that Plaintiff's claims against all the Defendants stand dismissed.

I abide by the order for costs made in the judgment of my learned brother Ogwuegbu JSC.

C

ONU JSC

I have been privileged before now to read in draft the judgment of my learned brother Ogwuegbu, JSC just delivered. I am in full agreement with him that this appeal lacks merit and should be dismissed.

A word or two of mine, I feel obliged, to add in expatiation to the lucid judgment of my learned brother as follows:-

The appellant having in his evidence in the trial court (as well as in his concession in the submission of his learned counsel, Mr. Onakoya, at the hearing of this appeal on 27/10/97) in categorically stating by way of admission that:-

"I don't know the 2nd to 4th Defendants I am not claiming anything from the 2nd to the 4th Defendants."

and having in a manner of a wild goose-chase as against the 1st Respondent, neither pleaded nor adduced evidence from which to infer liability on its part for causing public nuisance or the making of the excavation which blocked the road leading to his place of business and so causing him direct and substantial injury or inconvenience, his case, in my respectful view, savours of an escapade in gold digging. This is the moreso, that he also woefully failed to establish any proof of special or general damages to any or some of the one million, two hundred and fifty thousand Naira (N1,250,000) claimed by him jointly and severally against the Respondents, leading the court below in allowing the appeal of the 2nd and 3rd Respondents (having earlier upon appellant's concession dismissed the case against 1st and 4th Respondents at the close of his case),

and to also dismiss his (appellant's) Cross-appeal. Besides, having at the trial court resisted the 1st Respondent's application to visit the locus in quo, he can no longer be heard to complain since such a visit would have helped in no small measure in establishing by a preponderance of evidence to shift the onus probandi that lay on him to the Respondents. See Kaiyaoja v. Egunla {1974} 2 SC. 55 at 61. B

It is for the above reasons and those elaborately set out in the judgment of my learned brother Ogwuegbu, JSC, that I too, dismiss this appeal with the same consequential orders inclusive of those as to costs. C

D

E

F

G

H

B

C

D

E

F

G

H