

SUPREME COURT OF NIGERIA
30TH JANUARY, 1998. SC. 198/1994
CORAM:- A. B. WALI, I. L. KUTIGI, U. MOHAMMED,
S. U. ONU, A. I. IGUH, JJSC

ALHAJI MUSA KALA APPELLANT
AND
ALHAJI BURAU POTISKUM & ANOR. RESPONDENT

***APPEALS** - Issue - That cannot be related to any ground of appeal - And without obtaining leave of court - Will be struck out.*

***APPEALS** - Leave of court - Retrial - Alternative prayer for an order of retrial - Leave of Supreme Court is not necessary to raising the prayer.*

***EVIDENCE** - Inter pleader proceedings - Hearsay - Evidence of the judgment creditor being hearsay - Is not credible to establish his case.*

***PRACTICE & PROCEDURE** - Inter pleader proceedings - The burden is generally on the claimant to prove his claim - As done by the 1st respondent in this case.*

FACTS

In this inter pleader action commenced before the then Bornu State but now Yobe State High Court Potiskum, the 1st respondent (claimant) made claim to the house in issue which was taken in execution under a court process issued at the appellant's instance. The appellant originally sued the 2nd respondent before Fika Upper Area Court Potiskum claiming the sum of N60,000.00 being cost of four motor vehicles sold by the plaintiff to the defendant which the latter refused to pay for. It was as a result of the outcome of this case that the appellant caused execution to be levied against the house in dispute which the appellant claimed was sold by the 1st respondent to the 2nd respondent (judgment debtor). 1st respondent commenced the present inter pleader proceedings to establish

that the house is still his property and was never sold to the 2nd respondent. The said 2nd respondent had absconded and was not represented at all through out the entire proceedings. The trial court found no merit in the inter pleader proceedings and then dismissed it. 1st respondent's appeal to the Court of Appeal was allowed. Being dissatisfied, the appellant has now appealed to the Supreme Court raising 4 issues.

ISSUES FOR DETERMINATION

"(a) Whether from the State of pleadings, the appellant had the onus to prove that the 1st respondent was not the owner of land/house in dispute.

(b) Whether from the totality of evidence adduced by witnesses on both sides, the lower court was right in holding that the 1st respondent proved ownership of the house in dispute.

(c) Whether the lower court was right in holding that the appellant had been settled as per the contents of exhibit "CPIA".

(d) In the alternative, whether the lower court ought to have ordered a retrial of the matter before another judge."

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

Issue - That cannot be related to any ground

1. As rightly stated by learned counsel for the respondent Issue (c) of the appellant's brief is not covered by any of the four grounds of appeal filed by the appellant. There was no prior leave sought and granted either by the Court of Appeal or this Court, to raise the issue. The appellant's reply to the submission on the issue is so general to be of any assistance to the Court. It is trite that where an issue formulated cannot be related to any of the grounds of appeal filed, the court will strike it out and all arguments presented in its support will be discountenanced: See Oniah v. Onyia (1989) 1 NWLR (Pt. 99) 514; the objection against this issue is sustained and same is therefore struck out and any argument related thereto is accordingly discountenanced. (p. 240 E)

Leave of court - Retrial

2. Having regard to the provision of the Supreme Court rules, 1985 on the issue of retrial or new trial in Order 8 of the said Rules, I do not think that where an appellant's main contention is for the restoration of the judgment of the trial court with the prayer in the alternative for an order of a retrial; I do not think the appellant needs leave of this court in the circumstance to raise the alternative prayer more particularly when both parties had the opportunity of commenting on the issue in their respective briefs. This court has power under S. 22 of the Supreme Court Act 1960 and Order 8 rules 13(1) of the Supreme Court rules, 1985 to make order for a retrial without hearing the parties on the issue if it finds that expedient. It is unlike the order of a non-suit where parties have the option of relitigation. The objection raised in issue (D) accordingly fails. (p. 241 F)

Inter pleader proceedings - The burden is generally on the claimant

3. In inter pleader summon proceedings, the burden is generally on the claimant, now the 1st respondent to prove his claim. Evidence abounds in abundance in this case that the property in dispute was built by 1st respondent, Alhaji Burau Potiskum. See the evidence of P.W. 1 Alhaji Adamu Usman, P.W. 2 Iliya Sule, P.W. 3 Engineer Rufus Nwokeke and P.W. 4 Alhaji Mohammed Oputa which conclusively proved that the house in dispute is the personal property of 1st respondent and that since he built it, it has been in his possession physically or constructively and has never parted with its ownership in any form. The evidence of the judgment creditor, now the appellant did not establish sale of the property in dispute to the judgment debtor, Alhaji Mustapha Yessin. (p. 242 C)

Evidence - Inter pleader proceedings - Hearsay

4. The totality of the evidence of the appellant creditor is more or less hearsay as the 2nd respondent judgment debtor was not present at the trial to affirm what the witnesses alleged he told them. The appellant went further to admit that he did not read the purported document of sale

of the property in dispute by the 1st respondent to the 2nd respondent - the judgment debtor. In short there is no credible evidence by the appellant that the house in dispute was sold to 2nd respondent Alhaji Mustapha Yessin by the 1st respondent Alhaji Burau Potiskum. He had failed to B prove his case. See Jinadu v. Babaoye (1966) 1 ALL NLR 241.(p. 243F)

NOTABLE POINTS OF INTEREST

WALI JSC

C 1. *Impeachment of court record - Burden of proof*

Later on and in the course of the proceedings, the Appellant as plaintiff was recorded to have said:-

D *"I have nothing to say, since Alhaji Yessin (Def.) has promised to bring the money, he even asked for bail and granted, latter the surety sensed that he would run, he came and begged for withdrawal from the court, he has breached the trust, because initially he told me that the house he is occupying belongs to him while it does not belong to him, the house belongs to Alhaji Burau, therefore I have not agree." (sic)*

E The above statement is denied and is being contested. The record of the Upper Area Court is being impeached; the burden is on the plaintiff to prove it. Mere denial by him is not enough. (p. 244 B)

F ONU JSC

2. *The rule against hearsay as per Subramaniam case*

This fact was told them in the absence of the 1st Respondent and thus confirms the character of evidence as being hearsay. The rule against hearsay is stated by the Privy Council in Subramaniam v. Public Pros-
G ecutor (1956) 1 WLR 965 thus:

H *"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and admissible when it is proposed to establish by evidence not the truth of the statement but the fact that it was said."*

See also Management enterprises v. Otusanya (1987) 2 NWLR (Part 55)

179 (p. 248 B)

3. Hearsay testimony is inadmissible

The Appellant in proof of the fact of divestment gave that testimony uttered to him by the 2nd Respondent. It is clearly hearsay and is caught by the rule against its admissibility as it runs foul of Section 77 of the Evidence Act which makes direct oral evidence only admissible. This of course, is subject to those exceptions in the Act itself where secondary evidence is admissible. See Section 96 of the Evidence Act. See also Habib (Nigeria) Bank v. Koya (1992) 7 NWLR (Part 251) 43. The testimonies briefly considered by me above do not come within those exceptions and the evidence being hearsay, is inadmissible in law. See Armels Transport Ltd v. Martins (1970) 1 ALL NLR 2. (p. 248 E)

D

IGUH JSC

4. Inter pleader proceeding - When onus of proof will be on the judgment creditor

It is trite that in inter-pleader proceedings, the claimant generally is deemed to be the plaintiff and the judgment creditor, the defendant. Accordingly the burden of proof, again as a general rule, is on the claimant as the plaintiff in the proceedings. The onus lies on him to establish his title to the property in dispute, or where his claim is not absolute title, he must prove the precise interest or title he claimed. Where, however, the claimant was in possession of the property in issue at the time of its attachment, it would seem that the judgment creditor shall, in that case, be deemed a plaintiff and the burden of proof shall reverse accordingly. In that case, the onus must be on the judgment creditor to establish his claim. See Rabiu Jinadu v. Babaoye (1966) 2 ALL N.L.R. 241 per Taylor, C.J., as he then was. (p. 251 D)

G

REPRESENTATION

H

J. K. Gadzama Esq. C. O. Abubu with him for the appellant
C. Uwensuyi Edosomwan Esq. for the 1st respondent

CASES REFERRED TO

- Oniah v. Onyia (1989) 1 NWLR (Pt. 99) 514
 Ugo v. Obiekwe (1989) 1 NWLR (Pt. 99) 566
 Aja v. Okoro (1991) 7 NWLR (Pt. 203) 260
 B Ofondu v. Niweigha (1991) 2 NWLR (Pt. 275) 253
 Onyenma v. Amah (1988) 1 NWLR (Pt. 73) 772 at 778
 Onifade v. Olayiwola (1990) 7 NWLR (Pt. 16) 130
 Jinadu v. Babaoye (1966) 1 ALL NLR 241
 Management Enterprises v. Otusanya (1987) 2 NWLR (Part 55) 179
 C Okpalugo v. Adeshoye (1996) 10 NWLR (Part 476) 77 at 89
 Lagos Timber Co. Ltd. v. Titcombe (1943) 17 NLR 14

STATUTES & RULES REFERRED TO

- D Evidence Act 1990 ss. 135(1) (2) 136, 137 (1) (2) (3)
 Evidence Act 76, 132(1)

BOOK REFERRED TO

- E Phipson on Evidence, 4th Edition

LEAD JUDGMENT BY WALI JSC

- This is a case involving inter-pleader action wherein the 1st respondent, Alhaji Burau Potiskum, by an inter-pleader summons taken out in Potiskum High Court of the then Bornu State, but now of Yobe State, claimed against the appellant, Alhaji Musa Kala as follows:-

- "WHEREAS the claimant has made a claim to the house at Tudun Wada layout behind Coca Cola House Potiskum, taken in execution and under process issuing out of this Court at your instance.*

- You are hereby summoned to appear at the court to be holden at Potiskum on the 20th day of May 1987 at the hour of 9.00 in the FORE noon when the said claim will be adjudicated upon and such order made thereon as the court thinks fit."*

After service of the summons on the appellant both the claimant (1st respondent), and the appellant filed and exchanged pleadings. The 2nd respondent did not file any thing as his whereabouts could not be

traced to be served with processes. 2nd respondent was absent throughout the trial of this action and was equally not represented.

The penultimate of the paragraphs of the "Grounds of Statement of Claim" and "Particulars of Denial of Claimant's Claim" which stand as Statement of Claim and Statement of Defence respectively, are as follows:-

"GROUNDS OF STATEMENT OF CLAIM"

(2) *The claimant is engaged in the business of road transportation, building and civil engineering construction. General merchants and supplier and dealer on motor Vehicles.* C

(3) *Sometimes in 1978, the claimant employed the judgment debtor in this case as his engineer and representative incharge of his fleet of lorries, tippers, tankers and general maintenance. That as an employee of the claimant, the judgment debtor was lodged in the attached house in this suit when the accommodation promised by the claimant was found to be inconvenient after his employment.* D

(4) *That while inside the house in question the judgment creditor instituted an action against the judgment debtor at the Fika Upper Area Court Potiskum on 17/2/86 in suit No. 30/86. That during the pendency of that case the judgment creditor himself admitted in open court that he knows the house in question was not the property of the judgment debtor but that of the claimant. The claimant will tender and rely on the copy of proceedings in this case during the trial of this claim.* E F

(5) *That the claimant has been the person who built the said house in question sometimes before 1975 and have since then been exercising his rights of title and ownership including letting in tenants ever before the year the judgment debtor came to potiskum and was employed by the claimant without any challenge from anybody. The various people who were let into the said house both as tenants and lodgers over the years will be called upon to testify during the trial of this claim as well as some of the construction labourers that may be available.* G H

(6) *That apart from the working relationship of employer and employee the claimant has not given away, sold pledged or mortgaged the property to the judgment debtor and that this fact is known to and*

admitted by the judgment debtor."

"PARTICULARS OF DENIAL OF CLAIMANT'S CLAIM

(3) *The judgment creditor admits paragraphs 8 of the grounds of claim in so far as it states that "the judgment creditor instituted an action against the judgment debtor at Fika Upper Area Court Potiskum in suit No. 30/86". But vehemently deny ever stating in open court in the proceeding: "that he knows the house in question was not the property of the judgment debtor but that of the claimant."*

A. *The judgment creditor avers that the judgment debtor told him before and during the pendency of suit No. 30/86 that the house belonged to him as he had bought it from Alhaji Burau for the sum of N28,000.00.*

B. *The judgment creditor further say (sic) that the judgment debtor told him in the presence of witnesses that he (judgment debtor paid a deposit of N20,000.00 to Alhaji Burau who latter wrote off the balance of N8,000.00 as the arrears of unpaid salary, to the judgment debtor therein the employ of Alhaji Burau and Company Ltd.)"*

At the end of the hearing the learned trial judge, after considering the evidence adduced, concluded as follows:-

"I find no merit in the claim hereby dismissed with N400.00 costs payable by the claimant to the judgment Creditor, having regard to all the circumstances."

Aggrieved by the trial court's decision, the 1st respondent as appellant appealed against it to the Court of Appeal, Jos Division.

In its well considered and unanimous judgment, after considering the written briefs filed, the Court of Appeal arrived at the following conclusion:

"In the sum, the 1st respondent's case ought to fail and should have been dismissed. The appeal will be and is hereby allowed. The judgment of Kuyatsemi J. dated the 16th day of December, 1987 together with the order for costs is hereby set aside. The case for the 1st respondent/creditor is dismissed, and this shall be the judgment of the court below. Costs in the court below assessed at N400.00 and costs in this court assessed at N500.00."

Henceforth in this judgment the claimant and the judgment creditor will be referred to as the 1st Respondent and the Appellant respectively.

The simple facts of this case are as follows:-

The appellant, Alhaji Musa Kala originally sued the 2nd Respondent, Alhaji Mustafa Yessin before Fika Upper Area court, Potiskum, B claiming the sum of N60,000.00, being cost of four motor vehicles sold by the plaintiff to the defendant which the latter refused to pay. When the parties appeared before the Upper Area Court, the defendant admitted the claim and made several promises at different times to pay the money C but failed to do so.

When the plaintiff noticed that the defendant was trying to abscond, he, with the permission of the trial Upper Area Court Judge discontinued with the effort to recover the debt admitted by the defendant before that court so that he could sue the judgment debtor to recover the D judgment debt. Hence the inter-pleader summons involving the house in dispute which the appellant claimed that the 1st respondent sold to the judgment debtor Alhaji Mustapha Yessin.

Both parties filed and exchanged briefs of arguments which they E adopted at the hearing and made oral submissions by way of elaboration.

In the brief filed by the appellant, the following four issues were formulated for determination:

"(a) Whether from the State of pleadings, the appellant had the F onus to prove that the 1st respondent was not the owner of land/house in dispute.

(b) Whether from the totality of evidence adduced by witnesses on both sides, the lower court was right in holding that the 1st respondent G proved ownership of the house in dispute.

(c) Whether the lower court was right in holding that the appellant had been settled as per the contents of exhibit "CPIA".

(d) In the alternative, whether the lower court ought to have H ordered a retrial of the matter before another judge."

On his part, the respondent also raised the following issues for determination:-

"2. (a) Whether the first Respondent established his ownership

of the property by some of the five ways of proving ownership of land i.e.

(a) Numerous and positive Acts of ownership extending over a sufficient length of time, and or (b) Acts of long possession and undisturbed enjoyment of land and if so whether the Court of Appeal was not justified in interfering with the trial court's finding that the first Respondent had not proved his ownership of the property.

2.(b) Whether the Appellant had a burden to prove that the first Respondent had been divested of his ownership of the property by a sale transaction between him and the second Respondent/Judgment Debtor in favour of the latter.

2.(c) If the answer to 2(b) above is in the affirmative, whether the Appellant discharged that burden with legal admissible evidence."

It is pertinent to mention again at this stage that the 2nd defendant who is the judgment debtor did not participate in the inter-pleader proceedings both during the trial and at the appeal level.

The respondent raised preliminary objection against issues (c) and (d) in the appellant's brief in that issue (c) is not based on any ground of appeal while there was no leave granted to the appellant either by the Court of Appeal or this court to raise issue (d) for the first time.

It was the submission of learned counsel for the appellant that issue (c) of his brief was covered by the ground of appeal.

As rightly stated by learned counsel for the respondent Issue (c) of the appellant's brief is not covered by any of the four grounds of appeal filed by the appellant. There was no prior leave sought and granted either by the Court of Appeal or this Court, to raise the issue. The appellant's reply to the submission on the issue is so general to be of any assistance to the Court. It is trite that where an issue formulated cannot be related to any of the grounds of appeal filed, the court will strike it out and all arguments presented in its support will be discountenanced: See Oniah v. Onyia (1989) 1 NWLR (Pt. 99) 514; Ugo v. Obiekwe (1989) 1 NWLR (Pt. 99) 566; Aja v. Okoro (1991) 7 NWLR (Pt. 203) 260 and Ofondu v. Niweigha (1991) 2 NWLR (Pt. 275) 253. The objection against this issue is sustained and same is therefore struck out and any argu-

ment related thereto is accordingly discountenanced.

The other issue objected to is No (D) of the appellant's brief. It was the contention of learned counsel for the respondent that as the issue is being taken for the first time in this court the appellant ought to have sought for leave of the court before arguing it. In addition learned counsel contended that the issue does not involve substantial point of law, substantive or procedural, to occasion any miscarriage of justice if it is not taken. The cases of Koya v. UBA (1997) 1 NWLR (Pt.) 251 at 266, and Adeyemo v. Arokopo (1988) 2 NWLR (Pt. 79) 703, were relied on.

Learned counsel raised this issue in alternative to restoring the judgment of the trial High Court. He cited the cases of Umar v. Bayero University, Kano (1988) 4 NWLR (Pt. 86) 88 at 93 and Onyenma v. Amah (1988) 1 NWLR (Pt. 73) 772 at 778. The argument presented is incoherent and of not very much assistance to the court on whether a party on appeal must either raise, in a ground of appeal or in the absence thereof, seek leave of the appellate court before he can ask for an order of a re-trial.

The grounds on which an appellate court can order a retrial has been stated and restated in several decisions of appellate courts, both local and foreign, and are now firmly established. See Onifade v. Olayiwola (1990) 7 NWLR (Pt. 16) 130; Adeyemo v. Arokopo (1988) 2 NWLR (Pt. 79) 703, and Armels Transport Ltd. v. Martins (1970) ALL NLR 27. **Having regard to the provision of the Supreme Court rules, 1985 on the issue of retrial or new trial in Order 8 of the said Rules, I do not think that where an appellant's main contention is for the restoration of the judgment of the trial court with the prayer in the alternative for an order of a retrial; I do not think the appellant needs leave of this court in the circumstance to raise the alternative prayer more particularly when both parties had the opportunity of commenting on the issue in their respective briefs. This court has power under S. 22 of the Supreme Court Act 1960 and Order 8 rules 13(1) of the Supreme Court rules, 1985 to make order for a retrial without hearing the parties on the issue if it**

finds that expedient. It is unlike the order of a non-suit where parties have the option of relitigation. The objection raised in issue (D) accordingly fails.

Issue A. This as rightly pointed out by the appellant is related to
 B Ground 1 of the Grounds of Appeal. The gist of the appellant's argument
 in this issue is that the onus is on the 1st respondent to prove that the
 house in dispute belongs to him and was at no time sold to Alhaji Mustapha
 Yessin, the judgment debtor. Learned counsel cited sections 135(1) and
 C (2), 136 and 137 (1), (2) and (3) of the Evidence Act, 1990 and the
 decision in Kate Enterprises Ltd. v. Daewoo Nigeria Ltd. (1985) 2 NWLR
 (Pt. 5) 116 at 127 - 128.

In inter pleader summon proceedings, the burden is generally on the claimant, now the 1st respondent to prove his claim.
 D **Evidence abounds in abundance in this case that the property in
 dispute was built by 1st respondent, Alhaji Burau Potiskum. See
 the evidence of P.W. 1 Alhaji Adamu Usman, P.W. 2 Iliya Sule,
 P.W. 3 Engineer Rufus Nwokeke and P.W. 4 Alhaji Mohammed
 E Oputa which conclusively proved that the house in dispute is the
 personal property of 1st respondent and that since he built it, it has
 been in his possession physically or constructively and has never
 parted with its ownership in any form.**

**The evidence of the judgment creditor, now the appellant
 F did not establish sale of the property in dispute to the judgment
 debtor, Alhaji Mustapha Yessin. He said in his evidence:**

*"When the judgment debtor was about to run away. I sued him
 before Fika Upper Area Court Potiskum in respect of the said N60,000.00.
 G That court adjudged the said sum in my favour. Following this, the
 judgment debtor brought the document relating to the purchase of the
 said house, asking me to hold it pending the payment. I refused to take
 the document because my money N60,000.00 was more than the value of
 H the house."*

Under cross examination he further said:-

*"Before the Upper Area Court, the issue of the house in question
 came up and was mentioned. The judgment debtor told that court that he*

bought the house. Some plots were also mentioned. I did not read the document the judgment debtor brought to me to hold pending his payment."

D.W. 1, testifying for judgment Creditor stated in part as follows:-

"In the year 1985, the judgment creditor, Alhaji Musa Kala, B asked me to accompany him to the house of the judgment debtor - Alhaji Mustapha Yessin. I did so. The judgment debtor welcomed both of us; he entertained us. Later he told us that he bought the house in question from the claimant - Alhaji Burau Potiskum - for N28,000.00 he did not pay because the claimant did not pay him one year's salary; the claimant himself did not ask about the balance either. The house in question is located at Tudun Wada Ward, behind Coca Cola Company, Potiskum. The judgment debtor brought some documents saying that they were in respect of the house."

When cross examined D.W. 1 said:-

"It was the judgment debtor who told us he had bought the house. Apart from this, I do not know anything about the buying and selling of the house between the judgment debtor and the claimant. When the judgment debtor was telling us what I had said above, the claimant was not present."

D.W. 2 Alhaji Waziri Gaganuwa also said in his evidence:-

"Mustapha Yessin told me that formerly he was engineer working for Alhaji Burau Potiskum; that he was then on his own; and that he purchased the house."

The totality of the evidence of the appellant creditor is more or less hearsay as the 2nd respondent judgment debtor was not present at the trial to affirm what the witnesses alleged he told them. The appellant went further to admit that he did not read the purported document of sale of the property in dispute by the 1st respondent to the 2nd respondent - the judgment debtor. In short there is no credible evidence by the appellant that the house in dispute was sold to 2nd respondent Alhaji Mustapha Yessin by the 1st respondent Alhaji Burau Potiskum. He had failed to prove his case. See Jinadu v. Babaoye (1966) 1 ALL NLR 241. In Exhibit CP1 and its

English Translation Exhibit CP1A, the 2nd respondent never stated that the house in dispute belonged to him. All he said was -

"I will look for the money, I will bring it. I have six plots, I will sell it (sic) and bring the remaining money, my wife has travelled home to bring the remaining money."

Later on and in the course of the proceedings, the Appellant as plaintiff was recorded to have said:-

"I have nothing to say, since Alhaji Yessin (Def.) has promised to bring the money, he even asked for bail and granted, latter the surety sensed that he would run, he came and begged for withdrawal from the court, he has breached the trust, because initially he told me that the house he is occupying belongs to him while it does not belong to him, the house belongs to Alhaji Burau, therefore I have not agree." (sic)

The above statement is denied and is being contested. The record of the Upper Area Court is being impeached; the burden is on the plaintiff to prove it. Mere denial by him is not enough.

I entirely agree with the decision of the Court of Appeal in the following excerpts of its judgment:

"The appellant in paragraph 6 of the particulars of claim and evidence established ownership of the house and denied that he sold it. From the state of the pleadings and available evidence the burden is on the respondent to prove that the appellant had been divested of ownership. The respondent contends that if the burden was on him it was discharged and during the course of the case shifted to the appellant. The burden has now shifted it is on the respondent to prove that the house

was sold to the 2nd respondent. See Nigeria Maritime Services Ltd., v. Alhaji Bello Afolabi (1978) 2 S.C. 79 at 84, Mogaji v. Cadbury Nig. Ltd. (1985) 2 NWLR Pt. 7; Onoboruchere v. Esegine (1986) 1 NWLR Pt. 19 p. 799 at 807. See section 145 of the Evidence Act. The evidence in which the 1st respondent relied in paragraphs 3(a) (D) and 5 of the reply (pleading) in rebuttal of paragraph 6 of the claim amounts to nothing but hearsay evidence which is inadmissible in law. See Armels Transport Ltd. v. Madam Tinuke Martins (1970) 1 ALL N.L.R. 2; Ojukwu v. Governor of Lagos State (1985) 2 NWLR Pt. 10 P. 806, and Pharmacists

Board of Nigeria v. Adegbesote (1986) 5 NWLR Pt. 44 p. 707."

xx

"The plaintiff must succeed on the strength of his case and not on the weakness of the defendant's case does not apply where the defendant's case itself supports that of the plaintiff and contains evidence on which the plaintiff is entitled to rely. See *Mogaji v. Cadbury Nig. Ltd.* (1985) 2 NWLR Pt. 7 393 at p. 429; *Ajao v. Alao* (1986) 5 NWLR Pt. 45 802 at 826. The burden to prove the transfer of ownership by sale is on the 1st respondent and this he failed to discharge.

Furthermore a trial court must decide a case on legal evidence adduced and where it has failed to follow this course an appeal court will interfere. See *Ogbechie v. Onochie* (1988) 1 NWLR (Pt. 70) p. 370 at 387; *Ishaya Shiya v. Nurikai Pari* (1986) 2 NWLR (Pt. 21) p. 147."

Issue C is not supported by any ground of Appeal. It is therefore incompetent and struck out.

In the final analysis the appeal has no merit and it fails. I affirm the judgment and orders of the Court of Appeal with N10,000.00 costs to 1st respondent in this appeal.

KUTIGI JSC

I read in advance the judgment just delivered by my learned brother, Wali, JSC. I agree with his reasoning and conclusions. The appeal lacks merit and it is hereby dismissed with costs as assessed.

MOHAMMED JSC

I entirely agree that this appeal has no merit and ought to be dismissed. I have had the privilege to read the judgment of my learned brother Wali, JSC., in draft and I adopt his opinion as mine. I have nothing more to add.

The appeal is dismissed. I abide by the order made in the lead judgment on costs.

ONU JSC

Having had a preview of the judgment just read by my learned brother Wali, JSC I am in entire agreement therewith that the appeal lacks merit and ought to fail. In expatiation thereto, I wish to add the following comments of mine.

In allowing the 1st Respondent's appeal and quashing the judgment of the learned trial Judge, the Court of Appeal (per Okezie, JCA and concurred in by Ndoma-Egba and Mukhtar, JJ.CA) held inter alia that the 1st Respondent by his pleading and evidence led in support thereof proved ownership and that the burden of proving that the said ownership of the property in dispute had been divested from him (1st Respondent) had shifted to the Appellant who had positively asserted that fact or divestment. Of the three issues submitted at appellant's instance for our determination, I will consider the second issue (2b), which along with the other two - issues 2(a) and 2(c) together, revolved around the burden of proof. While I regard the joint treatment of issues 2(a) and 2(b) as enough to dispose of this appeal, I will place emphasis on only issue 2(b) whose grouse is:

"Whether the Appellant had a burden to prove that the 1st Respondent had been divested of his ownership of the property by a sale transaction between him and the second Respondent/judgment Debtor in favour of the matter."

Material facts germane to the case in hand for a short hindsight disclosed as follows:-

Between 24th March 1985 and 6th December, 1985, the Appellant sold 3 cars to the 2nd Respondent for N60,000.00 (sixty thousand Naira only) at Potiskum, Bornu State (now Yobe State). The 2nd Respondent failed to pay and the Appellant sued him by issuing a writ under the Undefended List procedure. He (Appellant) obtained judgment on 11/4/87 for the sum claimed with interest against the 2nd Respondent who had by that time absconded. The Appellant proceeded to attach the property in dispute purporting it to belong to the 2nd Respondent. Whereupon the 1st Respondent who claimed to be the owner thereof initiated interpleader proceedings. The learned trial Judge, Kuyatsemi, J. after

hearing five witnesses including the Registrar of the Upper Area Court, Fika on behalf of the 1st Respondent, two witnesses testified to complement the evidence of the Appellant. It was not contested at the hearing before the learned trial Judge that the 2nd Respondent was at all material times an employee of the 1st Respondent by reason of which he (2nd Respondent) as did other staff of 1st Respondent in respect of other properties, came into the property as employee-benefactors thereof.

The Appellant knew that the 1st Respondent was at least at some point, the owner of the property and he made an admission of this fact by the combined effect of paragraphs 3 and 4 of the Particulars of Denial of Claimant's Claim at pages 8 and 9 of the record and also formally admitted same in the course of the trial. What is more, the learned trial Judge at page 32 of the record made a similar finding of the admission by the Appellant. Further still, all the 1st Respondent's witnesses testified positively that not only did he build the property but he had exercised ownership thereof by providing accommodation for his employees and had also let same to others, while exercising these ownership rights for about 14 years since he built same - vide the evidence of 1st Respondent's first witness, Alhaji Adamu Usman who was 1st Respondent's employee for about 15 years. See also the evidence of Mohammed Oputa, who testified that even at the time of the trial, the occupant of the property was put there by the 1st Respondent who was obliging his friend and Alhaji Yaro Gambo whose employee the occupant was. It is noteworthy that this piece of evidence was not challenged under cross-examination vide page 17, line 9 of the record. 1st Respondent's second witness, Iya Sule confirmed the evidence of 1st Respondent's first witness and added that the 2nd Respondent was in furtherance of the policy of the 1st Respondent accommodated his staff transferred to the house under reference from somewhere else. On cross-examination, both witnesses denied knowledge of any transaction by way of mortgage or sale between the 1st and 2nd Respondent.

The Appellant's witnesses on the other hand all testified that they were told by the 2nd Respondent that the 1st Respondent sold the property to him for N28,000.00, paid N20,000.00, leaving a balance of

N8,000.00 which was satisfied by a year's salary arrears. Said 1st Appellant's witness under cross-examination:-

"It was the judgment debtor who told us he had bought the house. Apart from this I do not know anything about the buying and selling of the house between the judgment debtor and claimant. When the judgment debtor was telling us what I said above, the claimant was not present."
(Underlining for emphasis)

This fact was told them in the absence of the 1st Respondent and thus confirms the character of evidence as being hearsay. The rule against hearsay is stated by the Privy Council in Subramaniam v. Public Prosecutor (1956) 1 WLR 965 thus:

"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and admissible when it is proposed to establish by evidence not the truth of the statement but the fact that it was said."

See also Management enterprises v. Otusanya (1987) 2 NWLR (Part 55) 179 and Judicial Service Committee v. Omo (1990) 6 NWLR (Part 157) 407. The Appellant had been told by the 2nd Respondent according to him (Appellant) that the 1st Respondent had sold the property to him (2nd Respondent). The Appellant in proof of the fact of divestment gave that testimony uttered to him by the 2nd Respondent. It is clearly hearsay and is caught by the rule against its admissibility as it runs foul of Section 77 of the Evidence Act which makes direct oral evidence only admissible. This of course, is subject to those exceptions in the Act itself where secondary evidence is admissible. See Section 96 of the Evidence Act. See also Habib (Nigeria) Bank v. Koya (1992) 7 NWLR (Part 251) 43. The testimonies briefly considered by me above do not come within those exceptions and the evidence being hearsay, is inadmissible in law.

See Armels Transport Ltd v. Martins (1970) 1 ALL NLR 2.

The Appellant also stated in his testimony that there was document of title evidencing the sale transaction between the Appellant and the 2nd Respondent. He said:

"The house in issue does not belong to the Claimant - Alhaji Burau Potiskum because he sold it to the judgment debtor - Alhaji Mustapha Yessin. I know this because Alhaji Mustapha Yessin showed me the document by which the house was sold to him by the claimant for N28,000.00."

Under cross-examination the Appellant stated that he did not read the document i.e. instrument of purchase. In effect, the document was neither produced nor tendered in court contrary to Sections 76 and 132(1) of the Evidence Act. See also Okpalugo v. Adeshoye (1996) 10 NWLR (Part 476) 77 at 89 and Lagos Timber Co. Ltd. v. Titcombe (1943) 17 NLR 14. Since the document ought to have been tendered or secondary evidence therefore given of its contents upon proper foundation being laid but this was not done, the evidence led about it in proof of the proprietary interests of the 2nd Respondent went to no issue. See Olarewaju v. Bamigboye (1987) 3 NWLR (Part 60) 353 at 359 following Emegokwe v. Okadigbo (1973) 4 SC. 113. Besides, Appellant stated categorically to the utter damage of his own case that he did not read that document. It is in this regard that I hold that the court below was justified (indeed it had no choice) but to appraise the whole evidence anew based on the pleadings and correctly, in my opinion, drew inferences thereon and holding that on a combination of the pleadings of the parties and evidence led in support thereof that the 1st Respondent had made out a case of ownership and the Appellant's claim of divestment of ownership of the property by an alleged sale transaction between both Respondents failed. That court held inter alia as follows:-

"The Appellant (FIRST RESPONDENT) in paragraph 6 of the particulars of claim and evidence established ownership of the house and denied that he sold it; from the state of the pleadings and available evidence the burden is on the Respondent (APPELLANT) to prove that Appellant (FIRST RESPONDENT) had been divested of ownership The evidence in which the First respondent (appellant) relied in paragraphs 3(a), (b) and 5 of the Reply (pleading) in rebuttal of paragraph 6 of the claim amounts to nothing but hearsay evidence which is inadmissible in law."

The learned authors of Phipson on Evidence, 14th Edition stated the meaning of Burden of Proof at paragraph 4.03 of page 51 thus:

"The Phrase Burden of Proof has three meanings

(i) *The persuasive burden, the burden of proof as a matter of law and pleading, the burden of establishing a case whether by preponderance of evidence or beyond reasonable doubt. (This is also referred to as the legal burden which Lord Denning in 1954 61 LQR 379 preferred to call persuasive burden as being the more common in use and easier to understand).*

(ii) *The evidential burden, the burden of proof in the sense of adducing evidence.*

(iii) *The burden of establishing the admissibility of evidence.*"

The learned authors further state at page 190 (ibid) thus:

D *"In civil cases the ultimate burden of establishing a case is as disclosed in the pleadings. The person who would lose the case if on completion of the pleadings and no more evidence is led has the general burden of proof." See also Section 136 Evidence Act, Cap 112 Laws of*
E *the Federation of Nigeria, 1990.*

In the instant case, as the court below, rightly in my view, held that the burden of proving that the 1st Respondent had been divested of his ownership in the property clearly shifted and rested on the Appellant (See Mogaji v. Odofin (1978) 4 SC. 91 at 93/94 and Woluchem v. Gudi (1981) 5 SC. 291 at 294 - 295) but who failed to discharge same by preponderance of evidence; the decision of the court below is clearly unassailable and I so hold.

For these and the more elaborate reasons proffered in the lead-
G ing judgment of my learned brother, Wali, JSC I too dismiss the appeal
with the same order for costs as contained therein.

H IGUH JSC

I have had the privilege of reading in draft the leading judgment just delivered by my learned brother, Wali, J.S.C. and I agree entirely that there is no merit in this appeal.

The facts that gave rise to this appeal have been adequately set out in the leading judgment. It suffices to state that the matter in issue between the parties has arisen out of an interpleader proceeding following the attachment of a house said by the judgment creditor to have originally belonged to the claimant but subsequently sold by the said claimant to the judgment debtor. B

The claimant, for his own part, asserted that the house in issue is his bona fide property, that he built the same and had remained in constructive possession thereof for some 14 years by letting it out to rent paying tenants. It is plain to me that the narrow issue for determination in this appeal is on whom the burden of proof lies to establish that the subject matter of the dispute no more belonged to the claimant as he had allegedly sold it to the judgment debtor prior to its attachment. Was this burden on the claimant or the judgment creditor to prove that the said claimant had been divested of his ownership of the property by a sale of the same by himself to the judgment debtor. D C

It is trite that in interpleader proceedings, the claimant generally is deemed to be the plaintiff and the judgment creditor, the defendant. E Accordingly the burden of proof, again as a general rule, is on the claimant as the plaintiff in the proceedings. The onus lies on him to establish his title to the property in dispute, or where his claim is not absolute title, he must prove the precise interest or title he claimed. Where, however, F the claimant was in possession of the property in issue at the time of its attachment, it would seem that the judgment creditor shall, in that case, be deemed a plaintiff and the burden of proof shall reverse accordingly. In that case, the onus must be on the judgment creditor to establish his claim. See Rabiu Jinadu v. Babaoye (1966) 2 N.L.R. 241 per Taylor, G C.J., as he then was.

In the present case, it is not in dispute that the house in dispute was built by the claimant and was owned by him. It is also uncontroverted that he had held the property undisturbed for at least 14 years after he H erected the building and had remained in constructive possession thereof by letting it out on payment of rent to his employee tenants. In this regard, the learned trial Judge observed -

"Here it should be recalled that the Judgment Creditor admitted that the house initially belonged to the claimant but that the Claimant latter sold it to the Judgment Debtor before the attachment complained of."

B The Court of Appeal, for its own part also commented thus -

"In the case now under consideration, the appellant carefully set out facts upon which his claim was based particularly in paragraphs 5 and 6 of his particulars of claim (pleading). He made it clear that he build the house in question sometime before 1975 and have since been exercising his rights to title and ownership including letting tenants ever before the year the judgment debtor came to Potiskum and was employed by the claimant without any challenge from any body. In addition it was pleaded that he has not given away, sold, pledged nor mortgaged the property to judgment debtor and that this fact was known to and admitted by the judgment debtor."

Indeed the appellant, namely, the Judgment Creditor, by paragraph 5.2 of his brief of argument further admitted as follows -

E *"..... It is not in dispute that the house originally belonged to the 1st respondent (Claimant) but the appellant testified that the 1st respondent latter sold same to the 2nd respondent."*

It is therefore clear that while the case of the claimant is that the house in issue is his bona fide property, the judgment creditor, admitted that the house originally belonged to the claimant but that the same had been sold by the said claimant to the judgment debtor. In the circumstances, I agree entirely with the court below that the onus rested squarely on the judgment creditor to prove the sale he alleged and not on the claimant to disprove the alleged sale which, on his evidence, was a mere fiction. This onus the judgment creditor failed to discharge.

It is for the above and the more elaborate reasons contained in the judgment of my learned brother, Wali, J.S.C that I, too, dismiss this appeal and affirm the decision of the court below. I abide by the order for costs contained in the leading judgment.