

SUPREME COURT OF NIGERIA
6TH MARCH, 1998. SC. 156/95
CORAM:- S. M. A. BELGORE, I. L. KUTIGI, M. E.
OGUNDARE, U. MOHAMMED, A. I. IGUH, JJSC

ALHAJI FASASI OLOWOLAGBA & 3 ORS. PLAINTIFFS/
(For themselves and as Matemí/Amore APPELLANTS
family of Orile, Ikeja

AND

ABUDU RASHIDI BAKARE & 2 ORS DEFENDANTS/
(Executors of the estate of Late A. G. Bakare) RESPONDENTS

CONSTITUTIONAL LAW - *Right to fair hearing - Where the appellants' claim was thoroughly considered and rightly dismissed - The contention that there had been a breach of right to fair hearing - Is unfounded and misconceived.*

JUDGMENTS - *Dismissal - Of the appellants' claims for damages for trespass and injunction - Was justifiably affirmed - Where the appellants on their evidence failed to establish their ownership and/or possession of the land in dispute.*

LAND LAW - *Trespass - Where the respondents were rightly adjudged to have a better title - And to be in exclusive possession of the land in dispute - The only option open to the court is to dismiss appellants' claims in trespass.*

LAND LAW - *Declaration of title - Where the claim fails - It does not mean that a claim in damages for trespass and injunction on the same land - Must also fail.*

FACTS

The plaintiffs/appellants for themselves and as representing the entire members of the Matemí/Amore family of Orile, Ikeja had instituted

an action jointly and severally against the defendants / respondents as executors of the estate of the late A.G. Bakare, claiming for a declaration of title under Native Law and Custom to the land in dispute, situate at Ikeja, near Alade Village in the Ikeja District of Lagos State; damages for acts of trespass; and perpetual injunction. The plaintiffs predicated their title to the land in dispute mainly on evidence of traditional history, claiming that they had been on the land from time beyond human memory and on acts of possession of the land. The defendants, on the other hand, sought to establish their title to the land in dispute by traditional evidence, the production of documents of title, acts of long possession and other acts of ownership, numerous and positive enough to warrant the inference that they are the owners of the land in dispute. While the plaintiffs claimed their root of title from the Amore family of Orile, Ikeja, the defendants traced their own title from the Owodina family.

At the conclusion of hearing, the learned trial judge found the plaintiffs claims not established and was accordingly dismissed in their entirety. Aggrieved by this decision, the plaintiffs lodged an appeal against the same to the Court of Appeal, Lagos Division, which court in an unanimous judgment dismissed the appeal. Dissatisfied with this decision of the Court of Appeal, the plaintiffs have further appealed to the Supreme Court. The plaintiffs from their grounds of appeal distilled three issues for the determination of this appeal. The defendants for their part substantially adopted the issues formulated by the appellants. But the issues were reformulated into two by the court.

ISSUES FOR DETERMINATION

(1) Whether there was failure by the Court of Appeal to determine and pronounce on the appellants' claims in damages for trespass and injunction and, if so, whether this was not contravention of section 33 (i) of the Constitution of the Federal Republic of Nigeria, 1979 or occasion a miscarriage of justice.

(2) Whether the Court of Appeal, on the evidence, ought to have entered judgment for the appellants in respect of their claims for trespass and injunction.

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

Declaration of title - Where the claim fails

1. In the present case, the issue of the appellants' failure to establish their title to the land claimed is not in dispute. This is because learned appellants' counsel did concede before us, and quite rightly in my view, that the appellants on the evidence and the findings of the trial court, as affirmed by the court below, were unable to establish their title to the land in dispute. But, again, without doubt, if a plaintiff's claim for declaration of title to land fails, this does not necessarily mean that his claim in damages for trespass on the same land and injunction must also fail. See Adegbite v. Ogunfaolu (1990) 4 N.W.L.R. (Part 146) 578, Ojibah v. Ojibah (1991) 5 N.W.L.R. (Part 191) 296 etc. (p. 559 A)

Trespass - Where the respondents have a better title

2. It therefore seems to me that once the respondents were rightly adjudged to have a better title than the appellants to the land in dispute and, at all events, to be positively in exclusive possession of the said land, the Court of Appeal would have had no option open to it than to dismiss the appellants' claims for damages for trespass and injunction as, indeed, it did. See too Nsirim v. Nsirim (1995) 9 N.W.L.R. (Part 418) 169. This is because if it be alleged that some one in possession of land is a trespasser, the person so alleging has the onus of establishing that he has a better right to the possession which was disturbed and unless that onus is discharged, the person so alleging cannot defeat that rival party. (p. 561 B)

Right to fair hearing

3. I am therefore satisfied that the court below thoroughly considered the appellants' claims for trespass and injunction and rightly dismissed them. In the circumstance, the contention that there had been a breach of the appellants' constitutional right to fair hearing must be dismissed as unfounded and misconceived. (p. 561 E)

Judgments - Dismissal of appellants' claims

4. In this regard, attention must once again be drawn to the findings of the learned trial Judge already set out above to the effect that the appellants were unable to prove satisfactorily the material averments of facts pleaded in their amended Statement of Claim and that they proved nothing in support of their claim on the questions of their ownership and possession of the land in dispute. The Court of Appeal, for its own part, was in substantial agreement with these findings of the learned trial Judge, holding that the appellants, on their evidence, failed to establish their ownership and/or possession of the land in dispute. It therefore seems to me clear in the circumstances that having regard to the above findings, the court below was fully justified in affirming the dismissal of the appellants' claims for damages for trespass and injunction by the trial court. (p. 561 H)

NOTABLE POINT OF INTEREST**IGUHJSC**

E I. Trespass to land is actionable at the suit of the person in possession

I think I ought to begin by observing that it is trite law that trespass to land is actionable at the suit of the person in possession of the land in dispute. Such a person in possession of land is entitled to maintain an action in trespass even if he is neither the owner nor a privy or agent of the owner, as exclusive possession of land confers to the person in such possession of the land the right to retain it and to undisturbed enjoyment thereof against every other person else except the true owner or a person with a better or superior title thereto. See Pius Amakor v. Benedict Obiefuna (1974) 3 S.C. 67 at 75. (p. 559 E)

REPRESENTATION

P. O. Jimoh-Lasisi Esq. for the appellants
H O. S. Sowemimo Esq. for the respondents

CASES REFERRED TO

Onifade v. Olayiwola (1990) 7 N.W.L.R. (Part 161) 130 at 165

Ukpai v. Okoro (1983) 2 S.C.N.L.R. 380

Adegbite v. Ogunfaolu (1990) 4 N.W.L.R. (Part 146) 578

Ojibah v. Ojibah (1991) 5 N.W.L.R. (Part 191) 296

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Amakor v. Obiefuna (1974) 3 S.C. 67 at 75

Kareen v. Ogunde (1972) 1 S.C. 182

Kasunmu v. Abeo (1972) 2 S.C. 69

Nsirim v. Nsirim (1995) 9 N.W.L.R. (Part 418) 169

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STATUTES REFERRED TO

Constitution of the Federal Republic of Nigeria, 1979 s. 33 (1)

Court of Appeal Act, s. 16

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LEAD JUDGMENT BY IGUH JSC

This is an appeal against the judgment of the Court of Appeal, Lagos Division, which had on the 19th day of January, 1995, dismissed the appeal by the plaintiffs from the decision of Sotuminu, J., sitting at Ikeja in the High Court of Lagos State.

The plaintiffs for themselves and as representing the entire members of the Matemi/Amore family of Orile, Ikeja had instituted an action jointly and severally against the defendants, as executors of the estate of the late A. G. Bakare, claiming as follows -

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"1. Declaration of title under Native Law and Custom to all that piece or parcel of land situate lying and being at Ikeja near Alade Village in the Ikeja District of Lagos State of Nigeria.

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2. N500.00 damages for acts of trespass committed by the Defendants, their privies, servants and/or agents on the said land.

3. Perpetual injunction restraining the Defendants their privies, agents and/or servants from further acts of trespass."

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Pleadings were ordered in the suit and were duly settled, filed and exchanged.

At the subsequent trial, the parties testified on their own behalf

and called witnesses. The plaintiffs predicated their title to the land in dispute mainly on evidence of traditional history; claiming that they had been on the land from time beyond human memory and on acts of possession on the land. The defendants, on the other hand, sought to establish their title to the land in dispute by traditional evidence, the production of documents of title, acts of long possession and other acts of ownership, numerous and positive enough to warrant inference that they are the owners of the land in dispute. While the plaintiffs claimed their root of title in respect of the land in dispute from the Amore family of Orile, Ikeja, the defendants traced their own title from the Owodina family.

At the conclusion of hearing, the learned trial Judge, after a review of the evidence on the 10th day of February, 1989 was of the view that the plaintiffs' traditional evidence was unconvincing, unsatisfactory and was not established. The court further held that the plaintiffs did not establish that the land in dispute belonged to or was possessed by them or their ancestors. The plaintiffs' claims were accordingly dismissed in their entirety.

Aggrieved by this decision of the trial court, the plaintiffs lodged an appeal against the same to the Court of Appeal, Lagos Division. The Court of Appeal in a unanimous judgment on the 19th day of January, 1995 dismissed the plaintiffs' appeal.

Dissatisfied with this decision of the Court of Appeal, the plaintiffs have further appealed to this court. I shall hereinafter refer to the plaintiffs and the defendants in this judgement as the appellants and the respondents respectively.

Five grounds of appeal were filed by the appellants against this decision of the Court of Appeal. It is unnecessary to produce them in this judgment. It suffices to state that the parties, pursuant to the Rules of this court filed and exchanged their written briefs of argument.

The three issues distilled from the appellants' grounds of appeal set out on their behalf for the determination of this appeal are as follows-

"1. WHETHER THE FAILURE OF THE COURT OF APPEAL to determine and pronounce on the Additional Ground of Appeal dealing with damages for trespass and Injunction (Ground 5) (pp. 384) was not

in Breach of section 33 (1) of the Constitution of the Federal Republic of Nigeria 1979 as amended.

2. *WHETHER THE FAILURE OF THE COURT OF APPEAL to determine the Additional Ground of Appeal dealing with damages for trespass and Injunction did not occasion a miscarriage of justice to the rights of the plaintiffs/appellants.*

3. *WHETHER THE COURT OF APPEAL ought to have entered judgment for the plaintiffs/appellants on their claims for damages for trespass and Injunction on the evidence on record."*

The respondents, for their part, submitted that as the appellants joined no issue with the respondents on the dismissal of the appellants' claim for declaration of title, the said respondents would adopt the issues for determination as formulated by the appellants save that the first question ought to be reframed thus -

"Whether or not the learned Justices of the Court of Appeal gave due consideration to the appellants' claims for trespass and injunction."

A close examination of the issues identified by the parties in their respective briefs show that they are amply covered by the under-mentioned two issues, namely -

(1) *Whether there was failure by the Court of Appeal to determine and pronounce on the appellants' claims in damages for trespass and injunction and, if so, whether this was not contravention of section 33 (i) of the Constitution of the Federal Republic of Nigeria, 1979 or occasion a miscarriage of justice.*

(2) *Whether the Court of Appeal, on the evidence, ought to have entered judgment for the appellants in respect of their claims for trespass and injunction.*

It seems to me convenient in this judgment to consider the above two issues together.

At the oral hearing of the appeal before us, both learned counsel for the parties adopted their respective briefs of argument and proffered additional submissions in amplification thereof.

Learned counsel for the appellants, P. O. Jimoh-Lasisi Esq., in

his submissions, conceded that the appellants did not prove title to the land in dispute. He however stressed that their claims in damages for trespass and injunction were not considered by the Court of Appeal. He submitted that by virtue of section 16 of the Court of Appeal Act, the court below in the exercise of its appellate jurisdiction had a duty to rehear the whole case and to consider and determine all the issues placed before it. He argued that the Court of Appeal by its failure to consider the dismissal of the appellants' claims in damages for trespass and injunction denied them the benefit of a decision on their complaints in contravention of section 33(1) of the Constitution of the Federal Republic of Nigeria, 1979 and that this thereby occasioned a miscarriage of justice. He urged the court to allow this appeal and to remit the case to the High Court of Lagos State for a retrial before another Judge.

Learned counsel for the respondents, O. S. Sowemimo Esq., in his reply, submitted that the Court of Appeal did infact deal with the appellants' claims for damages for trespass and injunction and that the appellants' contentions to the contrary must be dismissed as untenable and unsupported by the records. He referred to various passages of the judgment of the court below and stressed that it was obvious the Court of Appeal did infact consider the appellants claims for damages for trespass and injunction but came to the conclusion that they were misconceived as the appellants failed to establish that they were in lawful possession or that they were entitled to a right of possession of the land in dispute. He therefore argued that the contention that there had been a breach of the right to fair hearing was misconceived. He pointed out that the trial court found that the respondents were firmly in lawful possession of, and had a better title to the land in dispute, which findings were affirmed by the court below. Learned counsel therefore submitted that the Court of Appeal had no option than to dismiss the appellants' claims for trespass and injunction. He urged the court to dismiss this appeal.

It is indisputable, pursuant to the right of parties to any litigation to fair hearing, that a trial court ought to hear and consider all the legal and admissible evidence adduced before it in respect of all relevant issues joined by the parties. In the same vein, an appellate court ought to hear

and consider the arguments on all the material issues canvassed by the parties before it. See Onifade v. Olayiwola (1990) 7 N.W.L.R. (Part 161) 130 at 165, Ukpai v. Okoro (1983) 2 S.C.N.L.R. 380 etc. **In the present case, the issue of the appellants' failure to establish their title to the land claimed is not in dispute. This is because learned appellants' counsel did concede before us, and quite rightly in my view, that the appellants on the evidence and the findings of the trial court, as affirmed by the court below, were unable to establish their title to the land in dispute. But, again, without doubt, if a plaintiff's claim for declaration of title to land fails, this does not necessarily mean that his claim in damages for trespass on the same land and injunction must also fail. See Adegbite v. Ogunfaolu (1990) 4 N.W.L.R. (Part 146) 578, Ojibah v. Ojibah (1991) 5 N.W.L.R. (Part 191) 296, etc.** The main issue before this court is whether or not the appellants' claims in trespass and injunction against the respondents were considered by the court below. I will now proceed to examine this question.

I think I ought to begin by observing that it is trite law that trespass to land is actionable at the suit of the person in possession of the land in dispute. Such a person in possession of land is entitled to maintain an action in trespass even if he is neither the owner nor a privy or agent of the owner, as exclusive possession of land confers to the person in such possession of the land the right to retain it and to undisturbed enjoyment thereof against every other person else except the true owner or a person with a better or superior title thereto. See Pius Amakor v. Benedict Obiefuna (1974) 3 S.C. 67 at 75. It is, perhaps, desirable to examine, firstly, how the learned trial Judge, having dismissed the appellants' claim for title, dealt with the issue of trespass and injunction in respect of the land in dispute.

In this regard the learned trial Judge observed as follows -

"I accordingly make the specific findings that the material averments of facts set out by the Plaintiffs in paragraphs 1 to 23 (except paragraphs 8 and 15) of their final amended statement of claim dated 4th day of May, 1988 and summerised above in this judgment were not

satisfactorily proved and established by legally admissible evidence at the trial and that Plaintiffs proved nothing in support of their claim that the land in dispute belonged to or was possessed by their ancestors. In respect of acts of ownership and possession on the land in dispute the Defendants were able to show satisfactorily several acts of ownership and possession thereon by themselves or their servants or agents. The evidence given by the Defendants and the documents tendered by them established that the Defendants had from 1924 and 1937, in respect of the two parcels of land respectively, exercised maximum acts of ownership and possession to my satisfaction."

She concluded thus -

"In these circumstances, it seems to me that the Plaintiffs claim for a declaration of title fails and is hereby dismissed. Their claims for trespass and injunction also fail and are hereby dismissed as well. I shall hear the parties as to costs."

The Court of Appeal in considering the same issue stated as follows -

"The last issue is whether the learned trial judge adequately considered the claims of damages for trespass and injunction independently of the claim for declaration of title..... The appellants having failed in their claim for declaration of title and without even establishing any right of possession, there is nothing more that can be done on damages and injunction. Claims for damages in trespass and order of injunction cannot avail a plaintiff whose claim for declaration of title could not be proved unless the plaintiff was able to establish that he was in lawful possession - see OLUWI VS. ENIOLA (1967) NMLR G 339 at 340; AMAKOR VS. OBIEFUNA (1974) 3 SC 67 and ADEGBITE VS. OGUNFAOLU (1990) 4 NWLR (pt.146) 578 SC."

It is obvious from the above passages that both the trial court and the court below did infact deal adequately with the appellants' claims for damages for trespass and injunction but came to the conclusion that the appellants had failed to prove that they were either in possession of or were entitled to the right of possession of the land in dispute. It was also their finding that the respondents, on the contrary, had positively

established their possession of and a better title to the said land.

It has to be borne in mind that quite apart from the overwhelming positive evidence of possession led by the respondents in respect of the land in dispute which both courts below accepted as established, where both parties, as in the present case, had claimed to be in possession of land, the law ascribes lawful possession to the party with title or with a better title to the land. See Kareen v. Ogunde (1972) 1 S.C. 182, Kasunmu and Another v. Abeo (1972) 2 S.C. 69 etc. **It therefore seems to me that once the respondents were rightly adjudged to have a better title than the appellants to the land in dispute and, at all events, to be positively in exclusive possession of the said land, the Court of Appeal would have had no option open to it than to dismiss the appellants' claims for damages for trespass and injunction as, indeed, it did. See too Nsirim v. Nsirim (1995) 9 N.W.L.R. (Part 418) 169. This is because if it be alleged that some one in possession of land is a trespasser, the person so alleging has the onus of establishing that he has a better right to the possession which was disturbed and unless that onus is discharged, the person so alleging cannot defeat that rival party.** This onus the appellant failed to discharge in the present case. **I am therefore satisfied that the court below thoroughly considered the appellants' claims for trespass and injunction and rightly dismissed them. In the circumstance, the contention that there had been a breach of the appellants' constitutional right to fair hearing must be dismissed as unfounded and misconceived.**

On the question of whether the court below ought to have entered judgment for the appellants in respect of their claims for trespass and injunction, in other words, whether the appellants had by their evidence established a better title to the land in dispute than the respondents, I need only state that both courts below, on the contrary, held that the respondents established a better title to land in dispute than the appellants. On the state of the evidence led before the trial court, it is clear that this conclusion cannot be faulted.

In this regard, attention must once again be drawn to the

findings of the learned trial Judge already set out above to the effect that the appellants were unable to prove satisfactorily the material averments of facts pleaded in their amended Statement of Claim and that they proved nothing in support of their claim on the questions of their ownership and possession of the land in dispute. The Court of Appeal, for its own part, was in substantial agreement with these findings of the learned trial Judge, holding that the appellants, on their evidence, failed to establish their ownership and/or possession of the land in dispute. It therefore seems to me clear in the circumstances that having regard to the above findings, the court below was fully justified in affirming the dismissal of the appellants' claims for damages for trespass and injunction by the trial court.

In the final result, I find no substance in this appeal and the same must be and is hereby dismissed with costs to the respondents against the appellants which I assess and fix at N10,000.00.

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BELGORE JSC

The appellants never succeeded on their claim for title before the trial Court. Court of Appeal on the whole matter before it from the trial Court found no reason to interfere with the decision of the trial Court. However, the appellants have now raised the issue of non-consideration of their claim for damages for trespass. It is possible in some instances that the person in possession has not got title to land, that possession in those instances can avail him claim to damages for trespass should he be disturbed in that possession. But the trial Court in this case after reviewing the evidence and pleadings of the appellants before it found no evidence of possession much less trespass in their favour. The Court of Appeal, rightly in view, had nothing new before it to disturb the decision of the trial Court on this issue.

I find nothing in the argument before this Court either to interfere with the Court of Appeal's decision.. This appeal has no merit and for the reasons adumbrated by my learned brother Iguh, J.S.C. which I

agree with entirely, I dismiss this appeal with N10,000.00 costs to the respondents against the appellants.

KUTIGI JSC

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I read in advance the judgment just delivered by my learned brother Iguh, JSC. I agree with his conclusion that the appeal lacks substance. It is accordingly dismissed with N10,000.00 costs against the appellants.

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OGUNDARE JSC

I agree entirely with the judgment of my learned brother Iguh, J.S.C. just read. I have nothing more to add. For reasons given by him I too dismiss this appeal as totally lacking in substance. I abide by order for costs made in the said judgment.

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MOHAMMED JSC

I have had a preview of the judgment just read by my learned brother, Iguh J.S.C., and I agree that this appeal from two concurrent findings of fact has failed. I have nothing more to add. The appeal is dismissed.

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