

**SUPREME COURT OF NIGERIA**  
8TH MAY, 1998. SC. 222/91  
**CORAM:- S. M. A. BELGORE, I. L. KUTIGI, E. O.**  
**OGWUEGBU, U. MOHAMMED, S. U. ONU, JJSC.**

EME NDUKWE ..... APPELLANT

AND

UMA ACHA & 4 OTHERS ..... RESPONDENTS

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***EVIDENCE*** - Additional evidence - Power of court to call additional evidence suo motu - The trial court will be in a serious error if it calls evidence suo motu - To establish a fact which the plaintiff fails to do in the prosecution of his claim.

***EVIDENCE*** - Pleadings - Evidence which is at variance with plaintiff's pleadings - The Court has no power to expunge the evidence - In order to save the case of the plaintiff from collapsing.

***EVIDENCE*** - Witnesses - Credibility of - The appellate court can only interfere - Where the trial court decides to believe a witness quite contrary to the trend of accepted evidence - Or where oral testimony is contrary to the contents of a written document.

***LAND LAW*** - Title - Proof of roots of title - Where evidence of traditional history contradicts plaintiff's pleadings - He had not proved his root of title as pleaded.

***LAND LAW*** - Partition - The issue of partition is not established since the appellant's root of title has collapsed - Through his evidence that he is not a member of the family of the original founder of the land in dispute.

**TRESPASS** - *Claim for trespass - Where the appellant had failed to establish title - And there is no evidence that he was in effective possession of the land in dispute - His claim for trespass cannot succeed.*

### **FACTS**

In the Imo State High Court, sitting at Ohafia, the plaintiff/appellant sued the defendants/respondents on behalf of himself and as a representative of the people of Uwa Iku maternal family of Ebem Ohafia. In the Statement of Claim the appellant claimed against the respondents jointly and severally for the following reliefs: a declaration of title to a piece of land known as, and called Awa-Otolu, situate at Ohafia in the Ohafia Judicial Division; general damages for trespass; and perpetual injunction. Pleadings were filed and exchanged. At the hearing of the case the appellant stated that the founder of the land in dispute was no longer Ukpai Ukpai, as pleaded but Ukpai Okpo. The descendant's of the said Ukpai Okpo which the appellant stated in the evidence were not the same as those mentioned in his pleadings. The evidence of P.W. 2 went along the same line.

In a well considered judgment, at the end of the trial, the learned trial judge found that the plaintiff/appellant had failed to prove the traditional history he relied on, the identity of the land and the precise nature of his claim. For those reasons the court dismissed the claim. Dissatisfied with the decision the appellant appealed to the Court of Appeal. That court affirmed the decision of the High Court and dismissed the appeal. The appellant has finally appealed to the Supreme Court on five grounds of appeal. The issues raised on those grounds by the respondents was considered more apt for the determination of the appeal.

### **ISSUES FOR DETERMINATION**

- "1 *Whether the appellant proved his root of title.*
2. *Whether the appellant identified properly the land in dispute*
3. *Whether the appellant pleaded partition and proved it.*
4. *Whether the appellant proved exclusive possession of the land in dispute to enable him claim for trespass against the respondents. Were the respondents trespassers in their family land?*

5. *Whether the Court of Appeal was right in accepting as the High Court of Ohafia did the findings of the Arbitration of Ebem Elders as stated by DW1.*

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

***Additional evidence - Power of court to call***

1. With greatest respect, let me make it quite clear to the learned counsel for the appellant that there is no proviso to section 74 of the Evidence Act. But if the learned counsel is referring to section 75 of the Act the proviso to the section does not give power to the trial court to call additional evidence, suo motu, to help correct a contradiction in the evidence adduced by the plaintiff in support of his claim. The burden of proof on the pleadings rests upon the party who substantially asserts the affirmative of an issue and who would fail if no evidence were adduced. The burden of proving exclusive ownership is on the party who pleads so. The trial court will be in a serious error if it calls evidence suo motu, to establish a fact which the plaintiff fails to do in the prosecution of his claim. See Imana J.O.O. v Robinson Jarin Madam (1979) ALL NLR page 1 at 16 and J.W.Amu v. J.B. Atake and Anor. (1974) A.N.L.R. 678. (p. 1122 E)

***Evidence - Pleadings***

2. The learned counsel ought to know that if the evidence the plaintiff/appellant adduced before the trial court during trial, is at variance with his pleadings neither the trial court nor the Court of Appeal has power to expunge the evidence that tend to conflict with the plaintiff's pleadings in order to save the case of the plaintiff from collapsing. The case of National Investment and Properties Company Limited v. Thompson Organisation Limited & Ors. (1969) N.M.L.R. 99 which learned counsel referred to in support of his submission does not support such assertion. (p. 1123 A)

***Proof of roots of title***

3. It is evidently clear that the appellant had not proved the roots of his title as pleaded<sup>1</sup>. At the hearing of the case the appellant stated that the founder of the land in dispute was no longer Ukpai Ukpai, as pleaded but B Ukpai Okpo. The descendants of the said Ukpai Okpo which the appellant stated in the evidence were not the same as those mentioned in his pleadings. It was not the appellant alone who gave evidence that Ukpai Okpo was the founder of the land in dispute. PW2 also, gave similar C evidence. The appellant failed to link Ukpai Okpo with Amaghalu who was the mother of Ukpai Ukpai the founder of the land in dispute. (p. 1123 H)

***Land law - partition***

D 4. In dealing with the issue of partition it is relevant to refer to the observation of both the Court of Appeal and the trial court that the appellant had failed to pin-point his branch of the family to whom the land in dispute was allotted to. There is nothing in the evidence adduced to E show that the appellant is a member of Amaghalu's family through Ukpai Ukpai, the founder of the land in dispute. The learned counsel for the appellant cannot be correct to say that the wordings of paragraph 4 of the statement of claim, if read with other paragraphs, would establish F that partition had been pleaded. Paragraph 4 of the statement of claim reads:

*"The land in dispute is surrounded by other lands of Ukpai Ukpai who showed the different portions to his relations at different times for G them to farm upon. These relations used the different portions allotted to them for farming purposes and all the boundary people who are relations of Ukpai Ukpai belong to the Amaghalu family."*

The boundary men to the land in dispute as shown in the evidence are all relations of Ukpai Ukpai of Amaghalu's family. Ukpai Ukpai H

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<sup>1</sup>. See also *Bangboye v. Olusoga* (1996) 4 KLR (pt 40) 665 - on the need for clear evidence of traditional history.

was also the founder of all the parcels of land sharing common boundaries with the land in dispute. If the appellant is not a member of Ukpai Ukpai branch of the family how could the land in dispute be allotted to him through partition? The issue of partition, even if pleaded cannot therefore be established since the appellant's root of title has collapsed through his insistence that his ancestor was Ukpai Ukpo and not Ukpai Ukpai, the original founder of the land in dispute. (p. 1124 E)

***Claim for trespass***

5. The issue of trespass goes with the proof that the appellant owned the land exclusively or was in possession of the same before the commencement of this action or had proved the right to its possession. See Carpenter, Nureni and Another v. Bello Lanuwun (1970) All NLR 455. It is clear from the pleadings and evidence that the appellant had failed to establish title to the land in dispute and there is no cogent evidence either that he was in effective possession of the disputed land. The evidence before the court is that the disputed land is owned and farmed communally by all members of Amaghalu's family. If the appellant says, as he has done, that he is not from Amaghalu's family he cannot possess the said land. DW2, who is one of the respondents, told the trial court that the dispute in respect of this land started when the appellant pledged the land to one Nka Iro. The matter was reported to the elders and they directed the appellant to return the land back to the family. Since then the appellant had not gone back to the land in dispute. The appellant told the trial court that in 1971 he rejoined members of Amaghalu in declaring that no portion of Amaghalu's land would be sold. He is wrong now to ask the trial court to declare a portion of the land to be his own. His claim for trespass cannot therefore succeed and it is rightly dismissed. (p. 1125 C)

***Credibility of witnesses***

6. On the issue of arbitration by the elders over the land in dispute the trial High Court did not believe the evidence given by the appellant that the elders after listening to both sides adjudged that the disputed land was

his. The learned trial judge considered all the evidence adduced on the issue and disbelieved the appellant. The court of Appeal, quite rightly, looked into the issue and found that it was a matter of credibility of the witnesses' testimonies which they must not re-open or re-appraise since the court did not see or heard the witnesses. I quite agree. Any trial court has the liberty and privilege to believe one litigant and disbelieve the other. Where the issue is that of credibility of witnesses the appellate court has a very limited, if any scope to interfere. It can only do so when the trial court decides to believe a witness quite contrary to the trend of accepted evidence or where oral testimony is contrary to the contents of a written document. see Samuel Agbonifo v. Madam Arorore Aiwereoba and anor. (1988) 1 N.S.C.C. 237 at 245. (p. 1125 H)

#### D NOTABLE POINT OF INTEREST

##### ONUJSC

##### *1. Family land - Application of s.46 Evidence Act*

The submission made on behalf of the appellant that it was because individuals owned land around the land in dispute that Amaghalu's land was partitioned could not be true. The assertion that Amaghalu's land was given out for farming purposes seasonally could not be equated to partitioning. Significantly, almost all the parcels of land shown in the respondent's plan (Exhibit B) depict them as mostly all communally owned; improvement of any kind of family land by a member cannot cause family land to cease from being family property. See Shelle v. Asajon (1957)2 FSC 65 at page 67. Further, the use of family land by a member, however long, does not make the land the private property of that individual member. See Adenle, Ataoja of Oshogbo v. Oyegbade (1967)NMLR 136; Kuma Kuma 5 WACA61, and Eze v. Giliegbe & Or. 14 WACA 61. Besides, it is trite law that the onus is on the party claiming property as his personal land to prove that he is in fact entitled to the family land against all other family members. See Atuanya v. Onyejekwe (supra). In the light of all I have said above, for the provisions of section 45 (now Section 46) of the Evidence Act, Cap.112 Law of the Federation of Nigeria) to apply, there must be an admission by the re-

spondents or a finding by the trial court that the land in dispute was surrounded by other lands belonging to the appellant. See Idundun & Ors. v. Okumagba (1976) 9-10SC. 227at 249 251. See also Okechukwu v. Okafor (1961)2 SCNLR 369; (1961) All NLR 685.

This is not the case in the instant case. Rather, the evidence is to the effect that the said land was given to Olekanma Ofuche for farming purpose only by the ancestor of the respondents. In which case, If section 46 of the Evidence Act is to be invoked, it will be invoked in favour of the respondents, the admitted owners of the land and not the appellant. (p. 1132 A)

### **REPRESENTATION**

U. U. Uche with C. Amene for the Appellant

C. A Kalunta for the Respondents

### **CASES REFERRED TO**

Imana J.O.O. v Jarin (1979) ALL NLR page 1 at 16 and

J.W.Au v. J.B. Atake (1974) A.N.L.R. 678.

National Investment and Properties Company Limited v. Thompson Organisation Limited & Ors. (1969) N.M.L.R. 99

Carpenter, Nureni and Another v. Lanuwun (1970) All NLR 455.

Agbonifo v. Aiwereoba (1988) 1 N.S.C.C. 237 at 245.

Odofin v. Ayoola (1984) 11 SC. 72

Owoade v. Omitola (1988) 2 NWLR (Part 77) 41

George v. U.B.A Ltd (1972) 1 ALL NLR (Part 2) 347

Great Nigeria Insurance Co. Ltd. v. Lad Groups Ltd (1986) 4 NWLR (Part 33) 72

Olakunle Elias v. Omo Bare (1982) 5 SC. 25 at 59

Eze v. Giliegbe 14 WACA 61

Okechukwu v. Okafor (1961)2 SCNLR 369

### **STATUTE REFERRED TO**

Evidence Act Cap. 112 Laws of the Federation of Nigeria, ss 46, 74 and 75

**LEAD JUDGMENT BY MOHAMMED JSC**

The proceedings giving rise to this appeal were commenced by the appellant as plaintiff before Abengowe J of Imo State High Court, sitting at Ohafia. In the High Court the appellant sued the respondents on behalf of himself and as representative of the people of Uwa Iku maternal family of Ebem Ohafia. In the Statement of Claim the appellant claimed against the respondents (Defendants at the trial court) jointly and severally, for the following reliefs:

"(i) *A declaration of title to a piece of land known as, and called Awa-Otulu, situate at Ohafia in the Ohafia Judicial Division, at the annual rent of N10.00.*

*{ii) N1,000 general damages for trespass:*

*(iii) Perpetual Injunction restraining the defendants her servants workmen and/or agents from entering into any part, or in anyway, interfering with the said land".*

Pleadings were filed and exchanged. In a well considered judgment, at the end of the trial, the learned trial judge found that the plaintiff/appellant had failed to prove the traditional history he relied on, the identity of the land and the precise nature of his claim. For those reasons the court dismissed the claim. Dissatisfied with the High Court's decision, the appellant appealed to the Court of Appeal. The Court of Appeal affirmed the decision of the High Court and dismissed the appeal

The appellant has finally reached this court on five grounds of appeal. I will reproduce the five grounds of appeal but shorn of their particulars because I find the issues raised on those grounds by the learned counsel for the respondents more apt for the determination of this appeal. The five grounds without their particulars. read as follows

*"(1). That the learned Court of Appeal judges erred in law and in fact when they found for the respondents that the root of title to the land in dispute is a triable issue when the parties are agreed that they are descended from a common matrilineal ancestor, the founder of the land in dispute.*

*(2) That the Court of Appeal misdirected itself on the question of the meaning of the land in dispute and the branch of the family of the*

appellant.

(3) *That the Court of Appeal erred in law and in fact when they found that partition of the land in dispute had not been pleaded and established in evidence by the appellant.*

(4) *that the Court of Appeal erred in law and in fact and misdirected itself in respect of the findings of the arbitration of Ebem Elders.* B

(5) *The Court of Appeal erred in law and in fact and misdirected itself on the question of damages for trespass and injunction claimed by the appellant".*

The issues identified by the learned counsel for the respondents for the determination of the appeal are six and are listed below: C

"1 *Whether the appellant proved his root of title.*

2. *Whether the appellant identified properly the land in dispute*

3. *Whether the appellant pleaded partition and proved it.* D

4. *Whether the appellant proved exclusive possession of the land in dispute to enable him claim for trespass against the respondents. Were the respondents trespassers in their family land?*

5. *Whether the Court of Appeal was right in accepting as the High Court of Ohafia did the findings of the Arbitration of Ebem Elders as stated by DW1.* E

6. *Whether this Court would in the absence of error on the face of the record of this case occasioning miscarriage of justice disturb the findings of the lower courts".* F

The learned counsel for the appellant made what I regard as a novel submission on matters raised in issues 1 and 2. Learned counsel agreed with what is trite; that parties are bound by their pleadings and so any evidence which tend to contradict the material fact of their pleadings or introduce an entirely different matter from what had been pleaded goes to no issue. After this submission, learned counsel argued that the trial court had powers under the proviso to section 74 of the Evidence Act to call additional evidence, suo motu, in respect of the origin of the land. This counsel added, was not done by the trial court and that the Court of Appeal was in error to fail to address it's mind to this well founded principle of law as set out in section 74 of the Evidence Act. G H

The learned counsel went further with his novel submission thus:

*"It may be conceded that the appellant and his witnesses gave conflicting evidence to his pleadings in court. This would at best amount to a deliberate attempt by the appellant to introduce new matters into the case and at worst, an inadvertent failure on his part to lead evidence in line with his pleadings.*

*If the trial court and the Court of Appeal found the plaintiff's/Appellant's evidence to be at variance with his pleadings the only proper step to take in that situation is to expunge the evidence of the plaintiff/Appellant that tend to conflict with his pleadings. See the case of the National Investment & Properties Company Limited v. Thompson Organisation Limited & Ors. (1969) N.M.L.R. 99. Instead of limiting himself to that principle of law the trial judge went on to state at page 70 lines 6 and 7 that the plaintiff's evidence was incongruous and unsatisfactory. The Court of Appeal committed the same error by reaching the same conclusion as the trial judge that even though facts about the common ancestry of both the plaintiffs and the defendants have been admitted in their pleadings that did not settle the issue of root of title to the land between the parties".*

**First, with greatest respect, let me make it quite clear to the learned counsel for the appellant that there is no proviso to section 74 of the Evidence Act. But if the learned counsel is referring to section 75 of the Act the proviso to the section does not give power to the trial court to call additional evidence, suo motu, to help correct a contradiction in the evidence adduced by the plaintiff in support of his claim. The burden of proof on the pleadings rests upon the party who substantially asserts the affirmative of an issue and who would fail if no evidence were adduced. The burden of proving exclusive ownership is on the party who pleads so. The trial court will be in a serious error if it calls evidence suo motu, to establish a fact which the plaintiff fails to do in the prosecution of his claim. See Imana J.O.O. v Robinson Jarin Madam (1979) ALL NLR page 1 at 16 and J.W.Amu v. J.B. Atake and Anor. (1974) A.N.L.R. 678.**

Secondly, the learned counsel ought to know that if the evidence the plaintiff/appellant adduced before the trial court during trial, is at variance with his pleadings neither the trial court nor the Court of Appeal has power to expunge the evidence that tend to conflict with the plaintiff's pleadings in order to save the case of the plaintiff from collapsing. The case of National Investment and Properties Company Limited v. Thompson Organisation Limited & Ors. (1969) N.M.L.R. 99 which learned counsel referred to in support of his submission does not support such assertion. What this court decided in that case is as follows:

*"It is convenient here to deal with one other general matter. Chief Akin Olugbade frequently asked us to look at the evidence adduced and not at the pleadings as it was the evidence that mattered. Now just as an appellant is bound by his grounds of appeal so at the earlier stage of the action both parties are bound by their pleadings and it is elementary that admissions in pleading do not have to be proved. In so far as pleadings do not contain admissions then the matters alleged must be proved in evidence, but that evidence cannot derogate from the pleadings as Chief Akin Olugbade seems to us to think it could. See Idahosa v. Oronsaye 4 FSC. 166 at 171. A plaintiff must call evidence to support his pleadings and evidence which is in fact adduced which is contrary to his pleadings should never be admitted. It makes no difference, as Chief Akin Olugbade suggested, that the other side did not object to the evidence or that the judge did not reject it. It is of course, the duty of counsel to object to inadmissible evidence and that the duty of the trial court any way to refuse to admit inadmissible evidence, but if notwithstanding this evidence is still through oversight or otherwise admitted then it is the duty of the court when it comes to give judgment to treat the inadmissible evidence as if it had never been admitted. This has long been the case but it is clearly set out in the judgment of this court in Bada v. The Chairman L.E.D.B. SC. 501/65 of the 23rd of June, 1967. We cannot therefore look at or accept evidence on the record here when it runs contrary to the pleadings of the plaintiffs".*

**It is evidently clear that the appellant had not proved the**

roots of his title as pleaded. At the hearing of the case the appellant stated that the founder of the land in dispute was no longer Ukpai Ukpai, as pleaded but Ukpai Okpo. The descendants of the said Ukpai Okpo which the appellant stated in the evidence were not the same as those mentioned in his pleadings. It was not the appellant alone who gave evidence that Ukpai Okpo was the founder of the land in dispute. Pw2 also, gave similar evidence. The appellant failed to link Ukpai Okpo with Amaghalu who was the mother of Ukpai the founder of the land in dispute. Issue 1 and 2 are therefore resolved *in favour* of the respondents.

The matter raised in the third issue is the question whether partition of the land has been pleaded and established in the evidence by the appellant. Learned counsel for the appellant argued that despite the fact that the word "partition" was not used in paragraph 4 of the statement of claim it could be inferred *that* it had been pleaded and proved by the appellant. Counsel referred to paragraphs 2,3,4,5,7,8,9, and 11 of statement of claim, Exhibit 'A' and the evidence of PW1, PW2 and PW3 to buttress his submission.

In dealing with the issue of partition it is relevant to refer to the observation of both the Court of Appeal and the trial court that the appellant had failed to pin-point his branch of the family to whom the land in dispute was allotted to. There is nothing in the evidence adduced to show that the appellant is a member of Amaghalu's family through Ukpai Ukpai, the founder of the land in dispute. The learned counsel for the appellant cannot be correct to say that the wordings of paragraph 4 of the statement of claim, if read with other paragraphs, would establish that partition had been pleaded. Paragraph 4 of the statement of claim reads:

*"The land in dispute is surrounded by other lands of Ukpai who showed the different portions to his relations at different times for them to farm upon. These relations used the different portions allotted to them for farming purposes and all the boundary people who are relations of Ukpai Ukpai belong to the Amaghalu family."*

The boundary men to the land in dispute as shown in the

evidence are all relations of Ukpai Ukpai of Amaghalu's family. Ukpai Ukpai was also the founder of all the parcels of land sharing common boundaries with the land in dispute. If the appellant is not a member of Ukpai Ukpai branch of the family how could the land in dispute be allotted to him through partition? The issue of partition, even if pleaded cannot therefore be established since the appellant's root of title has collapsed through his insistence that his ancestor was Ukpai Ukpo and not Ukpai Ukpai, the original founder of the land in dispute.

The issue of trespass goes with the proof that the appellant owned the land exclusively or was in possession of the same before the commencement of this action or had proved the right to its possession. See Carpenter, Nureni and Another v. Bello Lanuwun (1970) All NLR 455. It is clear from the pleadings and evidence that the appellant had failed to establish title to the land in dispute and there is no cogent evidence either that he was in effective possession of the disputed land. The evidence before the court is that the disputed land is owned and farmed communally by all members of Amaghalu's family. If the appellant says, as he has done, that he is not from Amaghalu's family he cannot possess the said land. DW2, who is one of the respondents, told the trial court that the dispute in respect of this land started when the appellant pledged the land to one Nka Iro. The matter was reported to the elders and they directed the appellant to return the land back to the family. Since then the appellant had not gone back to the land in dispute. The appellant told the trial court that in 1971 he rejoined members of Amaghalu in declaring that no portion of Amaghalu's land would be sold. He is wrong now to ask the trial court to declare a portion of the land to be his own. His claim for trespass cannot therefore succeed and it is rightly dismissed.

On the issue of arbitration by the elders over the land in dispute the trial High Court did not believe the evidence given by the appellant that the elders after listening to both sides adjudged that the dispute land was his. The learned trial judge considered all

the evidence adduced on the issue and disbelieved the appellant. The court of Appeal, quite rightly, looked into the issue and found that it was a matter of credibility of the witnesses' testimonies which they must not re-open or re-appraise since the court did not see or heard the witnesses. I quite agree. Any trial court has the liberty and privilege to believe one litigant and disbelieve the other. Where the issue is that of credibility of witnesses the appellate court has a very limited, If any scope to interfere. It can only do so when the trial court decides to believe a witness quite contrary to the trend of accepted evidence or where oral testimony is contrary to the contents of a written document. see Samuel Agbonifo v. Madam Arorore Aiwereoba and anor. (1988) 1 N.S.C.C. 237 at 245.

Finally, it follows from what I have been saying above that the appellant has failed to convince me to disturb the decision of the lower court. This appeal has no merit at all and it is dismissed. The judgment of the court of Appeal affirming the decision of Abengowe J. of Imo High Court, is hereby affirmed. The appellant shall pay the costs of N10,000.00 to the respondents.

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#### BELGORE JSC

The appellant failed to prove his root of title. He also failed to establish linkage with the Ukpai family or Amaghalu's family. The courts below found in this line based on the evidence. Against these concurrent findings of fact by the courts below, the appellant has not shown what is irregular or perverse. I also find no merit in this appeal and I dismiss it with N10,000.00.

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#### KUTIGI JSC

I read before now the judgment just delivered by my learned brother, Mohammed, JSC. I agree with his conclusion that there is no merit in the appeal. The appeal is dismissed accordingly. The judgments

of both the trial High Court and that of the court of Appeal are affirmed. The respondents are awarded costs of ten thousand naira (N10,000.00) against the appellant.

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### OGWUEGBU JSC

I have had privilege of a preview of the judgment of my learned brother Mohammed, J.S.C. dismissing this appeal on all the grounds argued before us. I entirely agree with the judgment and I also dismiss the appeal. I have nothing further to add. I adopt all the orders made in the said judgment inclusive of the order as to costs.

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### ONU JSC

I had the advantage to read before now the draft judgment prepared in this case by my learned brother Mohammed, JSC just delivered. I agree with his reasoning and conclusion that the appeal is devoid of merit.

In expatiating briefly and generally on the salient issues considered and resolved against the appellant, I wish to observed as follows:-

On the issue of root of title, this being a triable issue wherein the Appellant had pleaded that his genealogical table of descent emanated from his ancestor/founder/owner of the land in dispute called Ukpai Ukpai but in his rendering of his traditional evidence before the trial court stated that his founder/owner ancestor was by name UKPAI Okpo his, traditional history on which he pinned his hope for success failed. In other words where as in the instant case, the appellant failed to prove the base upon which he founded his title the claim must perforce fail. See Mogaji & Ors v. Cadbury (Nig) Ltd & Ors(1985) 2 NWLR 393 at ratio 9 page 395; (1985)2 NSCC 959; Odofin v. Ayoola (1984)11 SC.72 and Owoade v. Omitola (1988) NWLR (part 77 41. In a claim for declaration of title such as the one in hand, the onus is on the plaintiff to prove his title, and he has to do so without relying on the weakness of the defendant's which, however, can be used to strengthen the case of the

plaintiff shown to be strong enough to stand on its own. See Michael Atuanya v. Fabian Onyejekwe & Anor In re: Ofiaju Mbajekwe (1975)3 SC. 161 at 167.

In the instant case, the pleading of the appellant at paragraph 3 of his Statement of claim reads:

"3. *The original owner of the land in dispute who first cleared it and established ownership and possession thereof was one Ukpai Ukpai. Ukpai Ukpai exercised maximum acts of ownership over the land in dispute by farming thereon and reaping the crops and economic trees thereon.*"

In his testimony in the trial court he testified among other things as P.W1 on 9th February, 1981 to the following effect:-

"*The founder of this land was one Ukpai my maternal ancestor. The full names of my ancestor is Ukpai Okpo and he was the founder of the land in dispute. He was a blacksmith and apart from that he was cultivating the land in dispute .....*"

Nothing was done during the cross-examination of the appellant to correct the ideal of his ancestor, the original settler on the land in dispute being known and called Ukpai Okpo instead of his pleading that stated he was called Ukpai Ukpai. Nor was an amendment made to rectify the pleading. In such a case, the traditional evidence of settlement by the appellant's ancestor that has failed cannot be substituted with acts of possession. Thus, as this court had occasion to point out in Odofin v. Ayoola (supra) at page 116:

"*If a party relies on, and pleads a grant as his root of title, he is under a duty to prove such grant to the satisfaction of the trial court. Other evidence of acts of possession after the grant will merely go to strengthen the grant. But where as in this case, the proof of the grant is inconclusive, the bottom is knocked out of the plaintiff/appellant's claim. When his root ceases to stand, the stem and branches will fall with the root. In other words, where the radical title pleaded is not proved, it is not permissible to support a non-existent root of title with acts of possession; it is not permissible to substitute a root of title that has failed with acts of possession which could have derived from that root.* (Underlining is mine for emphasis).

See also Mogaji & ors. v. Cadbury (Nig) Ltd & ors. (supra) where this court held in ratios 9 and 13 inter alia that:

*"9. Once a party pleads and traces the root of his title to a particular person or family, he must establish how that person also came to have title vested in him. He cannot ignore the proof of his overlord's title and rely on long possession.*

*13. Where a party adduces two competing histories of his ownership in support of his claims, he has failed to make the case he set out to make and his claim must be dismissed."*

The consequence of this is that the appellant never pleaded that he was a member of Amaghalu but rather of Uwaiku family whereas at the hearing of the case he and his witnesses gave evidence that it was no longer Ukpai Ukpai that founded the land but Ukpai okpo. There is therefore a break in nexus between Ukpai Ukpai and Ukpai Okpo. This is authority enough to say that the appellant failed to prove his root of title. Since both parties admitted at the close of pleadings that the founder of the land in dispute is Ukpai Ukpai but at the hearing without amending his statement of claim and without stating that Ukpai Okpo had an alternative name, his evidence was at variance with his pleading and so goes to no issue - George v. U.B.A. Ltd (1972)1 All NLR (part 2) 347; Great Nigeria Insurance Co. Ltd v. Lad Groups Ltd (1986) 4 NWLR (part 33) 72. The appellant also claimed against the respondents in trespass and damages but he founded his action on traditional history which had failed, any evidence adduced by him in support thereof based on possession cannot succeed since possession cannot hang from nowhere - See Odofin v. Ayoola (supra).

All efforts made by professor Uche, learned counsel for the appellant to convince us at the oral hearing of this appeal that the appellant gave evidence in line with his pleading came to naught.

Further, with regard to appellant's root of title the following extract, among others represents the trial court's opinion on the matter: H

*"The implication of this to the case of the plaintiff is that he failed to identify the land he is claiming .....his ownership and that of his brother should not have extended to the area sur-*

rounding the land in dispute because those are shared out to the defendants. While still on this point, I wish to draw attention to the fact that the contention of the defendants is that the land in Exhibit "B" belongs to both parties which they own as the descendants of Amaghalu. This point is very significant in view of the evidence of the plaintiff as shown above. This is not all. The plaintiff throughout his statement of claim did not show the branch of his family. Save for the heading of his suit where he showed that he is representing Uwaiku maternal family, he did not say or plead how he broke off from the family. This is important because in an action of this nature where the plaintiff is claiming to have come from a different branch of the family from the defendants the onus is on him to show with certainty, that branch and how he came to belong to it. The plaintiff in his evidence in chief said that Amaghalu is the mother of those who received share from the land surrounding the land in dispute. In this case he excluded himself but at the same time he admitted that he is a descendant of Amaghalu as well as the defendants. In paragraph 4 of his Statement of claim he averred that "all boundary people who are relations of Ukpai Ukpai belong to Amaghalu family....."

Continuing, the learned trial further expatiated:

".....But he also denied that he is Ukpai's son. What is my bother about this case of the plaintiff is that he has not pin-pointed his branch of the family. From the evidence in this case he is a member of Umuigbo family as well as the defendants. He is also a descendant of Amaghalu family as well as the defendants which one is his particular family for which he claims the land in dispute exclusively. The plaintiff has not succeeded so far to establish his branch of the family. Paragraph 3 of the statement of claim shows the line of descent of the plaintiff but it did not show from which branch he descended. Is it Amaghalu or Umuigbo and if it is Uwaiku how did he branch off to include Amaghalu and Umuigbo? These facts are shown either in the pleading or in his evidence."

Furthermore, the appellant at the trial failed to lead evidence of the boundaries and extent of the land in dispute in line with his plan (Exhibit 'A' ) The appellant in his Brief conceded this inaccuracy be-

tween Exhibit 'A' and the evidence led but no attempt was made by him to explain the inconsistency. As the appellant did not know the extent of the land he claimed to be in dispute and the court below agreed with the trial court about this shortcoming, his case ought to be dismissed. See Alhaji Adebola Olakunle Elias v. Timothy Omo Bare (1982)5 SC.25 at B 59.

On partition it has been contended on behalf of the Appellant that he had pleaded it in paragraph 4 of the Statement of claim when read in conjunction with paragraphs 2,5,6 and 7 of the same. With utmost due respect, a careful perusal of all five paragraphs alluded to discloses nothing from which to infer partition. In his testimony, the Appellant said that the land founded by Ukpai Okpo was divided into two parts, the pieces of land outside the land in dispute were given out seasonally to his relations for farming purposes who were members of Amaghalu families. As appellant agreed under cross-examination that he was a descendant of Amaghalu he was by that token one of those who were given land to farm seasonally. An allotment of family land under customary law, which is all the Appellant was talking about, means no more than mere possession or licence from the family to make use of its land. That act of allotment cannot and would not entitle him as an allottee to a declaration of title to the land allotted. See Bamgbose v. Oshoko (1988)2 NWLR (part 78)509. The appellant has asserted that the partition he is referring to had taken place before he was born. C D E F

The question is, if his family had owned the land in dispute as shown on Exhibit A, how did he give out land outside the land in dispute to his brother-in-law, Nkata Iro? Also, in his testimony, Appellant agreed that he was one of those who signed a joint declaration that no land of Amaghalu would be sold and that the land in dispute was one of 28 pieces belonging to the family they had agreed not to sell. Further still, he agreed that he used to attend a joint meeting with the respondents and that he had sold some family land with them to one Iro Nkwa which he said was outside the land in dispute. pw2, Igbe Kalu from Umukpai family said that members of Umukpai who were sons of the founder had continued to farm their land sharing common boundary with the land in dispute commu- G H

nally- thus jettisoning the partition stance taken by him. The submission made on behalf of the appellant that it was because individuals owned land around the land in dispute that Amaghalu's land partitioned could not be true. The assertion that Amaghalu's land was given out for farming purposes seasonally could not be equated to partitioning. Significantly, almost all the parcels of land show in the respondent's plan (Exhibit B) depict them as mostly all communally owned; improvement of any kind of family land by a member cannot cause family land to cease from being family property. See Shelle v. Asajon (1957)2 FSC 65 at page 67. Further, the use of family land by a member, however long, does not make the land the private property of that individual member. See Adenle, Ataoja of Oshogbo v. Oyegbade (1967)NMLR 136 at 137; Kuma Kuma 5 WACA61, and Eze v. Giliogbe & Ors. 14 WACA 61. Besides, it is trite law that the onus is on the party claiming property as his personal land to prove that he is in fact entitled to the family land against all other family members. See Atuanya v. Onye jekwe (supra). In the light of all I have said above, for the provisions of section 45 (now Section 46) of the Evidence Act, Cap.112 Law of the Federation of Nigeria) to apply, there must be an admission by the respondents or a finding by the trial court that the land in dispute was surrounded by other lands belonging to the appellant. See Idundun & Ors. v. Okumagba (1976) 9-10SC. 227at 249 251. See also Okechukwu v. Okafor (1961)2 SCNLR 369; (1961) All NLR 685.

This is not the case in the instant case. Rather, the evidence is to the effect that the said land was given to Olekanma Ofuche for farming purpose only by the ancestor of the respondents. In which case, if section 46 of the Evidence Act is to be invoked, it will be invoked in favour of the respondents, the admitted owners of the land and not the appellant.

On whether the court below was right in accepting as the High Court of Ohafia did the findings of the Arbitration of Ebem Elders as stated by DW1, it is pertinent in considering the issue of arbitration by the Elders of Ebem to advert to the pleading by the appellant at paragraph 9 of his Amended Statement of Claim. There, appellant alleged that later, the 1st, 2nd and 3rd respondents summoned the appellant before Ebem,

Ohafia Elders or Amalas. The said elders were shown as having looked into the matter with the appellant's consent by both sides going on the land with them and after inspecting the land came up with their findings which favoured the appellant as owner in possession thereof. The 1st and 3rd respondents who have boundary with appellant were admonished to confine themselves within their own portion. The learned trial judge who saw and heard DW1 and later evaluated his evidence, part of which was to the effect that "I know Kalu Agbai (Pw3) he was not sent by the Amalas of Ebem because he belonged to one of the branches of the disputing parties, hence they sent five of us who are independent to come and testify". This piece of evidence not having been challenged, was the version as between the appellant's and the respondents stories accepted by the trial court and it was affirmed by the court below. The court below was therefore right in refusing to re-open the issue as to the credibility of the two witnesses. See NICON v. Power and Industrial Engineering Co Ltd (1986)1 NWLR (part14)1 and Etowa Enang v. Ikor Adu (1981)11-12 SC. 25 at 39. B C D

As to whether this court would in the absence of error on the face of the record of this case occasioning a miscarriage of justice disturb the findings of the two courts below, it is enough to say here that as there been two concurrent findings of fact of the lower courts on all the issues hereinbefore considered by me it will be futile, in my opinion, for us to be called upon to review the evidence a third time. This is the moreso when it has not been demonstrated that these decisions of the two lower courts constitute a miscarriage of justice or that an error of substantive or procedural law was perpetrated or futherstill, that both decisions being perverse cannot be sustained. see Mogo Chinwendu v. Nwanegbo Mbamali (1980) 3 SC . 31 Overseas Construction Ltd v. Creek Enterprises Ltd (1985)3 NWLR (part 132)298, to mention but a few. E F G

For these and the fuller reasons contained in the leading judgment of my learned brother Mohammed, JSC I too dismiss this appeal. I make the same consequential orders inclusive of those as to costs made therein. H

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