

IN THE COURT OF APPEAL
BENIN JUDICIAL DIVISION HOLDEN AT BENIN CITY
4TH JUNE, 1986. CA/B/37/85
CORAM: O. EBOH, A. IKWECHEGH, O. AJOSE-ADEOGUN, JJCA

MONDAY A. O. OHIOWELE		APPELLANT
AND		
GABRIEL AIRELOBHEGBE		RESPONDENT

FAMILY LAW - Family status - The distinction between family membership and family status.

JURISDICTION - Claim - As to family Membership - The claim does not fall within any of the matters excluded - From the inherent and wide jurisdiction of the High Court.

JURISDICTION - Family Status - Only the customary court has original jurisdiction - To determine family status.

JUDGMENTS - Conclusion - Of the learned judge - Was totally misplaced - And contrary to the claim before the court.

JURISDICTION - Customary court - Its power and jurisdiction -As set out in the Customary Court Edict - Is not applicable to the appellant's claim.

FACTS

The Plaintiff/appellant instituted a suit in the High Court at Ekpoma against the defendant/respondent claiming (1) A declaration that defendant is not a child (son) of plaintiff's late father and not so recognized and (2) An injunction to restrain defendant from proclaiming or styling himself as son off plaintiff's late father or performing funeral rites or any act of inheritance under Ekpoma Customary Law in relation to the deceased. Upon completion of pleadings, defendant's solicitors raised preliminary

points of law challenging plaintiff's locus standi and the jurisdiction of the High Court on the ground that the reliefs claimed deal with a matter for which special Procedure has been provided for under the Laws of former Bendel State.

The learned trial judge ruled that it had no original jurisdiction to entertain the suit, but it appears that no specific ruling on the issue of 'locus standi' was made. Dissatisfied the plaintiff appealed to the Court of Appeal, Benin Division.

ISSUE FOR DETERMINATION

'Whether, considering the nature of the plaintiff's claim, it is the High Court or the Customary Court that has competent jurisdiction to entertain the said claim.'

HELD (Unanimously allowing the appeal per lead judgment of **AJOSE-ADEOGUN JCA**)

Jurisdiction - Claim

1. Upon a close examination and careful consideration of the above-quoted proviso, it seems clear to me that the appellant's claim, as formulated, does not fall within any of the matters excluded from the inherent and wide jurisdiction of the High Court. As a superior court of record, the High Court here does "posses and exercise all the jurisdiction, powers and authorities which are in or capable of being exercised by the High Court of Justice in England" (see section 9 of the aforesaid High Court Law). Its powers include those for making declarations. Besides, section 236(1) of the Constitution of the Federal Republic of Nigeria, 1979 confirmed and amplified the unlimited jurisdiction of a State's High Court. (p. 1831 E)

Family Law - Family Status

2. There is a distinction between family membership and family status; "... no question as to a person's status in any particular family can arise until it be first established that he is a member of that family" (See the case of Arnold Nwafia Vs. Nwanakwuo Ububa (1966) N.M.L.R. 219 and the English case of FORD Vs FORD (1946 - 47) C.L.R.524). (p.1832B)

Jurisdiction - Family Status

3. Only the customary court has original jurisdiction to determine family status while the High Court can entertain and make a declaration on the issue of family membership. (p. 1832 C)

Judgments - Conclusion

4. It is the above-mentioned distinction that the lower court failed to observe, thus leading to the erroneous decision that the question for determination was "whether the plaintiff (appellant) was the surviving oldest son in the line of Ohiowele, an issue which not only relates to the plaintiff's customary family status, but which is fundamental and not incidental ..." Surely, the said conclusion of the learned judge was totally misplaced and contrary to the claim before the court. It was not the plaintiff's status or that of his family that was at stake. Nobody questioned that. The claim before the court simply raised the question whether defendant (respondent) is a member of Ohiowele family at all. The issue posed by the learned Judge reversed that question as against the claimant (plaintiff/appellant) himself. (p. 1832 D)

Jurisdiction - Customary court

5. Reference was also made by respondent's counsel to section 20 Customary Court Edict (No. 2) of 1984 which was already in operation when the case under review was filed on 10th July, 1984. That section provides that the "jurisdiction and power of the Customary Court in civil causes and matters shall be as set out in the First Schedule to (the) Edict." A close look at the list in the said Schedule clearly shows that the appellant's claim does not come within any of the types of causes or matters so listed. The submission of learned counsel for the respondent concerning the applicability of the said section 20 to the appellant's claim is therefore misconceived. (p. 1833 B)

CASES REFERRED TO

Arnold Nwafia vs. Nwanakwuo Ububa (1966) N.M.L.R. 219

Ford vs. Ford (1946 - 47) C.L.R. 524.

Isaac Olubodun Akereja vs. Chief Daniel Awodele Oloba (for Sapetu B Family) in Appeal No. CA/B/138/84

STATUTES REFERRED TO

Constitution of the Federal Republic of Nigeria 1979 ss.1(i) 6 (6) and 236

C High Court Law of Bendel State, s. 10

Customary Court Edict (N0 2) s. 20.

LEAD JUDGMENT BY AJOSE-ADEOGUN JCA

D By a suit instituted in the High Court at Ekpoma, Bendel State, the plaintiff therein (now appellant) was claiming from the defendant/respondent the following reliefs:-

"1. A declaration that the defendant is not a son (child) of the plaintiff's father, Joseph Ofangbomu Ohiowele of Eguare Ekpoma, who E in his life time had no knowledge of nor did he recognise the defendant as an offspring of the plaintiff's late father's body or blood.

2. An injunction to restrain the defendant, his servants, agents and or privies from proclaiming or styling defendant as plaintiff's late F father's son or calling

Himself or using the name Joseph Ohiowele or answering that name Ohiowele or doing anything or performing any ceremony in relation to such funeral rites of the late Joseph Ohiowele and or performing any act of inheritance under the Ekpoma Customary Law in relation G thereto.

Upon completion of pleadings, defendant's solicitors applied, by motion on notice, that the preliminary points of law already raised in paragraph 11 of the Statement of defence be heard and determined before trial. The lower court granted leave for taking the said points which H may be briefly put thus:-

"1. that the plaintiff has no locus to institute this action.

2. The reliefs claimed ... deal with ... a matter for which special

procedure has been provided for under the (Laws of Bendel State and ... same is incompetent and not properly before the court."

Having heard counsel for both parties on the above application, the lower court ruled that it had no original jurisdiction to entertain the suit, thereby sustaining part of the objection of the defendants/applicant. B It appears that no specific ruling on the issue of 'locus standi' was made. This appeal is consequently by the plaintiff against the said ruling. In his Notice of Appeal, four grounds were set out. They are as follows:-

"1. The learned trial judge erred in law in failing to advert his C mind to the provisions of Sections 1(1), 6(6) and 236 of the Constitution of the Federal Republic of Nigeria, 1979 which give him unlimited jurisdiction to hear and determine any civil proceedings in which the existence, extent of a legal right by any person is in issue.

2. The learned trial judge erred in law when he inferred in his D judgment that the supremacy of the Constitution of the Federal Republic of Nigeria has been suspended thereby wrongly concluding that he no longer has jurisdiction to hear and determine the matter.

3. The learned trial judge erred in law when he refused jurisdic- E tion to hear and determine in a declaratory proceeding in which the plaintiff claims a legal right and calls for an injunction to restrain the defendants from encroaching on his (plaintiff's legal right as Ohiowele's first son.

4. The learned trial judge erred in law in that having decided F that he has no original jurisdiction to hear the matter, he ought to have struck out the case and no longer has jurisdiction to continue to adjourn it."

In what can hardly be described as a 'Brief,' counsel for the G plaintiff/appellant stated the only issue to be decided in this appeal as follows:-

"Whether section 1(1) of the 1979 Constitution of the Federal H Republic of Nigeria, on the basis of which the learned trial judge said he had no jurisdiction over this matter, has been suspended."

Apart from the very narrow approach adopted in formulating the issue for determination in this appeal, appellant's counsel advanced

virtually no argument in support of the four grounds of appeal put forward by him. All that was said in the so-called "Brief of Argument" was the unsupported submission "that section 1(1) of the said Constitution is not affected by the Suspension and Modification Decree." Counsel then
B concluded that "it would be contrary to the Constitution for the court to abandon its jurisdiction to hear and determine legal rights of the parties."

However, at the hearing of the appeal in this court, counsel for the appellant did mention that the claim before the trial court related to the "paternity or legitimacy of the defendant (respondent)." He then
C submitted that in view of the unlimited jurisdiction of the High Court under section 236 of 1979 Constitution, that court had jurisdiction and the lower court was therefore wrong in its ruling to the contrary.

On his part, counsel for the defendant/respondent identified the
D issue for determination in this appeal as being whether the plaintiff/appellant was in the proper court to prosecute the rights alleged to have been infringed by the respondent. In that regard, the suggestion of respondent's counsel would appear to be more appropriate than that of the appellant's
E counsel as to the real issue for determination in this appeal. But taking into consideration the nature of the appellant's claim, the ruling of the lower court under appeal, the grounds of appeal and the arguments or submissions of counsel - particularly the respondent's counsel, the suggestion issue may, with slight modification, be re-stated thus:-
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'Whether, considering the nature of the plaintiff's claim, it is the High Court or the Customary Court that has competent jurisdiction to entertain the said claim.'

Actually, the only ground of appeal which relates to the above
G question is the third one which complains about the error of the learned judge in refusing jurisdiction to hear and determine a claim for a declaration regarding the nature of defendant's interest in the plaintiff's family. In my view, all the other so-called grounds (I, II & IV) of the appeal are
H nothing but part of the arguments which may be used in determining the real and only issue in this appeal.

As already indicated earlier, the appellant's brief contains no argument in support of any of those grounds. Strictly speaking, the said three grounds

(I,11 & IV) should therefore be struck out or dismissed as not having been pursued.

Reverting back to the issue for determination in this appeal, learned counsel for the respondent submitted that the claim, as framed, was essentially based on Ekpoma Customary Law relating to the marriage of Respondent's mother to his father. In other words, so argued counsel, the claim challenged "the paternity of the respondent and his rights to inheritance of the estate of late Ohiowele as his eldest surviving son." Consequently, counsel submitted that the said claim was caught by the proviso to section 10 of the High Court Law of Bendel State, Cap. 65, which reads thus:-

"10(1) Provided that, except in so far as the executive Counsel may by order otherwise direct and except in suits transferred to the High Court under the provisions of the Customary Courts Law, the High Court shall not exercise original jurisdiction in any matter which is subject to the jurisdiction of a customary court relating to marriage, family status, guardianship of children and inheritance or disposition of property on death."

Upon a close examination and careful consideration of the above-quoted proviso, it seems clear to me that the appellant's claim, as formulated, does not fall within any of the matters excluded from the inherent and wide jurisdiction of the High Court. As a superior court of record, the High Court here does "posses and exercise all the jurisdiction, powers and authorities which are in or capable of being exercised by the High Court of Justice in England" (see section 9 of the aforesaid High Court Law). Its powers include those for making declarations. Besides, section 236(1) of the Constitution of the Federal Republic of Nigeria, 1979 confirmed and amplified the unlimited jurisdiction of a State's High Court.

In the case under appeal, the appellant's claim, as already set out above, is for a declaration that respondent is not a son (child) of appellant's late father. Such a claim obviously challenges the membership of the respondent within the appellant's family . It does not relate to the respondent's own marriage or his family status or even to the inheritance

or disposition of his property at death. The claim itself has nothing to do with the status or position of the respondent in plaintiff's family. Indeed, it seeks a declaration that respondent is not even a member, let alone having a position, status or any right in the appellant's family or its property.

There is a distinction between family membership and family status; "... no question as to a person's status in any particular family can arise until it be first established that he is a member of that family" (See the case of Arnold Nwafia Vs. Nwankwuo Ububa (1966) N.M.L R. 219 and the English case of FORD Vs FORD (1946 - 47) C.L.R.524). Only the customary court has original jurisdiction to determine family status while the High Court can entertain and make a declaration on the issue of family membership.

It is the above-mentioned distinction that the lower court failed to observe, thus leading to the erroneous decision that the question for determination was "whether the plaintiff (appellant) was the surviving oldest son in the line of Ohiowele, an issue which not only relates to the plaintiff's customary family status, but which is fundamental and not incidental ..." Surely, the said conclusion of the learned judge was totally misplaced and contrary to the claim before the court. It was not the plaintiff's status or that of his family that was at stake. Nobody questioned that. The claim before the court simply raised the question whether defendant (respondent) is a member of Ohiowele family at all. The issue posed by the learned Judge reversed that question as against the claimant (plaintiff/appellant) himself.

The case of Ububa (supra) relied upon by the respondent's counsel and also by the learned judge dealt with an issue relating to family status while the issue as to the family membership of the plaintiff/respondent therein was not in dispute. The question for determination in the said case was whether the respondent "was the surviving eldest male in the line of Aguba entitled as a matter of right to occupy and possess the property in dispute." Family membership of the said respondent was already accepted by both parties. The question that arose related only to

his position or status in that family. Thus, Ububa case (supra) rests on a different consideration and is not on all fours with the case now on appeal.

The above consideration should be sufficient to dispose of the appeal herein-particularly having regard to the grounds filed in respect thereof. But **reference was also made by respondent's counsel to section 20 Customary Court Edict (No. 2) of 1984 which was already in operation when the case under review was filed on 10th July, 1984. That section provides that the "jurisdiction and power of the Customary Court in civil causes and matters shall be as set out in the First Schedule to (the) Edict."** A close look at the list in the said Schedule clearly shows that the appellant's claim does not come within any of the types of causes or matters so listed. They relate to land, matrimonial causes or matters or those under customary law concerning liquidated demands, guardianship and custody of children under customary law, inheritance upon intestacy under customary law and for claims in contract or tort not exceeding N7000.00 **The submission of learned counsel for the respondent concerning the applicability of the said section 20 to the appellant's claim is therefore misconceived.**

Arising from all the above, it is my conclusion that it is the High Court which has the competent jurisdiction to entertain the appellant's claim. This conclusion is in line with a recent decision of this court in the case of Isaac Olubodun Akereja Vs. Chief Daniel Awodele Oloba (for Sapetu Family) in Appeal No. CA/B/138/84 decided on 15th January 1986. In the result, this appeal succeeds. The ruling of the High Court at Ekpoma in Bendel State, including the order for costs, delivered on 30th November, 1984 is accordingly hereby set aside. Instead, it is hereby ordered that the case be remitted back to the High Court at Ekpoma, which has jurisdiction, for trial of the substantive claim on its merits.

The appellant is entitled to the costs of this appeal and of the proceedings in the lower court, all of which are assessed at N120.00 to be paid by the defendant/respondent.

EBOH JCA

I have had the opportunity of reading, in draft, the judgment just delivered by my brother Ajose-adeogun, J.C.A., and I am in full agreement with the conclusion reached therein. I also allow the appeal and do hereby endorse the order as to costs.

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IKWECHEGH JCA

I agree.

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