

SUPREME COURT OF NIGERIA
17TH DAY OF JULY, 1998. SC. 44/1992.
CORAM:- I. L. KUTIGI, E. O. OGWUEGBU, U. MOHAMMED,
S. U. ONU, A. I. IGUH, JJSC.

VICTOR OSITA OKONKWO PLAINTIFF/APPELLANT
AND
1. GEORGE N.C. OKONKWO
2. CHRISTOPHER IKEMEFUNA OKONKWO
3. JOHN OKONKWO DEFENDANT/APPELLANTS
4. IKECHUKWU OKONKWO
5. SYNDICATED INVESTMENT HOLDINGS LTD

***APPEALS** - Grounds of appeal - Decision of the Court of Appeal - Which failed to advert to the new grounds of appeal filed by the appellant - But was based on issues formulated on them - Did not amount to any miscarriage of justice.*

***LAND LAW** - Sale of family property - By the head of family with the concurrence of a majority of the principal members of the family - Is valid*

***LAND LAW** - Sale of family land - Equitable remedy - Setting aside the sale of family property - Delay in challenging the contract of sale - The appellant has lost his right to have the transaction reopened.*

FACTS

In a suit filed before the Onitsha High Court by the plaintiff/appellant against the defendants/respondents he claimed inter alia for a declaration that the purported sale of a family property by the 1st to 4th defendants to the 5th defendants is null and void, and of no legal effect on the ground that he did not consent to the transaction. The appellant gave his evidence in chief and closed his case. For the defence only the 1st respondent who is the head of Okonkwo's family gave evidence. The

house in dispute was inherited by the 1st to 4th respondents, One F. Chuma Okonkwo who died in London and the appellant. The appellant has been living in London since 1959. In 1973 the 1st to 4th respondents granted a lease of the property to the 5th respondent. The appellant received his share of the proceeds from the lease. Subsequently, in 1974 the property was sold to the 5th respondent for a sum of N20,000.00. Out of the proceeds of the sale N3,600.00 was sent to the appellant. On 4th December, 1976, almost One and a half years after receiving the cheque of N3,600.00 the appellant returned the total amount in cash. Thereafter he instituted the action.

At the end of the hearing and in a considered judgment, the learned trial judge found that the transaction was voidable and since the appellant had not acted timeously his claim had failed. Dissatisfied with this judgment the appellant filed an appeal before the Court of Appeal, Enugu Division. That court in a split decision, Oguntade and Uwai JCA, on one side dismissed the appeal while Macaulay JCA disagreed with the majority view and allowed the appeal. The appellant aggrieved by the majority decision has finally appealed to the Supreme Court raising five issues. But the appeal was decided on issue one and a main issue framed by the court.

ISSUES FOR DETERMINATION

"1. Whether the judgment of the Court of Appeal must be sustained when the majority of the Justices of the Court of Appeal clearly failed and or neglected to consider the Amended Grounds of Appeal as well as the arguments proffered to them in the Appellant's brief in support of his case on an appeal before them?"

2. Whether the failure of the 1st to 4th respondents to obtain the consent of the appellant before they conveyed the property at No. 51 New Market Road, Onitsha, to the 5th respondent has nullified the sale of the house.

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

Appeals - Grounds of appeal

1. The error of Oguntade JCA, in failing to advert his mind to the new brief filed by the appellant has, in my view, been cured by the decision of the learned justice to accept the issues formulated by the respondent's counsel in the respondent's brief as the basis for writing his judgment. It is quite clear that those issues in the 5th respondent's brief were formulated on the new grounds which the learned counsel for the appellant submitted to have been ignored by Oguntade JCA. In comparing the issues raised by respective counsel for the parties in the appellant's and the 5th respondent's briefs before the Court of Appeal it is quite clear that the issues raised by the learned counsel for the respondents relate more to the 8 new grounds of appeal than the issues formulated in the appellant's brief. After reading carefully the judgment of Oguntade, JCA, it is without any doubt that the learned justice had considered all the points of law and fact argued by the appellant's counsel before the Court of Appeal. Thus, it is my view that the majority decision of the Court of Appeal was based on the issues formulated against the new grounds of appeal filed by the appellant on 22nd January, 1987. The majority decision of the Court of Appeal did not therefore amount to any miscarriage of justice calling for ordering a retrial of this suit. (p. 2040 A)

Sale of family property - By the head

2. The learned justice of the Court of Appeal considered the issue of concurrence of all members of the family in alienating the family property. The learned justice's opinion is quite on the track wherein he held;

"The plaintiff says he did not consent to the sale. He therefore wished it set aside. On the state of the law, it is manifest that the sale of the property to the 5th defendant was not void. Can the plaintiff succeed in setting the sale aside? I think not. The inability of the plaintiff to succeed stems from two reasons. Firstly, the plaintiff might have been an important or principal member of his family. But he was not the head. At the time of the transaction complained of in this suit, the plaintiff

*resided in far away England. Even if plaintiff were in Nigeria, it has to be understood that it is not the requirement of law that for a valid sale of family property, there has to be a unanimity of concurrence of the members of the family. To insist on that is to set up a dictatorship of the minority. It would seem that if the head of family secures the concurrence of the majority of the principal members of the family, he can validly alienate the family property.*² (p. 2040 G)

Equitable remedy - Setting aside sale of family property

3. The appellant received the amount of N3,600.00 and kept the money for almost one and half years before he returned it. It was held, quite rightly, by the learned trial judge that the appellant had not acted tim-
eously in order to justify a decision in his favour resulting in setting aside
the sale. It should be borne in mind that what the appellant was applying
for the trial court to invoke in his favour is an equitable remedy and in
view of the delay in challenging the contract of sale of the house the
appellant has lost his right to have the transaction reopened - see Taylor
and ors. v. Kingsway Stores of Nigeria Ltd. and Anor. (1965) ALL NLR
19. (p. 2042 A)

NOTABLE POINTS OF INTEREST

MOHAMMED.JSC

1. Need to canvas arguments on the basis of issues formulated
This Court had pronounced in several decisions that arguments are to be
canvassed on the basis of issues formulated and not on grounds of ap-
peal, for while a resolution of an issue which is a question in dispute
between the parties may determine an appeal, a ground of appeal which
forms a part of that issue may not - see Olu Ogunsola v. NICON (1996)
1 NWLR (Pt. 423) 126 and Ala Mazi Aja and Another v. John Okoro and
ors (1991) 7 NWLR (Pt. 203) 260 at 277. (p. 2039 F)

² See also Odekilekun v. Hassan (1997) 12 KLR (pt 55) 2026 and Olorunfunmi v. Saka (1994) 3 KLR 19 where the Supreme Court reached a similar decision.

2. It is the duty of the plaintiff to establish his claim

The failure of the 5th respondent to give evidence is a weak ground to complain about. It is for the appellant, being plaintiff who filed the suit to prove his claim. If a plaintiff fails to establish his claim the defence is not duty bound to call evidence. This procedure is so elementary to be highlighted. (p. 2042 C)

IGUHJSC

3. Customary law on the sale of family land

The law is that a sale of family land which the head of the family carries out as such head of family, whether with or without some principal members of the family is only voidable but not void at the instance of the non-consenting principal members of the family provided such non-consenting members acted timeously and are not caught by laches. This is against a sale made by principal members of a family without the concurrence of the head of the family. This, in accordance with customary law, is void ab initio. See Ekipendu and others v. Erika (1959) 4 F.S.C. 79 at 81, Kwesi Manko and others v. Bonso and others (1936) 3 W.A.C.A. 62 at 63 etc. (p. 2053 B)

REPRESENTATION

S. I. Oputa for the appellant

Dr. Ilochi A Okafor, SAN with G. U. Ahuchogu

CASES REFERRED TO

Mogaji and v. Nuga (1960) 5 F.S.C. 107 at 109

Ogunsola v. NICON (1996) 1 NWLR (pt. 423) 126

Aja r v. Okoro (1991 7 NWLR (pt. 203) 260 at 277.

Adewuyin vs. Ishola (1958) WNLR 110 at 113

Adebedu v. Makanjuola 10 WACA.

Taylor v. Kingsway Stores of Nigeria Ltd (1965) All NLR 19

Kwesi Manko v. Bansa (1936) 3 WACA 62 at 63

Bayaidu v. Mensah FCL 150

Osayeme v. The State (1966) NMLR 399

Sanyaolu v. The State (1976)6 SC.37
 Wankey v. The State (1993)5 NWLR (part 295) 542 at 552
 Enang & ors. v. Adu & ors. (1981) 11 - 12 SC. 25 at 42

LEAD JUDGMENT BY MOHAMMED JSC

B A dispute over the sale of a family house led to the filing of this
 suit before Onitsha High Court. This is an appeal from the judgment of
 the Court of Appeal, Enugu, in which it affirmed the decision of Onitsha
 High Court wherein the claim of Mr. Victor Osita Okonkwo against his
 C four brothers and the Syndicated Investment Holdings Limited was dis-
 missed. Mr. Okonkwo who hereinafter shall be referred to as the appel-
 lant filed this suit against the five defendants, now respondents in this
 appeal, and claimed for the following reliefs:

D *"(1) A declaration that the purported sale of the said property
 by the 1st to 4th defendants to the 5th defendants, is null and void, and
 of no legal effect.*

E *(2) An order of Court for the cancellation of the deed of con-
 veyance between the 1st to 4th defendants with the 5th defendant and
 registered as No. 37 at page 37 in Volume 765 in the land Registry in the
 office at Enugu, on ground that the plaintiff is not a consenting party to
 the said agreement."*

F The facts of the case are simple because only two witnesses
 testified during the trial. The appellant gave his evidence in chief and
 closed his case and, for the defence, only Mr. George N. C. Okonkwo,
 the head of Okonkwo's family, gave evidence and explained the family's
 story about the sale of the family property. The house in dispute was an
 G estate left behind by Mr. Ogbuefi Nnanyelugo Samuel Nnebechi Okonkwo
 of Ogbotu Village, Onitsha, who died intestate in September, 1931. The
 1st to 4th respondents, one F. Chuma Okonkwo who died in London and
 the appellant inherited the property.

H The appellant has been living in London since 1959. In 1973 the
 4 brothers, 1st to 4th respondents, granted a lease of No. 51 New Mar-
 ket Road, Onitsha to the 5th respondent. The 5th respondent paid
 N10,000.00 as advance rent for the first ten years of the agreement. The

appellant was paid N1,000.00 being his share of the proceeds from the lease. Later, on 9th December, 1974, No. 51 New Market Road, Onitsha, was sold to the 5th respondent for a sum of N20,000.00. Out of the proceeds of the sale N3,600.00 was sent to the appellant.

The appellant admitted receiving a cheque for the said amount in June, 1975. It was sent to him by the 1st respondent. He told the court that he did not know that the amount was his share from the proceeds of the sale of the family house. On 4th December, 1976, almost one and a half years after receiving the cheque of N3,600.00, the appellant returned the total amount in cash to the respondent. Thereafter he went and took out a writ in the High Court, Onitsha, and sought for the reliefs which I mentioned above, in this judgment. At the end of the hearing and in a considered judgment, the learned trial judge found that the transaction was voidable and since the appellant had not acted timeously his claim had failed. The learned trial judge went further and concluded as follows:

"In any event, Mogaji (supra) (Mogaji and ors. v. Nuga (1960) 5 F.S.C. 107 AT 109) is the authority for the position in law that the non availability of a principal member would not be a sufficient reason to void the sale of family land if such a sale was at the instance of the Head of the family with the consent of other members. The sale in this case was agreed by 4 of the plaintiff's brothers, including the 1st defendant who is his Okpala or Head of family. This being so, the sale is unimpeachable and there can be no basis for setting it aside or for cancelling the Deed of Conveyance."

Dissatisfied with this judgment the appellant filed an appeal before the Court of Appeal. The court below, in a split decision, Oguntade and Uwaifo JJCA, on one side, dismissed the appeal. Learned justice of the Court of Appeal, Macaulay disagreed with the majority view and allowed the appeal. It is against the majority decision that the appellant has come finally before this court armed with six grounds of appeal.

Learned Counsel for the appellant, in the appellant's brief, made a submission which I find pertinent to consider before dealing with the issues formulated by the respective counsel for the parties. Mr. Oputa

pointed out that the appellants filed two briefs before the Court of Appeal. The first was filed on 11/2/85 and the second on 22nd January, 1987 when the learned counsel prayed for an order to amend his grounds of appeal and substitute the original and additional grounds with the new grounds of appeal. Learned counsel, in the same motion, applied for extension of time to file what he called "a proper brief of argument." The application was granted. The 5th respondent filed his brief on 18/1/88. The appeal came up for hearing on 22/9/98. Both counsel adopted the briefs filed on 2/1/87 and on 18/1/88 on behalf of their respective parties and the Court of Appeal reserved judgment.

When the Court of Appeal delivered its decision learned counsel for the appellant observed that Ogunlade, learned justice of the Court of Appeal who wrote the lead judgment ignored the appellant's amended grounds of appeal and the brief filed on 22/1/87 which was based on those amended grounds. Hence the learned counsel formulated the following issues which he said are pertinent for the determination of this appeal:

"1. Whether the judgment of the Court of Appeal must be sustained when the majority of the Justices of the Court of Appeal clearly failed and or neglected to consider the Amended Grounds of Appeal as well as the arguments proffered to them in the Appellant's brief in support of his case on an appeal before them?"

2. Whether the 5th defendant/respondent pleaded any equitable defence as well as particulars of such equitable defence to defeat the plaintiff's/appellant's claim?

3. If the answer to 2 above is in the positive did the 5th defendant/respondent lead any evidence in support of such pleading?

4. What is the nature of delay that would amount to a bar for an equitable relief of setting aside a Conveyance by a consenting party who did not consent?

5. Was the plaintiff/appellant guilty of such delay?"

Learned counsel for the respondents, Mr. Nwakoby, having observed the line of argument of the appellant's counsel identified the following three issues for the determination of the appeal:

"1. Whether an appellant is entitled *ex debito justitiae* to call on the Supreme Court to send an appeal back to the Court of Appeal for rehearing without showing that he had suffered any miscarriage of justice in that court.

2. Whether the Supreme Court is not in as good a position as the Court of Appeal in giving any judgment which the trial court could have given.

3. Whether on the merits of the case the Supreme Court should not dispose of the appeal at once instead of remitting it to the Court of Appeal for rehearing."

After going through the judgment written by Oguntade, JCA, I agree that the learned justice did not advert his mind to the appellant's brief which was filed on 21st January, 1987 and which was based on the 8 amended grounds of appeal. In dealing with the arguments advanced by learned counsel for the appellant on issue I which pointed to the failure of the learned justice of the Court of Appeal to consider the new grounds and the amended brief I went through both the original and the amended briefs filed by the appellant before the Court of Appeal. My resolve is that the original brief and the amended brief were almost the same except that no issues for determination had been drawn up in the original brief. However, even in the amended brief where issues were formulated, learned counsel for the appellant, contrary to the general principles and the Rules on brief writing, argued only the grounds of appeal and not the issues formulated on them. This Court had pronounced in several decisions that arguments are to be canvassed on the basis of issues formulated and not on grounds of appeal, for while a resolution of an issue which is a question in dispute between the parties may determine an appeal, a ground of appeal which forms a part of that issue may not - see Olu Ogunsola v. NICON (1996) 1 NWLR (Pt. 423) 126 and Ala Mazi Aja and Another v. John Okoro and ors (1991) 7 NWLR (Pt. 203) 260 at 277.

I have also looked into all the grounds of appeal filed by the appellant including the 8 new grounds which were made to substitute the original and the amended grounds and I agree with learned justice of the

Court of Appeal that the grounds were plainly repetitious. For example grounds 2, 3 and 4 of the new grounds were questioning the trial judge's decision in dismissing the appellant's claim on the ground of delay. They were couched in different terminologies only.

B Be that as it may, **the error of Oguntade JCA, in failing to
advert his mind to the new brief filed by the appellant has, in my
view, been cured by the decision of the learned justice to accept the
issues formulated by the respondent's counsel in the respondent's
brief as the basis for writing his judgment. It is quite clear that
C those issues in the 5th respondent's brief were formulated on the
new grounds which the learned counsel for the appellant submitted
to have been ignored by Oguntade JCA. In comparing the issues
raised by respective counsel for the parties in the appellant's and
D the 5th respondent's briefs before the Court of Appeal it is quite
clear that the issues raised by the learned counsel for the respon-
dents relate more to the 8 new grounds of appeal than the issues
formulated in the appellant's brief.**

E After reading carefully the judgment of Oguntade, JCA, it
is without any doubt that the learned justice had considered all the
points of law and fact argued by the appellant's counsel before the
Court of Appeal. Thus, it is my view that the majority decision of
the Court of Appeal was based on the issues formulated against the
F new grounds of appeal filed by the appellant on 22nd January, 1987.
The majority decision of the Court of Appeal did not therefore
amount to any miscarriage of justice calling for ordering a retrial
of this suit.

G The main issue in this appeal is the question whether the failure
of the 1st to 4th respondents to obtain the consent of the appellant before
they conveyed the property at No. 51 New Market Road, Onitsha, to the
5th respondent has nullified the sale of the house. **The learned justice
H of the Court of Appeal considered the issue of concurrence of all
members of the family in alienating the family property. The
learned justice's opinion is quite on the track wherein he held;**

"The plaintiff says he did not consent to the sale. He there-

fore wished it set aside. On the state of the law, it is manifest that the sale of the property to the 5th defendant was not void. Can the plaintiff succeed in setting the sale aside? I think not. The inability of the plaintiff to succeed stems from two reasons. Firstly, the plaintiff might have been an important or principal member of his family. But he was not the head. At the time of the transaction complained of in this suit, the plaintiff resided in far away England. Even if plaintiff were in Nigeria, it has to be understood that it is not the requirement of law that for a valid sale of family property, there has to be a unanimity of concurrence of the members of the family. To insist on that is to set up a dictatorship of the minority. It would seem that if the head of family secures the concurrence of the majority of the principal members of the family, he can validly alienate the family property.

In Adewuyin & ors. vs. Mosadogun Ishola & ors. (1958) W.N.L.R. 110 at 113 Ademola C.J. said:

"Now the case Bello Adedebu and another v. Makanjuola 10 W.A.C.A. 33 laid down the principle that the head of a family in Ibadan cannot dispose of family property without the consent of the family. This in my view must not be taken to mean that every member of the family has to give his consent. It is, in my view enough if a majority of the members gave their consent."

The main point in consideration therefore is whether the appellant, after refunding the N3,600.00 could have the sale of the property set aside. In Mogaji and ors. v. Nuga (Supra) and Banso and ors. v. Manko & ors. 3 WACA 62 the agreement to sell a family property was held not void but it could be opened up provided the plaintiff acted timely. In Halsbury's Law of England, 4th Edition, at page 1004 the following was stated under the heading "Cases where Special Promptitude is required"

"In claims, too, for specific performance and for rescission of contracts, the special relief in equity is only given on condition that the plaintiff comes with great promptitude any substantial delay after the negotiations have terminated, such as a year OR probably less, will be a bar. In cases of rescission the defendant may be altering his position in

the belief that the contract is to stand, and the claim to rescind must be made promptly."

The appellant received the amount of N3,600.00 and kept the money for almost one and half years before he returned it. It was held, quite rightly, by the learned trial judge that the appellant had not acted timeously in order to justify a decision in his favour resulting in setting aside the sale. It should be borne in mind that what the appellant was applying for the trial court to invoke in his favour is an equitable remedy and in view of the delay in challenging the contract of sale of the house the appellant has lost his right to have the transaction reopened - see Taylor and ors. v. Kingsway Stores of Nigeria Ltd. and Anor. (1965) ALL NLR 19. The failure of the 5th respondent to give evidence is a weak ground to complain about. It is for the appellant, being plaintiff who filed the suit to prove his claim. If a plaintiff fails to establish his claim the defence is not duty bound to call evidence. This procedure is so elementary to be highlighted. It is plain therefore that the majority decision of the Court of Appeal is right to affirm the learned trial judge's conclusion.

In sum, this appeal has failed and it is dismissed. The majority decision of the Court of Appeal is hereby affirmed. I award N10,000.00 costs in favour of the 5th respondent.

F

KUTIGI JSC

I read in advance the judgment just delivered by my learned brother, Mohammed, JSC. I agree with his reasoning and conclusions. I find no merit in the appeal. It is accordingly dismissed. The judgements of the lower courts are hereby confirmed, costs of N10,000.00 (Ten Thousand Naira) are awarded to the 5th defendant/respondent.

H

OGWUEGBU JSC

I have had the advantage of reading in draft the judgement just delivered by my learned brother Mohammed, J.S.C. I agree with him that this appeal should be dismissed and with the reasons which he gave

for reaching this conclusion. I too dismiss the appeal and award N10,000.00 costs to the respondents.

ONU JSC

I read before now the judgement of my learned brother Mohammed, JSC just delivered. I entirely agree with him that the appeal lacks merit and ought therefore to fail.

In expatiating on the judgement I wish to add as follows:-

The plaintiff/appellant's main complaint revolves around the sale by 1st - 4th defendants to the 5th defendant of the property No. 51 New Market Road, Onitsha belonging to the plaintiff as well as 1st - 4th defendant's father, Ogbuefi Nnanyelugo Samuel Nnebechi Okonkwo, by a conveyance (Exhibit B) he (appellant) not being a consenting party to the sale thereof. Prior to the sale, proceeds of which the appellant benefited from by receiving his share thereof though he denied same, he was held, rightly in my view, to be a beneficiary of the lease vide Exhibit 'A' of the same property.

After the learned trial judge F.O. Awogu, J. (as the then was) had weighed and evaluated the evidence adduced as well as considered the addresses of counsel for both sides, he held, inter alia, as follows in his judgement:-

"The relief sought by the plaintiff is that Exhibit B is null and void and of no effect. The reliefs as modified in the Statement of Claim, read as follows:-

(1) A declaration that the purported sale of the said property by the 1st to 4th defendants to 5th defendant, is null and void, and of no legal effect.

(2) An order of Court for the cancellation of the deed of conveyance between the 1st to 4th defendants with the 5th defendant and registered as No.37 at page 37 in Volume 756 in the land Registry in the office at Enugu, on ground that the Plaintiff is not a consenting party to the said agreement.

Assuming the plaintiff succeeded in his claim, Exhibit 'A' would still be

binding on the parties. The plaintiff said he did not initially agree to Exhibit A, which is in respect of the same piece or parcel of land, the land would still remain in the possession of the 5th defendant for 60 years beginning from 1st January, 1974. In his statement of claim, the plaintiff alleged fraud on the part of the 5th defendant, which he particularized in paragraph 8. He led no evidence of fraud."

The learned Judge went on -

"Secondly, in paragraph 7 of his statement of claim, the plaintiff said that Exhibit B was made on 9/12/74 without his being consulted and that "he promptly repudiated the said transaction and issued a public notice dated 4/12/76." A delay of nearly 2 years before repudiating the sale can hardly be regarded as "prompt action." Thirdly, the plaintiff did not disclose in his pleadings that he got any share from the proceeds of the lead (Exhibit A) and the sale (Exhibit B). The purpose of this was no doubt to create the impression that no benefit ensued to him from both transactions. He admitted under cross-examination by the 1st defendant who was the Okpala of the family at the point in time, that he received his share of the proceeds of the lease (Exhibit A) and later of the sale (Exhibit B) save that, as he put it, he did not know that the cheque for N3,600 was meant to be his share of the proceeds of the sale. Assuming this to be so, a reasonable man would be put on inquiry to know what the money was meant for and the plaintiff is certainly a reasonable man even if judged by the standard of those who board the Clapham Bus (London) or Ekene Dili Chukwu Bus (Nigeria). But he made no inquiry. He claimed to have refunded the N3,600.00 to the 1st defendant but lacked the courage to say so in his statement of claim. From his own evidence, the plaintiff was away from Nigeria from 1959 till date. The lease and sale were in 1974, some 15 years after he had left Nigeria. If, as he put it, he reluctantly took his share of the lease, was it unreasonable for 1-4 defendants to presume that he would also agree to the sale, the more so when he got his share of N3,600.00 and said nothing nearly two years? I do not think so."

The learned trial Judge in conclusion held as follows:-

"On the authority of Bonso & ors. v. Manko & ors. 3 WACA 62, the

plaintiff should have acted more timeously, since the sale was only voidable. In any event, Mogaji (supra) is the authority for the position in law that the non-availability of a principal member would not be a sufficient reason to void the sale of family land if such a sale was at the instance of the Head of the family with the consent of other members. The sale in this case was agreed to by 4 of the plaintiff's brothers, including the 1st defendant who is his Okpala or Head of the family. This being so, the sale is impeachable (sic) and there can be no basis for setting it aside, or for cancelling the Deed of Conveyance" (Underlining is for emphasis). B C

Affirming the decision of the trial court, the court below by the majority decision of Oguntade and Uwaifo, JJ.C.A. (Macaulay J.C.A. dissenting) said inter alia as follows:-

"The plaintiff says he did not consent to the sale. He therefore wished it set aside. On the state of the law, it is manifest that the sale of the property to the 5th defendant was not void. Can the plaintiff succeed in setting the sale aside? I think not. The inability of the plaintiff to succeed stems from two reasons. D E

Firstly, the plaintiff might have been an important or principal member of his family. But he was not the head. At the time of the transaction complained of in this suit, the plaintiff resided in far away England. Even if the plaintiff were in Nigeria, it has to be understood that it is not the requirement of law that for a valid sale of family property, there has to be a unanimity of concurrence of the members of the family. To insist on that is to set up a dictatorship of the majority. It would seem that if the head of the family secures the concurrence of the majority of the principal members of the family, he can validly alienate family property." F G

After referring to two authorities i.e. Adewuyin v. Ishola (1958) WNLR 110 at 113 and Mogaji & Ors. v. Nuga (1960) 5 FSC. 107 at 109 to buttress the above view, the learned Justice delivering the leading judgment (per Oguntade, J.C.A.) further said:-

"The second reason why the plaintiff's action deserved to fail arises from that by asking that the sale be set aside, the plaintiff was

appealing to the equitable jurisdiction of the court.

In KWESI MANKO & ORS. V. BONSO & ORS. (1936) 3 WACA 62 at 63 Petrides C.J. Gold Coast referred to the observation of the full court in QUASSIE BAYAIDU v. KWAMINA MENSAH F.C.L. 150 to the effect that:

"Now, although it may be and we believe it, the law that the concurrence of the members of the family ought to be given in order to constitute an unimpeachable sale of family land, the sale is not in itself void, but is capable of being opened up at the instance of the family, provided they avail themselves of their right timeously and under circumstances in which upon the rescinding of the bargain, the purchases (sic) can be fully resolved to the position in which he stood before the sale."

Later down in its judgment, the court below held:-

"It is not worthy that the plaintiff never tendered in evidence the letter sent to him by 1st defendant with the money. The 1st defendant however said that he had said in the letter that the sum of N3,600.00 sent to the plaintiff was "proceeds from 51 New Market Road, Onitsha." The plaintiff agreed that he had previously got his share of the rents received from the property when it was leased. The question is - how could plaintiff have received a further N3,600.00 as proceeds from the same property without being put on enquiry? He received the money in June, 1975 and did nothing until 4/12/76 about 11/2 (one and half) years later when he made a publication in the "Daily Star." This situation must stir the mind of any Judge being called upon to exercise his equitable jurisdiction on account of the plaintiff.

Not surprisingly in his judgment, the trial Judge said at page 35: "Secondly, in paragraph 7 of his Statement of Claim, the plaintiff said that Exhibit 'B' was made on 9/12/74 without his being consulted and that "he promptly repudiated the said transaction and issued a public notice dated 4/12/76." A delay of nearly two years before repudiating the sale can hardly be regarded as "prompt action."

I think the lower court was right to so conclude."

I also cannot but agree with the above conclusion arrived at by the court below for its reasonableness and unassailability. Besides, the

decisions of the two courts below constitute concurrent findings of fact in relation to which the attitude of this court is that they ought not to be disturbed unless there is some miscarriage of justice or a violation of some principles of law or procedure. See Osayeme v. The State (1966) NMLR 399; Sanyaolu v. The State (1976) 6 SC. 37; and Wankey v. The State (1993) 5 NWLR (Part 295) 542 at 552. See also Enang & ors. v. Adu & Ors. (1981) 11 - 12 SC. 25 at 42; Okagbue v. Romaine (1982) 5 SC. 133 at 170-171; Elike v. Nwankwoala (1984) 12 SC. 301 at 325 and Evans v. Bartlam (1937) AC. 473. For this court sitting on a further appeal to interfere with a decision, such as the one in hand based on matters of fact, especially when it is clear that the same is not perverse or the result of an improper exercise of judicial discretion; it can only do so if the trial court is shown to have failed to do so and the court below is shown to have adopted same in error. See Ajadi v. Okenihun (1985) 1 NWLR 484. In Fashanu v. Adekoya (1974) 6 SC. 83 Coker, JSC delivering the judgment of this court, stated as follows:-

"The appraisal of oral evidence and the ascription of probative values to such evidence is the primary duty of the tribunal of trial and a Court of Appeal would only interfere with the performance of that exercise if the trial court had made an imperfect or improper use of the opportunities of hearing and seeing the witnesses or has drawn wrong conclusions from accepted or proved facts which those acts do not support or indeed has approached the determination of those facts in a manner which these facts cannot and do not in themselves support."

Karibi-Whyte, JSC in the same vein restated the law in Chief Patrick A. Abusomwan v. Mercantile Bank of Nigeria Ltd. (1987) 3 NWLR (Part 60) 196 at 208 thus:

"It is our law that where there is ample evidence and the trial Judge fails to evaluate it and make correct findings, the Court of Appeal is at liberty to evaluate such findings and make proper findings, unless the findings rest on the credibility of witnesses. See Shell B. Petroleum Co. (Nig.) Ltd. v. His Highness Pere-Cole & ors. (1978) 3 SC. 183." See also Woluchem & ors. v. Gudi & Ors. (1981) 5 SC. 291.

In making findings of fact in the instant case, the learned trial Judge who

had the prerogative of choosing which witnesses to believe, made a perfect job of his duty in that regard and the court below whose duty it was to interfere with such findings if it found reason so to do, declined to do so as the learned trial Judge did not misdirect himself or found same to be B perverse. Hence, this court will decline to intervene. See Palmer v. Dada (1986) 5 NWLR 541 at 542 and Bamishebi v. Faleye (1987) 2 NWLR 51 at 52-53.

For these reasons and the fuller ones contained in the leading C judgment of my learned brother Mohammed, JSC I too dismiss this appeal. I make the same consequential orders inclusive of the order for costs as contained in the leading judgment.

IGUH JSC

D I have had the privilege of reading in advance the judgment just delivered by my learned brother, Mohammed, J.S.C and I agree entirely that this appeal lacks substance and should be dismissed.

The lone issue argued by learned counsel for the appellant is E whether the alleged failure by the Court of Appeal to consider the amended grounds of appeal and the arguments proffered in support thereof in the appellant's amended brief of argument did not constitute such fundamental breach of the audi alteram partem rule as to render its decision defective and liable to be set aside. It is the contention of learned counsel for F the appellant, S. I. Oputa Esq., relying on the decision of this court in Ebenezer Nwokoro and Others v. Titus Onuma and Another (1990) 3 N.W.L.R. (Part 136) 22 at 32 - 33, that the decision of the court below was so grossly irregular and erroneous that only a hearing of the appeal G de novo on the merits before another panel of the Court of Appeal would meet the justice of the case. He argued that this was because the judgment of the court below failed to consider the appellant's amended grounds of appeal together with his amended brief of argument filed on the 22nd H January, 1987 based on the said amended grounds of appeal which amended brief the appellant relied on in the appeal. He contended that the Court of Appeal did not hear the appellant when it failed to consider the appeal as argued in the appellant's amended brief of argument and that the said

court below was therefore in breach of the audi alteram partem rule.

For the respondents, learned leading Senior Advocate of Nigeria, Dr. Ilochi A. Okafor, after a close examination of the issues that arose in Nwokoro's case submitted that these were clearly distinguishable from those under consideration in the present case. He argued that the issues in both cases are so materially different that the decision in Nwokoro's case could not conceivably apply to the facts of the present appeal. Learned Senior Advocate stressed that the issues considered by the Court of Appeal in the present case, not only fully covered those formulated in the appellant's amended brief of argument, but went further to deal with other material questions relevant to the appeal but not specifically raised in the appellant's amended brief. He therefore submitted that no question of any breach of the audi alteram partem rule arises in this case and that the judgment of the court below, in the absence of any error of law or a miscarriage of justice, could not be faulted. He urged the court to dismiss this appeal.

A close study of the decision of this court in Nwokoro's case clearly shows that the facts therein are materially different from those of the present appeal. Whereas in the former case, the original appellants' brief was defective in that it did not contain, as it ought to, the issues for determination, the amended brief was, in all respects, not defective but valid. The said amended brief fully corrected the inadequacies in the original brief of the appellants. This, it did, by the provision therein of appropriate issues for the determination of the appeal and restoring grounds 8, 9 and 10 of the appeal which had been abandoned in the original brief. Regrettably, however, the court below in hearing the appeal, perhaps inadvertent, considered the original defective and incomplete brief. In effect the Court of Appeal considered much less than the totality of what was urged upon it by the appellants in their amended brief of argument when it proceeded to determine the appeal on the defective and incomplete appellants' original brief.

In the first place, it is a well established principle of law that once ordered, what stood before an amendment of a process is no longer material before the court and no longer defines the issues to be tried. See

Warner v. Simpson (1952) 2 W.L.R. 109, Grace Amanambu v. Alexander Okafor and Another (1966) 1 ALL N.L.R. 205, Col. Rotimi v. MC Gregor (1974) 11 S.C. 133 at 152. The material and appropriate issues for the determination of the court, in so far as the appellants in the Nwokoro's case were concerned, were therefore as formulated and set out in their amended brief of argument and not what stood before the amendment.

In the second place, the appellants' original brief in the Nwokoro's case was defective in that it did not contain issues for determination by the court. This is as against the appellants' amended brief which, admittedly, was not defective as it contained questions for determination by the Court of Appeal. The appellants' original brief of argument, being thus defective and invalid, the Court of Appeal, in effect, had not proper brief of argument before it on behalf of the appellants. It ought not, therefore, to have made use of or relied on such a defective brief of argument as it did when it had the amended and valid appellants' brief of argument before it for the determination of the appeal. See Ebenezer Nwokoro and others v. Titus Onuma and Another (supra) at page 32, E Bioku v. Light Machines (1986) 5 N.W.L.R. (Part 39) 42 etc.

In the third place, it is fully recognized that the audi alteram partem rule, that is to say, the obligation to hear the other side of a dispute or the right of a party in a dispute to be heard is so basic and fundamental a principle of our adjudicatory system of the determination of disputes that it cannot be compromised on any ground. As Karibi-Whyte, J.S.C. aptly put it in Nwokoro's case at page 31.

"It is a fundamental requirement of our adversary system of administration of justice that a party to the litigation before the court must be heard before the court can determine his civil rights or obligations before it".

As already indicated, the Court of Appeal, quite erroneously, decided the appeal in the Nwokoro case by a consideration of a defective appellants' original brief as against their valid amended brief in which appropriate issues for the resolution of the court were clearly set out. It also decided the appeal oblivious of the said grounds 8, 9 and 10 of the appeal which, although abandoned in the original appellants' brief, were

restored in the amended appellants' brief.

There can be no doubt that the appellants in the Nwokoro case, as indeed, parties to any other case, were entitled as of right to the consideration of the case they presented before the court and to be heard thereupon. The appellants were also entitled to have their appeal considered against the background of their complaints as formulated in their issues for the determination of the appeal. This, the Court of Appeal failed to do in the Nwokoro case. In the same vein, where a court of law relied on a case abandoned by the litigant or on matters, which no longer defined the issues to be tried between the parties, as in the present appeal, for the determination of the cause or matter before it, I think it can be said, in such circumstance, that such a litigant neither received a fair hearing nor was he really heard as prescribed by law. It therefore seems to me plain that the appellants' case in the Nwokoro case as presented before the court of Appeals was obviously not fully considered by that court. This is because the arguments in their amended brief of argument were completely ignored or inadvertently lost sight of and were therefore not considered. It was their original brief which was no longer material before the court and no longer defined the issues to be tried between the parties that was considered by the Court of Appeal. It is clear to me that this was a patent breach of the appellants' right to fair hearing which is fundamental in our jurisprudence. I entertain no doubt that this court was quite right in allowing the appeal in the Nwokoro case on ground of want of fair hearing.

Turning now to the facts of the present case, it cannot be disputed that both briefs of argument filed by the appellant were in certain respects defective. The original brief was patently defective in that it did not contain the issues for determination. The amended brief, on the other hand, although it set out four issues for determination, proceeded to argue, not the issues so formulated, but the grounds of appeal filed. It was in the face of this seeming irregularity in the appellant's amended brief that learned counsel for the appellant was quite rightly chastised by the Court of Appeal.

It cannot be over emphasized, and the point is firmly settled that

it is the issues that are argued in a brief of argument and not the grounds of appeal. See Western Steel Works Ltd. v. Iron and Steel Workers Union of Nigeria (1987) 1 N.W.L.R. (Part 49) 284 at 304, Adelaja v. Fanoiki (1990) 2 N.W.L.R. (Part 131) 137 at 148, Anie v. Uzorka (1993) 8 N.W.L.R. (Part 309) 1 at 17, Jimoh Odubeko v. Victor Fowler (1993) 7 N.W.L.R. (Part 308) 637 at 653. The appellant's amended brief of argument in the present case which, although it contained issues for determination of the appeal, proceeded instead to argue the grounds of appeal was clearly faulty and, to some extent, defective. In my view, however, this defect was not such as to render the entire brief totally incompetent and null and void. It was merely a faulty brief and I think the Court of Appeal was entitled, as indeed it did, not to shut its eyes to its existence. See Philip Obiora v. Paul Osele (1989) 1 N.W.L.R. (Part 97) 279 at 300, Akpan v. The State (1992) 6 N.W.L.R. (Part 248) 439 etc.

It is crystal clear from the record of proceedings, that the four issues distilled by the Court of Appeal from all the thirteen grounds of appeal filed by the appellant for the consideration of his appeal were substantially similar to the four issues identified by the appellant in his amended brief of argument for the determination of his appeal. It is equally clear that the court below, in its judgment carefully set out all the said thirteen grounds of appeal filed by the appellant with a view to identifying the relevant issues in the appeal. The said issues, as framed by the court below, coincidentally covered and, broadly speaking, were in fact more extensive in scope than the four issues set out in the appellant's amended brief. Learned counsel for the appellant, with respect, cannot therefore be right in his contention that the court below failed to consider the appeal on the issues contained in the appellant's amended brief of argument. In my view, the issues for determination considered by the Court of Appeal, not only fully covered, but were, in fact, more extensive in scope than the four issues raised in the appellant's amended brief. Accordingly I am unable to accept that the court below was in any way in contravention of the appellant's right to fair hearing.

On the merits of the case, both courts below were of the view that the 1st respondent, as head of the family of the late Ogbuefi

Nnanyelugo Samuel Okonkwo, with the 2nd, 3rd and 4th respondents, who were principal members of the family, validly sold the property in dispute to the 5th respondent in the year 1974. Only the appellant, another principal member of the family, appeared to be kicking against the said sale, claiming that he did not consent to the transaction. But the law is not that the sale of family land by the head and some principal members of the family without the consent of a principal member of such family is void. On the contrary, the law is that a sale of family land which the head of the family carries out as such head of family, whether with or without some principal members of the family is only voidable but not void at the instance of the non-consenting principal members of the family provided such non-consenting members acted timeously and are not caught by laches. This is as against a sale made by principal members of a family without the concurrence of the head of the family. This, in accordance with customary law, is void ab initio. See Ekipendu and others v. Erika (1959) 4 F.S.C. 79 at 81, Kwesi Manko and others v. Bonso and others (1936) 3 W.A.C.A. 62 at 63 etc.

Both courts below were of the view that the appellant failed to challenge this sale promptly when he only tried to do this three years thereafter. They also held that he had been unable to establish any valid ground for setting aside the said sale in issue. The above are all concurrent findings of facts by both the trial court and the court below and in the absence of any establishment of a miscarriage of justice or violation of some principles of law or procedure, I cannot see my way clear to interfere with them. See Igwego v. Ezeugo (1992) 6 N.W.L.R. (Part 249) 561 at 574 etc.

It is for the above and the more detailed reasons contained in the judgment of my learned brother, Mohammed, J.S.C. that I, too, dismiss this appeal as lacking in substance. I abide by the order for costs therein made.

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