

SUPREME COURT OF NIGERIA
8TH JANUARY, 1999. SC.49/1990
CORAM: M. L. UWAIS CJN, S. M. A. BELGORE, I. L. KUTIGI,
E. O. OGWUEGBU, A. I. IGUH, JJSC

STEPHEN ONOWHOSA & ANOR.

(For themselves and on behalf of
Ewukobe Branch of Uwhruwe family)

TIMOTHY AKAMA & ANOR. APPELLANTS

(For themselves and on behalf of Onoromate
Branch of Uwhruwe family)

JONAH OVOH & ANOR.

(For themselves and on behalf of Ovie
Branch of Uwhruwe family)

AND

PETER IKEDE ODIUZOU & ANOR..

(For themselves and on behalf of Eromahwe
Branch of Uwhruwe family)

RESPONDENTS

APPEALS - Fresh issue - Which was not raised in the court below -
Argument on it - Will not be entertained by the Supreme Court - Except it
involves a substantial point of law.

APPEALS - Evidence - Admissibility - Objection to the admissibility of
evidence - Which was ruled against by the two lower courts - Will not be
sustained at the Supreme Court without an improvement on the argu-
ments.

EVIDENCE - Evaluation of evidence - Corroboration in civil cases - Is
not required by law - Except in few cases.

LAND LAW - Declaration of title - Based on joint -Ownership of land -

Application of the principle in Ekpo v. Ita - The trial judge was right in adopting the principle - Having regard to the circumstances of the case.

JURISDICTION - *Ouster of jurisdiction - The issue of family status - In deciding whether the issue ousts the jurisdiction of the High Court in a case - That issue must be fundamental and not incidental.*

FACTS

In the High Court of the former Bendel State holden at Ugheli the plaintiffs/respondents claimed against the defendants/appellants for inter alia a declaration that plaintiffs and defendants as members of Uwhruwe family of Bethel, Oyede in Isoko Division are Joint Owners of the Uwhruwe Family land known and called Okpailoho land. The 5th and 6th defendants by their own application were subsequently joined as co-defendants before pleadings were filed. From the pleadings and the evidence adduced before the trial court it was common ground that the land in dispute is called IKPAILOGHO which was founded by a man called UWHRUWE and after his death the land passed on to his descendants from generation to generation as their joint property up till today. The descendants of Uwhruwe constitute what is today known as the family of Uwhruwe of Bethel, Oyede. While the plaintiffs claimed they are members of the Uwhruwe family and therefore co-owners of the land in dispute. The defendants on the other hand contended that the plaintiffs do not belong to the Uwhruwe family, and therefore have no claims whatever to the said land. The plaintiffs testified that they belonged to the Eromahwe branch of the Uwhruwe family. The defendants asserted that the plaintiffs were not born into the Uwhruwe family. Both parties led evidence in proof of their genealogical history. The plaintiffs also gave evidence of transactions in respect of the land in dispute.

At the close of hearing, the learned trial judge found for the plaintiffs and granted all the reliefs they claimed. Aggrieved by the decision the defendants appealed to the Court of Appeal, Benin Division and their appeal was dismissed. They have now appealed to the Supreme Court raising four issues.

ISSUES FOR DETERMINATION

"(i) Was the traditional evidence given in this case properly and adequately evaluated?

(ii) Having held:

(a) that the principles enunciated in Ekpo vs. Ita N.W.L.R. 68 did not arise in this case since title to Ikpailogho land was not in issue;

(b) that the acts of their user/management and enjoyment of Ikpailogho land cannot form the bases of Respondents' membership of Uwruwe family, were the Justices of Court of Appeal justified in adopting the principles on Ekpo v. Ita to this case?

(iii) Were exhibits D, E, F and G admissible?

(iv) Has the trial court jurisdiction to hear the case?"

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

Appeals - Fresh issue

1. It has been the practice of this court not to entertain arguments on a fresh issue which was not raised in the court below except in a few cases, for example where the question involves a substantial point of law or procedure which should be allowed in order to prevent a obvious miscarriage of justice. The issue canvassed in ground one did not fall within the exceptions. See Skenconsult Nigeria Ltd. & Or. v. Uke (1981)1 S.C. 6 at 28 and Shonekan v. Smith (1964) All N.L.R. 161. It is therefore incompetent and arguments on issue number one raised from it go to no issue. (p. 9 E)

Evidence - Evaluation of evidence

2. With certain exceptions such as action for breach of promise of marriage, corroboration is not required by law in civil cases. It is therefore idle for the defendants to contend that the failure of the trial judge to consider the evidence of 2nd and 3rd defendants and D.W. 3 as independent and corroborative of one another was prejudicial to their case. Even though the trial judge was wrong in treating the evidence of the 2nd and 3rd defendants and their witness (D.W.3) as one, it did not occasion any

miscarriage of justice. Issue (i) is resolved against the defendants on the merits also. (p. 11 H)

Land Law - Declaration of title

B 3. On the application of the principle in Ekpo v. Ita (supra) by the learned trial judge which the defendants complained *was* wrongly upheld by the court below, I must say that the learned counsel for the defendant mis-
 C hold any finding of the trial judge based on acts of ownership or user simpliciter. The court below realized that the declaration of joint-owner-
 ship of Okpailoho land is tied to and flowed from membership of Uwhruwe family and not dependent on the principles on which a decision to grant a
 D declaration of title to land simpliciter is based. The court below held that the learned trial judge did not apply the principle in Ekpo v. Ita (simpliciter) and that the trial judge considered other things done or other rights exer-
 cised by the plaintiffs with the defendants. I endorse the conclusion of the court below that the learned trial judge was right in adapting the
 E principle having regard to the circumstances of the case. Since the trial judge found both versions of evidence of genealogy inconclusive, he was right to consider other evidence which helped him to come to the conclu-
 sion and the court below was equally right to endorse such approach.
 F (p. 14 E/ 16 G)

Appeals - Evidence

4. On the question whether Exhibits "D", "E", "F" and "G" were admis-
 G sible in evidence the defendants objected to them when they were being tendered. The learned trial judge considered the objections and ruled against them. The same objections were canvassed in the court below. The court below agreed with the rulings of the learned trial judge on the objections. The same objections have been raised here. Nothing has
 H been urged by the defendants which improved their arguments in the courts below. I am unable to come to a different view and it is to be remembered that these are concurrent findings of two lower courts and the attitude of this court on such findings is well known. (p. 16 H)

Jurisdiction - Ouster of jurisdiction

5. Headship of a family is a status while membership of a family is not, See Adeyemi & Ors. v. Opeyori (1976) 9-10 S.C. 81, Nwafia v. Ububa (1960) N.M.L.R. 219 and Akereye v. Oloba (1986) N.W.L.R. (Pt.22) 257. In deciding whether the issue of family status ousts the jurisdiction of the High Court in a case, that issue must be fundamental or cardinal and not incidental or secondary. No inquiry into a person's status within a particular family arises until it is first established that he is a member of the family and the headship of a family presupposes that he is a member of the particular family. See Adeyemi & Ors. v. Opeyori (supra). The averments in paragraphs 9,10, 16 and 23 of the plaintiffs' statement of claim and paragraph 12 of the defendants' statement of defence are incidental to the main averments on the genealogy of the parties. A close look at paragraph 32 of the plaintiffs' statement of claim shows that not one of the items claimed raises ex facie any issue which can possibly be regarded as ousting the jurisdiction on the High Court of the former Bendel State as provided in the said High Court Law. From the plaintiffs' pleadings, I am satisfied that the main claim of the plaintiffs was that they are members of Eromahwe sub-family of Ewhruwe family of Bethel, Oyede and are joint owners of Uwhruwe family land which is in dispute. This does no ipso facto raise an issue of family status. The averments in the pleadings and evidence on successive headship of the family are incidental or secondary to the main issue canvassed by the parties. (p. 18 E)

NOTABLE POINTS OF INTEREST

OGWUEGBU JSC

1. Arguments on appeal should be based on issues formulated.

No issue was formulated in respect of ground two of the grounds of appeal . The defendants argued the ground of appeal in their brief. Arguments on appeal should be based on issues formulated and not on grounds of appeal. We have gone a long way since the introduction of brief writing and this court has said in a number of its decisions that arguments at the appeal court should be based on issues formulated and not on grounds of appeal. I will in the circumstance ignore the argument in

respect of ground two of the grounds of appeal. It is not in compliance with Order 6 Rule 3 of the Court of Appeal (Amendment) Rules, 1984. (p. 12 B)

B IGUHJSC

2. The Onus of establishing exclusive ownership of land

The law is well settled that where a plaintiff leads evidence that a land in dispute is communal property, the onus is on the defendant to establish that the land belongs to him exclusively. See Udeakpu Eze v. Igiligbe 14 W.A.C.A. 61, Atuanya v. Iubajekwe (1975) 3 S.C. 616 at 167. This onus, the defendants were unable to discharge in this case. I think both courts below are right in holding that the land in dispute is in the communal ownership of both the appellants and the respondents. (p. 23 B)

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REPRESENTATION

Chief B. B. E Idigbe for Defendants/Appellants.

Mr. J.E. Ikede for Plaintiffs/Respondents.

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CASES REFERRED TO

Skenconsult Nigeria Ltd. v. Uke (1981)1 S.C. 6 at 28

Shonekan v. Smith (1964) All N.L.R. 161

F Mogaji v. Odojin (178)4 S.C. 91 at 93

Ekpo v. Ita 11 N.L.R. 68

Adeyemi v. Opeyori (1976) 9-10 S.C.81

Nwafia v. Ububa (1960) N.M.L.R. 219

Akereye v. Oloba (1986) N.W.L.R. (Pt.22) 257

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STATUTES & RULES REFERRED TO

Court of Appeal (Amendment) Rules, 1984 0. 6 r. 3

Evidence Act Cap. 112 Laws of the Federation of Nigeria, 1990 s. 123

H High Court Law Cap. 65 vol II Laws of Bendel State of Nigeria 1976; s. 100

LEAD.JUDGMENT BY OGWUEGBU.JSC

This is an appeal against the decision of the Court of Appeal, Benin Division affirming the judgment of Oki, J. sitting in the High Court of former Bendel State, Ugheli Judicial Division in Suit No. UHC/40/75. He granted all the reliefs claimed by the plaintiffs. The plaintiffs claimed the following :-

"(a) a declaration that plaintiffs and Defendants as members of Owruwe Family of Bethel, Oyede in Isoko Division are JOINT OWNERS of the UWHRUWE FAMILY LAND shown in plaintiffs' Survey plan No. MWC/88/76 and known and called OKPAILOHO LAND at Bethel Town, Oyede, Isoko Division of the Bendel State of Nigeria.

(b) a declaration that the plaintiff's Eromahwe branch or sub-family, as one of the three branches or sub-families which make up the Uwhruwe Family, is entitled to one third share of the said Uwhruwe Family's Okpailoho land.

(c) an order of injunction RESTRAINING the Defendants by themselves, their agents, relations and servants from interfering with plaintiffs' right to work and or farm on the said Okpailoho land pending the partition of the said land.

(d) an order that the said Okpailoho land be partitioned PERMANENTLY among the said Eromahwe, Ewukobe and Onoromate branches of the Uwhruwe Family and or in the alternative, any other Order or relief which this Honourable Court may deem fit, just and equitable in the circumstance."

Before pleadings were filed, the 5th and 6th defendants applied to the trial court by way of motion for an order joining them as co-defendants in the suit. The application was opposed by the plaintiffs and after hearing arguments from the parties the learned trial judge granted their prayer and they were accordingly joined as 5th and 6th defendants on 15th March, 1976. Pleadings were ordered, filed and exchanged. The six defendants filed a joint statement of defence. From the pleadings filed, it was common ground that the land in dispute is called IKPAILOGHO which was founded by a man called UWHRUWE and after the death of Owruwe who was the original founder the land passed

on to his descendants from generation to generation as their joint property up to today. The descendants of Uwhruwe constitute what is today known as the family of Uwhruwe of Bethel, Oyede.

While the plaintiffs asserted that Uwhruwe had three children, B Eromawhe, Ekwukobe and Onoromate and that they descended from Eromawhe branch and therefore entitled to one third share of the land in dispute, the defendants contended that Eromawhe is not one of the three branches that make up Uwhruwe family of Bethel, Oyede. The 2nd and C 3rd defendants averred in the joint statement of defence that they belong to the Ogu branch of Uwhruwe family and not Ewukobe branch as alleged by the plaintiffs. The 3rd and 4th defendants also claimed to belong to Osiawhoro branch of Uwhruwe family and not Onoramate as the plaintiffs tagged them. The 2nd to 4th defendants stated that the 5th and D 6th defendants are descendants of one Emagho who was a brother of Uwhruwe and that they were recognized as a branch of Uwhruwe family and entitled to the enjoyment of the land in dispute.

The defendants maintained in their pleadings and evidence that E the plaintiffs are not members of Uwhruwe family. They asserted that the plaintiffs are strangers who were permitted by Uwhruwe family to live in Bethel, Oyede when the Christians were being persecuted and are in no way related to Uwhruwe family. Each side pleaded and led evidence of his genealogy. F

At the close of pleadings the main issue before the learned trial judge was whether the plaintiffs are members of Uwhruwe family as they claimed. At the hearing, the plaintiffs led evidence to show their descent from Uwhruwe and transactions in respect of the land in dispute. G

After taking evidence and the addresses of counsel, the learned trial judge found for the plaintiffs and granted all the reliefs they claimed. Aggrieved by the decision, the defendants appealed to the Court of Appeal, Benin Division and their appeal was dismissed. They have now H appealed this court filing eight grounds of appeal.

In their brief of arguments the defendant sets out the following four questions for determination in the appeal.

"(i) Was the traditional evidence given in this case properly and adequately evaluated?

(ii) Having held:

(a) that the principles enunciated in Ekpo vs. Ita 11 N.W.L.R. 68 did not arise in this case since title to Ikpailogho land was not in issue;

(b) that the acts of their user/management and enjoyment of Ikpailogho land cannot form the bases of Respondents membership of Uwhruwe family, were the Justices of Court of Appeal justified in adopting the principles on Ekpo v. Ita to this case?"

(iii) Were exhibits D, E, F and G admissible?

(iv) Has the trial court jurisdiction to hear the case?"

The plaintiffs also formulated four issues which are adequately covered by the issues identified by the defendants. I will determine the appeal on the issues submitted by the defendants and as a result it is not necessary to reproduce those of the plaintiffs.

The respondents in their brief gave notice of objection to the first ground of appeal on the ground that it is incompetent in that the question is being raised in this court for the first time without the leave of this court. Ground one of the grounds of appeal is a complaint against an error committed by the trial judge. The issue was not raised in the court below. **It has been the practice of this court not to entertain arguments on a fresh issue which was not raised in the court below except in a few cases, for example where the question involves a substantial point or law of procedure which should be allowed in order to prevent an obvious miscarriage of justice. The issue canvassed in ground one did not fall within the exceptions. See Skenconsult Nigeria Ltd. & Or. v. Uke (1981)1 S.C. 6 at 18 and Shonekan v. Smith (1964) All N.L.R. 161. It is there one incompetent and arguments on issue number one raised from it go to no issue.**

I will also determine the issue on its merits. The defendants contended in their brief and in oral submission by their counsel that the traditional evidence led by the parties was not adequately and properly

evaluated by the trial judge. They further submitted that the learned trial judge refused to consider the evidence of the 2nd and 3rd defendants and that of D.W.3 as evidence of independent witnesses corroborating one another and if he had done so, he would have preferred the traditional or genealogical evidence of the defendants to that of the plaintiffs. The plaintiffs argued in their brief that it is within the province of the trial judge who saw and heard the witnesses to assess their evidence and ascribe probative values thereto.

This contention arose from the evaluation of the traditional evidence given by the 2nd and 3rd defendants and D.W.3. (Jairus Mukoro Ofuo Ukpu). The three men testified as to their ancestry. When D.W. 3 was being cross-examined by the plaintiffs' counsel, he was shown a diagram of their genealogy which was attached to their statement of defence. After examining the diagram, D.W.3 stated:

"I see the diagram of genealogy attached to the Statement of Defence. I help (sic) to draw it up long ago when we had some other cases - not this case."

This piece of evidence was reflected in the judgment of the learned trial judge When he evaluated the evidence led by one parties on their genealogy.

The learned trial judge commented on the above evidence of the D.W. 3 in the course of his judgment as follows: -

" The onus of proving the claim is on the plaintiffs. In my view they will succeed in the case if I accept their traditional evidence which is mainly one of genealogy. If I reject that as inconclusive, they may still succeed if I hold that they have proved sufficient acts of ownership of use and management of the land along with the defendants for a long time. See Ekpo v. Ita 11 N.L.R. 68, Abudu Kamiru v. Daniel Fajube 1968 N.M.L.R. 152 and Idundun & Ors. v. Okumagba 1976 9 & 10 S.C. 227. I shall first examine the evidence of tradition which, as I have said, is mainly one of genealogy. The genealogy given by the first plaintiff (who says that Uwhruwe had three children) appears quite straightforward and convincing. In the same way the genealogy given by the 2nd and 3rd defendants and their 3rd witness (who say (sic) that Uwhruwe

had only two children) also appears quite straightforward and convincing.

I may say for the purposes of this case I am regarding the evidence of 2nd and 3rd defendants and defendants' 3rd witness as the evidence of one person and not of three persons corroborating one another. I do so because as admitted by the defendants' 3rd witness he sat with the 2nd and 3rd defendants and helped to produce the genealogical table which they attached to their Statement of Defence..... Thus, with these violent (sic) about the genealogies given by either side, it is not possible for me to know who is correct and who is wrong though I must say that I was very impressed by the quick and direct manner the 1st plaintiff (a man of about 85 Years) gave out names of various persons even under cross-examination." (Underlining are for emphasis)

I have carefully read the judgment of the learned trial judge. He appraised the traditional evidence led by the parties and applied the procedure laid down by this court in Mogaji Ors. v. Odojin & Ors. (1978) 4 S.C. 91 at 93. He had nothing to choose from the two sets of traditional evidence given by each side appeared straightforward and convincing. He held in effect that the traditional evidence adduced by both parties is inconclusive.

The law does not prescribe any number of witnesses a party should file before he gets judgment in his favour. Before a trial judge who had heard the evidence of the parties in a civil action comes to a decision as to which evidence he believes or accepts and which evidence he rejects, he first of all puts the totality of the testimony adduced by both parties on the imaginary scale. He puts the evidence of the plaintiff on one side of the scale and that of the defendant on the other side and weighs them together. He seems which is heavier and this does not depend on the number of witnesses called by each party but on the quality and probative value of the evidence of those witnesses. See Mogaji & Ors. v. Odojin & Ors. (supra).

With certain exceptions such as action for breach of promise of marriage, corroboration is not required by law in civil cases.

It is therefore idle for the defendants to contend that the failure of the trial judge to consider the evidence of 2nd and 3rd defendants and D.W. 3 as independent and corroborative of one another was prejudicial to their case. Even though the trial judge was wrong in treating the evidence of the 2nd and 3rd defendants and their witness (D.W.3) as one, it did not occasion any miscarriage of justice. Issue (i) is resolved against the defendants on the merits also.

No issue was formulated in respect of ground two of the grounds of appeal. The defendants argued the ground of appeal in their brief. Arguments on appeal should be based on issues formulated and not on grounds of appeal. We have gone a long way since the introduction of brief writing and this court has said in a number of its decisions that arguments at the appeal court should be based on issues formulated and not on grounds of appeal. I will in the circumstance ignore the argument in respect of ground two of the grounds of appeal. It is not in compliance with Order 6 Rule 3 of the Court of Appeal (Amendment) Rules, 1984.

The contention of the defendants in issue number two was that the plaintiffs failed to adduce conclusive traditional evidence based on genealogy that they are members of Uwhruwe family, that the trial judge was not permitted to adapt the principles enunciated in Ekpo v. Ita 11 N.L.R. 68 and that the court below was wrong in their interpretation of the judgment of the trial judge which required no interpretation.

It was further submitted that since the court below held that acts of user/management alone would not be sufficient basis for deciding membership of the family, they were wrong to have treated the transactions in Exhibits "B" to "G" as other transactions that deserved extra consideration. It was submitted by the plaintiffs' counsel that there was abundant evidence of joint acts of ownership and enjoyment of Ikpaiogho land for a long time coupled with evidence of primary facts given by witnesses who took part in the transactions or had personal knowledge of those facts and that the court below was right when it upheld the adaptation of the principle in Ekpo v. Ita, (supra) by the trial judge.

The learned trial judge appreciated that the burden of proof was

on the plaintiffs. He proceeded as follows:

"In my view they will succeed in their case if I accept their traditional evidence which is mainly one of genealogy. If I reject that as inconclusive, they may still succeed if I hold that they have proved sufficient acts of ownership or use and management of the land along with the defendants for a long time. See Ekpo v. Ita 11 N.L.R. 68, Abudu Karimu vs. Daniel Fajube (1968) N.M.L.R. 151 and Idundun & Ors. vs. Okumagba (1976) 9-10 S.C. 277."

(Underlining is for emphasis)

The learned trial judge continued in his judgment thus:

"In short, I am of the view that plaintiffs' evidence of tradition or genealogy is inconclusive. I shall now examine the evidence to see whether plaintiffs and/or members of the Esomahwe branch on behalf of whom they are claiming, have done things or exercised any rights along with the defendants' people for a sufficiently long enough time to warrant the inference that they are members of Uwhruwe family and therefore co-owners of Okpailoho land."

The learned trial judge thereafter made the following findings:-

(i) that records of Uwhruwe family were kept by the successive heads of Uwhruwe family and passed on to the next head of family on the death of an incumbent head;

(ii) that some of such documents were tendered by the plaintiffs namely, Exhibit "C" and C1" by which Paul Ovie - a one time head of Uwhruwe family conveyed part of Okpailoho land to the missionaries and as the defendants did not prove that the plaintiffs stole them, they were in possession of the plaintiffs' because they are members of Uwhruwe family.

(iii) that apart from being in possession of Uwhruwe family documents touching on Okpailoho land, the plaintiffs tendered various other documents showing transactions done by Uwhruwe family and most of those documents were signed by the 1st plaintiff and other undoubted members of Uwhruwe family. These other documents are exhibits "E", "F" and "G" .

(iv) that Exhibit "B" - Uwhruwe family Record Book which came

into existence in 1951 contained various transactions in which the Uwhruwe family granted lands and other benefits to various persons and that the entries in it were signed and thumb impressed by the 1st plaintiff, P.W.3, P.W.4, and P.W.5 who identified the signatures against the entries.

B The learned trial judge disbelieved the 3rd defendant - Timothy Akama who denied the existence of existence of Exhibit "B" and he equally disbelieved the 2nd defendant who testified that they never kept record of their family meetings. In the words of the learned trial judge:

C *"They lied in that regard in order to avoid the damning evidence of Exhibit "B".*

He concluded thus:

D *"From the various exhibits tendered by the plaintiffs and from the evidence of 3rd, 4th and 5th plaintiffs' witnesses supporting plaintiffs' case, I am satisfied beyond doubt that plaintiffs and defendants were always holding meetings of Uwhruwe family together and jointly using Okpailoho land or granting parts of it to strangers. I hold that that was the position before disagreement crept into the family. In short,*
 E *I hold that plaintiffs and all members of their Eromahwe branch are all members of Uwhruwe family to which the defendants also belong."*

F **On the application of the principle in Ekpo v. Ita (supra) by the learned trial judge which the defendants complained was wrongly upheld by the court below, I must say that the learned counsel for the defendant misconceived what the lower courts did.** The Court of Appeal after stating the principle in Ekpo v. Ita (supra) said:

G *"There was indeed a claim for a declaration of title before the trial judge i.e. to joint-ownership of the land in dispute. If it was a claim for a declaration of title simpliciter, there would be no difficulty whatsoever in the learned trial judge applying the principle of Ekpo v. Ita quoted earlier, which is now trite law. But the first claim of the respondent to which this principle should be tied is phrased thus:*

H *"A declaration that plaintiffs and defendants as members of Uwhruwe family are joint owners of the Uwhruwe family land....." This, means that the declaration of joint ownership claimed is tied to it, conditional on and flowing from membership of Uwhruwe family and*

not dependent on the usual rules/principles on which a decision to grant a declaration of title to land simpliciter is based. In other words, respondents can only succeed if and only if they are first adjudged members of Uwhruwe family..... A contention that the principle in Ekpo v. Ita simpliciter is not applicable is there fore not without some force. B

This is particularly so in the light of the correct admission of the appellant that title is not really in dispute, vesting as it admittedly is (sic) in the Uwhruwe family to which both parties claim to belong.....

But, did the learned trial judge apply the principle in Ekpo v. Ita simpliciter. Had the learned trial Judge stuck rigidly to this legal proposition, I would have held that he was in error, and probably failed to appreciate what he had to decide upon. This is because acts of user/management of the land alone would not be sufficient basis for deciding on family membership. What the learned trial judge however did to my mind was to adapt the principle in Ekpo vs. Ita to the facts and circumstances of this case. After having decided that the evidence as to genealogy as led by both parties was inconclusive and that he could not prefer one side to the other, he proceeded to examine the evidence led to show whether the respondents: C

D

E

"Have done things or exercised any rights along with the defendants' people for a sufficiently long enough time to warrant the inference that (sic) are members of Uwhruwe family, and co-owners of Okpalioho land" (Underlining mine) F

He did not therefore limit his examination to acts of joint-user/management of the land in dispute (as per Ekpo vs. Ita simpliciter), he considered other rights exercised (an adaptation of Ekpo vs. Ita). In my view he was right in doing so." (underlining mine) G

I have taken pains to reproduce at length the excerpt of the judgments of the courts below. I did so for a better appreciation of the reasoning and conclusion of the Court of Appeal on the issue. **The Court of Appeal did not uphold any finding of the trial judge based on acts of ownership or user simpliciter. The court below realized that the declaration of joint-ownership of Okpalioho land is tied to and flowed from membership of Uwhruwe family and not dependent on the** H

principles on which a decision to grant a declaration of title to land simpliciter is based. The learned trial judge proceeded to examine the evidence led which showed that the plaintiffs.

"Have done things or exercised any rights along with the defendants' people for a long enough time to warrant the inference that (sic) are members of Uwhruwe family and therefore co-owners of Okpailoho land"
(underlining is for emphasis).

The above reasoning of the trial judge cannot be taken to mean a whole sale application of the principle in Ekpo v. Ita (supra). **The court below held that the learned trial judge did not apply the principle in Ekpo v. Ita (simpliciter) and that the trial judge considered other things done or other rights exercised by the plaintiffs with the defendants.**

I endorse the conclusion of the court below that the learned trial judge was right in adapting the principle having regard to the circumstances of the case.

The findings of the learned trial judge on the records of Umhruwe family kept by the head of the family and passed on to the next head of family - Exhibits "B", "C", "C1", "E" and "F" were in the possession of the plaintiffs and were tendered by them at the trial. From their contents, the exhibits are evidence of things done or rights exercised along with the defendants for a sufficiently long time to warrant the inference that they are members of Uwhruwe family. Exhibits "B", "E", "F" and "G" were found to be more than twenty years old and the learned trial judge held that they are genuine documents. He relied on the provision of section 123 of the Evidence Act Cap.112 Laws of the Federation of Nigeria, 1990 as to the presumption that can be made of such documents.

Since the trial judge found both versions of evidence of genealogy inconclusive, he was right to consider other evidence which helped him to come to the conclusion and the court below was equally right to endorse such approach.

On the question whether Exhibits "D", "E", "F" and "G" were admissible in evidence the defendants objected to them when

they were being tendered. The learned trial judge considered the objections and ruled against them. The same objections were canvassed in the court below. The court below agreed with the rulings of the learned trial judge on the objections. The same objections have been raised here. Nothing has been urged by the defendants B which improved their arguments in the courts below. I am unable to come to a different view and it is to be remembered that these are concurrent findings of two lower courts and the attitude of this court on such findings is well known.

On issue four, it was the contention of the defendants that the C High Court had no jurisdiction to entertain the case in view of section 10(1) Cap.65 Vol. II Laws of Bendel State of Nigeria 1976. Section 10(1) provides:

"10.(1) To the extent that such jurisdiction may be conferred by D the State Legislature, the jurisdiction by this Law vested in the High Court shall include all civil jurisdiction of the High Court of Justice in England which at the commencement of this Law, was or at any time afterwards may be, exercisable in the Bendel State, for the judicial hear- E ing and determination of matters in difference, or for the administration or control of property and persons, and also all criminal jurisdiction of the High Court of Justice in England which at the commencement of this Law was, or at any time afterwards may be, there exercisable for the F repression or punishment of crimes or offences or for the maintenance of order; and all such jurisdiction shall be exercised under and according to the provisions of this Law and not otherwise:

Provided that, except in so far as the Executive Council may by G order otherwise direct and except in cases 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 H death."

The original jurisdiction of the high court is ousted where a matter relating inter alia to "family status" is involved. It is the Customary

Court which has jurisdiction in such a matter. It was submitted in the defendants brief that the claim before the court was that of membership of Uwhurwe family, that the issue of headship of Uwhruwe family was also pleaded in paragraphs 9,10, 16 and 23 of the statement of claim and paragraph 12 of the statement of defence and that the trial judge having found that the plaintiffs' traditional evidence was inconclusive, resorted to a decision on the headship of the family in order to get materials which he used in deciding the issue of plaintiffs membership of Uwhruwe family. Defendants' counsel further submitted that the learned trial judge used the documents to decide that the plaintiffs are members of Uwhruwe family and thereby resolved the issue of headship which is a question of status.

Learned counsel for the plaintiffs submitted that the jurisdiction of a court on any matter before it is determined by the claim before that court and in this case, there is nothing on the face of the claim that raised any issue as to family status which is outside the jurisdiction of the High Court.

Headship of a family is a status while membership of a family is not, See Adeyemi & Ors. v. Opeyori (1976) 9-10 S.C. , Nwafia v. Ububa (1960) N.M.L.R. 219 and Akereye v. Oloba (1986) N.W.L.R. (Pt.22) 257. In deciding whether the issue of family status ousts the jurisdiction of the High Court in a case, that issue must be fundamental or cardinal and not incidental or secondary. The learned trial judge decided on it as follows:

"The issue, as I see it in this case is whether or not the plaintiffs and members of the Eromahwe branch whom they represent are members of the Uwhruwe family. The plaintiffs say they are; the defendants say they are not. This is the cardinal issue on which the entire case hangs and not the side issue of whether or not 1st plaintiff was head of the family. (Underlining is for emphasis).

The court below agreed with the learned trial judge when it held:

"In short, the membership of the family is the cardinal issue and the headship of the family a side issue, put in another way, is it necessary to decide on the headship of the family before arriving at the conclusion

that the respondents are members of Uwhruwe family? The answer is clearly in the negative. I therefore agree with the conclusion of the learned trial judge."

No inquiry into a person's status within a particular family arises until it is first established that he is a member of the family and the headship of a family presupposes that he is a member of the particular family. See Adeyemi & Ors .v. Opeyori (supra). The averments in paragraphs 9,10, 16 and 23 of the plaintiffs' statement of claim and paragraph 12 of the defendants' statement of defence are incidental to the main averments on the genealogy of the parties. A close look at paragraph 32 of the plaintiffs' statement of claim shows that not one of the items claimed raises ex facie any issue which can possibly be regarded as ousting the jurisdiction on the High Court of the former Bendel State as provided in the said High Court Law. From the plaintiffs' pleadings, I am satisfied that the main claim of the plaintiffs was that they are members of Eromahwe sub-family of Ewhruwe family of Bethel, Oyede and are joint owners of Uwhruwe family land which is in dispute. This does no ipso facto raise an issue of family status. The averments in the pleadings and evidence on successive headship of the family are incidental or secondary to the main issue canvassed by the parties.

All the issues canvassed by the defendants have been resolved against them. The appeal is devoid of any merit and I hereby dismiss it with N10,000.00 costs to the respondents I affirm the decision of the court below.

UWAIS CJN

I have had the opportunity of reading in draft the judgment read by my learned brother Ogwuegbu, JSC. I entirely agree with him and have nothing to add. I dismiss the appeal and adopt the order therein as to costs.

BELGORE JSC

This is an appeal against the concurrent findings of the court below for which no special circumstances have been advanced to justify interference by this court. I agree with my learned brother Ogwuegbu J.S.C., that this appeal has no merit whatsoever and I also dismiss it with N10,000.00 as costs to respondents.

KUTIGI JSC

I read in advance the judgment just delivered by my learned brother Ogwuegbu, J.S.C., I agree with his reasoning and conclusions. I find no merit in the appeal. It is dismissed. The decision of the Court of Appeal is affirmed with N10,000.00 costs in favour of the Plaintiffs/ Respondents.

IGUH JSC

I have had the opportunity of reading in draft the leading judgment just delivered by my learned brother, Ogwuegbu, J.S.C. and I am in entire agreement with the reasoning and conclusion therein.

It is clear both from the pleadings and the evidence adduced before the trial court that the main issue between the parties concerns the joint ownership or otherwise of the piece or parcel of land known as and called "Okpailoho land" at Bethel town, Isoko. It is not in dispute that the said land was originally founded by a man called Uwhruwe. This land on his death, devolved on his children and thereafter passed from one generation of his descendants to the other.

It is also common ground that the land in dispute is now the communal property of the descendants of the said, Uwhruwe who constitute the Uwhruwe family of Bethel, Oyede. The real question between the parties is whether, as the plaintiffs/respondents claimed, they are members of the Uwhruwe family and therefore co-owners of the land in dispute or, as the defendants/appellants contended, the said plaintiffs do not belong to the Uwhruwe family, and therefore have no claims what-

ever to the said land.

In respect of the above question, both parties led evidence in proof of their genealogical history. The plaintiffs/respondents, in particular testified that they belonged to the Eromahwe branch of the Uwhruwe family. The defendants/appellants, on the other hand, asserted that the respondents were not born into the Uwhruwe family. Although the learned trial judge considered there were serious conflicts on the genealogical history traced by both parties as a result of which he found it difficult to determine which side to believe, he none-the-less stated as follows -

"..... though I must say that I was very impressed by the quick and direct manner the 1st plaintiff (a man of about 85 Years) gave out names of various persons even under cross-examination Again while it is for the 1st plaintiff to prove that he belonged to the Uwhruwe family I do not for one moment believe or accept defendants' story that he or his ancestor was a native of Emede As to the evidence given by defendants' 1st witness, Ekenumeke Odiuzo, I am unable to accept any part of it dealing with genealogy. He generally either forgot or had second thought about names he was asked."

But he went on -

"In spite of all I have said and inspite of my being impressed by 1st plaintiff's evidence of genealogy, since he is plaintiff, I think he needed some other evidence in confirmation of his story. In short, I am of the view that plaintiff's evidence of tradition or genealogy is inconclusive."

The learned trial Judge next examined various other evidence before the court relevant to the plaintiffs' membership of the Uwhruwe family and had this to say -

"Apart from being in possession of Uwhruwe family documents touching or Okpailoho land, plaintiffs have also tendered various documents showing transactions done by the Uwhruwe family and most of which documents are signed either by 1st plaintiff alone or by 1st plaintiff and other undoubted members of Uwhruwe family. Some of these

documents are Exhibits 'E', 'F', and 'G' which I have listed earlier on in this judgment and which are 20 or more years old. I hold that they are genuine documents. In this connection I wish to say that I have carefully examined the signatures 'Tim akama' appearing in Exhibits 'D' and 'F' and the signature 'Timothy Akama' appearing at the first page of sheet 7 in Exhibit 'B'. The writing or signatures are similar. The 3rd defendant, Timothy Akama, has denied signing of them. I do not believe him. Rather I believe plaintiffs' 2nd witness (Ishmael Ikede) who said categorically that he knew Timothy Akama's writing. It is unimaginable that someone else signed those documents over 20 years ago to use them against the defendants now."

He concluded -

" From the various Exhibits tendered by the plaintiffs and from the evidence of 3rd, 4th and 5th plaintiffs' witnesses supporting the plaintiffs case, I am satisfied beyond doubt that plaintiffs and the defendants were always holding meetings of Uwhruwe family together and jointly using Okpailoho land or granting parts of it to stranger. I hold that that was the position before disagreement crept into the family. In short, I hold that plaintiffs and all members of their Eromahwe branch are members of Uwhruwe family to which the defendants also belong.

From the evidence before me I am also satisfied that because of the disagreement, the defendants have harassed the 1st plaintiff and his people and have tried by various methods to excluded them from the enjoyment of the common family property, namely the Okpailoho land."

The trial court had thus no difficulty in accepting that the defendants/appellants and the plaintiffs/respondents are all members of the Uwhruwe family of Bethel Oyede in Isoko Division and that they are therefore the joint owners of the land in dispute. These findings of fact were carefully considered and affirmed by the court below.

Secondly, in establishing their claims, the plaintiffs/respondents led copious evidence to the effect that the land in dispute is the communal property of both parties as members of the Uwhruwe family. It was the case of the defendants/appellants, on the other hand, that the said land belonged exclusively to them and, at any rate, that the plaintiffs/

respondents did not belong to the said Uwhruwe family. But as already indicated, it was the finding of the trial court as affirmed by court below that the plaintiffs, together with the defendants, belong to the Uwhruwe family, the communal owners of the land in dispute.

The law is well settled that where a plaintiff leads evidence that a land in dispute is communal property, the onus is on the defendant to establish that the land belongs to him exclusively. See Udeakpu Eze V. Igiligbe 14 W.A.C.A. 61, Atuanya V. Iubajekwe (1975) 3 S.C. 616 at 167. This onus, the defendants were unable to discharge in this case. I think both courts below are right in holding that the land in dispute is in the communal ownership of both the appellants and the respondents.

Thirdly, this court will not interfere with the concurrent findings of fact made by both the trial court and the Court of Appeal where, as in the present case, there is sufficient evidence in support of such findings and where there is no substantial error apparent on the record of proceedings such as some miscarriage of justice or violation of some principle of law or procedure. See Chikwendu v. Mbamali (1980) 3-4 S.C. 31 at 75, Lokoyi v. Olojo v. (1983) 2 SCNLR 127 at 131, Igwega v. Ezeugo (1992) 6 N.M.L.R. (Part 249) 561 at 585 etc. Again I think both courts below, having regard to the above entered solid findings of fact, were entirely right to have entered judgment for the respondents as claimed.

It is for the above and the more detailed reasons contained in the leading judgment that I, too, dismiss this appeal as lacking in substance. I subscribe to the order for costs therein made.

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