

SUPREME COURT OF NIGERIA

14TH MAY, 1999. SC.70/1993

**CORAM:- S. M. A. BELGORE, M. E. OGUNDARE,
U. MOHAMMED, O. ACHIKE, A. O. EJIWUNMI, JJSC.**

EMMANUEL JIAZA APPELLANT
AND
HASSAN BAMGBOSE & ANOR RESPONDENTS
(Substituted for BUSARI BAMGBOSE
(deceased) by Order of Court)

***EVIDENCE** - Proof - Land law - Burden on plaintiff - To establish his claim upon relevant and credible evidence - Was not discharged by the appellant.*

***LAND LAW** - Family land - Sale or lease thereof - Alienation without the concurrence of the family head is void - Whereas sale by the head without the concurrence of principal family members - Is voidable.*

***LAND LAW** - Title - As parties joined issues on title - Lower Court rightly considered whether appellant had established title.*

***LAND LAW** - Title - Issue of title raised by the appellant - It became his duty to establish his title.*

FACTS

Before the Lagos High Court the plaintiff/appellant file an action against the original deceased defendant now substituted by the present respondents. The plaintiff's case is that in 1959 he obtained a leasehold of the parcel of land at No. 29 Oyebo Street, Araromi, Apapa from the Oluwa Chieftaincy family. This was through one chief Asafa Oluwa described as the representative of the family. He constructed a bungalow of 11 rooms up to window level before disruption in 1967 when he left Lagos for the East because of political disturbances. Upon his return in 1970,

he discovered that the defendant had trespassed into his property. The defendant claimed that his own plot is at No. 33 Oyebo street which he acquired from Chief Oluwa in 1969. He later obtained a deed of lease from the family and built a house of 12 rooms and one shop on the land.

The trial court upon a review of the evidence found the land in dispute to be the same in spite of the parties' different description as to its location. It found in favour of the plaintiff whose structure was on the land as having a prior equitable interest. The defendant's appeal to the Court to Appeal was upheld as it held that the plaintiff failed to establish how he became seised of the disputed land. Being dissatisfied, the plaintiff has now appealed to the Supreme Court raising 3 issues.

ISSUES FOR DETERMINATION

(1) Whether the learned Justices of the Court of Appeal were not in error in holding that the case dealt exclusively with the acquisition or transfer of family land by lease, when the appellant's claim was based on trespass and found upon his possession of the said land.

(2) Whether the existence of a Power of Attorney in favour of Ashafa Oluwa and/or the extent of the said Ashafa Oluwa's authority contained in the said Power of Attorney were matters which were put in issue by the pleadings.

(3) Whether the learned Justices of the Court of Appeal were not in error in holding that the respondent acquired a valid lease from the Head of the Oluwa Chieftaincy family free of a prior equitable interest in favour of the appellant.

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

Title - As parties joined issues on title

1. As the parties have directly joined issues on title to the land, it is my respectful view that the Court below was right to have considered whether the appellant had duly established his title to the disputed land. (p.1220 B)

Title - Issue of title raised by the appellant

2. Where, as in this case, the appellant had raised the issue of title, then it

became his duty to establish his title. I think that the Court of Appeal was right to have considered whether the appellant had established his title to the disputed land. And it seems to me that having regard to his pleadings, the only recourse that the Court below had was to consider whether on the records the appellant duly established that the disputed land was properly leased to him by the Oluwa Chieftaincy family as he had pleaded (p. 1220 F)

Family land - Sale or lease thereof

3. The Court below was also right to consider the incidents of the sale or lease of family land, it being common ground between the parties that the land in dispute is the family land of the Oluwa Chieftaincy family. I therefore agree entirely with the Court below when it stated that alienation of family land to wit, that a sale or lease of family land without the concurrence of the Head of family is void whereas the sale or lease of same by the Head of family without the concurrence of the principal members of family is voidable. See Ekipendu v. Erika 4FSC 79, Oyebanji v. Okunola (1968) NMLR 221. (p. 1221 B)

Proof - Land law - Burden on plaintiff

4. It is of course settled law that cases are, in a civil suit, won upon a preponderance of evidence. It follows therefore that a plaintiff in such a case has the burden of establishing his claim upon relevant and credible evidence; evidence that is conclusive and that commands such probability that is in keeping with the surrounding circumstances of the case in hand. See Dibiamaka v. Osakwe (1989) 3 NWLR (pt. 107) 101 at 113; Mogaji v. Odofin (1978) 4 SC. 91. From what I have said above, it is my view that the appellant has not established by any credible evidence his claim to the land in dispute having regard to the principles enunciated above. (p. 1222 A)

REPRESENTATION

H. O. Ajumogobia Esq. for the Appellant

P. O. Jimoh Lasisi Esq. for the Respondent

CASES REFERRED TO

- Nigerian Housing Development Society v. Mumuni (1977) 2 SC 57
Commissioner for Works Benue State v. Devcon Development Society Ltd. (1988) 3 NWLR (pt. 83) 407
- B Akinfolarin v. Akinnola (1994) 3 NWLR (pt. 353) 659
Amakor v. Obiefuna (1974) 3 SC 76
Akano v. Okunade (1974) 4 SC. 129
Fabunmi v. Agbe (1985) 1 NWLR (pt. 2) 99
- C Adegbite v. Ogunfaolu (1990) 4 NWLR (pt. 149) 578
Kponugbo v. Adja (1933) 2 WACA 24
Ekpendu v. Erika 4FSC 79
Oyebanji v. Okunola (1968)
Dibimaka v. Osakwe (1989) 3 NWLR (pt. 107) 101 at 113
- D Ekpo v. Ita II NLR 68
Okorie v. Udom 1960 5FSC 162 at 165; 1960 SCNLR 326 at 330
Njokwu vs. Eme (1973) 5SC 293
National Investment and Property Co. Ltd. v. Thompson Organization
- E Ltd. (1969) 1 ALL NLR 138 at 142
George v. Dominion Flour Mills Ltd. (1963) 1 SCNLR 117

LEAD JUDGMENT BY EJIWUNMI JSC

- F This appeal is from the Court of Appeal (Lagos Division). The proceedings were commenced in the High Court of Lagos where the plaintiff claimed against the original defendant Busari Bamgbose for general damages for trespass into his property lying and situate at 29 Oyebo Street Araromi, Apapa, possession of the said building and premises and
- G perpetual injunction restraining the defendant his servant and agents from continuing his acts of trespass.

- At the trial Court, the learned trial Judge duly ordered pleadings. Consequently, pleadings were filed and exchanged. The defendant also
- H filed and served an amended statement of defence with leave. The plaintiff filed a reply to the original statement of defence. But before then the plaintiff, with the leave of the trial Court, had the claim for possession withdrawn and it was duly struck out.

During the hearing before the trial court the parties called witnesses and several documentary exhibits were tendered and admitted. The case for the plaintiff is that in 1959 he obtained a leasehold of a piece of land situate and lying at No. 29 Oyebo Street, Araromi, Apapa from the Oluwa. Chieftaincy family. The plot of land was allegedly granted to him through one Chief Asafa Oluwa who was described as the representative of the family. The plaintiff claimed he made an initial payment of #60.00 (N120.00) and also paid the annual rent of #1.10s (N3.00). He claimed that he paid the annual rents for the period 1959 - 1962 and obtained a receipt. After the land was shown to him he cleared the bush and had his sign-board on it. In 1960 he commenced the construction of a building on it consisting of 11 rooms and one shop in accordance with an approved building plan. By the time he left Lagos in 1967 for the East because of the political disturbances that raged in the country at the time, the building had been constructed to window level. Before he left, he had in 1963 caused the land to be surveyed and obtained a survey plan, exhibit C. Upon his return to Lagos sometime in 1970, he discovered that the defendant had trespassed into his property. He immediately challenged the defendant as to his right to the land; but the defendant ignored him. Though he reported the matter to the Police, he had to commence this action against the defendant to assert his right.

The case for the defendant would appear to be that he has no interest of any kind in the parcel of land at No. 29 Oyebo Street, Araromi, Apapa, the subject matter of this litigation. He claimed that his own plot of land is at No. 33 Oyebo Street which he acquired in 1969 from Chief Oluwa of Lagos. The land so acquired was, according to the defendant, vacant at the time of his acquisition. Later he obtained a deed of lease from the family. Following necessary payments to the family, he commenced building a house of 12 rooms and one shop of the land. Throughout the period during which the house was under construction in 1969, he claimed that no one disturbed him or his contractor on the land. The building has since been completed and he has been living there with his family.

At the end of the trial of this matter before the High Court, the

learned trial judge reviewed the evidence before him. Following the address of learned counsel appearing for the parties, the learned trial judge delivered a considered judgment. By that judgment, the trial court upheld the plaintiff's claim having formed the view that the land in dispute is the same as claimed by the parties in spite of the different descriptions given by the parties as to the location of the land. The learned trial Judge further formed the view that the lease to the defendant was executed on the 26th October, 1970. He also held that the plaintiff's structure was on the land when the defendant obtained the deed of lease and that it was the plaintiff's structure that he eventually built upon. The learned trial Judge therefore took the view that the defendant could not have obtained his interest in the land through the deed of lease without notice of the prior equitable interest of the plaintiff. The learned trial Judge then held that the deed of lease relied upon by the defendant and which was registered a couple of years after the plaintiff was let into possession cannot override the plaintiff's equitable interest.

Being dissatisfied with the judgment and orders of the trial court the defendant appealed to the Court of Appeal (Lagos Division).

The learned Justices of the Court of Appeal after due consideration of the issues raised before that court concluded in their judgment that the plaintiff failed to establish how he became seized of the disputed land. On the other hand, it was held that as the defendant had established by evidence on the record how he was granted the lease of the disputed land, and by whom, the learned trial judge ought to have found that fact in his favour. The judgment and orders of the trial court which were made in favour of the plaintiff were therefore set aside.

As the plaintiff was not satisfied with that judgment of the Court of Appeal (Lagos Division), he has appealed to this Court. Pursuant thereto four grounds of appeal were filed on his behalf. However, with the leave of this Court the plaintiff (who shall from henceforth be referred to as the appellant) filed an amended Notice of Appeal consisting of three grounds of appeal. Subsequently, his learned Counsel, H. O. Ajumogobia Esq, filed and served the appellant's brief. The defendant died during the pendency of this appeal and was, by virtue of the High

Court of Lagos State substituted by Hassan Bamgbose and Seliatu Bamgbose, who are now the respondents. P. O. Jimoh Lasisi Esq, filed on their behalf a respondent's brief.

At the hearing before this Court learned Counsel appearing for the parties adopted and placed reliance on their respective briefs of argument. B

Learned Counsel also made further submissions in elaboration of the arguments in their respective briefs. I will in the course of examining the issues identified in the briefs consider also the submissions made before the court. C

In the appellant's brief of argument, the following are the issues identified for the appellant for the determination of the appeal:-

(1) Whether the learned Justices of the Court of Appeal were not in error in holding that the case dealt exclusively with the acquisition or transfer of family land by lease, when the appellant's claim was based on trespass and found upon his possession of the said land. D

(2) Whether the existence of a Power of Attorney in favour of Ashafa Oluwa and/or the extent of the said Ashafa Oluwa's authority contained in the said Power of Attorney were matters which were put in issue by the pleadings. E

(3) Whether the learned Justices of the Court of Appeal were not in error in holding that the respondent acquired a valid lease from the Head of the Oluwa Chieftaincy family free of a prior equitable interest in favour of the appellant. F

Arguing the first issue for the appellant, the learned Counsel's contention as can be gathered from the brief and oral argument is based on his assertion that the Court below set up a case other than that pleaded by the parties. It is his submission that the case which the appellant pleaded was that he was in possession of the property and that the respondent committed trespass by entering the land without his consent. G
It is not, argued learned counsel to the appellant, a case that is concerned with the alienation of family land without the concurrence of the Principal members of the family. The case of the appellant it is stressed, is that of possession of the disputed land prior to that of the respondent. It is H

therefore argued that the Court below fell into error for determining the case upon the basis of ownership as identified above. It is submitted therefore that as a court is not competent to give judgment contrary to that formulated by the parties, the appeal ought to be allowed. In support of this proposition, the following cases are cited Adeniji v. Adeniji (1972) 1 ALL NLR (pt. 1) 278; Nigerian Housing Development Society v. Mumuni (1977) 2 SC 57; Commissioner for Works Benue State v. Devcon Development Society Ltd. (1988) 3 NWLR (pt. 83) 407; Akinfolarin v. Akinola (1994) 3 NWLR (pt. 353) 659. In any event, it is further argued for the appellant that upon the evidence before the court, and which was accepted by the trial court, the Court below should have upheld the judgment of the trial court. Learned counsel for the appellant urged this court to reverse the judgment of the court below in favour of the appellant. This the court can do having regard to the principles established in the following authorities:- Amakor v. Obiefuna (1974) 3 SC 76; Akano v. Okunade (1974) 4 SC. 129; Fabunmi v. Agbe (1985) 1 NWLR (pt. 2) 99 and Adegbite v. Ogunfaolu (1990) 4 NWLR (pt. 149) 578;

In response to the above contentions made for the appellant, respondents' counsel takes the view that the court below was not wrong to have considered the competing titles of the parties to the disputed land. The argument advanced for the respondents is that the basis of the action appellant instituted lies in his pleadings. By his pleadings the appellant had claimed in trespass to land coupled with an order of injunction restraining further trespass on the disputed land. Having regard to such pleadings the issue of who had proved title to the disputed land must first be settled before the court could properly decide the question as to who then was in rightful possession of the disputed land. The following authorities are, it is claimed, in support of that submission, Abotche Kponugbo v. Adja Kodadja (1933) 2 WACA 24 (The Privy Council Judgments (ed. Olisa Chukwura) 255 at 259; Okorie v. Udom 1960 5FSC 162 at 165; 1960 SCNLR 326 at 330 and Amakor v. Obiefuna (1974) 1 ALL NLR (pt. 1) 119 at 128.

It is in my view manifest that the resolution of the question raised by this issue must commence with the pleadings filed by the parties. For

that purpose I wish to refer to paragraphs 3, 4, 5, & 6 of the appellants statement of claim, and paragraphs 2A, 3 & 3A of the amended statement of Defence of the respondents. In paragraphs 3, 4, 5 & 6, appellant in his statement of claim pleaded thus:-

(3) The plaintiff was and still is at all material time the owner in possession of the land and 12 roomed building all situate at No. 29 Oyebo Street, Araromi, Apapa. B

(4) In 1959, the plaintiff acquired the said land by way of customary lease from Chief Ashafa Oluwa representing the Chief Oluwa and family for the initial payment of #60 and an annual rent of #1.10s. C

(5) The plaintiff has since the said 1959 paid his annual rent to the said Customary owners. The copies (sic) rent payment receipts are attached and marked Exhibit "A - A1".

(6) The said property situate 29, Oyebo Street thereon is bounded as described in approved plan No. EA.27/1-23/60; copy of which is attached and marked exhibit "B". D

By paragraphs 2A, 3 & 3A of Respondents' amended Statement of Defence the respondents pleaded thus:- E

(2A) The defendant denies paragraphs 4, 5, 6, 7, 8, 9, 10, 12, 15 of the plaintiff's statement of claim on which strict proof is required and will in particular contend at the trial that Chief Ashafa Oluwa mentioned in paragraph 4 of the said statement of claim was never at any time Chief Oluwa of Lagos. F

(3) In January, 1969, the defendant acquired the land known as 33, Oyebo Street, by way of Customary lease from Chief Sulaiman Babatunde Ajasa Oluwa, the Chief Oluwa of Lagos and Apapa and the family for initial payment of #116 (One hundred and sixteen pounds) and thereby for annual rental of #5 Receipt for #116 (One hundred and sixteen pounds) attached and marked exhibit "A". G

(3A) The defendant avers that if at all any land was ever leased out to the plaintiff in that locality at any time, it is not the one validly leased to him by the Oluwa Chieftaincy Family and on which he had erected his building. H

It does not need a lot of study to see from the above pleadings of

the parties that the issue of title to the disputed land was put directly in issue.

It is pertinent also to refer to the reply to the statement of defence filed by the appellant. In his reply the appellant again pleaded, inter alia, that the disputed land surveyed for him in 1963 is the same land which the 1st respondent described as No. 33 Oyebo Street Araromi, Apapa. **As the parties have directly joined issues on title to the land, it is my respectful view that the Court below was right to have considered whether the appellant had duly established his title to the disputed land.**

I have duly considered the arguments proffered for the appellant in his brief and the oral argument that the Court below was wrong to have considered and resolved the issue of title to the disputed land. But his argument cannot in my respectful opinion be accepted having regard to the settled decisions of this Court on this aspect of the law.

First, it must be borne in mind that as parties are bound by their pleadings the fate of their case therefore depend upon what they have alleged in them. See Emegokwue & Ekpenyong & Ors. v. Chief Ayi (1973) 3 ECS CR 41 (1973) 1 NMLR 372; Kalu Njokwu & Ors. vs. Ekwu Eme & Ors (1973) 5SC 293; National Investment and Property Co. Ltd. v. Thompson Organization Ltd. (1969) 1 ALL NLR 138 at 142; George v. Dominion Flour Mills Ltd. (1963) 1 SCNLR 117.

Secondly, **where, as in this case, the appellant had raised the issue of title, then it became his duty to establish his title. I think that the Court of Appeal was right to have considered whether the appellant had established his title to the disputed land. And it seems to me that having regard to his pleadings, the only recourse that the Court below had was to consider whether on the records the appellant duly established that the disputed land was properly leased to him by the Oluwa Chieftaincy family as he had pleaded.**

It is after such a title had been established in his favour that the land which he claimed had been leased to another person, i.e. the 1st respondent would he have a chance to succeed against the 1st respondent. See Okorie v. Udom (1960) 5 FSC 162, 165, (1960) SCNLR 326 at 330 and

Amakor v. Obiefuna (1974) 1 ALL NLR (pt. 1) where this Court held as follows:-

"Generally speaking, as a claim for trespass to land is rooted in exclusive possession, all a plaintiff needs to prove is that he has exclusive possession or he has the right to such possession of the land in dispute. But once a defendant claims to be the owner of the land in dispute, title to it is put in issue and, in order to succeed, the plaintiff must show a better title than that of the defendant." B

The Court below was also right to consider the incidents of the sale or lease of family land, it being common ground between the parties that the land in dispute is the family land of the Oluwa Chieftaincy family. I therefore agree entirely with the Court below when it stated that alienation of family land to wit, that a sale or lease of family land without the concurrence of the Head of family is void whereas the sale or lease of same by the Head of family without the concurrence of the principal members of family is voidable. See Ekpendu v. Erika 4FSC 79, Oyebanji v. Okunola (1968) NMLR 221; Akerele v. Atunrase (1968) 1 ALL NLR 201 and also Akinfolarin v. Akinbola (1994) 3 NWLR (pt. 335) 659. Learned Counsel to the appellant has stressed in his argument that the principles enunciated in Ekpendu v. Erika (supra) is inapplicable to the instant case. I think that argument is misconceived. D E

Even if the appellant was right in his contention that the principle in Ekpendu v. Erika is not applicable to the instant case, he has to prove that he duly acquired the leasehold interest in the disputed land. It would be recalled that his claim to the disputed land rests on his evidence that the interest he acquired in the disputed land was through the Power of Attorney granted to one Chief Ashafa Oluwa. F G

That being his contention, the appellant ought to lead evidence in support of that claim. As it happened, the appellant did not call any evidence in that regard. The Power of Attorney under which he allegedly acquired his leasehold interest in the disputed land was not tendered. Indeed he admitted under cross-examination that the Power of Attorney was not in his possession, and the donee of the said Power of Attorney, H

Chief Ashafa Oluwa was not called to give evidence on his behalf in relation to the alleged leasehold interest that was granted to him in respect of the land in dispute.

It is of course settled law that cases are, in a civil suit, won upon a preponderance of evidence. It follows therefore that a plaintiff in such a case has the burden of establishing his claim upon relevant and credible evidence; evidence that is conclusive and that commands such probability that is in keeping with the surrounding circumstances of the case in hand. See Dibiamaka v. Osakwe (1989) 3 NWLR (pt. 107) 101 at 113; Mogaji v. Odofin (1978) 4 SC. 91; Onwuka v. Ediala (1989) 1 NWLR (pt. 96) 182; Ekpo v. Ita II NLR 68. From what I have said above, it is my view that the appellant has not established by any credible evidence his claim to the land in dispute having regard to the principles enunciated above. In the result, this appeal fails and it is dismissed in its entirety. The Judgment and orders of the Court below are hereby affirmed. The respondents are awarded costs in the sum of N10,000.00 only.

E _____

BELGORE JSC

This appeal has no merit as the appellant failed to prove his case. I therefore agree with my learned brother. Ejiwunmi, JSC., in his judgment which I had opportunity of reading in advance that this appeal be dismissed. I dismiss the appeal with N10,000.00 costs to the respondent.

G _____

OGUNDARE JSC

The Plaintiff who is now the Appellant before us instituted an action against one Busari Bamgbose claiming:

H *"(a) The sum of (500) Five hundred Pounds being general damages for trespass committed by the Defendant and his agents who, on the month of May, 1970, without the Plaintiff's consent or lawful excuse entered on to the plaintiff's building and land situate at 29, Oyebo Street,*

Araromi Apapa (within the Jurisdiction of the High Court of Lagos State) and there broke the Plaintiff's wall fitted doors into the Plaintiff's door spaces and plastered the plaintiff's walls.

(b) Possession of the said building and premises.

(c) A perpetual injunction restraining the Defendant his servants and agents from continuing the acts of trespass on the said building and premises."

Claim (b) was in the course of the proceedings abandoned by the plaintiff. Pleadings were filed and exchanged. The plaintiff filed a Reply to the Defendant's pleadings.

In the Statement of Claim the Plaintiff pleaded inter-alia as follows:

"3. The Plaintiff was, and is at all material time the owner in possession of the land and 12 roomed building all situate at No. 29, Oyebo Street, Araromi, Apapa.

4. In 1959, the Plaintiff acquired the said land by way of customary lease from Chief Ashafa Oluwa representing the Chief Oluwa and Family for the initial payment of 60 and an annual rent of 1.10/-.

5. The Plaintiff has since the said 1959 paid his annual rent to the said customary lessors. The copies of rent payment Receipts are attached and marked Exhibit 'A' - 'A1'.

6. The said property situate at 29, Oyebo Street, Araromi Apapa with the building thereon is bounded as described in approved Plan No. EA. 27/1-23/60; a copy of which is attached and marked Exhibit 'B'.

7. The Plaintiff commenced the said 12 roomed building in 1960 and used his building Plan No. AOJ 256 by the PLANNING OFFICE OJO, a copy of which plan is attached and marked Exhibit 'C'.

8. The Plaintiff successfully built all the walls of the said building up to the window-level.

10. That due to the Nigerian Political disturbance in 1966, the plaintiff put the said building and premises in care of one Mr. Arake and left Lagos for the Eastern Nigeria.

11. The Plaintiff on his return to lagos in 1970, found that the Defendant with his servants and agents had trespassed onto the said build-

ing and premises and continued to do so despite the repeated warning of the plaintiff and his agents.

12. *The plaintiff immediately approached the Defendant requesting the defendant to release to the plaintiff the said building and premises but the Defendant refused."*

The Defendants in the penultimate paragraphs of his amended Statement of Defence pleaded as hereunder:

"2A. *The Defendant denies paragraphs 4, 5, 6, 7, 8, 9, 10, 12, 15 of the Plaintiff's Statement of Claim on which strict proof is required and will in particular contend at the trial that Chief Ashafa Oluwa mentioned in paragraph 4 of the said Statement of Claim was never at any time chief Oluwa of Lagos.*

3. *In January, 1969, the Defendant acquired the land known as 33, Oyebo Street, by way of Customary Lease from Chief Sulaimon Babatunde Ajasa Oluwa, the Chief Oluwa of Lagos and Apapa and the family for initial payment of 116 (One hundred and Sixteen Pounds) and thereby for Annual rental of 5. Receipt for 116 (One hundred and sixteen pounds) attached and marked Exhibit 'A'.*

3A. *The Defendant avers that if at all any land was ever leased out to the plaintiff in that locality at any time, it is not the one validly leased to him by the Oluwa chieftaincy Family and on which he had erected his building.*

4. *The defendant has since been paying the annual rent in respect of the aforementioned property to Chief Oluwa and his accredited representatives. The receipts for annual rents are attached and marked Exhibits 'B' - 'B1'.*

5. *The said acquisition of the land was perfected by preparation and signing of a Deed of Lease in favour of the defendant sometime in 1970 by the said Chief Oluwa and his representatives. The Deed of Lease is hereby attached and marked Exhibit 'C'.*

6. *The defendant attached (sic) to erect a building of twelve rooms and a shop on the said property in 1969 and completed it sometime in 1970. The building is erected in accordance with an approved Plan No. OJ24/76 which is hereby attached and marked Exhibit 'D'.*

7. *The defendant moved with his family to the said completed building in 1970 and in addition put some tenants therein.*

8. *The defendant has since 1969 being in physical possession of the said land without any disturbance.*

9. *The defendant has at all material times being the owner in respect of the said building and premises and will further aver at the trial that the defendant has no interest whatsoever in respect of 29 Oyebo Street, Araromi Apapa sued for by the plaintiff."* B

At the trial evidence was led on both sides and after addressed by learned counsel for the parties the learned trial Judge in a considered judgment found: C

1. *"I am satisfied upon the evidence of the plaintiff's third witness, Ekundayo Ajayi, a licensed surveyor whose evidence I accept that the dispute between the parties relates to the same parcel of land. The composite plan Exhibit 'F' which he prepared contains a comparative analysis of the two plans relied upon by the parties - Exhibit 'C' by the plaintiff and Exhibit 'E' by the defendant."* D

2. *"From the totality of the evidence before me I am satisfied that the number of the plot of land in question is 29, Oyebo Street, Araromi, Apapa. This was the number given to the plot of land when the plaintiff got it from the Oluwa family in 1959. The receipts Exhibit A and D and the plan Exhibit C confirm this. It was at a later stage after the same land was given to the defendant that it became to be referred to as No. 33, Oyebo Street."* E F

3. *"There is no doubt that both the plaintiff and the defendant claim to have derived their respective interests in the land in dispute from the same source - Oluwa Chieftaincy Family. I am satisfied that the plaintiff was on the land before the defendant as a customary tenant of the family. That was in 1959. He cleared the land and commenced construction work on it in accordance with an approved plan. He built up to a level and suspended work as a result of the civil war in the Country at the material time. It was when he returned to Lagos that he found the defendant on the land. The deed of lease to the defendant was executed on the 26th October 1970 and I am further satisfied that the* G H

plaintiff's structure was on the land when the defendant obtained the deed of lease and it was the plaintiff's structure that he eventually build upon."

4. "The defendant can not therefore, in my view, be said to have obtained his interest in the land through the deed of lease without notice of the prior equitable interest of the plaintiff. It follows therefore, that the deed of lease relied upon by the defendant and which was registered a couple of years after the plaintiff was let into possession can not override the plaintiff's equitable interest."

It was upon these findings that the learned trial Judge concluded as hereunder:

"The claim for possession has been withdrawn and it is struck out. I am however, satisfied, in the light of above findings that the defendant is liable to the plaintiff in trespass in that he has wrongfully disturbed the plaintiff's possession of his land since 1970 and I therefore assess general damages at N1,000.00. The Plaintiff is also entitled to an order of injunction."

He entered judgment for the plaintiff in the sum of N1,000.00 general damages for trespass and an injunction restraining the defendant, his servants and agents from continuing the act of trespass on the land in dispute.

The Defendant being dissatisfied with this judgment appealed to the court of Appeal which Court allowed the appeal, set aside the judgment of the Court below and dismissed plaintiff's claims. In the lead judgment of Babalakin JCA (as he then was) and with which kalgo JCA (as he then was) and Tobi JCA agreed, the Court below held:

1. "That the issue of title is involved in this case.
2. That on decided authorities the sale or lease of family land without the concurrence of family head is void whereas the sale or lease of same by the head of family with the concurrence of the principal members of family is voidable.

3. "On occasions the family may delegate these powers of sale or lease to someone or to a group of people by means of a power of Attorney and such sales or lease by that person or group of persons be-

came binding on the family. See the case of *Ekipendu v. Erika* 4 FSC 79; *Oyebanji v. Okunola* (1968) NWLR 221 and *Akerele v. Atunrase* (1969) 1 All NLR 201. The Respondent's case falls to this latter category."

4. "To succeed, the Respondent must prove that there is a power of Attorney, that the power of Attorney is valid to transfer the Oluwa Chieftaincy land. It is important to know the extent of authority contained in the said power of Attorney. The law is that parties are bound by their pleadings. Here, the power of attorney was produced to enable the Court know that there was in fact a power of attorney in existence;"

5. That the defendant proved that the lease of the land in dispute to him is valid. He has therefore, proved a better right of possession of the land in dispute than the plaintiff.

The plaintiff has now appealed against that judgment to this Court.

During the pendency of the appeal in this Court, the Defendant Busari Bamgbose died and was by order of this Court substituted by Hassan Bamgbose and Seliatu Bamgbose who are now respondents to the appeal. They shall hereinafter be referred to as the Respondents.

Three issues have been formulated by the Plaintiff and adopted by the Respondents as calling for determination in this appeal.

They are:

"1. WHETHER the learned Justices of the Court of Appeal were not in error in holding that the case dealt exclusively with the acquisition or transfer of family land by lease, when the Appellant's claim was based on trespass and founded upon his possession of the said land.

2. WHETHER the existence of a Power of Attorney in favour of Ashafa Oluwa and /or the extent of the said Ashafa Oluwa's authority contained in the said power of attorney were matters which were put in issue by the pleadings.

3. WHETHER the learned Justices of the Court of appeal were not in error in holding that the Respondents acquired a valid lease from the Head of the Oluwa Chieftaincy Family free of a prior equitable interest in favour of the Appellant."

The main thrust of Plaintiff's argument on Issue (1) is that the Plaintiff's claim being in damages trespass possession of the land in dis-

pute was all that need to be proved and not title to the land. It is argued that Plaintiff established sufficient evidence of possession of the land and a finding to this effect was made by the trial Court. On issues (2) and (3) the argument is to the effect that the averment in the statement of claim of Ashafa Oluwa's agency to alienate on behalf of the family the land in dispute was not traversed in the statement of defence. In that case, therefore, it is argued, there was no need to tender the Power of Attorney given to Ashafa Oluwa. It is further argued that there was sufficient evidence without the power of attorney from which the court could deduce that Ashafa Oluwa had authority to lease family land on behalf of the Head and other members of the family and that on the findings of the trial Court judgment ought to be entered in Plaintiff's favour. We are urged to set aside the judgment of the Court below and uphold that of the trial High Court.

For the Respondents, it is contended that paragraphs 2A and 10 of the amended statement of Defence sufficiently traversed paragraph 4 of the Statement of Claim. It is further contended that the burden was on the Plaintiff to prove that Ashafa was representing the Oluwa family but that this burden was not discharged. Referring to Exhibits A and D, it is argued that exhibit D made mention of a number of Attorneys and it is submitted that the failure to produce the Power of attorney was fatal to Plaintiff's claim. We are urged to dismiss the appeal.

Having regard to the state of the pleadings, I think the proper view of the law is that title is involved in this case and to succeed plaintiff must prove that he has better title to the land in dispute than the defendant more so that the Defendant had a deed of lease as evidence of his own title. The law is succinctly stated by this Court in Pius Amakor v. Benedict Obiefuna (1974) 3SC. 67 at page 78 where Fatayi-Williams JSC (as he then was) delivering the judgment of this Court said:

"Generally speaking, as a claim for trespass to land is rooted in exclusive possession, all a Plaintiff need to prove is that he has exclusive possession, or he has the right to such possession, of the land in dispute. But once a defendant claims to be the owner of the land in dispute, title to it is put in issue, and, in order to succeed, the plaintiff must show a

better title than that of the defendant."

It is, therefore, not correct as argued on behalf of the plaintiff that the proof of possession in this case was sufficient. The Court below is right in its approach to the case and I resolve Issue (1) against the Plaintiff.

On the issue of the agency or authority of Ashafa Oluwa to lease the land in dispute to the plaintiff, I have examined the pleadings in this case and I am satisfied that by the reading together of paragraphs 2A and 10 of the amended Statement of Defence, the authority of Ashafa Oluwa to grant a lease of the land in dispute to the Plaintiff in 1959 was sufficiently put in issue. The Power of Attorney allegedly given to Ashafa Oluwa was never tendered in evidence and being a written document, extrinsic evidence of its contents would not be admissible. Therefore, the contention that there was sufficient evidence without the Power of attorney to support the finding that Ashafa Oluwa did, in fact, have an authority to lease on behalf of the family, the land in dispute, is misplaced. The Plaintiff in his evidence said:

"I saw the Power of attorney with Ashafa. The Power of Attorney is not in my possession."

PW2 David Ikoli who claimed to have purchased from Ashafa also stated in his evidence that he too saw the Power of Attorney. PW3 Ekundayo Ajayi a licensed Surveyor testified to the effect that:

"Ashafa was a principal member of the family."

Ashafa was one of the Attorneys of the family."

It is strange that Plaintiff made no attempt to tender the power of Attorney at the trial. It is the document that could inform the Court of the authority given to Ashafa and other members of the family and the extent of that authority. Without that document, I cannot see how a finding to the effect that Ashafa had authority to alienate Oluwa family land could be made. This is more so in the light of the evidence of DW3 Chief Suleiman Babatunde Ajasa Oluwa, the Head of the Oluwa family who in his evidence testified that:

"Ashafa had no authority to sign any document on behalf of the Oluwa Family."

The witness became Chief Oluwa and Head of family in 1966 and was

not a head of family in 1959 when plaintiff claimed that he acquired title to the land in dispute. This seeming weakness in the evidence of this principal witness is however, of little or no assistance to the plaintiff who ought to, but did not, tender in evidence the Power of Attorney he relied on. It is even doubtful if he could successfully tender the said Power of Attorney in proof of paragraph 4 of his Statement of Claim. I say no more on this.

The sum total of all I have been saying is that, as rightly held by the Court below, Plaintiff failed to prove his title to the land in dispute. The defendant having succeeded in establishing his own title and the plaintiff failed to show that he had better title than the defendant, in my respectful view, therefore, the Court below was right in dismissing his claims. I resolved issues (2) and (3) against the Plaintiff.

It is for the reasons I have given above that I, too, like my learned brother Ejiwunmi JSC, dismiss this appeal as lacking in merit. I, too, award N10,000.00 costs of this appeal to the Respondents.

E

MOHAMMED JSC

I agree entirely with the opinion of my learned brother, Ejiwunmi JSC., in the judgment just delivered. For the reasons given in that judgment I too would dismiss this appeal. It is accordingly dismissed. I affirm the judgment of the court below. I also award N10,000.00 as costs in favour of the respondent.

G

ACHIKE JSC

The Plaintiff's action against the defendant was simply one for general damages for trespass into his property lying and situate at 29 Oyebo Street Araromi, Apapa, possession of the said building and premises and perpetual injunction restraining the defendant, his servants and agents from continuing his acts of trespass. The parties' pleadings clearly showed that title to the land in dispute manifestly called for resolution between the parties. This fact was discernible from the relevant para-

graphs of the parties' pleadings which are reproduced hereunder. The following paragraphs of the Statement of Claim appear to me relevant:

"3. *The Plaintiff was, and is at all material time the owner in possession of the land and 12 roomed building all situate at No. 29, Oyebo Street, Araromi, Apapa.*

4. *In 1959, the Plaintiff acquired the said land by way of customary lease from Chief Ashafa Oluwa representing the Chief Oluwa and Family for the initial payment of #60 and an annual rent of #1.10/-.*

5. *The plaintiff has since the said 1959 paid his annual rent to the said customary lessors. The copies of rent payment Receipts are attached and marked Exhibit "A" - "A1".*

6. *The said property situate 29, Oyebo Street, Araromi Apapa with the building thereon is bounded as described in approved Plan No. EA.271/1-23/60; a copy of which is attached and marked Exhibit "B".*

7. *The Plaintiff commenced the said 12 roomed building in 1960 and used his building Plan No. AOJ 256 by the PLANNING OFFICE OJO, a copy of which plan is attached and marked Exhibit "C".*

8. *The plaintiff successfully built all the walls of the said building up to the window-level."*

For the Defendant/Respondents, the following response was fielded in the Amended Statement of Defence:

"2A. *The defendant denies paragraphs 4, 5, 6, 7, 8, 9, 10, 12, 15 of the Plaintiff's Statement of Claim on which strict proof is required and will in particular contend at the trial that Chief Ashafa Oluwa mentioned in paragraph 4 of the said Statement of Claim was never at any time Chief Oluwa of Lagos.*

3. *In January 1969, the Defendant acquired the land known as 33, Oyebo Street, by way of Customary Lease from Chief Sulaimon Babatunde Ajasa Oluwa, the Chief Oluwa of Lagos and Apapa and family for the initial payment of #116 (One hundred and sixteen pound) and thereby for Annual rental of #5. Receipt for #116 (one hundred and sixteen pounds) attached and marked Exhibit "A".*

3A. *The Defendant avers that if at all any land was ever lensed out to the plaintiff in that locality at any time, it is not the one validly*

leased to him by the Oluwa Chieftaincy Family and on which he had erected his building.

4. xxxxxxxxxxxx

B 5. *The said acquisition of the land was perfected by preparation and signing of a Deed of Lease in favour of the Defendant some time in 1970 by the said Chief Oluwa and his representatives. The Deed of Lease is hereby attached and marked Exhibit "C".*

C 6. *The Defendant started to erect a building of twelve rooms and a shop on the said property in 1969 and completed it sometime in 1970. The building is erected in accordance with an approved Plan No. OJ24/76 which is hereby attached and marked Exhibit "D".*

D 7. *The Defendant moved with his family to the said completed building in 1970 and in addition put some tenants therein.*

8. *The Defendant has since 1969 being (sic) in physical possession of the said land without any disturbance."*

The above paragraphs of the parties' pleadings put beyond doubt that title to the disputed land was put in issue.

E Having raised the issue of title in his pleadings, Plaintiff/Appellant was obliged to establish same. Therefore, even though the trial court found in favour of the plaintiff, on appeal, the Court was under a duty to satisfy itself that the judgment in plaintiff's favour was sustainable in terms of whether the plaintiff had successfully made out a good case to F establish a better title than that of the defendant. Without satisfactorily showing that the title to the land in dispute inures to him the plaintiff would be completely disarmed and disadvantaged to succeed in his claim for trespass and injunction. It is beyond peradventure that it is good law G that when a claimant sues in damages and injunction and goes further to assert the right to title to the land in dispute, he has unwittingly put title in issue. The principle has for long gained universal acceptance. Thus, for over a quarter of a century ago, Fatayi-Williams JSC in Amakor v. H Obiefuna (1974) 3 SC 67 at p. 78 affirmed that principle very tersely and lucidly:

"Generally speaking, as a claim for trespass to land is rooted in exclusive possession, all a plaintiff need to prove is that he has exclusive

possession, or he has the right to such possession, of the land in dispute. But once a Defendant claims to be the owner of the land in dispute. Title to it is put in issue, and, in order to succeed, the plaintiff must show a better title than that of the defendant."

See Kponuglo v. Kodadja 2 WACA 24 and *Ayoola v. Adebayo*. (1969) 1 B ALL NLR 159.

In proof of his better title to the land in dispute Appellant relied heavily on a leasehold interest acquired over the said land which was granted to him by the Oluwa family through one Chief Ashafa Oluwa and who in turn relied on a Power of Attorney donated to him by the Oluwa family. In contrast, the Respondent on his part relied on a leasehold grant made to him by the Oluwa family under the leadership of one Chief Sulaiman Babatunde Ajasa Oluwa, the Chief Oluwa of Lagos and Apapa. That was the background against which the legal battle for better title raged between the parties. Since the appellant was plaintiff in the legal battle, the evidential burden was undoubtedly on him to establish his claim to better title on balance of probabilities through credible evidence that would tilt the balance in his favour. Regrettably, the appellant performed woefully in this regard because he neither fielded Chief Ashafa Oluwa, a potentially important witness to his case to testify on his behalf nor did he tender in evidence the Power of Attorney empowering Chief Oluwa to effect the transaction of leasehold to him in respect of the land in dispute. What remained intriguing in this case was the conspicuous absence of the Power of Attorney alleged. Appellant testified that he himself saw it. PW2 who also testified that he purchased from Chief Ashafa Oluwa stated that he saw the said Power of Attorney. PW3, a licensed surveyor fielded by the Appellant only succeeded in saying that the Power of Attorney alleged included Chief Ashafa Oluwa as one of the attorneys of the family and further described him as a principal member of the Oluwa family. The position of the Appellant's case vis-a-vis the untendered power of Attorney was, in my view, catastrophic more so when the Appellant remained muted in this regard and without any forthcoming explanation as to the existence or non-existence of the Power of Attorney. There is no gainsaying the fact that this instrument was a material

document because, in the absence of satisfactory explanation as to its whereabouts, no secondary evidence will be tendered in its place and any such evidence led as to its content will be inadmissible and must be expunged by the appellate court. Thus, at the end of the day, the scope of the rights allegedly conveyed to the Appellant by the nebulous Power of Attorney remained anybody's guess. This was most unfortunate to Appellant's claim to title to the land in dispute. The result is that the court below rightly found no basis to justify the decision of the learned trial Judge in favour of the Plaintiff/Respondent. I cannot agree more with the decision of the court below. See Kodilinye v. Odu 2 WACA 336, Jules v. Ajani (1980) 5-7 SC 96, Bello v. Eweka (1981) 1 SC 107 and Mogaji v. Odofin (1978) 4 SC 91.

I think I have said enough from what has been stated above to show that I too, like the court below, unhesitatingly agree that the appellant has failed to establish on balance of probabilities that he is entitled to the reliefs he had prayed. In the result, I hold that the appeal lacks merit and the same should be dismissed. Accordingly, I dismiss the appeal and award N10,000.00 costs to the Respondents.

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