

SUPREME COURT OF NIGERIA

18TH JUNE, 1999. SC. 2/1993

**CORAM:- A. G. KARIBI-WHYTE, E. O. OGWUEGBU, U.
MOHAMMED, A. I. KATSINA-ALU, S. O. UWAIFO, JJSC.**

DENNIS IVIENAGBOR PLAINTIFF/APPELLANT
AND
HENRY OSATO BAZUAYE DEFENDANTS/RESPONDENTS
MADAM AMIUKPOMAKO OGIEMWENSE

APPEALS - Concurrent findings of fact - By the two lower courts -
When the Supreme Court will interfere with such findings.

APPEALS - Evidence - Findings of fact - Made by a trial court - Which
are reasonably supported by the evidence - An appellate court has a duty
not to interfere with such findings

COURTS - Evidence - Evaluation of - The type of evidence a court can
act on - Is the evidence which was exposed and canvassed in court.

EVIDENCE - Evidence - Evaluation of - The type of evidence a court
can act on - Is the evidence which was exposed and canvassed in court.

EVIDENCE - Submission of counsel - Cannot be a substitute - For the
evidence required on an issue in a case.

EVIDENCE - Unchallenged evidence - Evaluation of Evidence - Un-
challenged evidence which is not by itself incredible - Is qualified to be
accepted - And acted upon by the trial court

FACTS

The plaintiff/appellant brought an action at the High Court, Benin
claiming an order of perpetual injunction to restrain the defendants/re-

spondents from any part of his land covered by certificate of occupancy No. BDSR 1151 and registered as No. 29 at page 29 in volume B. 25 of the Lands Registry in the office at Benin City; special and general damages for trespass upon the said land, and a declaration that he is entitled to the possessory title of that parcel of land measuring 50 feet by 100 feet which the 2nd defendant/respondent claimed to have acquired from one Mr. Osarinmwian. The respondents counterclaimed for a declaration that the 2nd respondent is entitled to a statutory right of occupancy to that parcel of land of 50 feet by 100 feet as shown in survey Plan No. OSA/1777/BD 86, a declaration that she is in lawful possession thereof; general damages and perpetual injunction.

The appellant acquired a parcel of land of the size of 100 feet by 100 feet at Eguadaiken Quarters, Ward 23/L, Benin City by way of transfer from one Mr. Edogun (D.W.4) sometime in 1975. The said Mr. Edogun had earlier been allocated a plot of land measuring 100 feet by 200 feet by the plot Allotment Committee of the afore-mentioned ward which was duly approved by the Oba. It was out of this plot that the transfer was made to the appellant. The appellant was subsequently granted a statutory right of occupancy to the said land as per the afore-said certificate of occupancy (exhibit C) The 2nd respondent who is the mother of the 1st respondent on the other hand claimed to have got a transfer of land of the size of 50 feet by 100 feet in the same ward from one Mr. Osarinmwian (D.W.2) which transaction was in writing (exhibit E). Mr. Osarinmwian acquired an area of land measuring 100 feet by 200 feet by allocation through the Eguadaiken Ward 23/L which was duly approved by the Oba and it was out of this that he transferred the land in dispute to the 2nd respondent. The appellant trespassed upon the said land transferred to the 2nd respondent sometime in 1983 by commencing a building on it despite warnings. He contended that the land he encroached on in building his house was a surplus land from the one transferred to him by his vendor meant for a proposed express road but his vendor (D.W. 4) denied that there was any surplus land in the area after the transfer to the appellant. Upon a complaint brought by the 1st respondent, the council of landlords in the area intervened and by way of

compromise decided that the respondents should take part of the appellant's land in exchange for their own which the appellant had built on. The appellant rejected the compromise and instituted the action while the respondents brought a counter claim insisting on a right to their land.

At the conclusion of trial, the learned trial judge gave judgment for the appellant only in respect of his claim for perpetual injunction and dismissed the other reliefs sought. The reliefs sought in the counter claim with the exception of claim for general damages were also granted. The appellant's appeal to the Court of Appeal was unsuccessful hence the further appeal to the Supreme Court, where he has now raised three issues.

ISSUES FOR DETERMINATION

(i) Whether or not the respondents are entitled to the declaration they sought.

(ii) Whether or not the appellant is entitled to a possessory title in respect of the land in question.

(iii) Whether or not the appellant is entitled to damages for trespass.

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

Evidence - Unchallenged evidence

1. Mr. Osarinmwian (d.w.2) who transferred the said land to the respondents, relying on his grant by the Oba of Benin, gave evidence in cleat term to that effect. His evidence was virtually unchallenged by the appellant. All he was recorded saying in cross-examination as contained in the printed record was simply: "I cannot interpret what is on Exhibit 'D' but I can identify the land on ground should the court pay a visit to same. One Edogun was my neighbour at the time I purchased the land and one Eguase Izevbigie." There is nothing to show that the appellant urged the court for a visit to the locus in quo. He threw away an opportunity that might have worked in his favour. There is no way, upon the evidence on the printed record, of disputing his right to the land. The learned trial judge was justified to have accepted it on the principle that

evidence which is unchallenged through cross-examination, not controverted by other evidence and is not by itself incredible is qualified to be accepted and acted upon by the trial court: see Omoregbe v Lawani (1980) 3-4 SC 108 at 117. (p. 1904 H)

B

Appeals - Evidence

2. The trial court made findings of fact which are in no way perverse but were sufficiently justified from the pleadings and evidence. The Court of Appeal accordingly upheld those findings after considering the evidence.

C

That was quite in consonance with the duty of an appellate court not to interfere with findings of fact made by a trial court which had the advantage of hearing and seeing witnesses testify so long as those findings are reasonably supported by the evidence: see Omoregie v Edo (1971) All

D

NLR 282 at 289. (p. 1906 A)

Appeals - Concurrent findings

3. Before this court therefore are concurrent findings of the two lower courts. It has been established to be the policy of this court that it will not disturb concurrent findings of fact by the two lower courts except in special circumstances such as the commission of error in substantive or procedural law or where the findings are shown to be perverse: see

F

Nwadike v. Ibekwe (1987) 4 NWLR (pt. 67) 718. (p. 1906 C)

Evidence - Submission

4. Learned counsel for the appellant may well have a clearer idea of the layout of the area in question than the trial court had but that is not borne out by the record. In a situation like the present, a court, not least an appellate court, is severely handicapped, unfortunately for the appellant, from looking beyond the record to rely on the submission of counsel.

G

That will be engaging in speculation. Submission by counsel cannot be a substitute for the evidence required on an issue in a case. (p. 1908 F)

H

Courts - Evidence

5. In the same way, a court is not entitled to substitute its own views for

matters in contention in the absence of evidence: see Owe v Oshinbajo (1965) 1 All NLR 72 at 75. The type of evidence a court can act on is the evidence which was exposed and canvassed in court. A judge cannot by examining documents outside court act on what he considers he has discovered on an issue when that was not supported by evidence or was not brought to the notice of the parties to be agitated in the usual adversarial procedure. (p. 1908 H)

NOTABLE POINTS OF INTEREST

UWAIFO.JSC

1. *Procedure for controverting evidence*

It is not enough to say d.w.2 failed to give evidence of the remaining portion of the land he got by grant from the Oba of Benin after he transferred part of it to the 2nd respondent. This is a civil case. Mr. Osarinmwian who claimed to have transferred part of his land to the 2nd respondent testified to that effect. He was not shown not to have done so or that he could not possibly have done so. This should have been established either through cross-examination or evidence led to controvert the counterclaim. It is then it might have been disclosed if Mr. Osarinmwian lost part of his land to S.& T. Road by going over to the other side of that road or that he was unable to explain, had he been cross-examined on it. Or if he could not be pinned down, then evidence of officials of the Town Planning Authority as to the land use and layout of that area could have been led by the appellant in defending the counterclaim after evidence had been led by the respondents in support of the said counterclaim. I have already said that a visit to the locus in quo, if one had been requested, might have concluded that fact in favour of the appellant if his contention was valid. It is simply a matter of following the essential procedures. (p. 1907 B)

2. *Distinction between inference and speculation*

A court cannot decide issues on speculation no matter how close what it relies on may seem to be to the facts. Speculation is not an aspect of inference that may be drawn from facts that are laid before the court.

Inference is a reasonable deduction from facts whereas speculation is a mere variant of imaginative guess which, even when it appears plausible, should never be allowed by a court of law to fill any hiatus in the evidence before it: see Overseas Construction Co. Ltd v Creek Enterprises Ltd (1985) 16 NSCC (pt.2) 1371 at 1375; (1985) 3 NWLR (pt.13) 409. As a result of the nature of the argument relied on by the appellant in this case, I have endeavoured to consider the evidence very closely. I cannot see in what way the appellant had made out a case against the judgments of the two courts below without indulging in the realm of speculation. (p. 1909 E)

REPRESENTATION

Chief Charles Adogah, with James Ogoriefor Esq. for the appellant
A. I. Uhunmwagho Esq. for the respondents

CASES REFERRED TO

Omoregbe v Lawani (1980) 3-4 SC 108 at 117
Yesufu v Kupper International N.V. (1996) 5 NWLR (pt.446) 17
Omoregie v Edo (1971) All NLR 282 at 289
Okolo v Uzoka (1978) 4 SC 77 at 86
Ebba v Ogodo (1984) 4 SC 84 at 98
Nwadike v. Ibekwe (1987) 4 NWLR (pt. 67) 718
Onwuka v Ediala (1989) 1 NWLR (pt.96) 182
Onu v Agu (1996) 5 NWLR (pt.451) 652
Owe v Oshinbajo (1965) 1 All NLR 72 at 75
Bornu Holding Co. Ltd v Bogoco (1971) 1 All NLR 324 at 333
Overseas Construction Co. Ltd v Creek Enterprises Ltd (1985) 16 NSCC (pt.2) 1371 at 1375; (1985) 3 NWLR (pt.13) 409

LEAD JUDGMENT BY UWAIFO JSC

The plaintiff (now appellant) acquired a parcel of land of the size of 100 feet by 100 feet at Eguadaiken Quarters, Ward 23/L, Benin City. His case which was undisputed is that by agreement the original grantee, Mr. Ernest Adesotu Edogun, who gave evidence as d.w.4, transferred

the said land to him something in 1975. The said Mr. Edogun had earlier been allocated a plot of land 100 feet by 200 feet by the Plot Allotment Committee of the Ward in question which received the approval of the Oba of Benin on 15 March, 1969. It was out of this plot the land transfer was made to the appellant. The appellant subsequently, on 25 December, 1981, was granted a statutory right of occupancy to the said land as per a certificate of occupancy No. BDSR 1151 and this was registered as No.29 at page 29 in volume B.25 of the Lands Registry in the Office at Benin City (exhibit C).

The 2nd defendant (now 2nd respondent), who is the mother of the 1st respondent, claimed to have got a transfer of land of the size of 50 feet by 100 feet in the same Ward on 19 September, 1975 from one Mr. George Osarinmwian who gave evidence as d.w.2, which transaction was in writing (exhibit E). Mr. osarinmwian said he acquired an area of 100 feet by 200 feet by allocation through the Eguadaiken Ward 23/L which was approved by the Oba on 11 September, 1972 (exhibit F1) and that it was out of this he transferred 50 feet by 100 feet to the 2nd respondent.

The appellant was alleged to have trespassed upon the said land transferred to the 2nd respondent something in 1983 by commencing a building on it despite warnings. The appellant on the other hand alleged that at the time he negotiated to acquire the 100 feet by 100 feet land from Mr. Edogun, he informed him that the land was more in size than that since allowance had been made for a proposed express road through part of it. He said it was that space of land, which he regarded as 'surplus' land, that some other landlords in that area encroached on and that "when I wanted to build my house, I also encroached a little on the road."

The appellant eventually went to court to seek (1) an order of perpetual injunction to restrain the respondents from any part of his land covered by the certificate of occupancy; (2) N30,000.00 as special and general damages for trespass upon the said land; and (3) a declaration that he is entitled to the possessory title of that parcel of land of 50 feet by 100 feet which the 2nd respondent claimed to have acquired from Mr. Osarinmwian. The respondents counterclaimed for (a) a declaration that

the 2nd respondent is entitled to a statutory right of occupancy to that parcel of land of 50 feet by 100 feet as shown in survey plan No. OSA/1777/BD 86 and demarcated with beacons MM 814, BS 1442, BS 1443 and BF 1866; (b) a declaration that she is in lawful possession thereof; B (c) N1,000.00 general damages; and (d) perpetual injunction.

On 6 May, 1988, Akpomudjere J., sitting at the High Court Benin, after carefully considering the pleadings and evidence, gave judgment for the appellant in respect only of his claim for perpetual injunction and dismissed the other reliefs sought. The learned trial judge granted C the reliefs sought in the counterclaim except the claim for N1,000.00 general damages.

I may now state further facts of this case, particularly in regard to the evidence adduced and the findings made by the learned trial judge. D The appellant said his vendor, Mr. Edogun, as already indicated, told him that the land he transferred to him was larger than 100 feet by 100 feet because of the allowance made for a road there resulting in there being what he, the appellant, regarded as surplus land. But Mr. Edogun in his E evidence said he transferred only 100 feet by 100 feet to the appellant and that "there was no surplus land in the area after transferring my own portion to him." The learned trial judge accepted this evidence, holding that the attempt to discredit the witness with his evidence in a previous F criminal case in the District Customary Court was to no avail. That finding was not challenged on appeal to the Court of Appeal. The appellant further said because other landlords scrambled for that area of land intended for a road, he also encroached thereon to commence a building on it. But the learned trial judge rejected that evidence on the basis that G he did not call any of such landlords to say there was surplus land which the landlords shared among themselves. Obviously the two planks upon which the appellant founded his claim to the land in question which verged yellow in his survey plan (exhibit B) and pink in the respondents' survey H plan (exhibit D) easily collapsed.

Mr. Osarinmwian (d.w.2) who transferred the said land to the respondents, relying on his grant by the Oba of Benin, gave evidence in cleat term to that effect. His evidence was virtually

unchallenged by the appellant. All he was recorded saying in cross-examination as contained in the printed record was simply: "I cannot interpret what is on Exhibit 'D' but I can identify the land on ground should the court pay a visit to same. One Edogun was my neighbour at the time I purchased the land and one Eguase Izevbogie." There is nothing to show that the appellant urged the court for a visit to the locus in quo. He threw away an opportunity that might have worked in his favour. There is no way, upon the evidence on the printed record, of disputing his right to the land. The learned trial judge was justified to have accepted it on the principle that evidence which is unchallenged through cross-examination, not controverted by other evidence and is not by itself incredible is qualified to be accepted and acted upon by the trial court: see Omoregbe v Lawani (1980) 3-4 SC 108 at 117; Egbunike v African Continental Bank Ltd (1995) 2 NWLR (pt.375) 34; Broadline Enterprises Ltd v Monterey Maritime Corpn (1995) 9 NWLR (pt.417) 1 at 27; Yesufo v Kupper International N.V. (1996) 5 NWLR (pt.446) 17.

When there was dispute between the appellant and the respondents, the matter came before the landlords of that area. There is the evidence of Mr. Victor Ukpegbe, the Odionwere (leader) of the landlords who testified as d.w.3. He said that the 1st respondent brought the appellant before the council of landlords of that area on a complaint that the appellant had erected a building on their (respondents') land. He added: "We decided that since both parties own land in the area and the plaintiff had developed the front, we advised the 1st defendant to develop from his back. We found out that plaintiff had already built on 1st defendant's land." The learned trial judge believed d.w.3. It was when the appellant would not accept that compromise that the respondents decided to insist on their right to that land by way of a counterclaim. The respondents had thought they could rely on that intervention by the landlords and so they took part of the appellant's land in exchange for their own land and erected a well fence. But the appellant pulled it down, for which he was prosecuted and convicted.

The Court of Appeal fully endorsed the findings of the trial court

on those vital issues. Upon the evidence on record, the Court of Appeal had no alternative. In other words, **the trial court made findings of fact which are in no way perverse but were sufficiently justified from the pleadings and evidence. The Court of Appeal accordingly upheld those findings after considering the evidence. That was quite in consonance with the duty of an appellate court not to interfere with findings of fact made by a trial court which had the advantage of hearing and seeing witnesses testify so long as those findings are reasonably supported by the evidence: see Omoregie v Edo (1971) All NLR 282 at 289; Okolo v Uzoka (1978) 4 SC 77 at 86; Ebba v Ogodo (1984) 4 SC 84 at 98.**

Before this court therefore are concurrent findings of the two lower courts. It has been established to be the policy of this court that it will not disturb concurrent findings of fact by the two lower courts except in special circumstances such as the commission of error in substantive or procedural law or where the findings are shown to be perverse: see Nwadike v. Ibekwe (1987) 4 NWLR (pt. 67) 718; Onwuka v Ediala (1989) 1 NWLR (pt.96) 182; American Cyanamid Co v Vitality Pharm Ltd (1991) 2 NWLR (pt.171) 15; Adebayo v Ighodalo (1996) 5 NWLR (pt.450) 507; Onu v Agu (1996) 5 NWLR (pt.451) 652. It is clear from the issues raised by the appellant and the manner they were canvassed, that this court is being essentially invited to overturn the findings of the two lower courts which I have already identified in this judgment. The issues before this court are: (i) Whether or not the respondents are entitled to the declaration they sought. (ii) Whether or not the appellant is entitled to a possessory title in respect of the land in question. (iii) Whether or not the appellant is entitled to damages for trespass.

The argument urged in support of those issues revolves around the evidence adduced. The strongest point can be found in two aspects of the evidence of d.w.2, d.w.3 and d.w.4 which the appellant highlighted in his brief of argument. The first aspect is stated thus in the brief: "D.W.2 who claimed to have sold parcel A in Exhibit 'D' to the 2nd Defendant/Respondent said at the trial that he transferred 50 feet by 100

feet out of his land measuring 100 feet by 200 feet along S. & T. Lane. He failed to give evidence of the remaining piece or parcel of land but only indicated that he had a common boundary with D.W.4 the appellant's vendor. Since appellant's land was measured from the tarred road, it follows that D.W. 2 could not possibly have common boundary with D.W. 4." B

It is not enough to say d.w.2 failed to give evidence of the remaining portion of the land he got by grant from the Oba of Benin after he transferred part of it to the 2nd respondent. This is a civil case. Mr. Osarinmwian who claimed to have transferred part of his land to the 2nd respondent testified to that effect. He was not shown not to have done so or that he could not possibly have done so. This should have been established either through cross-examination or evidence led to controvert the counterclaim. It is then it might have been disclosed if Mr. Osarinmwian lost part of his land to S.& T. Road by going over to the other side of that road or that he was unable to explain, had he been cross-examined on it. Or if he could not be pinned down, then evidence of officials of the Town Planning Authority as to the land use and layout of that area could have been led by the appellant in defending the counterclaim after evidence had been led by the respondents in support of the said counterclaim. I have already said that a visit to the locus in quo, if one had been requested, might have concluded that fact in favour of the appellant if his contention was valid. It is simply a matter of following the essential procedures. C D E F

There is no evidence before the learned trial judge that appellant's land was measured from the tarred road. What is on record is that it was put to d.w.4 (i.e. appellant's vendor) that he had said in his evidence in the criminal proceedings against the appellant at the District Customary Court that the measurement was from the tarred toad. He denied saying so at those proceedings. The issue sought to be made therefrom appeared to have died there as the learned trial judge did not seem to have accepted that it was established by the evidence. There can therefore be no basis to argue, as the appellant has done, that d.w.2 "could not possibly have a common boundary with d.w 4", because the only oral evi G H

dence on record coming from d.w.2 is that he had a common boundary with d.w.4.

The second aspect as argued by the appellant in his brief is as follows: "Exhibit F which is the basis upon which D.W.2 sold any land at all relates to a parcel of land along S & T Lane as distinct from S & T Road where the appellant's land is situate. Since D.W.2 could not indicate the location of the balance of land unsold, it follows that his claim to parcel A in Exhibit 'D' must fail. At page 4 D.W.3, the Odionwere of the landlords stated as follows: - 'We found the whole land in the area to be 150 by 100'. This proves conclusively that D.W.4 (sic: D.W.2), the vendor of the respondents could not have owned any land in the area measuring 100 feet by 200 feet between the S. & T. Road and by the land of the Plaintiff/Appellant which measured 100 feet by 100 feet."

As already pointed out, it is not known, and cannot be ruled out, whether the S. & T. Road forms part of d.w.2's land, and that he has lost that portion, leaving the 50 feet by 100 feet sold now effectively abutting on S. & T. Road. There is no other evidence to make his own obviously terse evidence unlikely because he was not taken to task to extract a more elaborate evidence from him. The evidence of the Odionwere (d.w.3) that the landlords found the whole land in the area to be 150 feet by 100 feet is reasonably referable to the land covered by the appellant's certificate of occupancy which covers 100 feet by 100 feet and the one in dispute which is 50 feet by 100 feet. The total 100 feet by 150 feet is shown in the two litigation plans, exhibit B (by the plaintiff/appellant) and exhibit D (by the defendants/respondents). **Learned counsel for the appellant may well have a clearer idea of the layout of the area in question than the trial court had but that is not borne out by the record. In a situation like the present, a court, not least an appellate court, is severely handicapped, unfortunately for the appellant, from looking beyond the record to rely on the submission of counsel. That will be engaging in speculation. Submission by counsel cannot be a substitute for the evidence required on an issue in a case.**

In the same way, a court is not entitled to substitute its own

views for matters in contention in the absence of evidence: see Owe v Oshinbajo (1965) 1 All NLR 72 at 75; Bornu Holding Co. Ltd v Alhaji Hassan Bogoco (1971) 1 All NLR 324 at 333. The type of evidence a court can act on is the evidence which was exposed and canvassed in court. A judge cannot by examining documents outside court act on what he considers he has discovered on an issue when that was not supported by evidence or was not brought to the notice of the parties to be agitated in the usual adversarial procedure. In Alhaji Onibudo & Ors v Alhaji Akibu & Ors (1982) 7 SC 60 at 62, Bello JSC (later CJN) observed as follows:

"It needs to be emphasized that the duty of a court is to decide between the parties on the basis of what has been demonstrated, canvassed and argued in court. It is not the duty of a court to do cloistered justice by making an inquiry into the case outside court, event if such inquiry is limited to examination of documents when the documents had not been examined in court and their examination out of court disclosed matters that had not been brought out and exposed to test in court."

I think the present case falls within this admonition and hence the points now raised by Chief Adogah cannot be entertained.

A court cannot decide issues on speculation no matter how close what it relies on may seem to be to the facts. Speculation is not an aspect of inference that may be drawn from facts that are laid before the court. Inference is a reasonable deduction from facts whereas speculation is a mere variant of imaginative guess which, even when it appears plausible, should never be allowed by a court of law to fill any hiatus in the evidence before it: see Overseas Construction Co. Ltd v Creek Enterprises Ltd (1985) 16 NSCC (pt.2) 1371 at 1375; (1985) 3 NWLR (pt.13) 409. As a result of the nature of the argument relied on by the appellant in this case, I have endeavoured to consider the evidence very closely. I cannot see in what way the appellant had made out a case against the judgments of the two courts below without indulging in the realm of speculation. I have therefore come to the conclusion that there is no justifiable cause for me to interfere with the findings made by the two lower courts. I accordingly dismiss the appeal with costs of N10,000.00 in favour of the

respondents.

KARIBI-WHYTE JSC

I have read the judgment of my brother Uwaifo, JSC in this appeal. I am in complete agreement with the reasoning and conclusion that this appeal lacks merit and should be dismissed. I also will and hereby dismiss the appeal of the appellant.

The judgment of the Court of Appeal is hereby affirmed.

Appellant shall pay N10,000 as costs to Respondents.

OGWUEGBU JSC

I had the preview of the judgment just delivered by my learned brother Uwaifo, J.S.C. and I entirely agree with his reasoning and conclusions. I have nothing more useful to add. I also dismiss the appeal and the appellant shall pay the costs of N10,000.00 to the respondents.

MOHAMMED JSC

I entirely agree that the appellant has not advanced any convincing reason for me to disturb the concurrent findings of the two court below in this appeal. I will also dismiss this appeal for the reasons given in the judgment of my learned brother Uwaifo, J.S.C. I have had the advantage of reading the judgment in draft. The appeal is dismissed. I award N10,000.00 costs in favour of the respondents.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment prepared by my learned brother Uwaifo, JSC, and I cannot usefully add to it.

I also would dismiss the appeal and affirm the judgment of the Court below with N10,000.00 costs in favour of the Respondents.