

SUPREME COURT OF NIGERIA

16TH JULY, 1999. SC. 136/1993

**CORAM:- A. B. WALI, M. E. OGUNDARE, U. MOHAMMED,
O. ACHIKE, E. O. AYoola, JJSC.**

M. OLU BELLO DEFENDANT/APPELLANT
AND
BAMIDELE FAYOSE & ORS. PLAINTIFFS/RESPONDENTS

***APPEALS** - Issue - Doctrine of standing by - Which did not arise - It was erroneous for the court of Appeal - To have made a pronouncement on the issue - Which was neither an issue at the trial nor on the appeal.*

***APPEALS** - Issue - Proper issue - Declaration - Where no declaration was granted - An issue raised on the consequence - Of the failure on the part of the plaintiffs to present a plan - Showing the area for which declaration is sought - It not an issue properly arising.*

***APPEALS** - Issues - Hypothetical and abstract issues - What they mean - And how such issues affect an appeal.*

***APPEALS** - Judgment - Error - The Court of Appeal was wrong in raising and considering - The question of standing by in this case - But the error did not affect the correctness of its conclusion.*

***ESTOPPEL** - Standing by - The principle - What it means - And whether it applies in this case.*

***LAND LAW** - Trespass and injunction - Production of plan - Is not essential to a claim for trespass - And an order of injunction can be granted without a plan - Where the identity of the land is certain.*

***LAND LAW** - Trespass - Possession - Right to enter - Where the plaintiffs have been found to be in possession of the land in dispute - And the*

defendant had not established his right to enter any part of that land - He cannot make an issue of the failure of the plaintiff - To demarcate any part of the land - As that on which he should not enter.

FACTS

In the High court of Ondo State the plaintiffs/respondents sued the defendant/appellant claiming a declaration of title to statutory Right of Occupancy of the land in dispute; an order voiding the purported sale of a portion of the said land to the defendant and some other person yet unknown to the plaintiffs; damages for trespass and injunction. The plaintiffs are the owners of a large expanse of land over which they have successfully sued one chief Daramola the Ojumu of Akure in suit AK/15/77. The defendant in the present action was chief Daramola's solicitor in that action. The land in dispute formed part of the plaintiffs' family land which was the object of litigation in suit AK/15/77. The plaintiffs as well as their ancestors have been in undisturbed possession of the land. The action arose because the defendant who was neither a member of the plaintiffs' family nor purchaser from the plaintiffs' family entered the land, made sales of several portions of it to other persons and superimposed a different layout plan on one that the plaintiffs' family produced. The defendant's amended statement of defence disclosed that the root of title he relied on was from a family known as Eshiran family whose head was the 5th plaintiff in this present action. He pleaded a deed of conveyance executed in favour of persons including himself by one Mr. Babatunde Eshiran the son of the 5th plaintiff acting on behalf of Eshiran family in 1975. The defendant did not adduce any evidence at the trial in support of his claim as pleaded.

At the conclusion of hearing, the learned trial judge entered judgment in favour of the plaintiffs. He awarded N500.00 as damages for trespass against the defendant and order of injunction restraining him from entering the land in dispute. He did not award any declaration. And, in regard to the order "voiding the purported sale" to the defendant and persons yet unknown, the learned trial judge commented that the purported conveyance is null and void, but he did not make any order in

relation to or in terms of the plaintiffs' second claim. Dissatisfied, the defendant appealed to the Court of Appeal. The court of Appeal dismissed the appeal and held {per Adio JCA } that the plaintiffs have established their ownership and possession of the land in dispute. In addition, he held that the defendant, as counsel in suit AK/15/77, stood by in that suit and therefore could not raise the issue of ownership and possession of the land in the present case. The defendant has further appealed to the Supreme Court raising two issues.

ISSUES FOR DETERMINATION

"1. What are the consequences of the failure on the part of the plaintiffs/respondents:

(a) To produce at the trial a plan of the land claimed and pleaded by them clearly showing the area for which declaration of title was sought, on which the Defendant/Appellant had allegedly trespassed and from which the defendant/appellant was restrained by an order of injunction.

(b) To show the court clearly the area of land to which their claim related.

2. Whether the issue of Estoppel by Standing By/per res Judicata did arise in the proceedings and was properly raised in this case by the Court of Appeal; and whether the law on the doctrine or Estoppel by Standing By/per Res Judicata was properly applied by the Court of Appeal to sustain its decision."

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

Issues - Hypothetical and abstract issues

1. An issue of mixed law and fact is hypothetical when it is unrelated to the facts found or when it assumes facts as found when they were not found. When an issue is hypothetical the argument made thereon must fail because it would not have been based on facts as found. An issue is abstract when it raises a question of law the answer to which is general in the sense that even if it is answered correctly, such answer will not affect the decision appealed from one way or the other. It was held in Onyesoh v. Nnebedun & Ors (1992) 3 S.C. N.J. 129, 153 that a resolu-

tion of an issue one way or the other should affect the result of the appeal. When the resolution of an issue one way or the other will not affect the result of the appeal, such issue, for the purpose of an appeal is a false issue. Hypothetical and abstract issues are false issues. Arguments made on them will not be of any help to the party who advances them. (p. 2412 H)

Issue - Proper issue

C 2. In this case, there being no declaration granted the question whether failure on the part of the plaintiffs to present a plan " showing the area for which declaration was sought" has any consequence, is not an issue properly arising. (p. 2413 D)

D ***Land law - Claim***

3. In regard to the rest of the first issue, it is not the law that production of a plan is essential to a claim for trespass. In regard to injunction, the same observation made in regard to production of plan in relation to a claim to a declaration of title to land applies. The requirement that an order of injunction restraining a party from entering on a land in dispute should be tied to plan is to make the order clear as to what is restrained and enforceable. It is clear from the findings made by the trial judge F which were confirmed by the Court of Appeal, that those two courts were satisfied of the identity of the land to which the plaintiffs' claim related. Arguments that those findings were not justifiably made cannot properly be made or considered under the first issue as formulated. G (p. 2413 H)

Land law - Trespass

H 4. The plaintiffs have been found to be in possession of land which was litigated on in suit AK/15/77. That land is clearly certain in that it is ascertainable, the judgment of the High Court in the case having been tied to a plan. The defendant had not established his right to enter any part of that land of which the land in dispute formed part. Where the plaintiff has established his title to an ascertained and defined area of land, a de-

fendant who has no valid title to any part of that land and has not established a right to enter any part of the land cannot be heard to make an issue of the failure of the plaintiff to demarcate any particular part of the land as that on which the defendant should not enter. It would have been different if the plaintiff had conceded to the defendant or the defendant had established right to enter any part of the land. (p. 2414 C) B

Issue - Doctrine of standing by

5. The defendant has rightly criticized this aspect of the judgment of the Court of Appeal on the grounds first, that standing by was not an issue on the pleadings and on the appeal to the Court of Appeal and, secondly, that the doctrine does not apply. Although the plaintiffs filed a lengthy reply to the defendant's amended statement of defence, they did not raise a plea of standing by. The trial judge rightly did not consider any question of standing by. It was erroneous for the Court of Appeal to have made a pronouncement on the doctrine of standing by which was neither an issue at the trial nor on the appeal. Besides, the question of standing by did not arise from the facts of the case. (p. 2415 B) C D E

Estoppel - Standing by

6. The principle of estoppel by standing by is that if a person was content to standby and see his battle fought by somebody else in the same interest, he is bound by the result, and should not be allowed to re-open the case. See: Marbell v. Akwei 14 WACA 143, 145; In this case, the defendant in suit AK/15/77, Chief Daramola, was not fighting any battle in the same interest with the defendant in this case. The title of the present defendant was not put in issue in that case so as to make victory over Chief Daramola in that case victory over the present defendant. (p.2415E) F G

Appeals - Judgment

7. There is no doubt that the Court of Appeal was wrong in raising and considering any question of standing by and in its application of that principle to this case. However, that error does not affect the correctness of its conclusion that the appeal had no merit. The trial court did H

not decide the case on basis of the principle of standing by but on the basis that after the defendant had been given every opportunity to contest the issue that arose from the case he had failed to establish a valid defence to the action. In the result, notwithstanding the wrong pronouncement made by the Court of Appeal on the question of standing by, the appeal must fail. (p. 2416 A)

NOTABLE POINTS OF INTEREST

AYOOLA JSC

1. Comment made in the course of a judgment is not an order

It cannot be assumed that the comments quoted above amounted to an order. First, a comment made in the course of a judgment cannot be regarded as an order in the sense that it directs something to be done or omitted to be done, qualities which an order must possess. Secondly, the comments made were neither in terms of the order sought nor within what the plaintiffs asked for. (p. 2410 B)

2. Theoretical general question - Consequence of

The principle that a party seeking a declaration of title to land must show with certainty the land to which his claim relates is too well established to need citation of authorities. However, whether a plan is essential to the proof of the identity of the land is dependent on the facts of each case. Notwithstanding that, proof by a plan is the easiest and, perhaps, surest way of proving the identity of the land to which a declaration is sought. Where the identity can otherwise be defined with sufficient certainty, the absence of a plan will not make a grant of declaration of title to the defined land bad, notwithstanding the absence of plan. A requirement which is purely evidential should not be converted to a technical rule. It is clear, therefore, that had a declaration been granted by the trial judge, the issue formulated by the defendant regarding the consequences of failure on the part of the plaintiff to produce a plan showing the area to which declaration was sought, resolved as a theoretical general question, could not have advanced the defendant's cause. (p. 2413 D)

3. *Right of a person to litigate his own right*

It is trite that every person has a right to have his civil right determined by a court or tribunal. The correct position was summed up by Lord Penzance in Spencer & Anor. v. Williams & Ors 24 L.T.R. 513, 516 as follows:

"Every man has a right to litigate his own right and to be that guardian of his own right, and it is the commonest basis of justice that a man should not be robbed of that right by the fact that somebody else insisting upon the same right for his own purpose, has entered upon a litigation which has turned out unfavourably to him." (p. 2415 F) C

REPRESENTATION

Appellant in person

Chief A. O. Fesobi for the Respondents

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CASES REFERRED TO

Onyesoh v. Nnebedun (1992) 3 S.C. N.J. 129, 153

Marbell v. Akwei 14 WACA 143, 145

Spencer v. Williams 24 L.T.R. 513, 516

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LEAD JUDGMENT BY AYoola JSC

This is a second appeal from the decision of the High Court of Ondo State (Adeloye CJ) entering judgment for the plaintiffs (now "the respondents") against the defendant (now "the appellant") for damages for trespass and restraining the defendant, his agents, privies and all those acquiring through him from continued trespass on land which the trial judge described as "the said Fagbamila Falae or Esiran land." The plaintiffs had claimed in addition to damages for trespass and injunction, "a declaration of title to Statutory Right of Occupancy of a piece or parcel of land situate lying and being at Ilula-Udo, "and an order voiding the purported sale of a portion of the said land to the defendant and some other person yet unknown to the plaintiffs." F G H

The trial Judge (Adeloye CJ), set out the plaintiffs' claim at the beginning of his judgment, but at the end of his judgment he did not award any declaration. Also, in regard to the order "voiding the pur-

ported sale" to the defendant and persons yet unknown, although the learned Chief Judge had commented that:

"Any conveyance of the said land to him (the defendant) or any person or group of persons claiming through him is null, void, illegal and untenable. All layouts of the said illegally acquired piece of land or sale of portion made thereof are equally void."

at the end of the day, he did not make any order in relation to or in terms of the plaintiffs' second claim. It cannot be assumed that the comments quoted above amounted to an order. First, a comment made in the course of a judgment cannot be regarded as an order in the sense that it directs something to be done or omitted to be done, qualities which an order must possess. Secondly, the comments made were neither in terms of the order sought nor within what the plaintiffs asked for. For these reasons the decision of the High Court that comes for consideration on this appeal is confined to those aspects of the claim to which it was specific; namely, the award of N500 as damages for trespass against the defendant and order of injunction restraining him from entering the land in dispute.

The plaintiffs claimed to be owners of a large expense of land over which they have successfully sued one Chief Daramola, the Ojumu of Akure, several years ago. In the present action they sued the defendant who was Chief Daramola's solicitor in that action, claiming the declaration and reliefs mentioned earlier in this judgment.

The plaintiffs' case at the trial, was that the land in dispute formed part of the plaintiffs' family land which had been object of litigation in the High Court in suit AK/15/77 between the head of the plaintiffs' family who was the 5th plaintiff in the case and one chief Daramola Ojumu. The land originally formed portion of a large area of land which belonged to one Deji Arakale to whom they traced the title they claimed. The plaintiffs as well as their ancestors have been in undisturbed possession of the land. The action arose because the defendant who was neither a member of the plaintiffs' family nor purchaser from the plaintiffs' family entered the land, made sales of several portions of it to other persons and super-imposed a different layout plan on one that the plaintiffs' family

produced.

The defendant's amended statement of defence disclosed that the root of title he relied on was from "a family known as Eshiran family" whose head was the 5th plaintiff in this case. He pleaded a deed of conveyance executed in favour of persons including himself by one Mr. Babatunde Eshiran the son of the 5th plaintiff acting on behalf of Eshiran family in 1975. The defendant did not adduce any evidence at the trial in support of his claim as pleaded. B

The trial found that the plaintiffs have proved their possession of the land because, first, they have successfully raised a claim against Chief Daramola in Suit AK/15/77 and, secondly, the defendant admitted buying the land from the plaintiffs through a member of their family. He held that "reference to Eshiran family land is reference to Fagbamila Falae land to which all the plaintiffs were entitled." He also found that "Esiran or Fagbamila land as the area in dispute may be called is an unpartitioned family land," and that sale of the land by Babatunde Esiran to the defendant and 14 others as pleaded by the defendant was void. It is evident that from these findings, the trial judge held that the burden shifted on the defendant to prove that the plaintiffs have divested themselves of title to the land. That burden, he held the defendant did not discharge. In the event, he entered judgment against the defendant. D E

At the fore-front of the issues raised on the defendant's appeal to the Court of Appeal was whether or not the trial judge was right in holding that a bare denial of paragraphs 4 - 10 of the amended statement of claim amounted to an admission of the facts pleaded in these paragraphs. The facts averred in those paragraphs were summarized by Adio JCA (as he then was) who delivered the leading judgment of the Court of Appeal with which Ogundere and Akpabio JJ.C.A concurred. F G

Adio, JCA, held that even if there could not be said to have been an admission of these paragraphs the facts averred therein have been established. In regard to paragraph 10 which was an averment that the plaintiffs' family was the owner of the land in dispute the reasoning of the Court of Appeal (per Adio JCA) was that the defendant, as counsel in suit AK/15/77, stood by in that suit and therefore could not raise the issue of H

ownership and possession of the land in the present case. In the alternative to the question of standing by, Adio JCA held that on the evidence led by the plaintiffs which remained unchallenged the issues of the ownership and possession of the land in dispute and of the portion of the family land in dispute upon which the defendant trespassed have been established.

On this appeal from the dismissal of his appeal, the defendant raised the following two issues for determination:

"1. What are the consequences of the failure on the part of the plaintiffs/respondents:

(a) To produce at the trial a plan of the land claimed and pleaded by them clearly showing the area for which declaration of title was sought, on which the Defendant/Appellant had allegedly trespassed and from which the defendant/appellant was restrained by an order of injunction.

(b) To show the court clearly the area of land to which their claim related.

2. Whether the issue of Estoppel by Standing By/per res Judicata did arise in the proceedings and was properly raised in this case by the Court of Appeal; and whether the law on the doctrine or Estoppel by Standing By/per Res Judicata was properly applied by the Court of Appeal to sustain its decision."

The first of these issues as formulated overlooked several facts note of which must be taken. There was no declaration granted by the trial judge. The trial judge found, and the Court of Appeal confirmed, that, in substance, the land defined in suit AK/15/77 was sufficient description of the land found to be trespassed on by the defendant and which he should be restrained from entering. The judge's findings of possession of the land in dispute was based partly on the previous action as constituting act of possession. The land in dispute in AK/15/77 was ascertainable, the declaration granted in that case having been tied to an ascertained and clearly identified plan.

It is for these reasons that the plaintiffs' counsels submission that the first issue was hypothetical must find favour. **An issue of mixed law and fact is hypothetical when it is unrelated to the facts found**

or when it assumes facts as found when they were not found. When an issue is hypothetical the argument made thereon must fail because it would not have been based on facts as found. An issue is abstract when it raises a question of law the answer to which is general in the sense that even if it is answered correctly, such answer will not affect the decision appealed from one way or the other. ^B It was held in Onyesoh v. Nnebedun & Ors (1992) 3 S.C. N.J. 129, 153 that a resolution of an issue one way or the other should affect the result of the appeal. When the resolution of an issue one way or the other will not affect the result of the appeal, such issue, for ^C the purpose of an appeal is a false issue. Hypothetical and abstract issues are false issues. Arguments made on them will not be of any help to the party who advances them.

In this case, there being no declaration granted the question ^D whether failure on the part of the plaintiffs to present a plan "showing the area for which declaration was sought" has any consequence, is not an issue properly arising. The principle that a party seeking a declaration of title to land must show with certainty the land to ^E which his claim relates is too well established to need citation of authorities. However, whether a plan is essential to the proof of the identity of the land is dependent on the facts of each case. Notwithstanding that, proof by a plan is the easiest and, perhaps, surest way of proving the ^F identity of the land to which a declaration is sought. Where the identity can otherwise be defined with sufficient certainty, the absence of a plan will not make a grant of declaration of title to the defined land bad, notwithstanding the absence of plan. A requirement which is purely evidential should not be converted to a technical rule. It is clear, therefore, that ^G had a declaration been granted by the trial judge, the issue formulated by the defendant regarding the consequences of failure on the part of the plaintiff to produce a plan showing the area to which declaration was sought, resolved as a theoretical general question, could not have ^H advanced the defendant's cause.

In regard to the rest of the first issue, it is not the law that production of a plan is essential to a claim for trespass. In regard

to injunction, the same observation made in regard to production of plan in relation to a claim to a declaration of title to land applies. The requirement that an order of injunction restraining a party from entering on a land in dispute should be tied to plan is to make the order clear as to what is restrained and enforceable.

It is clear from the findings made by the trial judge which were confirmed by the Court of Appeal, that those two courts were satisfied of the identity of the land to which the plaintiffs' claim related. Arguments that those findings were not justifiably made cannot properly be made or considered under the first issue as formulated.

Besides, the defendant seemed to have approached this aspect of the matter abstractedly without regard to the facts and reality. The plaintiffs have been found to be in possession of land which was litigated on in suit AK/15/77. That land is clearly certain in that it is ascertainable, the judgment of the High Court in the case having been tied to a plan. The defendant had not established his right to enter any part of that land of which the land in dispute formed part. Where the plaintiff has established his title to an ascertained and defined area of land, a defendant who has no valid title to any part of that land and has not established a right to enter any part of the land cannot be heard to make an issue of the failure of the plaintiff to demarcate any particular part of the land as that on which the defendant should not enter. It would have been different if the plaintiff had conceded to the defendant or the defendant had established right to enter any part of the land.

From whatever angle one considers the first issue formulated by the defendant, it is evident that that issue was put forward on this appeal by the defendant as a red herring in a futile effort to divert attention from the manifest worthlessness of his case.

The second issue arose because Adio, JCA, having considered the principles of law relating to estoppel by standing by, proceeded to hold as follows:

"The appellant was aware of the full facts and the issues in-

involved in Suit No. AK/15/77. He knew that ownership and possession of the land in dispute were involved and he was contended to stand by. He could not raise the same issue again."

He made this pronouncement in relation to paragraph 10 of the amended Statement of Claim wherein the plaintiffs averred that their family was the owner of the land in dispute and had been in possession thereof.

The defendant has rightly criticized this aspect of the judgment of the Court of Appeal on the grounds first, that standing by was not an issue on the pleadings and on the appeal to the Court of Appeal and, secondly, that the doctrine does not apply. Although the plaintiffs filed a lengthy reply to the defendant's amended statement of defence, they did not raise a plea of standing by. The trial judge rightly did not consider any question of standing by. It was erroneous for the Court of Appeal to have made a pronouncement on the doctrine of standing by which was neither an issue at the trial nor on the appeal.

Besides, the question of standing by did not arise from the facts of the case. The principle of estoppel by standing by is that if a person was content to standby and see his battle fought by somebody else in the same interest, he is bound by the result, and should not be allowed to re-open the case. See: Marbell v. Akwei 14 WACA 143, 145;

In this case, the defendant in suit AK/15/77, Chief Daramola, was not fighting any battle in the same interest with the defendant in this case. The title of the present defendant was not put in issue in that case so as to make victory over Chief Daramola in that case victory over the present defendant. It is trite that every person has a right to have his civil right determined by a court or tribunal. The correct position was summed up by Lord Penzance in Spencer & Anor. v. Williams & Ors 24 L.T.R. 513, 516 as follows:

"Every man has a right to litigate his own right and to be that guardian of his own right, and it is the commonest basis of justice that a man should not be robbed of that right by the fact that somebody else insisting upon the same right for his own purpose, has entered upon a

litigation which has turned out unfavourably to him."

There is no doubt that the Court of Appeal was wrong in raising and considering any question of standing by and in its application of that principle to this case. However, that error does not affect the correctness of its conclusion that the appeal had no merit. The trial court did not decide the case on basis of the principle of standing by but on the basis that after the defendant had been given every opportunity to contest the issue that arose from the case he had failed to establish a valid defence to the action. In the result, notwithstanding the wrong pronouncement made by the Court of Appeal on the question of standing by, the appeal must fail.

For these reasons, I hold that there is no substance in the appeal and that it must fail in its entirety. Accordingly, I dismiss this appeal with N10,000 costs to the respondents.

WALI JSC

I have had the privilege of reading in advance, the lead judgment of my learned brother Ayoola, JSC and I agree with his reasoning the conclusion for dismissing the appeal.

For the same reasons stated in the lead judgment, I also dismiss this appeal with N10,000.00 costs to the respondents.

OGUNDARE JSC

I agree entirely with the judgment of my learned brother Ayoola JSC just delivered, a preview of which I had ere now. I too dismiss the appeal with costs as assessed by Ayoola JSC.

MOHAMMED JSC

I have had the privilege to read the judgment just read by my learned brother, Ayoola J.S.C., in draft, and I agree with him that this appeal is devoid of any merit. The appellant had failed to establish any

convincing argument which would make me disturb the judgment of the court below. In consequence, this appeal is dismissed. I award N10,000.00 costs in favour of the respondents.

ACHIKE JSC

I have read in advance the leading judgment delivered by my learned brother, Ayoola, JSC. I am of the view that full consideration has been accorded to the appeal and I find nothing useful to contribute to the said judgment except to say that I agree with what he has said. It is for this agreement that I, too, would dismiss the appeal as lacking in merit. I order N10,000 costs to the Respondents.

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