

SUPREME COURT OF NIGERIA

14TH APRIL, 2000. SC.80/1994

**CORAM:- A. G. KARIBI-WHYTE, I. L. KUTIGI,
U. MOHAMMED, A. I. KATSINA-ALU, E. O. AYoola, JJSC.**

GILBERT T. ESANJUMI SAGAY (Substituted
for Andrew Agbaminebitse Sagay deceased) APPELLANT
(For himself and on behalf of the
children of late Joseph Esanjumi Sagay)

AND

EGBERUO IKPIRI SAJERE & 2 ORS. RESPONDENTS
(For themselves and on behalf of Amukpe Community)

APPEALS - *Retrial - Failure of trial court to make proper use of the opportunity of seeing the witnesses - Appellate Court will not ascribe credibility to the witnesses - But would order a retrial.*

COURTS - *Evidence - Credibility - Appraisal of oral evidence - Is the primary function of the trial court - And not the appellate court.*

JUDGMENTS - *Evidence - Judgment must be based on evidence properly evaluated - For the trial judge to be seen to have discharged his judicial function properly.*

RETRIAL - *Appeals - Duty of trial court to make findings of fact - Based on the pleadings and evidence - Where not discharged - Retrial will be ordered.*

FACTS

Before the Sapele High Court, the plaintiff/appellant sued the defendants/respondents claiming damages for trespass and perpetual injunction. The plaintiff's case is that the landed property in dispute, a large rubber plantation was the property of his late father which plaintiff inherited intestate under Itsekiri customary law. Plaintiff relied on several

judgments of various courts in seeking to establish his claim. The defendants/respondents denied the plaintiff's claim. They relied on a past Supreme Court judgment which was in their favour.

Without proper assessment of the pleadings and evaluation of evidence, the trial court found in favour of the plaintiff. Damages for trespass was awarded against the defendants. The defendants' appeal to the Court of Appeal was allowed as judgment of the trial high court was set aside and retrial was ordered. Being dissatisfied, plaintiff has now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"(1) Whether the learned Justices of the Court of Appeal were right to sent the case back for trial de novo when there were evidence on record that the Appellants are customary tenants of the Respondents.

(2) Whether the Justices of the Court of Appeal in the instant case should or ought to evaluate the evidence of parties and their witnesses on record upon the failure of the trial Court to do so."

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

Courts - Evidence - Credibility

1. The appraisal of oral evidence and the ascription of probative values to such evidence is the primary function of the trial court: Fashanu v. Adekoya (1974) 6 SC 83. Where the issue turns on the credibility of witnesses an appellate court which has not seen the witnesses must defer to the opinion of the trial court. (p. 742 A)

Appeal - Retrial

2. Where the trial court has made an imperfect use of the opportunities of seeing the witnesses, the appellate court will not seek to ascribe credibility to the witnesses but would order a retrial. The decision of a court must be based on the evidence and on reason. It should not be based on the intuition of the judge or conjecture or what the judge, untrammelled by the evidence, conceives to be a fair conclusion. (p. 742 B)

Judgments - Evidence

3. When a judge who, guided by the pleadings, has heard evidence in a case but has in his judgment failed to give a fair summary of the cases presented by the parties and to summarise the evidence and make findings of fact on the various material issues raised in the pleadings, he cannot be seen to have discharged his judicial function properly. The requirement that a judgment must clearly demonstrate that the conclusions arrived at in the case were not based on intuition and whim of the judge but on evidence, properly evaluated, and the law is not an insistence on mere form, but derives from the need to ensure and demonstrate that substantial justice has been done in the case. (p. 742 D)

Duty of trial Court to make findings

4. Be that as it may, Ejiwunmi, JCA, (as he then was) who delivered the leading judgment of that court had said:

"In my opinion as it is the duty of a trial court to make primary findings of fact upon the issues before it, the decision of the learned Judge in awarding judgment to the respondent is vitiated by his failure to make definite findings of fact upon issues raised by the parties through their pleadings and the conflicting evidence led during the trial concerning the ownership of the land in dispute."

I am in entire agreement with him. I feel no hesitation in holding that the Court of Appeal were right in holding that the proper order to make was to remit the case to the High Court for retrial before another judge of that court. (p. 744 C)

REPRESENTATION

Okemute Mudiaga Odje (A. B. Odiete with him) for the respondents Appellant absent, not represented.

CASES REFERRED TO

Sagay v. U.A.C. (Nigeria) Ltd and others

Sanusi v. Ameyogun (1992) 4 NWLR (Part 237) 527, 552, 556

Gbadamosi v. Ajao SC. 462/66

Ozibe & Ors v. Aigbe & Ors 1977 (vol. 11) N.S.C.C. 389

Sanusi v. Ameyogun (1992) 4 NWLR 527

Ajakaiye v. Adedeji (1990) 7 NWLR 192

Imah v. Okogbe (1993) 9 NWLR 159

B Royal Netherlands Habour Works GBV V. Samma (1991) 2 NWLR 64

Fashanu v. Adekoya (1974) 6 SC. 83

Okpiri v. Jonah (1961) 1 All NLR 102

George v. George (1964) 1 All 136, at p. 140

C

LEAD JUDGMENT BY AYOOLA JSC

In the High Court of the Bendel State (as it then was) holden at Sapele (now in Delta State), the appellant, ("the plaintiff") on behalf of himself and the children of Joseph Esanjunmi Sagay, ("Joseph Sagay") sued the three respondents ("the defendants") for themselves and on behalf of the Amukpe Community claiming damages for trespass and perpetual injunction. The defendants defended the action. The High Court, (Dugbo, J.), after trial of the suit gave judgment for the plaintiff. An injunction was ordered in terms that the defendants for themselves and on behalf of the Amukpe Community, their servants and/or agents are "restrained from disturbing the right of the plaintiff (who represent (sic) the Sagay family) to the use and occupation of the land in dispute as shown on plan No. CS 8/47 dated 5th January, 1981, subject to the usufructuary rights of the Amukpe Community in accordance with the Supreme Court judgment in Suit No. FSC/203/57." Damages for trespass were awarded against the defendants.

The defendants appealed to the Court of Appeal who allowed their appeal, set aside the judgment of the High Court and ordered that the suit be retried by the High Court. In this appeal by the plaintiff from the decision of the Court of Appeal two issues were raised, namely: whether the court below were right to send the case back for retrial "when there were (sic) evidence on record that the appellant are customary tenants of the Respondents.", and whether the Court of Appeal should in the instant case not have evaluated the evidence of the parties and their witnesses on record upon failure of the trial court to do so.

On the pleadings the plaintiff's case was that Joseph Sagay, his

father, died at Amukpe in 1952 living at the time of his death a large rubber plantation at Amukpe. On his death intestate the plaintiff by Itsekiri customary law succeeded to the landed property of the late Joseph Sagay. The plaintiff averred that he would rely on the following judgments: (1) Judgment in a suit W/28/54 between Pa Okuojeror and others of Amukpe B and Sittim Sagay (later replaced by D. O. Sagay) and family of Amukpe over land which included the rubber plantation which Joseph Sagay had died possessed of. (2) Judgment of the Supreme Court Appeal No.S.C. 8/1975 arising from a suit No. S/27/65: Between Moses Edematia Sagay C (for himself and on behalf of Sagay family) and Messrs New Independent Rubber Company Limited and 3 others. (3) Judgment of the Supreme Court in SC.305/57 which was given in an appeal arising from a suit No. W/ 158/57. The plaintiff averred that the judgment in one Appeal No. SC/ 1975 "defined the rights of both the Sagay family and the Amukpe com- D munity in respect of the 'Larger Area of land used and occupied by members of Sagay family at Amukpe", and that one Clarke Ijuren was adjudged a trespasser in suit W/158/57. The plaintiff averred that dispute arose because the defendants were building without his consent on the E parcel of land which was "originally part of the land of the plaintiff's father."

For their part, the defendants denied by their pleadings: (1) that Joseph Sagay had a rubber plantation near the land in dispute or at all; (2) F that Joseph Sagay had any landed property; (3) that the Sagay family involved in suit No. S/27/65 which went to the Supreme Court as SC/8/ 1975 was the same as the family of Joseph Sagay. The defendants went further to aver (a) that the plaintiff in this suit was not representing in this G suit the same Sagay family referred to in Suits Nos. W/28/54 and FSC 103/57, and that the Sagay family referred to in that suit was not a tenant of the defendants community; (b) that the land which was the subject- matter of the suit was owned by the Amukpe community and that the H defendants neither granted nor sold the land to Joseph Sagay, and, (c) that the land in dispute and the land referred to as the "larger area" in W/28/54 or SC. 203/57 has been in the defendants' possession for many years and was then still in the defendants' possession. They pleaded that in appeal

No.SC154/67: Peter Orere Sagay v.U.A.C. (Nigeria) Ltd and others, the Supreme Court had held that Sagay family of which the plaintiff is a part could not maintain an action in trespass against the defendants in respect of any area in the larger area since the radical title in the larger area was vested in the defendants.

The plaintiff gave evidence and tendered in evidence two of the judgments referred to in the statement of claim, namely: the judgment of the Federal Supreme Court in appeal No. FSC./203/57 delivered on April 25, 1958 (exhibit A) and the judgment of the Supreme Court in Appeal No. SC 305/1966 delivered on December 22, 1966 (exhibit B). The defendants tendered the judgment delivered on December 22, 1969 in Appeal No. SC 153/67. (exhibit G).

The parties adduced oral evidence in addition to the documentary evidence tendered which consisted largely, as has been seen, of judgments in previous actions and plans. It emerged from the evidence, although not pleaded expressly by the plaintiff, that it was common ground that the Amukpe community, represented by the defendants, were the owners of land which included the land now in dispute; that the Sagay family had a grant of land from the defendants' community. Apparently, the Sagay family had gone beyond the limits of that original grant. This had driven the courts, in the previous actions which had related, apparently, to the land, to coin the term "larger area" to describe the area beyond the limits of that grant to the Sagay family. Thus, there were two areas of land, namely: the area of the original grant and the larger area beyond the limits of the original grant. The issues that emerged from the pleadings and evidence adduced in the case were whether the land now in dispute was part of the land granted by the Amukpe community to Sagay family; whether the plaintiff (and, for that matter, the Sagay family) had an exclusive possession of the land at all material times; and, the extent to which the judgments in the previous actions determined the rights of the parties. In a lengthy, but undoubtedly very poorly written, judgment which consisted mainly of a repetition of the evidence given in the case and a rehearse of the addresses of counsel, the trial judge held that: "The plaintiff is actively in possession of the land in dispute and the fact that the radical title vests in the Amukpe

Community has not abrogated the legal rights of the Sagay family recognised in Supreme Court Judgments cited and admitted in this suit.", and that "if the community is desirous of building a town hall on the land in dispute they must first obtain the consent of the Sagay family in actual possession subject to certain rights of the Amukpe community, defined B in Exhibit B"

On the appeal to the Court of Appeal, Ejiwunmi, JCA, as he then was, who gave the leading judgment of the court, with which Omo, JCA, (as he then was) and Salami, JCA, concurred, after referring to a passage C in the judgment of the trial judge which included in passages quoted above, which indeed contained the substance of the trial judge's decision, rightly observed that "beyond the passage quoted above, the learned trial judge did not examine the evidence of the other witnesses who testified during the trial. "He then asked the question whether in all the circumstances the D trial judge gave a dispassionate consideration to the evidence before him before he arrived at the verdict which he reached. He answered the question thus:

"... the trial Judge ought to have made special findings upon the E issues of ownership and should have examined the evidence and thereafter give his reasons for reaching the conclusion with regard to the view he held that the respondent was actively in possession of the land in dispute."

Being of the view that the learned trial judge did not examine the F issues before him as he ought to have done, and that he "did not advert to the principles laid down on the doctrine of the above estoppel per rem judicatam in his judgment, although he appeared to have based his verdict G upon the judgment of the Supreme Court in SC.203/75", the Court of Appeal set aside the judgment of the High Court and ordered a rehearing of the case before another judge of the High Court.

On this appeal from the decision of the court below, the substance H of the argument advanced by counsel on behalf of the plaintiff is that, granted that the trial judge had failed to evaluate the evidence, such evidence did not involve the issue of credibility of witnesses and, as such, the Court of Appeal were in much the same position as the trial judge to evaluate the

evidence and make proper findings of fact without a miscarriage of justice being occasioned. It was submitted that had the Court of Appeal evaluated the evidence on record which the trial judge failed to evaluate, they would have found that the plaintiff had been adjudged customary tenant of the defendants as contained in the judgement of the Supreme Court in Appeal No. SC/305/66. (Exhibit B.) It was submitted, further, that the plaintiff having been adjudged customary tenant in previous actions, he could maintain an action of trespass since his tenancy had not been forfeited. Reference was made to the case of Sausi v. Ameyogun (1992) 4 NWLR (Part 237) 527, 552, 556 in which the principles that guide an appellate court in ordering a retrial were stated. It was argued that the mind the distinction between cases in which a retrial is frowned upon because it has been ordered in a case in which a party has clearly failed to prove his case and one in which it has been ordered because of the failure of the trial judge to make findings of fact, where he should have, or determine issues which arose for determination in the case. The opinion held by the court below of the judgment of the High Court is in the latter category.

Learned counsel for the defendants carefully itemised some of the areas in which in his view there were conflicts of oral evidence on material issues. In his submission, those conflicts were not resolved by the trial judge and it was not proper for the court below to try to resolve them. Consequently, the court below was right in remitting the case to the High Court for rehearing.

Without doubt, the decisive question on this appeal is whether the Court of Appeal were justified in ordering the case to be reheard. It is not being contended that the trial judge evaluated the evidence before he came to a conclusion, the substance of the argument of counsel on behalf of the plaintiff is that his default notwithstanding, the court below was in a position to evaluate the evidence and come to the conclusion that the trial judge would have come to had he properly discharged his duty as a court of trial. So, the question really boils down to this: was this a case which could be satisfactorily determined without resolving conflicts in evidence? Or, put another way, was it a case which could have been determined

merely by drawing inferences or ascribing legal consequences to established or uncontested facts?

Certain established principles of law which have always guided our appellate courts may be quickly noted. When there are materials before the judge upon which he has to assess the evidence of a witness, it is not enough for the judge to say that he believed that witness without proper evaluation of the evidence upon which he based his belief: per Ademola CJN in Gbadamosi v. Ajao, SC. 462/66 delivered on June 24, 1968, quoted from Gbadamosi v. Ajao, SC. 462/66. The court must consider issues joined by properly reviewing the evidence and making proper findings. In the case of Ozibe & Ors v. Aigbe & Ors 1977 (vol.11) N.S.C.C. 389, the complaint of the appellant in that case, not dissimilar to the complaint in this case, was that the trial judge (i) did not give a fair summary of the cases presented by the parties; (ii) did not summarise the evidence and make findings of fact on the various issues raised in the pleadings; and (iii) did not relate the declaration granted to the evidence and the plan." The Supreme Court in that case (at p.394) noted that "The compass of the complaint widened to include the existence of irreconcilable conflicting evidence wrap (sic: wrapped?) up by the clothing of belief by the learned trial judge without any attempt at resolving the conflicts." Counsel for the appellant argued in that case that the learned trial judge totally failed to discharge his duty as judge and jury. He observed that there was no summing up and review of the evidence, that findings of fact were not made and that above all there was no proper evaluation of the evidence led. Allowing the appeal, setting aside the judgment of the High Court and remitting the case to the High Court for it to be retried the Supreme Court said:

"We have, ourselves studied the proceedings in this matter and found ourselves in entire agreement with both counsel appearing before us in this appeal. Pleadings were ordered filed and delivered. Several issues were joined on the pleadings and a great deal of evidence both documentary and oral led before the learned trial judge. The issues raised were not stated so as to engage the mind of the learned trial judge to a review and an examination of the evidence on the issues and enable

him to make specific findings of fact on them."

The appraisal of oral evidence and the ascription of probative values to such evidence is the primary function of the trial court: Ozibe & Ors v. Aigbe & Ors 1977 (vol.11) N.S.C.C. 389,

B Where the issue turns on the credibility of witnesses an appellate court which has not seen the witnesses must defer to the opinion of the trial court.

C Where the trial court has made an imperfect use of the opportunities of seeing the witnesses, the appellate court will not seek to ascribe credibility to the witnesses but would order a re-trial. The decision of a court must be based on the evidence and on reason. It should not be based on the intuition of the judge or conjecture or what the judge, untrammelled by the evidence, conceives to be a fair conclusion. When a judge who, guided by the pleadings, has heard evidence in a case but has in his judgment failed to give a fair summary of the cases presented by the parties and to summarise the evidence and make findings of fact on the various material issues raised in the pleadings, he cannot be seen E to have discharged his judicial function properly. The requirement that a judgment must clearly demonstrate that the conclusions arrived at in the case were not based on intuition and whim of the judge but on evidence, properly evaluated, and the law is not an F insistence on mere form, but derives from the need to ensure and demonstrate that substantial justice has been done in the case.

In my opinion, the case was not one which could have decided purely on the basis of the previous judgment put in evidence by the parties. G There was the question of the identity of the land granted by the community to Sagay family vis a vis the land in dispute which could not have been resolved merely by looking at the judgments. Furthermore, in regard to the land which immediately caused the dispute there was conflict of H evidence on the question of possession of the land and, particularly, whether it was part of the plaintiff's rubber plantation. There was evidence led by the defence intended to establish that the plaintiff could not claim to have been in exclusive possession of the land as the defendants have exercised

several unchallenged acts of possession on the land. By making a selective reference to the judgment of the Supreme Court in appeal No. SC. 305/66, (Exhibit B), counsel for the plaintiff had ignored and, perhaps, had attempted to wish away the judgment relied upon by the defendants, also of the Supreme Court and in a case between the representative of the Sagay family and of the Amukpe Community in Appeal No. SC 153/67 (Exhibit G). There, the Supreme court answered the question whether "the Sagay family are customary tenants of the Amukpe community in respect of the larger area:" They referred to the earlier judgment in appeal No. FSC 203/57, which is exhibit A relied on by the plaintiff, and said: C

"We consider it necessary to examine the judgment carefully as much reliance has been placed on it, from time to time, in cases which have come before the courts since the judgment was given, we are in no doubt that it preserves the rights of the members of Sagay family to use and occupy the larger area; and precludes them from asserting exclusive possession. But the argument of Mr. Sowemimo that by the judgment, the Sagay family were granted a customary tenancy of the larger area seems to us manifestly untenable as the court did not decide that the Sagay family are customary tenants of the Amukpe community. It is clear beyond argument that the Sagay family did not establish that they were customary tenants of the Amukpe Community in respect of the larger area." D E

It was decided in that case that the question whether the members of the Sagay family were customary tenants of the Amukpe community in respect of the larger area must be answered in the negative; and that the Sagay family could not sustain the action for trespass against the Amukpe community in whom was vested the radical title. F G

Notwithstanding the opinion of the Supreme Court as indicated above, the trial judge held, in effect, and counsel for the plaintiff, on this appeal, submitted without equivocation, that "the appellants as customary tenant in respect of the 'Larger Area' of land the subject matter of the appeal can maintain an action in trespass against the Respondent, because trespass is a wrong to possession." In view of the conclusion that may be arrived at later in this judgment, care is taken to refrain from comments H

which such submission should draw. Any such comment may be prejudicial to the case of either of the parties should there be a retrial as ordered by the court below. The passage above has been quoted to emphasise the need to resolve the conflict in the evidence in regard to: location of the land immediately in dispute in relation to area of the grant which the Sagay family had; the question of contested exclusivity of possession claimed by the plaintiff; and, the actual possession and occupation of the land subject-matter of the action.

In my judgment, had the matter rested solely on the judgments tendered in the case of which that tendered by the defendants was the last in time, the Court of Appeal had probably been extremely generous to the plaintiff in ordering a retrial. **Be that as it may, Ejiwunmi, JCA, (as he then was) who delivered the leading judgment of that court had said:**

"In my opinion as it is the duty of a trial court to make primary findings of fact upon the issues before it, the decision of the learned Judge in awarding judgment to the respondent is vitiated by his failure to make definite findings of fact upon issues raised by the parties through their pleadings and the conflicting evidence led during the trial concerning the ownership of the land in dispute."

I am in entire agreement with him. I feel no hesitation in holding that the Court of Appeal were right in holding that the proper order to make was to remit the case to the High Court for retrial before another judge of that court. In the result, I hold that the appeal lacking in substance. I dismiss the appeal accordingly with N10,000 costs to the defendants who are respondents to this appeal.

KARIBI-WHYTE JSC

I have before now the Judgment of my learned brother Ayoola, JSC in this appeal. I agree with his decision and in the much fuller reasoning in support.

This appeal is against the judgment of the Court of Appeal Division Holden at Benin City on the 16th January, 1989 setting aside the judgment of T.K. Dugbo J, of the Bendel State High Court holden at Sapele

dated 27/1/84 wherein all the claims of the Plaintiff were granted. The Court of Appeal after due hearing ordered the hearing of the case de novo by another judge of the High court.

The Plaintiffs, herein appellants brother an action in the Sapele High Court, against the Defendants, herein Respondents, claiming from the Defendants N600.00 (six hundred naira) as general damages for trespass and an order for perpetual injunction. After exchange of pleadings and trial of the action, the trial Judge entered judgment for the Plaintiffs in terms of their claim. The Defendants/Respondents appealed against the judgment to the Court of Appeal, Benin Division. In the Court of Appeal, the court considered whether the learned trial Judge considered and evaluated dispassionately, the evidence of ownership and exclusive possession of the land in dispute before before him. The Court after considering the evidence came to the conclusion that the trial Judge ought to have made specific findings on the issue of ownership and should have examined the evidence and to have given reasons for his conclusion that Plaintiffs were actively in possession of land in dispute. The Court of Appeal held that the learned trial Judge did not examined the issues before him as he ought to have done.

The other issue which the Court of Appeal relied upon in setting aside the judgment of the trial Judge is the failure of the trial Judge to apply the principles governing the application of the doctrine of estoppel per rem judicate. Plaintiff has appealed against the judgment of the court below to this Court alleging grounds of error in law and facts in the four grounds of appeal in their notice of appeal.

The four grounds of appeal are as follows -

"(1) The learned trial Judges in the Court of Appeal misdirected themselves on the facts and came to a wrong decision in law when they held, "The evidence on record has been set out already, and had been shown that the respondent and his witnesses admitted that the radical title in the land in dispute belonged to the Appellants. It is further admitted by the respondent that himself and his family have been adjudged as customary tenants of the appellants with regard to a large area of land of which the land in dispute was part thereof. But this issue though joined

by the pleadings as I had stated, did not receive the consideration of the learned trial Judge.

PARTICULARS OF MISDIRECTION

B *The learned trial Judges of the Court of Appeal having found in the records that the Plaintiffs had admitted that they are customary tenants of the Defendants ought to have decided the case on the basis of the right of customary grantees of land and not send it back for a retrial.*

GROUND (2)

C *The learned Judges of the Court of Appeal their witnesses as stated in the record of proceedings and came to a wrong decision in law when they held, "It is necessary that I should have to observe that beyond the passage just quoted above, the learned trial Judge did not examine the*
D *evidence of the other witnesses who testified during the trial. The question that must perforce be asked is whether in all the circumstances the learned trial Judge gave a dispassionate consideration to the evidence before him before he arrived at the verdict which he reached. In asking*
E *myself this question, I also recognise that in a situation such as this a Court of Appeal must not susrp the duties of a trial Court in their special area which is the collation and the evaluation of evidence.*

PARTICULARS OF MISDIRECTION

F *Where a Court of Appeal considers that the lower Court has not evaluated the evidence of the parties and their witnesses, it is the duty of the Court of Appeal itself to evaluate the evidence, and make its own findings of fact based on such evaluation.*

GROUND (3)

G *The learned trial Judges of the Court of Appeal misdirected themselves on the facts and came to a wrong decision in law when they held, "It is a matter for regret that the learned trial Judge did not take the full opportunity of seeing and hearing the witnesses, and also the documents*
H *tendered before him to arrive at a well reasoned conclusion in this matter. "In order to arrive at such a conclusion the area of alleged trespass must be properly tied in clear findings to the "larger area" in respect of which Sagays have a right of occupation, and other decisions of the Su-*

PARTICULARS OF ERROR

The evidence adduced at the lower Court was properly recorded in the record of proceedings and the exhibits which included the plans of the land in dispute were forwarded with the record of proceedings to the Court of Appeal. B

There was no where in the judgment of the learned Judges of the Court of Appeal where any reference was made to either the evidence adduced or the documents tendered as exhibits.

Having no set out their own findings based on their evaluation of the evidence as recorded, this is my humble submission, constituted an error in law. C

(4) The judgment of the Court of Appeal was against the weight of evidence." D

Learned Counsel for the Appellant has formulated the following two issues for the determination of the Court as arising from the grounds of appeal filed.

"(1) Whether the learned Justices of the Court of Appeal were right to sent the case back for trial de novo when there were evidence on record that the Appellants are customary tenants of the Respondents. E

(2) Whether the Justices of the Court of Appeal in the instant case should or ought to evaluate the evidence of parties and their witnesses on record upon the failure of the trial Court to do so." F

Learned Counsel to the respondent has formulated only one issue for determination, namely,

"Was the Court of Appeal right, having regard to the circumstances of this case, in ordering a retrial of the case?" G

The formulation of the issues for determination by the parties have covered all the grounds of appeal filed. There is no doubt if the Court below was in the position to evaluate the evidence which the trial Judge did not, it will not be a question merely of a trial de novo, but case of H evaluating the evidence. Accordingly it is appropriate for the determination of this appeal to rely on the issues for determination formulated by the Appellant.

The gravamen of the contention of Appellant on the first issue is that the evidence which the learned trial Judge is alleged to have failed to evaluate, is not evidence on the issue of credibility of witnesses. Accordingly the Court of Appeal was in much the same position as the trial judge to evaluate and make proper findings of fact without occasioning a miscarriage of justice. It was submitted that if the Court of Appeal evaluated the evidence, they would have found that the plaintiff had been adjudged customary tenant of the Defendants in the judgment of the Supreme Court in Appeal No. SC/305/66 Exh.B. The Plaintiff having been adjudged customary tenant in previous action, he could maintain an action in trespass since his tenancy had not been forfeited. Evaluation of evidence is predicated on the finding of credibility of witnesses which the Court below is ill-equipped to undertake and to make findings thereon. - Sanusi v. Ameyogun (1992) 4 NWLR. 527.

If the Appellate Court is satisfied that the Court of trial has been guilty of improper use of its powers on the performance of its adjudicative functions, to correct the error, the Court must be satisfied, that the error was such as could be corrected from evidence in cold print without injustice to either side. - See Ajakaiye v. Adedeji (1990) 7 NWLR.192 Imah v. Okogbe (1993) 9 NWLR.159; Royal Netherlands Harbour Works GBV V. Samma (1991) 2 NWLR.64.

Learned Counsel to the Respondents maintained that the Court below was right in remitting the case to the High Court for trial de novo. in his submission he pointed out the material issues on which there were conflicts of oral evidence; and these conflicts remain unresolved.

The competing issues which beckon and are clamant for immediate attention in the determination of this appeal are

- (i) whether the appeal could be satisfactorily determined without resolving the conflicts in evidence? or
- (ii) could the appeal be determined merely by the drawing of inferences or ascribing legal consequences to established or uncontested facts?

It is an elementary and primary principle of our judicial approach to the determination of issues that the appraisal of oral evidence and ascription of probative values to such evidence is within the primary func-

tion of the trial court - See Fashanu v. Adekoya (1974) 6 SC. 83. An appellate court is ill-equipped to defer on decisions involving the credibility of witnesses. In such cases the opinion of the trial court ought normally to be preferred,

Where a valid criticism of the judgment of the trial Judge is that he has made an improper use of the opportunities he had of seeing and observing the witnesses viva voce or that his appreciation of such witnesses has been imperfect, it is not the function of the appellate court, such as the Court below, to substitute its own views and seek to ascribe credibility to the testimony of witnesses it had no opportunity to see and observe. This is essentially because although our appellate procedure is based on the rehearing of the case as a whole, it is a rehearing on the cold printed record, without the witnesses whose evidence constitute the record of proceedings.

The observation of the demeanor and reaction of the witnesses, an essential factor in the determination of the credibility of testimony and evaluation of the weight of the evidence cannot be reproduced on the printed record. Absent these essential factors, an appellate court is only left to guesses and surmises based on intuition what the trial judge would have done in the appropriate situation. Accordingly, when the Court below observed in its judgment that

"the trial judge ought to have made specific findings upon the issues of ownership and should have examined the evidence and thereafter give his reasons for reaching the conclusion with regard to the view he held that the respondent was actively in possession of the land in dispute"

It was a correct observation on the failure of the trial Judge, who had the witnesses before him to evaluate their evidence and give them probative value before coming to a conclusion. The trial Judge is required to consider issues joined by properly reviewing the evidence and making proper findings - See Ozibe & ors. v. Aigbe & ors. (1977) vol.11 NSCC.389

The Court below was right in its observation of the learned trial Judge. This is a matter which cannot be determined satisfactorily without resolving the conflicts in the evidence.

The trial Judge has failed by neglecting to resolve the conflicts in the evidence as to ownership of the land in dispute. Again the trial Judge having not resolved the conflicts in the evidence as to ownership, the Court below cannot draw the proper inference or ascribe legal consequences to those facts. In the circumstance the Court below cannot ascribe credibility or probative value to the witnesses. The alternate is to order a retrial.

It is well settled that where the trial Judge was evasive in his findings and therefore did not take proper advantage of having seen or heard the witnesses before him, an order for a re-trial is appropriate - See Okpiri v. Jonah (1961)1 All NLR.102. In George v. George (1964)1 All 136, at p.140 a decision set aside on the ground of improper appraisal of evidence by trial Court, the Supreme Court observed.

"The learned Judge had the opportunity of seeing and hearing this witness and it is not for us to minimise the advantage he thus enjoyed in determining whether or not the witness was telling the truth. Nevertheless we are of the view that this is one of those cases in which the learned Judge reached a wrong decision about the credibility of the witness."

Accordingly, where a great deal depends so much on the credibility or reliability of witnesses, an order for retrial would be made - See Shell BP v. Cole (1978) 3 SC.183. This is predicated on the consideration that the case presented by the Plaintiff has not been properly considered, and that if properly considered might have been decided differently. The Court will not order a new trial if it is in a position after considering the evidence to do complete justice between the parties - See Okeowo v. Migliore (1979) 11 SC.138 where in accordance with the circumstances the appellate court can correct the decision appealed against, it will not order a re-trial as was the case in Nader v. Customs & Excise (1965) 1 All NLR.33, where the evidence the parties chose to present was available on the records, and the approach of the Chief Magistrate to the law was on the printed record. The duty of the Court was to correct the error.

It is clear that where what is shown as the failure of the trial Judge is a determination of vital issues by appraising and evaluating evi-

dence before it, an Appellate court will have no alternative but to order a re-trial - See Total v. Nwako (1978)5 SC.1

It is appreciated that there has been a full trial in this case on the pleadings of the parties and there is the implication that ordering a re-trial in this case tantamounts to affording an opportunity to the plaintiff of bringing the same action a second time - See Ayoola v. Adebayo (1969) 1 All NLR.159. I am satisfied on the evidence before the learned trial Judge, that absent the evidence improperly evaluated the plaintiff has not totally failed in establishing the claim before the Court. The irregularity apparent on the fact of the record is not so substantial as to support a dismissal of the claim - See Filani v. B.N.A. (1961) All NLR.473.

I therefore agree with the decision of the Court below in this appeal, that the proper order to make is that of a remit of the case to the High Court for trial before another Judge of that Court.

I accordingly dismiss this appeal. Appellant shall pay N10,000 as costs to the Respondents.

KUTIGI JSC

I read before now the judgment just delivered by my learned brother Ayoola, J.S.C. I agree with him that the appeal lacks merit and ought to be dismissed. It is therefore dismissed with N10,000.00 costs to the Respondents. The judgment and order of the Court of Appeal are hereby affirmed.

MOHAMMED JSC

From the facts and evidence I agree that the Court of Appeal is right to allow this appeal order for retrial of the claim filed by the appellants before the High Court. I have the privilege of reading the judgment of my learned brother, Ayoola, and for the reasons stated therein I dismiss this appeal and affirm the judgment of the Court of Appeal. I award N10,000.00 costs to defendants/respondents.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment of my learned brother Mohammed, JSC in this appeal. I agree completely with B it.

I too dismiss the appeal and order that the case be remitted to the High Court for trial before another judge. I also abide by the order for costs.

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