

SUPREME COURT OF NIGERIA

16TH FEBRUARY, 2001. SC. 152/1995

**CORAM:- S. M. A. BELGORE, I. L. KUTIGI, A. I. IGUH, A. I.
KATSINA-ALU, E. O. AYoola, JJSC.**

BONIFACE NNORODIM & ANOR. APPELLANTS

(For themselves and on behalf of

Umuanoro family of Umuduru

Ubahangwo, Etiti, Orsuihiteukwa)

AND

EZE PAUL EZEANI & 6 ORS. RESPONDENTS

APPEALS - Retrial - Was properly ordered by Appeal court - As trial court did not advert itself adequately to other issues before it.

PRACTICE & PROCEDURE - Retrial - Affords opportunity to parties to amend their pleadings - And revisit other necessary issues.

FACTS

The Appellants who were plaintiffs in the High Court of Imo state suing in a representative capacity for their family, sued the Respondents in their personal capacities for a declaration of Rights of Occupancy to the land in dispute, situate in Orsu-Ihitenansa, injunctions and damages for trespass. The Appellants contended in their pleadings that they were owners of the land in dispute by inheritance from their ancestor who first settled there. That they had in 1974 granted along with an adjoining family landowner a portion of their land to the community council for conversion into a motor park which was subsequently acquired by the local government. The Appellants contended that the Respondents had however encroached on the same granted land and started erecting stores and permanent buildings on the land and had even applied for a Right of Occupancy from the acquiring local government as well as trespassing into adjoining land.

The trial judge in his judgment dismissed the case of the plaintiff holding that they had been divested of their right over the land once they

voluntarily granted it to the community but did not advert his mind to many other issues. The Appellants having appealed, the Court of Appeal set aside the judgment of the trial court and ordered a retrial of the case before another judge. Both parties dissatisfied with the judgment, appealed and cross-appealed to the Supreme Court.

HELD: (Unanimously dismissing the appeal & cross appeal per lead judgment of **BELGORE, JSC**)

Retrial - Properly ordered

1. The trial judge finally dismissed the case for the plaintiff/appellants known as Anoro people. The reasons being that the Anoro people were divested of their right over the disputed land once they had made a voluntary grant to the community. But other issues were left out undecided in this case as the trial Court never adverted adequately to the plans exhibited. On appeal the Court of Appeal on consideration of all the issues found that the trial of other issues were not properly adverted by trial Court and ordered a retrial. This Court agrees with this decision which cannot be faulted. (p. 586 G)

Retrial - Affords opportunity

2. Both parties will at retrial be able to amend their pleadings and their plans to indicate clearly what they are claiming. Secondly they may have a revisit to the refusal to join to the Local Government which acquired the Motor Park allegedly covering the land in dispute. (p. 587 A)

NOTABLE POINTS OF INTEREST

BELGORE JSC

1. Joinder of parties - Why and when allowed

But it seems to me that in view of the provisions in all procedural rules of High Courts in this country, if a party appears to be necessary as a third party so as to have a just decision in a suit, such third party can be joined. This joinder of the third party can be at the instance of the parties to the suit or at the instance of the third party, and at the instance of the Court. (p. 586 F)

IGUHJSC***2. When appellate court may evaluate evidence and draw inferences from proved facts***

It is beyond dispute that the evaluation of evidence and the ascription of probative value to such evidence are the primary functions of a court of trial which saw, heard and assessed the witnesses. There are however recognised exceptions to this basic principle of law. One of such exceptions is where the issue in controversy between the parties is simply a matter of inference that can be drawn from established facts on record, not resting on the credibility of witnesses as a result of their demeanour in court or of the impression of them by the trial court. Clearly, where such exceptions exist and an appellate court is in as good a position as the trial court to evaluate evidence which has been given in a case, the appellate court must not hesitate to evaluate such evidence and make the necessary irresistible inference that can be drawn from the proved facts. (p. 587 H)

When a retrial is the only proper order to make

3. This is because where an appeal is allowed on the ground of failure of the trial court to resolve relevant issues and to make findings on material facts, and the determination of such material issues and/or facts, as in the present case, depends on the credibility of witnesses, the proper order to make in such circumstance is that of retrial of the suit. See Karibo v. Grend (1992) 3 NWLR (Part 230) 426. (p. 588 G)

REPRESENTATION

F. Chukwuemeka Ofodile for the Appellants/Respondents

J.T.U Nnodum for the Respondents/Appellants

CASES REFERRED TO

Akinloye and Another v. Eyiola and others (1968) N.M.L.R. 92 at 95

Woluchem v. Gudi (1981) 5 S.C. 291 at 320

Amadi v. Nwosu (1992) 5 N.W.L.R. (Part 241) 273 at 280

Okafor v. Idigo III (1984) 5 S.C. 1 at 36,
 The Registered Trustees of the Apostolic Faith Mission and Another v.
 James and Another (1987) 2 N.W.L.R. (Part 61) 556 at 567
 Karibo v. Grend (1992) 3 N.W.L.R. (Part 230) 426

B

REASONS FOR JUDGMENT BY BELGORE JSC

On 20th day of November 2000 I dismissed this appeal and upheld
 the decision of Court of Appeal which ordered a retrial of the matter at the
 C High Court. I now give my reasons. I also dismissed the cross-appeal.

The trial High Court made some positive findings in the case on the
 evidence before it. The case is more complicated than what the learned
 counsel for the appellant wanted to make it. The appellant claimed they
 made a grant of the disputed land to the land community, and there was
 D a matching grant by their adjacent land-owing family, for the purpose of
 a motor part. It later transpired in pleadings and evidence that the Local
 Government later acquired the garage compulsorily. There was no contest
 as to compensation but what seemed to irk the appellants is that the
 E respondent community started erecting stores and permanent buildings on
 the land and had applied for Rights of Occupancy from the acquiring
 Council/Local Government. The Local Government by motion asked to
 be joined as defendant but the plaintiff/appellants opposed this and their
 F objection was upheld by trial judge. The reasons advanced or the refusal
 by trial court to join the Local Government are not cogent enough. Though
 none of the parties questioned the decision in the appellate proceedings.
 But it seems to me that in view of the provisions in all procedural rules of
 High Courts in this country, if a party appears to be necessary as a third
 G party so as to have a just decision in a suit, such third party can be joined.
 This joinder of the third party can be at the instance of the parties to the
 suit or at the instance of the third party, and at the instance of the Court.

**The trial judge finally dismissed the case for the plaintiff/appellants
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adequately to the plans exhibited. On appeal the Court of Appeal on consideration of all the issues found that the trial of other issues were not properly adverted by trial Court and ordered a retrial. This Court agrees with this decision which cannot be faulted. Both parties will at retrial be able to amend their pleadings and their plans to indicate clearly what they are claiming. Secondly they may have a revisit to the refusal to join to the Local Government which acquired the Motor Park allegedly covering the land in dispute. It is not possible for an appellate court in circumstances as in this case to believe or disbelieve any of the parties on matters not adverted to by trial Court.

It is for the foregoing reasons that on 20th day of October 2000 dismissed this appeal and upheld the decision of Court of Appeal which ordered retrial of the case. The cross appeal has no merit and I dismissed it for the reasons given above. I make no order as to costs.

KUTIGI, JSC

I dismissed the appeal and cross-appeal in this case on 20th November 2000 with no order as to costs. I said I will give reasons for doing so today.

I have since read the Reasons for Judgment just delivered by the learned brother Belgore, JSC. I agree with him and adopt them as mine. The judgment of the Court of Appeal is confirmed.

IGUH, JSC

On the 20th day of November, 2000, I dismissed this appeal and affirmed the decision of the Court of Appeal which ordered a retrial of the suit and I then indicated that I would give my reasons for so doing today.

I have since had the privilege of reading in draft the reasons for judgment just delivered by my learned brother, Belgore, JSC, and I agree with the reasoning and conclusion therein.

It is beyond dispute that the evaluation of evidence and the ascription of probative value to such evidence are the primary functions of a court of trial which saw, heard and assessed the witnesses. See

Akinloye and Another v. Eyiyola and others (1968) NMLR 92 at 95, Woluchem v. Gudi (1981) 5.SC.291 at 320, Amadi v. Nwosu(1992)5 N.W.L.R (Part 241)273 at 280. There are however recognised exceptions to this basic principle of law. One of such exceptions is where the issue
B in controversy between the parties is simply a matter of inference that can be drawn from established facts on record, not resting on the credibility of witnesses as a result of their demeanour in court or of the impression of them by the trial court. Clearly, where such exceptions exist and an
C appellate court is in as good a position as the trial court to evaluate evidence which has been given in a case, the appellate court must not hesitate to evaluate such evidence and make the necessary irresistible inference that can be drawn from the proved facts. See Okafor v. Idigo III (1984) 5 S.C.1 at 36, The Registered Trustees of the Apostolic Faith Mission and
D Another v. James and Another (1987) 2 NWLR. (Part 61) 556 at 567.

There can be no doubt in the present case that a number of material issues and matters were left unresolved and therefore unanswered by the trial court in its evaluation of relevant evidence before the court. The more
E important of those issues have been adequately highlighted in the leading judgment of my learned brother, Belgore, JSC and no useful purpose will be served by my recounting them all over again. It suffices to state that they are not such matters or issues that an appellate court can resolve from
F the printed record or by drawing inference from any proved facts. It seems to me plain that they are matters and/or issues which may only be resolved by viva voce evidence in the course of which the credibility and veracity of the witnesses concerned, based on their demeanour and bearing as they testify in the witness box, may be assessed. It is my view
G that having regard to these relevant issues which the trial court failed adequately to consider and resolve, the court below was perfectly right to have allowed the appeal before it and to order a retrial of the case. This is because where an appeal is allowed on the ground of failure of the trial
H court to resolve relevant issues and to make findings on material facts, and the determination of such material issues and/or facts, as in the present case, depends on the credibility of witnesses, the proper order to make in such circumstance is that of retrial of the suit. See Karibo v. Grend (1992)

3 NWLR (Part 230) 426.

It is for the foregoing and the more detailed reasons contained in the leading “*Reasons for Judgment*” of my learned brother, Belgore, JSC that I, too, dismissed both the appeal and the cross-appeal and affirmed the decision of the Court of Appeal which ordered a retrial of the suit by another Judge with N10,000.00 costs to the respondents against the appellants.

KATSINA-ALU, JSC

On 20/11/2000, I dismissed both the appeal and the cross-appeal. I reserved my reasons till 16/2/2001.

I have had the advantage of reading in draft the judgment of my learned brother Belgore JSC in this appeal. I agree with it, for the reasons which he has given, I also dismissed both the appeal and the cross-appeal. I abide by the order for costs.

AYOOLA, JSC

On 20th November 2000 these appeal and cross-appeal were dismissed with reasons to be given later. I now give my reasons.

In the High Court of Imo State the present appellants who were plaintiffs suing in a representative capacity for their family, sued the respondents in their personal capacities for a declaration of customary right of occupancy to the land in dispute which they described as situate in Orsu-Ihiteuwa in Orlu Judicial Division of Imo State, injunction and damages for trespass. For convenience, I describe the appellants and the respondents, respectively, as “*the plaintiffs*” and “*the defendants*” in this judgment.

The plaintiffs defined the land in dispute as being that area verged pink on a plan No. DS 4162/IM 92D/86. On their pleadings the substance of their case was that they were owners of that land by inheritance from their ancestor “*who as original settler met the land as a virgin forest, cleared it and started living thereon.*” Sometime in 1974 the Orsu Ihitoukwa Community Council approached their family and one Umuobeaneri family, adjoining landowners for release of a portion of their

land for conversion into motor park. The request was granted. A motor park was then established on the land and it remained on the land up to the time the action was instituted.

The cause of this dispute, according to the plaintiffs, was that the defendants, sometime in 1982, encroached, first on the motor park, and, subsequently, went beyond the area of the motor park into adjoining land, divided the land into plots and erected private buildings thereon.

The defendants disputed the identity of the land in dispute and prepared, for their part, a plan showing what they claimed to be the land in dispute. They averred by their defence that the whole of the land in dispute was by consent of the entire community used as motor park and that the land had since been taken over and used as motor park by successive local government councils. They pleaded that the land in dispute *“is in effective possession of the Orlu-Local Government Council having inherited same from the defunct Orsu Local Government Council.”*

Ononuji, J., who tried the action was unable to find that it was the plaintiffs who granted the land for use as motor park. However, he held that even if he had so found, the plaintiffs’ rights over the land have been extinguished. He further held that the plaintiffs have failed to show the area of land granted for the purpose of motor-park and the area encroached on by the defendants. In the event, he dismissed the action in its entirety.

On the plaintiffs’ appeal to the Court of Appeal from the decision of the High Court, that court, (Rowland, Onolaja and Muntaka-Coommasie, JJ.C.A.,) allowed the appeal and set aside the decision of the High Court. They ordered that the case be re-tried before another judge of the High Court. The reasons for that order was expressed in the judgment of Muntaka-Coommasie, JCA, who delivered the leading judgment of the Court of Appeal, as follows:

“... the justice of this appeal does not require this court to embark on a fresh appraisal of the same evidence just to arrive at a different conclusion from that of the trial court. In other words, since the trial court has not made a proper use of the opportunity of seeing and hearing witnesses at the trial and has drawn wrong conclusions from exhibit G &

GI, the appeal court should not re-evaluate the evidence. I do not wish this court to be erroneously seen as descending into the arena of contest and usurp the functions of the trial judge in assessment of evidence and arriving at findings of facts."

The court below was unanimous in their view, put in the words of Onalaja, B JCA, that "*the learned trial judge did not only misconstrue the evidence adduced before him but also did not take proper advantage of having seen and heard the witnesses.*"

Both parties were dissatisfied with the decision. The plaintiffs appealed and the defendants cross-appealed. The plaintiffs complained that having regard to several findings made by the court below, their Lordships of that court should have given judgment for the plaintiffs and that the reasons given by that court were not cogent enough to justify the order for retrial of the case. The defendants' cross-appeal was, apparently, out of abundance of caution, to show that those findings which the plaintiffs built their appeal on were not justified. For their part, the defendants urged this court in the concluding part of their brief to hold that the lower court did not give due consideration to the defence pleadings and evidence. It was argued that: *This led the lower court to hold that the trial court should have given judgment in favour of the cross-respondents when there was no basis for that stance.*"

Although considerable attention was paid to the question of original ownership of the land, and it appeared from several passages of the leading judgment of the court below that court was of the view that the trial court should have been more impressed by the case of the plaintiffs, at the end of the day, the Court of Appeal were of the view that they were not in a position to resolve issues which, being not merely of inferences to be drawn from admitted or established facts, were eminently in the domain of the trial court. That is my understanding of the judgment of the court below. It is because learned counsel for the plaintiffs was on this appeal unable to see it that way that he argued, in effect, that the conclusion of the court below to order a retrial was inconsistent with the findings made by the court below. And, what were these so-called findings?

The court below was of the opinion that the defendants could not

meet the case of the plaintiffs in the court below. They pointed, in particular, the paragraphs 6 & 7 of the plaintiffs' statement of claim as the case not met. They noted that the defendants admitted that the plaintiffs' family and Unuobianeri family jointly donated the land for the motor park. They held that the trial judge did not give exhibits G & G1 proper consideration. They finally held that from the foregoing the trial judge should have given judgment in favour of the plaintiffs in respect of the area verged brown in the plaintiffs' plan. I pause to point out that the plaintiffs did not seek any declaration in respect of any such area, and indeed, there was no such area shown on the plaintiffs' plan. Finally, they expressed the view that: *"The evidence of Dw1 in suit No. HOR/19/76 on Exhibits 'G & G1' and other relevant evidence showing that the land in dispute belongs to the plaintiffs effectively destroyed the position of the defendants."*

Having regard to the above views of the Court of Appeal the first blush impression which I had was that the plaintiffs' complaints on this appeal may, indeed, have some merit in them. However, that first blush impression was dispelled when the judgment was considered in its entirety having regard to the issues in the case. Although the Court of Appeal used language, in places, in the leading judgment which seemed to imply that what was in issue on the appeal before them was that the trial judge had failed to draw the necessary inferences from the facts, it was clear from a closer reading of the judgment that was not so. Let me give one or two instances. One of the criticisms of the judgment of the trial judge by the Court of Appeal was that he did not consider Exhibit G & G1. However, it is clear that the highest use, if at all, he could have made of these exhibits, which were pleadings in a previous case, was to assess the credibility of the first defendant's evidence. That is, if at all, the contents of previous pleadings can be used to discredit a witness. Another is whether or not paragraphs 6 and 7 of the plaintiffs' statement of claim were adequately met by the defendants. Whether they were, or not, depended on the credibility of the witnesses which court below agreed they were incapable of assessing.

There is some support for the view of the court below that the trial

judge did not adequately consider the materials before him consisting of oral and documentary evidence and admissions. The conclusion of the court below that they were not in a position to consider those materials and make findings of primary fact is supported by ample authority. The power of an appellate court, such as the court below, to draw inferences of fact depends on whether findings of primary facts have, in the first place, been made by trial court or whether the evidence is capable of only one conclusion. Where the trial judge had not made findings of fact or such findings as he made were upon an inadequate consideration of the oral evidence placed before him, or where conflicting evidence can only be resolved on the basis of credibility of witnesses, an appellate court cannot reasonably be expected to make findings of primary fact. B C

One significant aspect of this case is that what should have been the decisive issue in the case was left unresolved. That was the question of the identity of the land granted to the community and now used by the Local Government Council for the purpose of motor park. The plaintiffs' case was that the defendant went beyond that land into adjoining land. The plaintiffs demarcated on their plan the area of land they claimed was granted to the community. The defendants showed a different area of land, also shown on their own plan. An officer of the Council tendered a plan Exhibit D1 which was said to be the survey plan of land granted for use as motor park. The parties did not attempt to resolve the question of the identity of the land granted for use as motor park by relating plan Exhibit D1 to their respective plans. D E F

However the trial judge held that there was nothing to show the area of land granted for the motor park, even though he had before him the evidence of the 1st defendant through whom was tendered the plan of the motor park (Exhibit D1) and that of second defence witness an officer of the Orlu Local Government who testified that the Orlu Local Government surveyed the land in dispute and identified Exhibit D1 as the plan produced as a result. What was left was to relate the several claims of the parties as to the identity of the motor park to the plan made by the Council ever before there was litigation. It is rather surprising that the first defendant who, according to his evidence, had all along been in custody of the plan, Exhibit G H

D1, did not deem fit to cause to be prepared a composite plan which would have related the land shown on the Council's plan.

With the pivotal question of the identity of the land granted for use as motor park unresolved, the arguments advanced by the parties both in the appeal and in the cross-appeal on the question of original title to the land, would not have led to any satisfactory resolution of its dispute. Besides, although an issue has not been made of the constitution of the action on this appeal, it is deserving of comment that the Local Government Council, claimed by both parties to have been granted land for use as motor park and agreed to be in possession of the area of land so granted, had not been made a party to the action. It may have been that the plaintiffs had not intended to dispute with the Council the land granted to and occupied by it as motor park, but is content to narrow the dispute to area outside that land, allegedly encroached upon by the defendants. Otherwise, the failure to make the Council a party to the action is rather incomprehensible. Even then, the identity of the area granted to the Council should have been ascertained in order to be able to decide whether or not the defendants went outside that area.

In my judgment, in these circumstances, the decision of the Court of Appeal to remit the case to the High Court for retrial best met the justice of the case.

It was for these reasons that I dismissed the plaintiff's appeal and the respondent's cross-appeal and ordered that the parties shall bear their respective costs of the appeal.

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