

SUPREME COURT OF NIGERIA
FRIDAY 11TH JULY, 2003. SC. 77/1996
CORAM:- S. M. A. BELGORE, U. MOHAMMED,
A. I. IGUH, A. I. KATSINA-ALU, D. MUSDAPHER, JJSC

JIMOH ABUDU APPELLANT
AND
JOHNSON EGUAKUN RESPONDENT

CUSTOMARY LAW - Administration of estate - Benin custom - Upon the death of a father - eldest son takes over his estate - As trustee for the deceased's children - Pending the performance of final burial rites (H1)

LAND LAW - Trust property - Sale - A trustee is entitled to sell land he holds on trust - In so far as the sale is not tainted with fraud or illegality (H2)

APPEALS - Courts - Findings of fact - Court of Appeal erred in setting aside correct findings of trial court - Made on the facts pleaded (H3)

FACTS

Under the Benin Customary law, the eldest son takes over the estate of a late father as a trustee for all the deceased's children. This estate includes the 'Igiogbe' – the house in which the deceased lived and died. But upon the performance of the final burial rites of the deceased by the eldest son or upon the distribution of the estate amongst the deceased's children, the Igiogbe automatically vests in the eldest son as personal property. However, the rest of the estate does not vest in anyone as personal property until the distribution of the estate. The sale of the land in dispute to original defendant/appellant took place while one Omorodion was holding the estate of Eguakun in trust for all the children of Eguakun. Omorodion sold the land without as much as performing the final burial rites of Eguakun. The sale was carried out before respondent.

Consequently, plaintiff/respondent sued appellant in the High Court of Edo State, Benin City. Respondent's claim was for declara-

tion that the land in dispute was still part of the estate of one late Eguakun (respondent's father). The claim of respondent was based on the ground that the sale of the land to appellant was invalid in that Omorodion lacked the legal capacity under Benin customary law to sell the land. After trial, the trial court dismissed the case of respondent as it held that appellant validly acquired title to the land. Aggrieved, respondent appealed to the Court of Appeal, Benin City Division which appeal was allowed and the decision of trial court was set aside. Dissatisfied, appellant filed appeal at Supreme Court.

HELD (Unanimously allowing the appeal per **BELGORE JSC**)

Administration of estate - Benin custom

1. By the Customary law of Benin, upon the death of a father, the eldest son takes over his estate as a trustee for all the deceased's children pending the performance of the second (final) burial rites. After performance of these rites, the eldest son automatically inherits the main seat of the deceased father, that is to say, the house where the deceased lived, died and was buried. This house is called 'IGIOGBE', and does not vest unless the second burial rites are performed by the eldest child. The "Igiogbe" passes, by way of inheritance, on distribution of the estate to the eldest son of the deceased. But until the distribution is done the "Igiogbe" will not vest except the eldest son performs the final burial rites; otherwise the eldest son retains all the estate including the "Igiogbe" in trust for himself and the children of the deceased. (p. 2068 F)

LAND LAW - Trust property - Sale

2. In 1944, some nine years after the demise of Eguakun, his eldest son, Omorodion, held the entire estate of his father in trust for himself and other children of his father, including Johnson, the respondent. He sold to the appellant the land now in issue in 1944 in the presence of the respondent. As a trustee he was perfectly entitled to do so insofar as the sale is not tainted with fraud or illegality; the trial High Court so held.

(p. 2069 F)

Courts - Findings of fact

3. The appellant as 4th defendant pleaded clearly how he acquired the land, now known as 7, Isekhere Street, Benin City, from Omorodion in 1944 in the presence of the respondent, how he developed the land, how he rented out the building on the land and was collecting rents therefrom and how the Oba of Benin, the prescribed authority sanctioned the sale. He has been in possession from 1944 up to now without secrecy or force or deceit, and finally even registered the land in the Land Registry. He concluded his pleading by averring as follows:-

“The defendant(s) will further contend that the claim is bad in law and equity and will rely on legal and equitable defences available to (them) in asking this Honourable Court to dismiss the plaintiff’s claim with substantial costs.”

The Court of Appeal held that this final paragraph of the Statement of Defence was faulty.

This conclusion, to say the least is unfortunate in this instance. All the facts of the purchase were clearly averred in the Statement of Defence for the court to see. The trial court made good use of the facts pleaded. Court of Appeal certainly erred in its conclusion to set aside the clear and correct findings of fact by trial court. The plaintiff lived all along at the same Isekhere Street and could not deny the 4th Defendant/Appellant’s possession of 7, Isekhere Street. (p. 2070 A)

REPRESENTATION

Chief B. C. Bozimo, with Mrs. J. U. Bozimo and C. O. Ihensekhien,
for the Appellant

Kemi Pinheiro, Esq., for the Respondent

CASES REFERRED TO

Olowu v. Olowu (1985) 3 NWLR (Pt. 13) 372

Ogiamien v. Ogiamien (1967) NSCC 189

Idehen v. Idehen (1991) 6 NWLR (Pt. 198) 382

Oke v. Oke (1974) NSCC 148

LEAD JUDGMENT BY BELGORE JSC

The original appellant, James Abudu, died and was substituted by Jimoh Abudu up to Court of Appeal. By the time this court was to hear the appeal, Jimoh Abudu died and was substituted by Iredia Abudu. The appellant was 4th defendant at the trial High Court. The plaintiff at the trial court is Johnson Eguakun, one of the children of late Mr. Eguakun who died in 1935. Mr. Eguakun left many children, male and female, and Johnson was the third son. The eldest son was Omorodion Eguakun, the father of Mary, Samson and Felix who were co-defendants with James Abudu the trial court. Some-time in 1944, James Abudu bought a piece of land, now in dispute from Omorodion Eguakun, the eldest son of Eguakun. The land belonged to late Eguakun and Omorodion as the eldest son, under Benin native law and custom, had certain rights which I shall explain later in this judgment. James Abudu erected a building on the land in 1952, about, eight years after he acquired it from Omorodion in the presence of the present respondent who was plaintiff at the trial court. In 1960, Omorodion died but he left a problem. From 1935, when Eguakun died to 1960, when Omorodion died, Omorodion never performed the final funeral rights (second burial they call it) of his father. He must perform this second burial to be entitled to his full right over Eguakun's estate as the eldest male child. This, Omorodion never did. The respondent, Johnson Eguakun, in 1971 performed the second burial of his father, Eguakun, as the eldest of the remaining male issues of Eguakun.

By the Customary law of Benin, upon the death of a father, the eldest son takes over his estate as a trustee for all the deceased's children pending the performance of the second (final) burial rites. After performance of these rites, the eldest son automatically inherits the main seat of the deceased father, that is to say, the house where the deceased lived, died and was buried. This house is called 'IGIOGBE', and does not vest unless the second burial rites are performed by the eldest child. The "Igiogbe" passes, by way of inheritance, on distribution of the estate to the eldest son of the deceased. But until the distribution is done the "Igiogbe" will not vest except the eldest son performs the final burial rites; otherwise the eldest son retains all the estate including the "Igiogbe" in trust

for himself and the children of the deceased (Arase v. Arase (1981) 5 SC 33, 62; Ogiamien v. Ogiamien (1967) NSCC 189, 192, 193; Olowu v. Olowu (1985) 3 NWLR (Pt. 13) 372; Idehen v. Idehen (1991) 6 NWLR (Pt. 198) 382, 386, 388.

The second burial or final funeral rites is a big ceremony by the eldest son of the deceased and is concluded by the family with another ceremony for him called “Ukpomwan” whereby he will be finally vested with “Igiogbe” and final distribution of the deceased’s estate will be performed. Arase v. Arase (supra) and Olowu v. Olowu (supra).

In the instant case the eldest son of Eguakun never performed the final burial rites of his father. Therefore even though he held the entire estate of his father in trust for himself and his brothers, “Igiogbe” was not vested in him as he was to perform the final rites and to have “Ukpomwan” done for him. Thus on his death his surviving immediate younger brother, the respondent herein, took over the estate as a trustee for himself and children of Eguakun, and on performing the final funeral rites of Eguakun, he succeeded to the “Igiogbe”. Omorodion as the eldest son of Eguakun never performed the final burial rites of his father up to the time he also died. In that case his own eldest son could not take over, even in trust, the estate of Eguakun, his grandfather. The customary law of Benin is clear on these points but it is pertinent to clear appreciation of the issues in this appeal to state the law clearly as I have done. The law is almost the same in Warri in view of this court’s decision in Oke & Anor. v. Oke & Anor. (1974) NSCC 148, 150, 152, 153.

In 1944, some nine years after the demise of Eguakun, his eldest son, Omorodion, held the entire estate of his father in trust for himself and other children of his father, including Johnson, the respondent. He sold to the appellant the land now in issue in 1944 in the presence of the respondent. As a trustee he was perfectly entitled to do so insofar as the sale is not tainted with fraud or illegality; the trial High Court so held.

At the Court of Appeal, the High Court’s decision was set aside. The court below arrived at its decision on the proposition that the appellant’s pleading at the trial court as 4th defendant was insufficient. Trial court held that the respondent, on performing the final burial rite of his father, Eguakun, succeeded automatically to

Eguakun's Igiogbe but to the exclusion of the land sold to the appellant, It held the appellant to have acquired the land lawfully in accordance with Benin customary law. The respondent and other surviving children of Eguakun after the death of Omorodion were entitled to share in the estate of Eguakun. **The appellant as 4th defendant pleaded clearly how he acquired the land, now known as 7, Isekhre Street, Benin City, from Omorodion in 1944 in the presence of the respondent, how he developed the land, how he rented out the building on the land and was collecting rents therefrom and how the Oba of Benin, the prescribed authority sanctioned the sale. He has been in possession from 1944 up to now without secrecy or force or deceit, and finally even registered the land in the Land Registry. He concluded his pleading by averring as follows:-**

"The defendant(s) will further contend that the claim is bad in law and equity and will rely on legal and equitable defences available to (them) in asking this Honourable Court to dismiss the plaintiff's claim with substantial costs."

The Court of Appeal held that this final paragraph of the Statement of Defence was faulty because.

(1) The particular doctrines of equity which the appellant (as 4th respondent in that court) sought to rely upon were not specifically pleaded.

(2) The reliance of the appellant as purchaser, bona fide, for value did not arise and was therefore irrelevant.

This conclusion, to say the least is unfortunate in this instance. All the facts of the purchase were clearly averred in the Statement of Defence for the court to see. The trial court made good use of the facts pleaded. Court of Appeal certainly erred in its conclusion to set aside the clear and correct findings of fact by trial court. The plaintiff lived all along at the same Isekhre Street and could not deny the 4th Defendant/Appellant's possession of 7, Isekhre Street.

I therefore find great merit in this appeal and I allow it. I set aside judgment of Court of Appeal. In its stead, I restore the judgment of trial court. I award N5,000.00 as costs in Court of Appeal and N10,000.00 as costs in this court to appellant against the respondent.

MOHAMMED JSC

I entirely agree with the opinion of my learned brother, Belgore, JSC, in the judgment just read. For the reasons given in the said judgments I will also allow the appeal. I have nothing more which I can usefully add. B

The appeal is allowed. I set aside the judgment of the Court of Appeal and restore the decision of the trial High Court. I abide by my learned brother's assessment and award of costs.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment delivered by my learned brother, Belgore, JSC. I agree with it and for the reasons he gives, I too allow the appeal and restore the judgment of the trial court with costs as assessed in the leading judgment.

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Belgore, JSC., and I am in agreement for reasons which he has given, that there is merit in this appeal. E

Consequently, I too allow this appeal and set aside the judgment of the Court of Appeal. The decision of the trial court is hereby restored and I subscribe to the order for costs made in the leading judgment. F

MUSDAPHER JSC

I have had the preview of the judgment of my Lord, Belgore, JSC., just delivered and I respectfully agree with the reasoning and the conclusion arrived at. The facts of the case have been lucidly and comprehensively stated in the aforesaid judgment, accordingly, I need not repeat them in this judgment. It is regrettable that the Court of Appeal decided that the appellant's pleadings were insufficient to ground the defences relied on by him. It is common ground that the respondent was privy to the transfer of the property to the appellant. G H

since 1944. The appellant had been in possession, nec clam, nec vi, nec precario that the appellant has been in possession neither secretly, nor by force, nor without permission. The law presumes that the long enjoyment of the appellant clearly indicated that his rights have a legal origin. The appellant had pleaded all the material facts indicating how he came to be in possession of the disputed land. He pleaded and led evidence to show that it was in the presence of the respondent that the appellant acquired the land from the respondent's brother and head of the respondent's family. The relevant ward committee recommended to the Oba to "grant" land to the appellant and finally the land was registered in the appellant's name. The appellant after pleading all those material facts, concluded his pleading by averring:-

"The defendant will further contend that the claim is bad in law and equity and will rely on legal and equitable defences"

In my view, the court below was clearly in error to hold that the appellant did not make sufficient pleading. It was clear that the appellant was bona fide purchaser for value and without notice of any defect in the title or the authority of Omorodion Eguakun to sell the land. It is for the above and the fuller reasons contained in the aforesaid judgment, that I too, allow the appeal. I set aside the decision of the court below and I restore the judgment of the trial court. I award the appellant costs of N5,000.00 and N10,000.00, in the court below and this court respectively.

G

H