

SUPREME COURT OF NIGERIA
FRIDAY 4TH JULY, 2003. SC. 95/1996
CORAM:- I. L. KUTIGI, M. E. OGUNDARE,
U. A. KALGO, A. O. EJIWUNMI, N. TOBI, JJSC

1. ANDONG ADAKE APPELLANTS
2. BOKKOS LOCAL GOVERNMENT	
(Formerly Mangu Local Government)	
AND	
ADAMU AKUN RESPONDENT

EVIDENCE - Facts not pleaded - Weight - Such evidence goes to no issue - And cannot therefore be relied on - In discharge of the onus of proof (H1)

APPEALS - Fresh issues - Raised without leave - Fate - Leave must be sought and obtained to raise such issues - Otherwise same must be discountenanced (H2)

FACTS

The parties were involved in dispute over the filling of the vacant office of Saf Manguna (District Head) of the Manguna Local Government of Plateau State. Plaintiff/respondent and 2nd defendant/1st appellant vied for the vacant office. There was a meeting of the kingmakers to elect one of the two contestants to the office pursuant to the provisions of the Mangu Emirate/Traditional Council (Modification of Native Law and Customs relating to the selection of the District Head of Mangu District) Order 1978, PLSG No. 11 of 1978. The electors elected 1st appellant to the office but respondent was dissatisfied with the election exercise.

Hence, he commenced this action against the Mangu Local Government and 1st appellant at the High Court of Plateau State, challenging the election of 1st appellant as the District Head of Mangu District on the ground that the election process was fraught with irregularities which rendered same null and void. Respondent contended that the person that presided over the election was not the proper person to do so as designated by the applicable law. After hearing, the trial court found in favour of appellants and dismissed

the claims of respondent. Aggrieved, respondent appealed to the Court of Appeal, Jos Division. The appeal was allowed and the election of 1st appellant declared null and void. Dissatisfied, appellants filed appeal at Supreme Court.

ISSUE FOR DETERMINATION

Whether the election that was held on the 1st of June, 1989, was properly conducted.

HELD (Unanimously dismissing the appeal per
OGUNDARE JSC)

EVIDENCE - Facts not pleaded - Weight

1. It must be observed that the meeting of the Traditional Council dated 2nd May, 1989, at which the Secretary to the Local Government was mandated to act as Secretary to the Traditional Council for the purpose of the election of the District Head of Manguna was never pleaded. The above evidence therefore, would go to no issue. In a similar manner D.W.3, Pyempute James also testified under cross-examination that “the traditional council instructed the Secretary to the Local Government to conduct the selection based on the Gazette on the traditional selection of Manguna District.” This evidence too was not in accord with the pleadings and therefore, went to no issue. In the light of all these, it cannot be said that the Defendants discharged the onus on them to prove that the Secretary to the Mangu Local Government was at any time designated by the Traditional Council as Secretary to the Council as required by law. That being so, it is difficult for me to fault the conclusion of the Court of Appeal that the conduct of the election made on 1st of June, 1989, was null and void.
(p. 2078 G)

APPEALS - Fresh issues - Raised without leave - Fate

2. It was submitted that the two grounds were incompetent in that they each alleged misdirection or error in law and facts at the same time. Mr. Gopep for the plaintiff urges us to discountenance this complaint in that it was a matter that should have

been raised at the Court of Appeal but was not so raised and that in raising it before this court, leave was neither sought nor obtained. I agree with Mr. Gopep that this point should have been raised in the Court of Appeal. The defendants who were Respondents in that court did not raise the point and in taking it up in this court did not seek nor obtain the leave of this court to raise the issue. (p. 2079 D)

NOTABLE POINTS OF INTEREST

EJIWUNMI JSC

1. Averment in pleadings is not evidence

An averment in a pleading is not evidence and cannot be substituted for evidence. Such an averment does not therefore amount to proof unless it is admitted. (p. 2081 A)

2. Defendants must prove dual status of the secretary

The short point to be determined then is, whether the Secretary to the Mangu Local Government who presided over the election of the 1st appellant was duly designated under Section 75(3) by the Traditional Council to carry out the duties of the Secretary to the Council. It is manifest from the pleadings of the appellants that they took the position that the Secretary to the Mangu Local Government is also the Secretary to the Traditional Council. In support of this assertion, they pleaded a document dated 30th May, 1989, which they would rely upon at the trial. They therefore had the burden of establishing that fact. (p. 2081 B)

REPRESENTATION

A. B. James, Esq., for the Appellants

D. Gopep, Esq., for the Respondent

CASES REFERRED TO

Mugnusson v. Koiki (1993) 9 NWLR 287

Ajuwon v. Akanni (1993) 9 NWLR 182

STATUTES REFERRED TO

Local Government Edict of Plateau State 1976, s. 75

Mangu Emirate/Traditional Council (Modification of Native Law and Customs relating to the selection of the District Head of Mangu District) Order 1978, PLSG No. 11 of 1978

LEAD JUDGMENT BY OGUNDARE JSC

B This appeal relates to the dispute over the filling of the vacant office of Saf Manguna (District Head) of the Manguna Local Government of Plateau State which fell vacant in April, 1989. The Plaintiff, Adamu Akun, (who is now Respondent before us and Andong Adake, 2nd defendant, who is 1st Appellant in the appeal before us) vied for the vacant office. There was a meeting of the kingmakers to elect one of the two contestants to the office pursuant to the provisions of the Mangu Emirate/Traditional Council (Modification of Native Law and Customs relating to the selection of the District Head of Mangu District) Order 1978, PLSG No. 11 of 1978. The electors elected the 2nd defendant (that is, 1st Appellant) to the office but the Plaintiff was dissatisfied with the election exercise and sued the Mangu Local Government and his co-contestant, Andong Adake, claiming as per paragraph 22 of the Statement of Claim as hereunder:

E “(a) A declaration that the purported election into the office of Saf Manguna held on the 1st day of June, 1989, was fraught with irregularities which render it null and void and of no effect whatsoever.

F (b) A declaration that David Mahanan who voted on the 1st day of June, 1989, is not a traditional elector; consequently his participation rendered the result null and void and of no effect whatsoever.

G (c) A declaration that the office of the Saf Maguna is still vacant and a fresh election be conducted immediately.”

At the conclusion of the pleadings the matter went to trial. The learned trial Judge found in favour of the defendants and dismissed plaintiff’s claims. Dissatisfied with this judgment, plaintiff appealed to the Court of Appeal which latter court allowed the appeal, set aside the judgment of the trial High Court and declared the election conducted on the 1st day of June, 1989, null and void.

H It is against that judgment that the defendants have appealed to this court seeking to set aside the judgment of the Court of Appeal and restoring that of the trial High Court. Pursuant to the rules of this

court, the parties filed and exchanged their respective briefs of argument. The main issue that has arisen in this appeal is as to whether the election that was held on the 1st of June, 1989, was properly conducted.

It is not in dispute that that election was presided over by the Secretary to the Mangu Local Government. The contention of the Plaintiff both in the courts below and in this court was that by the PLSG 11 of 1978, the election should have been presided over by the Secretary to the Traditional Council and not the Secretary to the Local Government. The defendants for their part argued that as the Secretary to the Local Government had been appointed Secretary to the Traditional Council, he properly presided over the election.

I think the issue for determination is a very narrow one. It is not in dispute that the man who presided over that election that chose the 1st Appellant was the Secretary to the Mangu Local Government. The Local Government Edict of Plateau State of 1976 provided in its Section 75(1) for the appointment of a Secretary to the Emirate/Traditional Council and specified the duties of the office. The appointment is to be made by the Local Government Service Commission. Sub-section (3) however provided:

“(3) Notwithstanding the foregoing provisions of this section, the Council instead of employing its own staff may, and where the Military Governor so directs, shall designate the Secretary to the Local Government or any other employee of any Local Government in its area to carry out the duties specified in or to be discharged pursuant to the said provisions or of any other provisions of this part.”

By this provision, the Emirate/Traditional Council could designate the Secretary to the Local Government or any other employee of the Local Government in its area to carry out the duties specified in or to be discharged by the Secretary under the Edict. In a similar way, the Edict provided for the appointment of the Secretary to the Local Government. The Mangu Traditional Council Standing Orders, 1984, made pursuant to powers under the Edict defined in paragraph 2 the word ‘Secretary’ to mean “a person appointed to be the Secretary to the Mangu Traditional Council and includes the person duly acting for the Secretary.”

The narrow issue in this appeal is - was the Secretary to the Mangu Local Government who presided over the election of the 1st

Appellant duly designated under Section 75(3) by the Traditional Council to carry out the duties of the Secretary to the Council? In his statement of claim, the Plaintiff averred as follows:

“11. *The purported election did not comply with the provisions of the MANGU EMIRATE/TRADITIONAL COUNCIL (MODIFICATION OF NATIVE LAW AND CUSTOM RELATING TO SELECTION OF THE DISTRICT HEAD OF MANGUNA DISTRICT) ORDER 1978, PLSG. No. 11 of 1978 (hereinafter referred to as the Edict)*’ as it was the Secretary of the first Defendant and not the Traditional Council Secretary that was the presiding officer as envisaged by Section 3(3) of the Edict.”

In their Statement of Defence, the defendants denied the above averment and pleaded as hereunder:

“7. *The defendants further aver that the Secretary to the Mangu Local Government is also the Secretary to the Traditional Council dated 30th May, 1989, will be relied upon by the Defendants at the hearing of this suit.*”

The onus of course, was on the defendants to prove that the Secretary to the Local Government was also the Secretary to the Traditional Council by proving the appointment pleaded in paragraph 7. This they failed to do. D.W.2, Michael Kasham Uirse in his evidence testified thus:

“*I recalled that on 2/5/89 during the Traditional Council meeting, the council was informed by the Secretary that approval for the selection of the District Head of Manguna was being received. The former Saf Manguna was then dead. After deliberation by the council, the Secretary of the Local Government was mandated to conduct the selection of the new District Head of Manguna, in keeping with the provisions of the gazette. The council selected me as an order (sic) at the selection.*”

It must be observed that the meeting of the Traditional Council dated 2nd May, 1989, at which the Secretary to the Local Government was mandated to act as Secretary to the Traditional Council for the purpose of the election of the District Head of Manguna was never pleaded. The above evidence therefore, would go to no issue. In a similar manner D.W.3, Pyempute James also testified under cross-examination that “the traditional council instructed the Secretary to the Local

Government to conduct the selection based on the Gazette on the traditional selection of Manguna District.” This evidence too was not in accord with the pleadings and therefore, went to no issue. In the light of all these, it cannot be said that the Defendants discharged the onus on them to prove that the Secretary to the Mangu Local Government was at any time designated by the Traditional Council as Secretary to the Council as required by law. That being so, it is difficult for me to fault the conclusion of the Court of Appeal that the conduct of the election made on 1st of June, 1989, was null and void.

Appellants have raised yet another issue, which went to the competence of the appeal before the Court of Appeal. They attacked two grounds of appeal before that court as being incompetent and, therefore, urged the court to hold that the decision of the court below was incompetent being based on those incompetent grounds of appeal. ***It was submitted that the two grounds were incompetent in that they each alleged misdirection or error in law and facts at the same time. Mr. Gopep for the plaintiff urges us to discountenance this complaint in that it was a matter that should have been raised at the Court of Appeal but was not so raised and that in raising it before this court, leave was neither sought nor obtained. I agree with Mr. Gopep that this point should have been raised in the Court of Appeal. The defendants who were Respondents in that court did not raise the point and in taking it up in this court did not seek nor obtain the leave of this court to raise the issue.*** I strike out the grounds of appeal upon which Issue 1 in this appeal is based.

In conclusion, I find no merit in this appeal which I hereby dismiss with N10,000.00 costs to the Plaintiff/Respondent. I affirm the judgment of the Court of Appeal.

KUTIGI JSC

I read in draft the judgment just delivered by my learned brother, Ogundare, JSC. I agree with him that the appeal lacks merit and ought to be dismissed. There was clearly no evidence that the Secretary to the Local Government was appointed or designated as Secretary to the Emirate/Traditional Council to qualify him to have pre-

sided over the meeting for the selection of a new Saf Manguna (District Head) of Manguna Local Government Area of Plateau State. The meeting was therefore null and void. And so was any selection made thereat.

The appeal therefore fails and it is hereby dismissed. The judgment of the Court of Appeal is affirmed. I endorse the order for costs.

KALGO JSC

I have read in advance the judgment of my learned brother, Ogundare, JSC., just delivered in this appeal. I agree with him that there is no merit in the appeal and it ought to be dismissed. For the reasons given in the said judgment which I adopt as mine, I also dismiss the appeal and abide by the order of costs made therein.

EJIWUNMI JSC

As I have read before now, the judgment just delivered by my learned brother, Ogundare, JSC., I agree for the reasons given in the said judgment that this appeal lacks merit.

In the main, the question that calls for consideration in this appeal is, whether the proceedings for the purported election into the office of Saf Manguna held on the 1st day of June, 1989, was not null and void because of the irregularities that occurred during the said election. The position taken by the respondent in this matter from the trial court was that the person who presided over the election had not the necessary competence to do so. This contention is based on Section 75(1) of the Local Government Edict of Plateau State, 1976, which provided for the appointment of a Secretary to the Emirate/Traditional Council and also the duties of his office. However, by virtue of Section 75(3), such appointment has to be made by the Local Government Service Commission and which reads:

“75(3) *Notwithstanding the foregoing provisions of this section, the Council instead of employing its own staff may, and where the Military Governor so directs, shall designate the Secretary to the Local Government or any other employee of any Local Government in its area to carry out the duties specified in or to be discharged*

pursuant to the said provisions or of any other provision of this part.”

It is clear that by this provision, the Emirate/Traditional council could designate the Secretary to the Local Government in its area to carry out the duties specified in or to be discharged by the Secretary under the Edict. An averment in a pleading is not evidence and cannot be substituted for evidence. Such an averment does not there-
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fore amount to proof unless it is admitted. See *Oladejo Ajuwon v. Falele Akanni & Ors.* (1993) 9 NWLR 182 at 200; *Mugnusson v. Koiki & Ors.* (1993) 9 NWLR 287. The short point to be determined then is, whether the Secretary to the Mangu Local Government who
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presided over the election of the 1st appellant was duly designated under Section 75(3) by the Traditional Council to carry out the duties of the Secretary to the Council. It is manifest from the pleadings of the appellants that they took the position that the Secretary to the Mangu Local Government is also the Secretary to the Traditional
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Council. In support of this assertion, they pleaded a document dated 30th May, 1989, which they would rely upon at the trial. They therefore had the burden of establishing that fact.

Having failed to discharge that burden, they have to be bound by the provisions of Section 75(1) and (3) of the Local Government
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Edict of Plateau State as to how the person to preside over the election to the office of Saf Manguna in the Mangu Local Government.

In the result, I agree with the judgment of the Court of Appeal, which is hereby affirmed. This appeal is therefore dismissed by me
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for the above reasons and the fuller reasons for dismissing the appeal given in the lead judgment and also the order striking out the grounds of appeal upon which issue 1 in this appeal is based. I also award costs in the sum of N10,000.00 in favour of the plaintiff/respondent.

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TOBI JSC

I have read in draft the judgment of my learned brother, Ogundare, JSC., and I agree with him that this appeal should be
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dismissed.

The issue as identified by my learned brother, Ogundare, JSC., is very narrow and it is whether the Secretary to the Mangu Local Government could preside over the election into the office of Saf Manguna, instead of the Secretary to the Traditional Council.

Although the defendants averred in paragraph 7 of their Statement of Defence that the Secretary to the Mangu Local Government is also the Secretary to the Traditional Council, no evidence was led by them to prove their averment. It is elementary law that a party who makes an assertion must prove the truth of it, in order to succeed in the action. A paragraph in a pleading not proved is of no avail to the party. In view of the fact that the defendants did not prove that the Secretary to the Mangu Local Government was at any time designated by the Traditional Council as Secretary to the Council, the election conducted by the Secretary to the Mangu Local Government is null and void.

It is for the above reasons and the more detailed reasons given by my learned brother, Ogundare, JSC., that I too dismiss the appeal and I award N10,000.00 costs in favour of the respondent.

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