

SUPREME COURT OF NIGERIA
FRIDAY 11TH JULY, 2003. SC. 196/1999
CORAM:- I. L. KUTIGI, S. U. ONU, A. I. IGUH,
E. O. AYOOLA, D. MUSDAPHER, JJSC

1. CHIEF L. U. OKEAHIALAM

2. JUDE ALOZIE

..... APPELLANTS

(For themselves and on behalf of
members of Onicha Town Union)

AND

1. NZE J. U. NWAMARA

(ISINZE ONICHA)

2. NZE B. B. OHANAGA

(For themselves and on behalf of
members of Onicha Amairi Autonomous
Community Council of Ndi Nze)

3. BONIFACE CHIKEZIE

..... RESPONDENTS

4. SIR LEVIN NKEMDIRIM

5. THE CHAIRMAN, EZINIHITTE

LOCAL GOVERNMENT

6. THE GOVERNOR OF IMO STATE

APPEALS - Judgment - Slip - Effect - Erroneous comment that is not
material to issue in an appeal - Cannot affect the conclusion therein
(H1)

CHIEFTAINCY MATTERS - Statutes - Jurisdiction - Ouster clause -
Imo State Traditional Rulers Law s.25 did not oust jurisdiction of
court - And is not in conflict with 1999 Constitution ss.6(6)(b) & 272
(H2)

CHIEFTAINCY MATTERS - Appeal - Right of - Limit - Imo State
Traditional Rulers Law s.25 - The right is restricted to interested party
- And does not imply a restriction of jurisdiction of court - For judicial
review (H3)

STATUTES - Interpretation - Manner of - Where an enactment can
be construed so as to avoid inconsistency with Constitution - Such

construction should be preferred to any other that leads to inconsistency (H4)

ACTIONS - Representative action - Parties - Status - Plaintiff suing defendant in a representative capacity - Must be deemed to have excluded himself - From those represented by defendant (H5)

FACTS

Plaintiffs/respondents (suing in a representative capacity) instituted this action against defendants/appellants before the High Court of Imo State. Respondents' claim was for a declaration that the purported recognition of 1st appellant as the traditional ruler of Onicha Amairi Autonomous Community was illegal and a nullity in that it was obtained fraudulently and contrary to the provisions of the Imo State Traditional Rulers Law. Respondents contended that 1st appellant was neither selected, presented nor installed as traditional ruler, pursuant to a "chieftaincy constitution" which they alleged was applicable to the traditional rulership of the community. At the trial, appellants raised an objection to the competence of the suit on grounds that same was not brought within 21 days allegedly limited by section 25 of the Traditional Rulers and Autonomous Communities law No. 11 of 1981 of Imo State ("traditional Rulers Law") and that the suit was bad for misjoinder of parties.

Upon hearing the objection, the trial court upheld same and struck out the suit on those grounds. Moreover, it held that the procedure stipulated for challenging unlawful recognition by the Traditional Rulers Law was by means of an appeal and not an action for judicial review as filed by respondents. Aggrieved, respondents appealed to Court of Appeal Port Harcourt. That court took the view that s.25 of Traditional Rulers Law was unconstitutional in that it restricted access to court among other things. It therefore declared the section null and void. It further held that the action was properly constituted. It therefore ordered that the suit be heard by another judge of the High Court. Dissatisfied, appellants have brought this appeal to Supreme Court.

ISSUE FOR DETERMINATION

Whether the proviso to Section 25 of Law No. 11 of 1981 applied to the suit and, whether the suit was properly constituted.

HELD (Unanimously dismissing the appeal per AYOOLA

JSC)

Judgment - Slip - Effect

1. Section 7 as it originally stood provided that recognition of a person as an Eze by the Governor was subject to the confirmation of the State House of Assembly. There is no doubt that was inconsistent with the finality accorded the recognition by the Governor. However, Section 7 was amended by the Traditional Rulers and Autonomous Communities (Amendment) Law, 1982 which, among other things, removed the provision making the recognition of a person as an Eze to be subject to the confirmation of the State House of Assembly. The amendment was not brought to the notice of the court below, probably because the matter was raised merely by way of a comment by Uwaifo, JCA., (as he then was), on his own motion in the course of his judgment. It was not a comment necessary for the determination of the appeal either in the court below or in this court. An erroneous comment that is not material to the issues in an appeal cannot affect the conclusion in the appeal. (p. 2213 D)

Statutes - Jurisdiction - Ouster clause

2. The appellants' counsel on this appeal argued that the section did not oust the jurisdiction of the court so as to bring it in conflict with the provisions of Section 6(6)(b) and Section 272 of the 1999 Constitution. I find no difficulty in agreeing with him and in holding that the court below was in error in holding that that section conflicted with Section 6(6)(b) or Section 272 of the Constitution or both. Section 6(6)(b) defines the scope of the judicial powers vested in the courts enumerated in Section 6, while Section 272 (1) declares the plenary jurisdiction of the High Court of a State "to hear and determine any civil proceedings in which the existence or extent of a legal right (etc) is in issue or to hear and determine any criminal proceedings....." There is nothing inconsistent

with the Constitution in the main provision of Section 25 which made the recognition by the Government of a person as an Eze final. The recognition was final in the sense that it could not be reviewed on the merit either by the Governor or by a court. However, it was not “final” in the sense that it could not be reviewed on the usual grounds of illegality, procedural impropriety, or irrationality. (p. 2214 C)

Appeal - Right of - Limit

3. Although the proviso to Section 25 provided for appeal by an interested party to the High Court within 21 days of the recognition of a person as an Eze for review of the recognition, the right of appeal given to such party was restricted to a person who “feels that in the exercise of such recognition of an Eze the rights of natural justice have been contravened.” The right given to the interested party to appeal only in the prescribed circumstances could not imply a restriction or exclusion of a right to invoke the jurisdiction of the court for a declaration or for judicial review. It only afforded an interested party an additional remedy by way of appeal which can only be granted by statute and which, but for the Law, he would otherwise not have had. (p. 2215 D)

STATUTES - Interpretation - Manner of

4. An intention to legislate in contravention of the constitution should not be imputed to the law-maker. Where an enactment can be construed and can operate as not to be inconsistent with the constitution, such construction and manner of operation should be preferred to any other construction that would lead to inconsistency. The court below was in error to have declared Section 25 of Law No. 11 of 1981 inconsistent with the Constitution and, therefore, void. (p. 2216 C)

Representative action - Parties - Status

5. The commonsense approach adopted in the judgment of the court below quoted above is to be preferred to a rigid adherence to a rule which is more applicable to cases in which the same person is named as a party, even if in different ca-

pacities, as both the plaintiff and the defendant. I am of the same view as the court below that in a representative action the person who named himself as a plaintiff suing the defendant in a representative capacity must be deemed to have excluded himself from the class represented by the representative defendant. It defies reason to argue that a person who has sued a defendant as representing an association to which he belongs for wrongfully acting against his interest must be deemed to be represented as a defendant by the named defendant merely because he did not expressly state that he had excepted himself, just as it would have defied reason to presume that he had alleged a wrong committed by himself against himself. (p. 2218 C) B C

REPRESENTATION

 D

Dr. A. N. Aguwa, for the Appellants

Chief M. I. Ahamba, SAN, with O.C. Ihenachor (Mrs.), for the Plaintiffs/Respondents

CASES REFERRED TO

 E

Pyx Granite Co. v. Minister of Housing and Local Government (1959) 3 All ER 1

R. v. Northumberland Compensation Appeal Tribunal, Ex Parte Shaw (1952) 1 All ER 122 F

STATUTES REFERRED TO

Traditional Rulers & Autonomous Communities Law No. 11 of 1981, of Imo State, ss.7 & 25

Constitution of the Federal Republic of Nigeria, 1979 ss.6 & 236 G

LEAD JUDGMENT BY AYOOLA JSC

The 1st and 2nd plaintiffs/respondents suing for themselves and members of the Onicha Amairi Autonomous Community Council of Ndi Eze, together with the 3rd and 4th plaintiffs/respondents, claimed in an action instituted in the High Court of Imo State, sometime in November, 1993, against the appellants and the defendants/respondents, a declaration that the purported recognition of Chief I.U. Okeahialam, the 1st appellant, as the Traditional Ruler of Onicha H

Amairi Autonomous Community “is illegal, and a nullity having been obtained fraudulently and contrary to the provisions of the relevant” law”; and, consequential reliefs.

The plaintiffs/respondents’ case in the High Court was that the 1st appellant was neither selected, presented nor installed as traditional ruler pursuant to what they described as a ‘chieftaincy constitution’ which they alleged came into force on 12th May, 1979, and that the 4th defendant was deceived into recognising him. The gist of their case was thus the alleged ‘unconstitutionality’, in terms of the chieftaincy constitution, of the steps taken leading to the recognition by the 4th defendant of the 1st appellant as traditional ruler of the respondents’ community by the letter of recognition dated 28th September, 1993 written by the Deputy Governor.

The appellants raised objection to the suit on several grounds, two only of which are material to this appeal. They are that:

(1) “*The court has no jurisdiction to entertain this suit, the suit having been instituted in gross violation and or contravention of Section 25 of the Traditional Rulers and Autonomous Communities Law No. 11 of 1981*”; and,

(2) “*The suit is tainted with a fundamental vice of improper joinder and mis-joinder of parties.*”

The trial Judge struck out the suit on the grounds first, that it was filed fourteen days after the mandatory period of 21 days from the date of recognition, that is, outside the time permitted for bringing such suit by Section 25 of Law No. 11 of 1981 and, secondly, that the procedure stipulated for challenging such recognition by the provisions of that section was by means of an appeal. He held that the suit was defective for improper joinder of parties as the plaintiffs were also the defendants in the same suit.

The plaintiffs/respondents appealed to the Court of Appeal which took the view that the appeal raised three issues, namely: (i) whether the suit was statute-barred by reasons of the provisions of Section 25 of the Law No. 11 of 1981; (ii) whether Section 25 of the Law was inconsistent with the relevant provisions of the 1979 Constitution; and, (ii) whether there was a misjoinder of parties.

The Court of Appeal held that Section 25 was in conflict with Sections 6 and 236 of the 1979 Constitution, in that it denied an aggrieved person his right of access to the court and, therefore, with-

out effect. Consequently, it held that the action of the appellants was not statute-barred. It went on to hold, among other things, that a proper complaint against such recognition is not by way of appeal but by action begun by writ of summons or by certiorari proceedings; that Section 25 was in conflict with Section 7 of the same law which makes recognition given the Governor to a person as an Eze subject to confirmation of the Imo State House of Assembly and finally, that the action was properly constituted in that the respondents must be deemed to have been excluded from the parties sued. The Court of Appeal allowed the appeal of the plaintiffs/respondents and set aside the order of the High Court striking out the suit. It ordered that the suit be relisted for hearing before another Judge of the High Court. The appellants herein appealed.

The appellants on their appeal raised six issues for determination, one of which was abandoned. Of the five issues remaining for determination, the question whether the court below was right in holding that Section 25 of Law No. 11 of 1981 was in conflict with Section 7 of the same Law need not delay me as the plaintiffs/respondents readily conceded that the court below was in error. ***Section 7 as it originally stood provided that recognition of a person as an Eze by the Governor was subject to the confirmation of the State House of Assembly. There is no doubt that was inconsistent with the finality accorded the recognition by the Governor. However, Section 7 was amended by the Traditional Rulers and Autonomous Communities (Amendment) Law, 1982 which, among other things, removed the provision making the recognition of a person as an Eze to be subject to the confirmation of the State House of Assembly. The amendment was not brought to the notice of the court below, probably because the matter was raised merely by way of a comment by Uwaifo, JCA., (as he then was), on his own motion in the course of his judgment. It was not a comment necessary for the determination of the appeal either in the court below or in this court. An erroneous comment that is not material to the issues in an appeal cannot affect the conclusion in the appeal.***

The two main issues decisive of this appeal are whether the proviso to Section 25 of Law No. 11 of 1981 applied to the suit and,

whether the suit was properly constituted. Section 25 of the Imo State Traditional Rulers and Autonomous Communities Law No. 11 of 1981 (“Law No. 11 of 1981”) which is central to this appeal provides as follows:

“25. *Where the Governor has accorded recognition to any person as an Eze, such recognition shall be final:*

Provided that where any interested party from within the autonomous community feels that in the exercise of such recognition of an Eze, the rules of natural justice have been contravened, then that Party may have within 21 days of the recognition, the right of appeal to the High Court for review of the recognition, and the court may make such order as it finds fit for peace, order and good government.”

The appellants’ counsel on this appeal argued that the section did not oust the jurisdiction of the court so as to bring it in conflict with the provisions of Section 6(6)(b) and Section 272 of the 1999 Constitution. I find no difficulty in agreeing with him and in holding that the court below was in error in holding that that section conflicted with Section 6(6)(b) or Section 272 of the Constitution or both. Section 6(6)(b) defines the scope of the judicial powers vested in the courts enumerated in Section 6, while Section 272 (1) declares the plenary jurisdiction of the High Court of a State “to hear and determine any civil proceedings in which the existence or extent of a legal right (etc) is in issue or to hear and determine any criminal proceedings.....” There is nothing inconsistent with the Constitution in the main provision of Section 25 which made the recognition by the Government of a person as an Eze final. The recognition was final in the sense that it could not be reviewed on the merit either by the Governor or by a court. However, it was not “final” in the sense that it could not be reviewed on the usual grounds of illegality, procedural impropriety, or irrationality. In R. v. Northumberland Compensation Appeal Tribunal, Ex Parte Shaw (1952) 1 All ER 122, Denning LJ., (as he then was) said (at p. 127):

“.....the court of King’s Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. That control extends not only to seeing that the

inferior tribunals keep within their jurisdiction, but also seeing that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal which, on the face of it, offends against the law. The King's Bench does not substitute its own views for those of the tribunal, as a court of appeal would do. It leaves it to the tribunal to hear the case again, and in a proper case B *may command it to do so."*

The Court below appreciated this when it said (per Uwaifo, JCA.). (as he then was):

"The duty (to give recognition) cannot be performed or the authority exercised by the court by way of a declaration or otherwise C *where the person failed to do so properly. What he did can only be set aside by the court in an appropriate case in its supervisory jurisdiction."*

Although Section 25 made the recognition to an Eze by the D Governor final, it did not thereby preclude the exercise of the supervisory jurisdiction of the court by way of judicial review of the Governor's decision, furthermore, ***although the proviso to Section 25 provided for appeal by an interested party to the High Court within 21 days of the recognition of a person as an Eze*** E ***for review of the recognition, the right of appeal given to such party was restricted to a person who "feels that in the exercise of such recognition of an Eze the rights of natural justice have been contravened."*** ***The right given to the interested party*** F ***to appeal only in the prescribed circumstances could not imply a restriction or exclusion of a right to invoke the jurisdiction of the court for a declaration or for judicial review. It only afforded an interested party an additional remedy by way of appeal which can only be granted by statute and which, but*** G ***for the Law, he would otherwise not have had.*** The opinion of viscount Simonds in *Pyx Granite Co. v. Minister of Housing and Local Government* (1959) 3 All ER 1 at p. 6, when adapted to Section 25 of Law No. 11 of 1981, is apt and I adopt it. He said:

"It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words.....It must be asked then what is there in the Act of 1947 which bars such recourse. The answer is that there is nothing except that the Act provides him H

with another remedy. Is it then an alternative or an exclusive remedy? There is nothing in the Act to suggest that while a new remedy, perhaps cheap and expeditious, is given the old and, as we like to call it, the inalienable remedy of Her majesty's subjects to seek redress in her courts is taken away."

- B In this country, any person's recourse to the courts is a constitutional right guaranteed by Section 36 of the 1999 Constitution. There is nothing in Section 25 of Law No. 11 of 1981 which barred such recourse. As already stated, the right of appeal in the proviso to Section 25 was restricted to cases in which the ground of complaint is that the rule of natural justice had not been observed. Such is not an exclusive remedy, operating to the exclusion of the right of invoking the supervisory jurisdiction of the courts which the constitution granted and which only the constitution can take away. ***An intention to legislate in contravention of the constitution should not be imputed to the law-maker. Where an enactment can be construed and can operate as not to be inconsistent with the constitution, such construction and manner of operation should be preferred to any other construction that would lead to inconsistency. The court below was in error to have declared Section 25 of Law No. 11 of 1981 inconsistent with the Constitution and, therefore, void.***
- E

- However, the plaintiffs/respondents who were not complaining of a breach of the rule of natural justice, but of the illegality of the recognition of the 1st appellant by the Governor and of the steps leading to that recognition, had no need for a recourse to the remedy of appeal provided by the proviso to Section 25. The limitation of time prescribed by the proviso, therefore, did not apply to them.
- F
- G Chief Ahamba, SAN, was right in his submission that: *"The 2nd set of respondents having brought their suit by way of writ of summons and having not predicated the suit on any complaint based on the infringement of the rules of natural justice the limitation time would not apply to their case and the Court of Appeal was thus right to have so decided."*
- H The plaintiffs/respondents were not precluded by the finality clause of Section 25 of Law No. 11 of 1981 from instituting the suit, the purpose of which was to seek a declaration of the illegality of the recognition granted the 1st appellant, nor were they caught by the limitation period stipulated in the proviso.

The remaining question is whether the suit was properly constituted or not. The court below was of the view that it was. It reasoned that the plaintiffs/respondents must be taken to have excepted themselves from the interest being defended by the Onicha Town Union. The issue arose because the trial Judge had held that the suit was defective for improper joinder of parties as, in his own view, the plaintiffs were also the defendants in the same suit. The trial Judge came to that conclusion because, as he put it, “the averment in paragraph 1 of the statement of claim that plaintiffs and 1st and 2nd defendants are indigenes clearly shows expressly or by reasonable implication that they are all members of Onicha Town Union which has also a Chieftaincy Constitution.” The submission of counsel for the plaintiffs/ respondents before us, which is convincing, is that:

“Nowhere in the statement of claim did the 2nd set of respondents claim to be members of the Town Union, 1st and 2nd respondents represent a distinct group namely, the Council of Ndi Nze while third and fourth respondents are persons interested in the suit as candidates. It is therefore submitted that none of the 2nd set of respondents needed to except himself from the represented Town Union.”

In the reply brief filed by counsel on behalf of the appellants, it was contended that from the facts canvassed by both parties in various affidavits in the High Court in respect of the motion for striking out the suit, the plaintiffs/respondents were clearly both plaintiffs and defendants in the suit.

It is evident that the trial Judge did not rely on facts canvassed in the affidavits mentioned in the reply brief for his conclusion. It is also evident that the court below limited its conclusion to the inference that the plaintiffs/respondents must be taken to have excepted themselves from the interest represented by the appellants. Uwaifo, JCA., (as he then was), who delivered the leading judgment of the court below said:

“I think it must be taken that when the real representative capacity in which an action brought in a personal capacity by a member or members of a community or association against that community or association is expected to be defended is reasonably clear or inferable in the absence of that member or members so expressly excepting themselves from the defendant community or association

on the writ of summons, that omission, (if it may be so described), can either be ignored by the court, or permitted to be amended at any stage should that be considered necessary.”

The general rule is that the same person cannot be both a plaintiff and a defendant in the same action. However, in my opinion, that general rule, strictly understood, is only applicable to parties actually before the court. The distinction between the parties named in the proceedings and the persons represented in the proceedings is always present. In representative proceedings, for instance, a person represented in but not a party to the proceedings cannot have the judgment in the representative proceedings enforced against him without leave, whereas it would have been so enforceable against the defendant or defendants actually before the court. ***The commonsense approach adopted in the judgment of the court below quoted above is to be preferred to a rigid adherence to a rule which is more applicable to cases in which the same person is named as a party, even if in different capacities, as both the plaintiff and the defendant. I am of the same view as the court below that in a representative action the person who named himself as a plaintiff suing the defendant in a representative capacity must be deemed to have excluded himself from the class represented by the representative defendant. It defies reason to argue that a person who has sued a defendant as representing an association to which he belongs for wrongfully acting against his interest must be deemed to be represented as a defendant by the named defendant merely because he did not expressly state that he had excepted himself, just as it would have defied reason to presume that he had alleged a wrong committed by himself against himself.***

Be that as it may, notwithstanding the copious submissions made by counsel for the appellants on this issue, he did not actually address the reasons given by the court below for coming to the conclusion that the suit was properly constituted. I am of the view that the court below came to a right decision. I resolve the two decisive issues in the appeal against the appellants. I hold that the appeal lacks merit and should be dismissed. In the result, I dismiss the appeal and order that appellants should pay costs of the appeal which is fixed at N10,000.00 to plaintiffs/respondents.

KUTIGI JSC

I have had a preview of the judgment just delivered by my learned brother, Ayoola, JSC. I agree with the conclusion, not without difficulties, that the appeal lacks merit. It is accordingly dismissed with N10,000.00 costs to the Plaintiffs/Respondents. B

ONU JSC

Having had the advantage of a preview of the judgment of my learned brother, Ayoola, JSC., just delivered, I agree entirely with his reasoning and conclusion and have nothing useful to add thereto. C

IGUH JSC

I have had the privilege of reading in draft the judgment of my learned brother, Ayoola, JSC., just delivered and I agree with the reasoning and conclusion therein reached. D

Consequently, I too, find no substance in this appeal and the same is hereby dismissed by me with costs as assessed in the leading judgment. E

MUSDAPHER JSC

I have read before now the judgment of my Lord Ayoola, JSC., just delivered. For the reasons contained in the aforesaid judgment which I adopt as mine, I too dismiss the appeal as unmeritorious. I abide by the order for costs contained therein. F

G

H