

SUPREME COURT OF NIGERIA

16TH FEBRUARY, 2007 SC. 230/2001

**CORAM:- I. L. KUTIGI CJN , A. I. KATSINA-ALU, N. TOBI,
A. M. MUKHTAR, F. F. TABAI, JJSC**

1. ALHAJI S. A. KAZEEM PLAINTIFFS/APPELLANTS
2. NOSIRU SAFARI

(For themselves and on behalf of
Agbaka Family of Ejigbo)

AND

1. MADAM WEMIMO MOSAKU DEFENDANTS/
2. MR. GBENGA MOSAKU RESPONDENTS
3. ALHAJIA. K. OLANREWAJU

LAND LAW - Sale - Exhibits - Averment - That is in conflict with written document - Goes to no issue - Seeing that conclusive written evidence - Invalidates oral evidence (H1)

PLEADINGS - Title - "Purported" - Meaning - Appellants are bound by their earlier averment - Which is supported by an exhibit (H2)

LAND LAW - Title - Burden of proof - Submission of counsel - That is not based on facts - Should be rejected (H3)

LAND LAW - Family land - Partition - Effect - Where land has been validly sold - And vested vide a deed of conveyance - A later partition will not affect validity of the sale (H4)

APPEALS - Concurrent findings - Where not perverse - But borne out from the evidence - Supreme Court will not tamper with them (H5)

FACTS

Before the Ikeja High Court of Lagos State the plaintiffs/appellants filed an action against the defendants/respondents. Appellants claimed

the sum of N500 as special and general damages for trespass and perpetual injunction in respect of the land in dispute. 1st respondent counter claimed for declaration of title, N500 damages for trespass and injunction. At the end of trial the learned trial judge dismissed the appellants' claim and granted 1st respondent's counter claim.

Appellants' appeal to the Court of Appeal was dismissed. Being dissatisfied, appellants have further appealed to the Supreme Court. They tried to fault the Court of Appeal for not making use of Exhibit C (a deed of conveyance) by which the land in dispute was conveyed to 1st respondent, but the exhibit was not really in their favour.

ISSUES FOR DETERMINATION

“(1) Whether having regard to the pleadings and the evidence the Court of Appeal was right to decide as the High Court did that the land was validly sold to the 1st Defendant by the Agbaka Family.

(2) Whether the lower Courts were right to uphold the sale to the 1st Defendant and do so in particular by the application of the Rule in Akinola v. Oluwo (1962) 1 All NLR 224/227.”

HELD (Unanimously dismissing the appeal per **TOBI JSC**)

LAND LAW - Sale - Exhibits

1. The appellants averred in paragraph 8(2) of their Statement of Claim that Agbaka family had at no time any personal representatives. This averment is in conflict with Exhibit C which clearly states that Mudasiru Sule, Bakare Abuna, Alaba Agberu and Semi Salami Abuna are “personal representatives of AGBAKA FAMILY”. Where lies the case the appellants are really making? And these are the appellants who tried to fault the Court of Appeal for not making use of Exhibit C. Is Exhibit C really in their favour? Counsel correctly submitted in paragraph 4.3.14 of the appellants' brief that Exhibit C “is final and conclusive as to the vendors who sold to the defendants” and “in that connection any recourse to any oral evidence is invalid.” This is solid law and counsel has very well expressed it. I am not here relying on any oral evidence. I rely on the Statement of Claim and Exhibit C and they are of no assistance to the appellants. If anything, they are against them. Considering the fact that

both the Statement of Claim and Exhibit C found their way to the court through the appellants they are really in trouble in this appeal. (p. 957 F)

Title - "Purported" - Meaning

2. In paragraph 7, the statement of claim referred to *Exhibit C* and averred that the 1st respondent purported to have bought the land in dispute from Mudasiru Sule, Bakare Abuna, Alaba Agberu and Semi Salami Abuna. I ask, why the word “purported” in paragraph 7. Purport in the context means to claim to be or have an appearance of being. How can the correct factual averment in paragraph 6 amount to a purported action in paragraph 7 which avers to *Exhibit C*? As *Exhibit C* was made in 1960, it qualifies within the averment in paragraph 6 to the effect that it was made between” 1959 and 1982. The point I am struggling to make is that the appellants are bound by the averment in paragraph 6 of their Statement of Claim and they cannot move out of it however they try in paragraph 7 because paragraph 7 is consistent with *Exhibit C* which the appellants have asked this court to use. (p. 958 D)

Title - Burden of proof

3. Learned counsel for the appellants submitted that “the title to Agbaka’s land devolved on the two surviving children here Otegbola and Eshubi.” The law is loud and clear that the burden of proof of title to land is on the plaintiff and he must discharge that burden to obtain judgment.

Counsel cannot just come out from the blues and make that submission. Submission of counsel must be based on facts that the land in dispute devolved on Otegbola and Eshubi. Counsel qua advocate is the owner of the law in the sense of expertise while the facts of the case are owned by the party in the sense of possession, knowledge and intimacy. While the party cannot dabble into the domain of the law which belongs to the counsel, counsel cannot dabble into the domain of the facts which belong to the party. Such is the clean and clear division of labour, though not in the strict use of the expression in the law of economics. As there are no facts upon which the submission of counsel can be based, it should be rejected, and I reject it. (p. 958 G)

Family land - Partition - Effect

4. Dealing with the issue of partition, the learned trial Judge said at page 101 of the Record:

B “*I find no evidence to support the allegation that the family land was in fact partitioned in 1982. Even if the family land was partitioned, the portion sold to and effectively vested in the 1st defendant was no part of the family land available for partition.*”

C I entirely agree with the learned trial Judge. If the land was partitioned in 1982, how can that affect *Exhibit C* which was executed in 1960? In the circumstance, the issue of a 1982 partition is a *non sequitur* in respect of *Exhibit C*, a 1960 deed (p. 959 E/ 960 A)

D ***Concurrent findings***

5. Another aspect of this appeal which is in favour of the respondents is the concurrent findings of fact of the High Court and the Court of Appeal. The law is trite that this court cannot tamper with concurrent findings of fact of the two courts unless such findings are perverse. I do not see any perversity in the findings of the two courts. On the contrary, I am of the view that the findings are borne out from the evidence before the trial court (p. 960 B)

F **NOTABLE POINT OF INTEREST**
TABAIJSC

1. Findings based on witness's credibility - Appellate Court's attitude thereto

G It is settled law therefore that where a finding of the trial court is based on its assessment of the credibility of a witness, the appellate court will be wary to interfere. The reason is that because of the appellate court's inability to see and hear the witnesses it cannot properly assess the credibility of the witnesses and make findings thereon in substitution for the findings of the trial court. Where however such a finding of the trial court on the credibility of witnesses is manifestly seen to be unreasonable or otherwise faulted on the ground that it failed to make proper use

of its singular opportunity of seeing and hearing the witnesses, an appellate court can intervene to set aside the resultant findings (p. 970 A)

REPRESENTATION

Akinlolu Omoyinmi with J. A. Omoyinmi for Plaintiffs/Appellants. B
G. Elias SAN with him R. G. Saka for Defendants/Respondents.

CASES REFERRED TO

Akinola v. Oluwo (1962) 1 All NLR 224/227 C
GB Ollivant Ltd. v. Korsah (1941) 7 WACA 188
Odesanya v. Ewedemi (1962) 1 All NLR 320
Adenle v. Oyegbade (1967) NMLR 136
Oyeyiola v. Adeoti (1973) NNLR 10
Francis Asanya V. the State (1991) 3 NWLR (Part 180) 422 at 471 and D
475
Balogun V. Agboola (1974) 1 All N.L.R. (Part 2) 66
Kponuglo V. Kodadja (1933) 2 WACA 24
Bamgbade V. Balogun (1994) 1 N.W.L.R. (Part 323) 718 E
Kalio v. Woluchem (1985) 1 NWLR (Part 4) 610
Popoola v. Adeyemo (1992) 8 NWLR (Part 257) 1 at 331
Ebba v. Ogudo (1984) 1 SCNLR 372
Nigerian Airways Ltd v. Abe (1988) 4 NWLR (Part 90) 524 F
Ajayi v. Texaco (Nig) Ltd (1987) 2 NWLR (Part 62) 577
Mogaji v. Cadbury (Nig.) Ltd. (1985) 2 NWLR (Pt. 7) 393

LEAD JUDGMENT BY TOBI JSC

The plaintiffs are the appellants. The defendants are the respondents. The appellants as plaintiffs claimed N500.00 special and general damages for trespass on land and perpetual injunction. G

Pleadings were filed and duly exchanged. The matter was tried by the learned trial Judge. He did not see his way clear in granting the H reliefs of the appellants. He dismissed the claim in its entirety. He granted the claim of the 1st respondent. He awarded damages of N1,200.00 for trespass. He also granted perpetual injunction against the appellants.

Aggrieved, the appellants went to the Court of Appeal. The appeal was thrown out. They have come to this court. Briefs were filed and duly exchanged. The appellants have formulated two issues for determination:

B “(1) *Whether having regard to the pleadings and the evidence the Court of Appeal was right to decide as the High Court did that the land was validly sold to the 1st Defendant by the Agbaka Family.*

C (2) *Whether the lower Courts were right to uphold the sale to the 1st Defendant and do so in particular by the application of the Rule in Akinola v. Oluwo (1962) 1 All NLR 224/227.*”

The respondents have formulated one issue for determination.

D “*Whether on the basis of the evidence given before and accepted by the trial Judge, the lower court was right in holding that there was a valid sale of the piece of land in issue to the 1st respondent.*”

The fulcrum of the submission of learned counsel for the appellants is that the learned trial Judge did not consider *Exhibit C* (the written agreement), the evidence of 1st and 2nd plaintiffs, PW2 and fifteen exhibits. He argued that the learned trial Judge was wrong in using only partial oral evidence, which resulted in shutting out the above vital evidence.

F He argued that the learned trial Judge directed his mind to the headship of the family, which was not an issue before the court. He cited *NITEL v. Jattau (1996) 1 NWLR (Pt. 425) 392*. Counsel submitted that there was evidence of partition of the land. He cited *Cole v. Folami (1956) 1 FSC 66/68*; *Iwuno v. Diali (1990) 5 NWLR (Pt. 149) 126 at 135*; *Tukur v. Government of Gongola State (1988) 1 NWLR (Pt. 68) 39* and *Onuoha v. State (1989) 2 NWLR (Pt. 101) 23*.

G On possession, learned counsel submitted that the decision reached by the learned trial Judge and confirmed by the Court of Appeal that the plaintiffs committed trespass on the land of the defendants is not correct and should therefore be set aside. He argued that as at 1984 the land was that of the family of the plaintiff who are presumed to be in possession of it till the contrary is proved. He cited *Ologunleko v. Ikueomelo (1993) 2 NWLR (Pt. 273) 16*. He contended that the 24 years possession of the 1st defendant cannot avail him because it is shown as 24 years when he performed no overt act of ownership to the plaintiff’s knowledge. He

cited *Isiba v. Hanson* (1967) NSCC 3. Counsel dealt with in paragraphs 4.7.01 to 4.7.03 of the brief what he regarded as adverse comments of the learned trial Judge.

On the Rule in *Akinola v. Oluwo* (1962) 1 All NLR 224 at 227, learned counsel submitted that the rule favours the appellants. He cited *B Olaloye v. Balogun* (1990) 5 NWLR (Pt. 148) 24; *Akintola v. Solana* (1986) 2 NWLR (Pt. 24) 598; *Ojo v. Phillips* (1993) 5 NWLR (Pt. 296) 751; *Otapo v. Sunmonu* (1987) 2 NWLR (Pt. 58) 587; *Mogaji v. Cadbury (Nig.) Ltd.* (1985) 2 NWLR (Pt. 7) 393; *Ajao v. Alao* (1986) 5 NWLR (Pt. 45) 805 and *Omoni v. Tom* (1991) 6 NWLR (Pt. 195) 93. He urged the court to allow the appeal.

Dr. G. Elias, learned Senior Advocate of Nigeria for the respondents, submitted that the evidence before the court was neither inconsistent with nor contradictory of Exhibit C. On the contrary, the evidence elicited in the course of cross-examination of PW2 complements *Exhibit C*; evidence learned Senior Advocate submitted was not contradicted. He cited *Odunsi v. Bamgbala* (1995) 1 NWLR (Pt. 374) 641. The essence of cross-examination, learned Senior Advocate argued, is to test the veracity of the evidence of the witness and any answer in the course of cross-examination, albeit damning to the case of the party who the witness represents but supportive of the case of the opposing party, is relevant. He cited *Akinola v. Oluwo* (1962) 1 All NLR 225; *Ojiako v. The State* (1991) 2 NWLR (Pt. 175) 578.

On partition, learned Senior Advocate submitted that mere allegation of the act of partition is not enough and so the Court of Appeal was right in holding that there was no evidence of partition. Even if there was partition, the partition will be inconsequential as it was alleged to have occurred in 1981, nearly 20 years after the land had been sold to the 1st respondent, learned Senior Advocate contended.

Learned Senior Advocate maintained that the trial court properly evaluated the evidence and the Court of Appeal was therefore in a good position to evaluate the evidence before the trial court. He referred to the concurrent findings of the two courts below and urged the court to dismiss the appeal.

The appellants have relied heavily on *Exhibit C*. They regard it as the alpha and omega of this appeal. To them, judgment ought to be given in their favour if *Exhibit C* is adequately considered and the content given desired probative value. The appellants accused the Court of Appeal of failing to examine the exhibit. And so, I must examine the almighty *Exhibit C*. It is the deed of conveyance. It begins with the traditional recitals, the history behind the deed. They are two. The first refers to the Supreme Court Suit No. 17/1953. The second is the history behind the sale, tracing it from the vendors and relating it, as usual, to the purchaser.

THE INDENTURE commenced from where the recitals stopped. I think I should not paraphrase the INDENTURE. It is the crux of the deed. Let me therefore read it in full:

“NOW THIS INDENTURE WITNESSETH that to effectuate the said sale and in consideration of the said sum of £660 (Six hundred and sixty Pounds) sterling full purchase money paid by the “Purchaser” to the said “Vendors” (receipt whereof is hereby acknowledged and from the same doth hereby release the “Purchaser”. They the said “Vendors” as Beneficial Owners and as such “Personal Representatives of the “Agbaka’s Family” hereby Grant and Convey unto the “Purchaser” all that Piece or parcel of land situate, lying and being at Ejigbo village in Ikeja District, on the Western Region of Nigeria, which with its dimensions and abuttals are described and delineated on the Map or Plan - shown below these presents and thereon Edged Red to Have and To Hold the said hereditaments Unto and to the Use of the “Purchaser”, her Heirs and Assigns in fee simple absolute.”

Learned counsel for the appellants submitted that the appellants have established that those who assigned *Exhibit C* are not the Agbaka family of Otegbola and Eshubi branches. Learned Senior Advocate for the respondents submitted that at least three of the representatives in Suit No. 17 of 1953 executed *Exhibit C* and conveyed title of the piece of land to the 1st respondent.

The position of the learned Senior Advocate is vindicated by the learned trial Judge, who said at page 97 of the Record:

“Now, both in their pleadings and evidence the plaintiff’s case is

that those who sold their family land to the 1st defendant were not the family's representatives hence they had no right to sell. Those vendors were Mudashiru Sule, Bakare Abuna, Alaba Agberu and Salami Abuna. It appears *ex facie* Suit No. 17 of 1953 that three of these vendors were the representatives of the Agbaka family who sued for and on behalf of B the family. By the 2nd plaintiff's witness showing these members of the family as the family's representatives would have the right to look after and sell the family's land. The defendants are entitled to the benefit of this evidence and adopt it as part of their case...."

Perhaps the position will become clearer by examining Exhibit C C closely, and this I will do by quoting the commencement:

"BETWEEN MUDASIRU SULE, BAKARE ABUNA, ALABA AGBERU and SEMI SALAMI ABUNA all of Ikeja District of the Western Region of Nigeria, "Personal Representatives of the "AGBAKA D FAMILY" of Ejigbo village and abroad (hereinafter called the Vendors which expression shall where the context so admits include successors in office) of..."

It is clear to me that the representatives of the family in Suit No. E 17 of 1953 and those in Exhibit C have three names in common. They are Mudasiru Sule, Bakare Abuna and Alaba Agberu. Is this a mere coincidence? I think not. That apart, contrary to the argument of learned counsel for the appellants that those who signed Exhibit C are not members of the Agbaka family, this is clearly stated in the above commencement of the exhibit in the following terms: "Personal Representatives of F the AGBAKA FAMILY....."

The appellants averred in paragraph 8(2) of their Statement of Claim that Agbaka family had at no time any personal representatives. This averment is in conflict with Exhibit C which clearly states that Mudasiru Sule, Bakare Abuna, Alaba Agberu and Semi Salami Abuna are "personal representatives of AGBAKA FAMILY". Where lies the case the appellants are really making? And these H are the appellants who tried to fault the Court of Appeal for not making use of Exhibit C. Is Exhibit C really in their favour? Counsel correctly submitted in paragraph 4.3.14 of the appellants' brief

that Exhibit C “is final and conclusive as to the vendors who sold to the defendants” and “in that connection any recourse to any oral evidence is invalid.” This is solid law and counsel has very well expressed it. I am not here relying on any oral evidence. I rely on the Statement of Claim and Exhibit C and they are of no assistance to the appellants. If anything, they are against them. Considering the fact that both the Statement of Claim and Exhibit C found their way to the court through the appellants they are really in trouble in this appeal.

I have not finished with the statement of claim. Let me read paragraph 6 of the Statement of Claim:

“Between (1959) and (1982) the members of the Agbaka family referred to in paragraph (5) above were the only competent members of the said family that could convey, grant or transfer the family land or any portion thereof to any person.”

In paragraph 7, the statement of claim referred to *Exhibit C* and averred that the 1st respondent purported to have bought the land in dispute from Mudasiru Sule, Bakare Abuna, Alaba Agberu and Semi Salami Abuna. I ask, why the word “purported” in paragraph 7. Purport in the context means to claim to be or have an appearance of being. How can the correct factual averment in paragraph 6 amount to a purported action in paragraph 7 which avers to *Exhibit C*? As *Exhibit C* was made in 1960, it qualifies within the averment in paragraph 6 to the effect that it was made between” 1959 and 1982. The point I am struggling to make is that the appellants are bound by the averment in paragraph 6 of their Statement of Claim and they cannot move out of it however they try in paragraph 7 because paragraph 7 is consistent with *Exhibit C* which the appellants have asked this court to use.

Learned counsel for the appellants submitted that “the title to Agbaka’s land devolved on the two surviving children here Otegbola and Eshubi.” The law is loud and clear that the burden of proof of title to land is on the plaintiff and he must discharge that burden to obtain judgment. See *GB Ollivant Ltd. v. Korsah* (1941) 7

WACA 188; Odesanya v. Ewedemi (1962) 1 All NLR 320; Adenle v. Oyegbade (1967) NMLR 136; Oyeyiola v. Adeoti (1973) NNLR 10 and Akinola v. Oluwo (1962) WNLR 133.

Counsel cannot just come out from the blues and make that submission. Submission of counsel must be based on facts that the land in dispute devolved on Otegbola and Eshubi. Counsel *qua* advocate is the owner of the law in the sense of expertise while the facts of the case are owned by the party in the sense of possession, knowledge and intimacy. While the party cannot dabble into the domain of the law which belongs to the counsel, counsel cannot dabble into the domain of the facts which belong to the party. Such is the clean and clear division of labour, though not in the strict use of the expression in the law of economics. As there are no facts upon which the submission of counsel can be based, it should be rejected, and I reject it.

And that takes me to the issue of partition. PW2, Jimoh Falana, in his evidence-in-chief said at page 47 of the Record:

“I remember that Esubi and Otegbola branches went to court in 1981. We later withdrew the case from court. We settled out of court amicably. We partitioned the Agbaka land, one part for Esubi and one part for Otegbola.”

Dealing with the issue of partition, the learned trial Judge said at page 101 of the Record:

“I find no evidence to support the allegation that the family land was in fact partitioned in 1982. Even if the family land was partitioned, the portion sold to and effectively vested in the 1st defendant was no part of the family land available for partition.”

The Court of Appeal said at page 212 of the Record on the issue of partition:

“I do not think that the issue of partitioning of the family land in 1982 is of any real relevance in this case. When the land was partitioned there was no survey plan showing the land belonging to Eshubi or Otegbola branch. Since the court below believed the evidence of the defence witness that when the survey plan of the area purchased by the 1st

respondent was being made several members of the Agbaka family including some of the appellants gave a helping hand. The necessary assumption or inference is that such land could not have been included in the area partitioned - the area subject of a deed of sale Ex. C."

B I entirely agree with the learned trial Judge. If the land was partitioned in 1982, how can that affect *Exhibit C* which was executed in 1960? In the circumstance, the issue of a 1982 partition is a *non sequitur* in respect of *Exhibit C*, a 1960 deed.

C Another aspect of this appeal which is in favour of the respondents is the concurrent findings of fact of the High Court and the Court of Appeal. The law is trite that this court cannot tamper with concurrent findings of fact of the two courts unless such findings are perverse. I do not see any perversity in the findings of the two courts. On the contrary, I am of the view that the findings are borne out from the evidence before the trial court.

D I do not think I should go into this appeal further. The appeal has no merit. It therefore fails and it is dismissed. I affirm the decision of the Court of Appeal. I award N10,000.00 costs to respondents.

KUTIGIAG. CJN

F I have had the privilege of reading in advance the judgment just delivered by my learned brother Niki Tobi, JSC. I agree with him entirely that the appeal has no merit. It fails and accordingly dismissed with N10,000.00 costs against the Appellants and in favour of the Respondents.

G

KATSINA-ALU JSC

H I have had the advantage of reading in draft the judgment delivered by my learned brother Niki Tobi JSC. I agree with it and, for the reasons which he has given I also dismiss the appeal and affirm the concurrent judgments of the two courts below. I abide by the order as to costs.

MUKHTAR JSC

The plaintiffs claim in the High Court of Lagos State as per the writ of summons are as follows:-

“(a) N500 special and general damages for trespass committed by the Defendants, their servants and agents who in September and October, 1984, broke and entered plaintiffs’ land situate and being at Ejigbo, Lagos State;

(b) Perpetual Injunction restraining the Defendants, their servants and agents from committing further or other acts of trespass on the said land.”

Annual rental value of the land = N10.00

The defendants denied the allegation of trespass and counter-claimed as follows in their statement of defence :-

“(1) The 1st defendant/counter claimant claims against the plaintiffs/defendants for a declaration that she is entitled to the statutory right of occupancy in respect of the piece or parcel of land at Ejigbo, Lagos State as shown in Plan No. AL.171/1959 attached to the deed of conveyance dated the 30th day of June 1960 and Registered as No. 16 at page 16 in volume 410 at the Lang Registry Office Ibadan (new Lagos).

(2) N500.00 as damages for trespass when the plaintiffs/defendants between 1980 and 1985 unlawfully broke and entered the said land without the consent of the 1st defendant or any other lawful justification.

(3) Injunction restraining the plaintiffs/defendants their servants or Agent from committing further acts of trespass against the 1st defendant/counter claimant in respect of the said land. Annual, rented at value of the land is N300.00”.

The evidence adduced by the parties were evaluated by learned trial judge who at the end of the day dismissed the claim of the appellant in its entirety, and found them liable in trespass claimed by the 1st defendant in her counter claim. The plaintiffs appealed to the Court of Appeal, who in turn dismissed the appeal as it found it lacking in merit. The plaintiffs have again appealed to this court on five grounds of appeal, and their respective counsel exchanged briefs of argument which were adopted

at the hearing of the appeal. The issues raised for determination in the appellants' brief of argument are as follows:-

“(1) Whether having regard to the pleadings and the evidence the Court of Appeal was right to decide as the High Court did that the land was validly sold to the 1st Defendant by the Agbaka family.

(2) Whether the lower courts were right to uphold the sale to the 1st Defendant and so in particular by the application of the Rule in *Akinola v. Oluwo* 1962 1 All N.L.R. 224/227.”

Only one issue for determination was raised in the Respondents' brief of argument and that issue is “whether on the basis of the evidence given before and accepted by the trial judge, the lower court was right in holding that there was a valid sale of the piece of land in issue to the 1st Respondent.” I will adopt this later issue for the treatment of this appeal, for I find it more succinct and comprehensive.

The evidence before the trial court is clear on the fact that the land in dispute was part of a larger parcel of land that was owned by one family namely the Agbaka family, and this fact is supported by the content of Exhibit ‘C’, a deed of conveyance, which opened with the following:-

“This indenture made the 30th day of June 1960, between MUDASIRU SULE, BAKARE ABUWA, ALABA AGBERU and SENMINU SALAMI ABUWA all of Ejigbo Village via Mushin in Ikeja District of the Western Region of Nigeria, ‘Personal Representatives of the “AGBAKA FAMILY” of Ejigbo Village and abroad (hereafter called the ‘Vendor’.....

The deed was executed in 1960, before the alleged partition of the land as averred in the following averment in the plaintiffs' statement of claim, which read thus:-

“10. In 1981, there was a dispute between the two branches of Agbaka family in respect of the family land which dispute because the subject matter in suit No. ID/293/81 (*Salisu Akanbi Kazeem and ors v. Jimoh Falana and ors*) in which the plaintiffs herein sought partition of the family land.

11. As a result of the suit referred to in paragraph (10) above the

Agbaka family land was by consent on 26/9/82 partitioned into two - (one each to Esubi and Otegbola branch)."

The fact that the land was sold before the said partition is buttressed by the evidence of PW 2 when he said inter alia:-

"I know all those names mention they are our fathers, Sule Otegbola, Bakare Abuna, Dada Agberin and Remi Salami all belonged to Otegbola branch. They did not tell us when the land was sold to the 1st defendant. At the time we partitioned the land, I was the head of Otegbola branch. Alhaji Akanbi (1st plaintiff) is the current head of Esubi branch. We never knew the land in dispute had been sold about 27 years ago."

Definitely the sale of the land to the 1st defendant/respondent, was before the purported partition, (if indeed there was a partition of the land), for the reproduced pleadings of the appellant, the evidence adduced and the content of Exhibit 'C' is very clear on this. It is therefore not in doubt that the land was validly sold to the 1st defendant/respondent. The courts below were absolutely right to have found in her favour against the plaintiffs/appellants. This court also finds likewise, as did the lower courts, and dismiss the appeal. Besides, this is an appeal on concurrent findings of the lower courts, which this court is not ordinarily at liberty to interfere with. The settled law is that an appeal on concurrent findings of facts will not be overturned by an appellate court unless it has found that the findings are perverse, are not supported by credible evidence and have resulted in miscarriage of justice. See *Woluchem v. Gudi* 1981 5 SC. 291, and *Chief Mene Kenon and ors v. Chief Albert Tekam* 2001 14 NWLR part 732 page 12.

This is not the situation in this case. So the appeal deserves to be dismissed, as concluded in the lead judgment of my learned brother Niki Tobi, JSC which I have had the privilege of reading in advance and which I entirely agree with. I abide by the consequential orders made in the lead judgment.

H

TABAI JSC

The suit culminating in this appeal was filed at the Ikeja Judicial

Division of the High Court of Lagos State on or about the 6/12/84 by the Appellants herein as Plaintiffs. The Respondents herein were the Defendants. The claim against them jointly and severally was for N500.00 special and general damages for trespass and perpetual injunction. Pleadings were duly filed and exchanged. Embodied in the Statement of Defence was the 1st Defendant/Respondent's counter-claim against the Plaintiffs/Respondents. The counter-claim was for a declaration of 1st Respondent's entitlement to the statutory right of occupancy in respect of the land in dispute, N500.00 damages for trespass and injunction.

At the end of the trial, the Plaintiffs/Appellants' claim was dismissed. The 1st Defendant/Respondent's counter-claim was allowed. The Judgment was on the 8/3/88. The appeal to the court below was dismissed and the judgment of the trial court affirmed. Still dissatisfied the Appellants have come to this Court on appeal. Both sides filed their Briefs of argument. The Appellants' Brief was prepared by Akinlolu Omoyinmi. That of the Respondents was prepared by G. Elias, SAN. Although the Appellant proposed two issues for determination, I am inclined to the view of the Respondent that there is only one issue and it is whether from the pleadings and the totality of evidence on record, the courts below were right in their decision dismissing the claim and allowing the counter-claim.

The complaints of the Appellants are centered around error of evaluation and insufficient evaluation. The substance of the arguments of learned counsel for the Appellants in the Appellants' Brief are as follows. It was counsel's submission that a fair trial is one in which the total evidence of both parties is considered and that in this case this court should intervene because of the lower courts' failure to consider the whole evidence. In support of these submissions he cited *ONUOHA v. STATE* (1987) 4 NWLR (Part 65) 321; *ATANDA v. AJANI* (1989) 3 BWLR (Part 111) 511; *WILLOUGHBY v I.B.M. LTD* (1987) 1 NWLR (Part 48) 105; *BALOGUN v. AKANJI* (1988) 1 NWLR (Part 70) 301; *ATUYEYE v. ASHAMU* (1987) 1 NWLR (Part 49) 267. It was his further submission that the learned trial judge erred when it considered and founded upon the unpleaded oral evidence of surveying of the land and that the

finding about the Plaintiffs/Appellants' participation on the sale was for that reason perverse, contending that oral evidence cannot be accepted to contradict the contents of a document and in this case Exh. C. He relied on section 132(1) of the Evidence Act; *OLALEYE v. BALOGUN* (1990) 5 NWLR (Part 148) 24; *AKINTOLA v. SOLANO* (1986) 2 NWLR (Part 24) 598. Having concluded that the Otegbola family sold the land to the 1st Respondent, he argued, it was wrong for the learned trial Judge to consider and rely on the oral testimony about surveying to reach the finding that the Appellants' Esubi family also joined in the sale. He submitted that Exhibit C is final and conclusive as to the vendor of the land to the 1st Respondent. In paragraphs 4.5.01 - 4.5.14 pages 12-14 of the Appellants' Brief learned counsel argued that the finding about there being no partition was perverse, same not having been borne out of the evidence. Similarly in paragraphs 4.6.01 - 4.6.17 pages 15-18 of the Brief learned counsel proffered various and detailed arguments to urge that the finding about the Appellants not being in possession was also perverse. In conclusion Akinlolu Omoyinmi urged that the appeal be allowed.

In the Respondents' Brief of Argument learned counsel G. Elias (SAN) proffered the following arguments. He referred to the concurrent findings by the two Courts below that the land in dispute was sold by the accredited and authorized representatives of the Agbaka family to the 1st Respondent in 1960 and submitted that this court ought not to interfere with the finding unless it is established that manifest injustice has been done. He relied on the case *ACHIAKPA v. NDUKA* (2001) 14 N.W.L.R (Part 734) 623 at 625. He referred to Suit No. 17 of 1953, the four representatives of the family therein, the admission by the PW2 that the four representatives could effect a valid sale of the family property, the fact that all surviving representatives of Suit No. 17/1953 executed Exhibit C and the evidence that the Appellants even assisted in the preparatory survey exercise and submitted that the judgment was supported by the evidence and ought not be disturbed. With respect to partition, it was argued that there was no evidence of partition and that even if there were, the partition is inconsequential as it was in 1981, more than 20

years after the sale to the 1st Respondent. He urged in conclusion that the appeal be dismissed. As I stated earlier the Appellants' complaints are centered around error of evaluation or insufficient evaluation.

Let me now assess the substance of these complaints. At pages
 B 93-94 of the record of appeal the learned trial judge restated the substance of the case of the parties as contained in the pleadings. Immediately thereafter at pages 94-95 of the record he itemized six points of facts on which, from the pleadings, the parties were in agreement. The
 C learned trial judge then identified two main issues for resolution as follows:-

(1) Whether the members of the Agbaka family who sold the land in dispute to the 1st Defendant could validly alienate the family land; and if they could not, whether the Plaintiffs are not estopped from chal-
 D lenging the sale effected and duly registered over twenty-four years before issue of the writ of summons; and

(2) Whether the Agbaka family land was indeed partitioned in 1982 as averred by the Plaintiffs, and if it was whether the portion pur-
 E chased by the 1st Defendant was still available for partition by the Agbaka family at the time of the partition.

Then, in an attempt to resolve these two main issues the learned trial judge embarked upon a detailed analysis of the oral and documentary
 F evidence of the parties, highlighting in the process, certain aspects of the evidence of some of the witnesses. In particular he highlighted part of the evidence of the 2nd P.W. Jimoh Falana, 3rd D.W. Gabriel Adewunmi Salu and 4th D.W. Alhaji Kolawole Lamidi Olarewaju. For the purpose of
 G determining whether the vendors in Exhibit C were the accredited representatives of the whole Agbaka family, the learned trial judge also considered the writ of summons and paragraphs 4, 5, 6, 7 and 8 of the Statement of Claim in Suit No. 17 of 1953. In conclusion he resolved the issues in the following terms:-

H *“On the first issue raised supra, I find that the members of the Agbaka family who sold the land in dispute to the first Defendant were accredited representatives of the family. The sale was made by the Agbaka family as one unit hence they validly and effectively divested their fam-*

ily of any right or interest in the portion sold to the 1st Defendant.

On the second issue, I find that the question of splitting the Agbaka family land into two along branch lines arose in 1981. I find no evidence to support the allegation that the family land was infact partitioned in 1982. Even if the family land was partitioned, the portion sold B to and effectively vested in the 1st Defendant was no more part of the family land available for partition.”

(See pages 100-100 of the record of appeal)

These findings and conclusions were all affirmed by the Court C of Appeal.

I have also examined the entirety of the oral and documentary evidence on record and I am satisfied that each of the findings and conclusions is supported by credible evidence. Mr. Omoyinmi, learned counsel for the Appellants argued rather strenuously that the learned trial judge D committed a breach of section 132(1) of the Evidence Act by his recourse to oral evidence to alter, add to or vary the contents of Exhibit C instead of confining himself to the document alone. I am not persuaded by this argument. I cannot appreciate any alleged violation of section E 132(1) of the Evidence Act committed by the learned trial judge. He was faced with the task of determining whether the vendors in Exhibit C that is, Mudasiru Sule, Bakare Abuna, Alaba Agberu and Senmi Salami Abuna were authorized and accredited representatives of the Agbaka family as a F unit. On this issue even Exhibit “C” without more was sufficient proof. The opening paragraph of Exhibit C states thus:-

“THIS INDENTURE made the 30th day of June 1960 Between MUDASIRU SULE, BAKARE ABUNA, ALABA AGBERU AND SENMI G SALAMI ABUNA all of Ejigbo Village via Mushin in Ikeja District of the Western Region of Nigeria.” “Personal Representatives of the “AGBAKA FAMILY” of Ejigbo Village and abroad”

(See page 110 of the record)

And in further emphasis of the vendors’ authorize representa- H tion, the document went further to state:

“They the said “vendors” as Beneficial owners and as such Personal Representatives of the “Agbaka family” hereby grant an convey

unto the “Purchaser” all that piece or parcel of land situate, lying and being at Ejigbo village in Ikeja District on the Western Region of Nigeria....” (See page 112 of the record of appeal).

Exhibit C contains no mention either of Otegbola or Esubi branches of the Agbaka family. Thus it is the Appellants that attempt a violation of section 132 of the Evidence Act by reading into it Otegbola or Esubi branches of the Agbaka family. And for the purpose of settling this issue of authorised representation, the trial learned trial judge was perfectly in order when he referred to Suit No. 17 of 1953 the writ of summons and statement of claim therein since same was referred to in Exhibit C itself.

Still in this issue of the authorised representation of the vendors in Exhibit C and the related issue of whether in 1953 and up to 1960 the Agbaka family acted as one unit without any concept of Otegbola and Esubi branches, it is my firm view that the learned trial judge was on course when he relied further on the oral testimony of some of the witnesses, including that of the 2nd P.W. Jimoh Falana. On this issue of the Agbaka family’s accredited representatives, the 2nd P.W. stated under cross examination at page 49 of the record thus:

“We used to have family representatives before. Their duty was to look after Agbaka family land. If any sale of land was to be made these representatives would make the sale. They also settled disputes on our family land. They would represent us in litigation in court.”

The learned trial judge invoked the principle in *AKINOLA & OTHERS v. OLUWO & OTHERS* (1962) 1 ALL N.L.R. 224 at 227 and *OJO ALAO & ORS v. POPOOLA ALAO & ORS* (1986) 5 NWLR 802 at 806 and held that the evidence, though given by the Plaintiffs/Appellants, ensured in favour of the Defendants/Respondent. I agree entirely with the learned trial judge and hold that the vendors in Exhibit C who were also the Agbaka family’s representatives in the earlier suit No. 17 of 1953 were the authorised and accredited representatives of the Agbaka family as a single unit.

That is not all. There was still that the issue of whether the Plaintiffs/Appellants were aware of and took part in the sale of the land in

dispute ended in Exhibit C. The case of the Appellants was that they were not aware of the sales transaction in 1960 and that they became aware only in 1981 when they were arrested and taken to the Ojo Military barracks. The case of the Respondents, on the other hand, was that the Appellants were not only aware but that they also took active part in the preparations of the survey plan. In preferring and accepting the evidence in support of the Respondents' case the learned trial judge relied on the evidence of the 3rd D.W. Gabriel Adewunmi Salu and 4th D.W. Alhaji Kolawole Lamidi Olanrewaju. With respect to the testimony of the 3rd D.W. the learned trial judge at page 98 of the record gave his assessment thus:-

"I believe this witness told the truth on the transactions between the Agbaka family and the 1st Defendant. This witness had no stake in the dispute between the parties. He gave his evidence frankly."

As regards the evidence of the 4th D.W. part of the learned trial judge's assessment went thus:-

"Alhaji Kolawole Lamidi Olanrewaju, a relation of the 1st Defendant accompanied the 1st Defendant, members of the Agbaka family and the surveyor Gabriel Adewunmi Salu to the Agbaka family in 1959. Younger members of the Agbaka family including the 1st and 2nd Plaintiffs went round the farmland with their elders and the surveyor. They helped in cutting bush to make way for the surveyor and the 1st Defendant. This witness is emphatic that the 1st Plaintiff was the one cutting the bush to make way for the Agbaka family representatives on the day in question. The Plaintiffs' fathers were in Agbaka family group who went round the land with the 1st Defendant and her surveyor. After the Exercise the 1st Defendant brought out some food and feasted the whole group in the farm."

The learned trial judge went on and concluded his assessment thus:

"I believe that this witness was there and present when members of the Agbaka family led by their family head, took the 1st Defendant and her surveyor to the land in dispute pursuant to its sale to the 1st Defendant. I accept his evidence on the events of that visit."

One striking feature of the above assessments is that they pertain to the trial court's assessment of the credibility of these witnesses, an area within the exclusive domain of the trial court which alone had the opportunity to see and hear the witnesses. It is settled law therefore that where a finding of the trial court is based on its assessment of the credibility of a witness, the appellate court will be wary to interfere. The reason is that because of the appellate court's inability to see and hear the witnesses it cannot properly assess the credibility of the witnesses and make findings thereon in substitution for the findings of the trial court. See FRANCIS ASANYA v. THE STATE (1991) 3 NWLR (Part 180) 422 at 471 and 475; BALOGUN v. AGBOOLA (1974) 1 ALL N.L.R. (Part 2) 66 KPONUGLO v. KODADJA (1933) 2 WACA 24, BAMGBADE v. BALOGUN (1994) 1 N.W.L.R. (Part 323) 718. Where however such a finding of the trial court on the credibility of witnesses is manifestly seen to be unreasonable or otherwise faulted on the ground that it failed to make proper use of its singular opportunity of seeing and hearing the witnesses, an appellate court can intervene to set aside the resultant findings. See KALIO v. WOLUCHEM (1985) 1 NWLR (Part 4) 610, POPOOLA v. ADEYEMO (1992) 8 NWLR (Part 257) 1 at 331, EBBA v. OGUDO (1984) 1 SCNLR 372, NIGERIAN AIRWAYS LTD v. ABE (1988) 4 NWLR (Part 90) 524; AJAYI v. TEXACO (NIG) LTD (1987) 2 NWLR (Part 62) 577.

In the present case, the learned trial judge's assessment of the credibility of the 3rd DW and 4th D.W. is not shown to be manifestly unreasonable. Nor has it been otherwise faulted. In the circumstances, neither the court below, nor this court has any basis to Interfere with the trial court's finding that the Appellants were aware of and even actively participated in the sale of the property by the Agbaka family to the 1st Defendant/Respondent. From all I have discussed above, the single issue for determination ought to be and is hereby resolved in favour of the Respondents.

In view of the above considerations and the better reasons comprehensively set out in the leading judgment of my learned brother Niki Tobi JSC I do not see any substance in this appeal. The result is that I

also dismiss the appeal and affirm the concurrent judgments of the two courts below. I abide by the consequential order on costs contained in the leading judgment.

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