

SUPREME COURT OF NIGERIA

10TH DECEMBER, 2010. SC. 2/2003

**CORAM;- M. MOHAMMED, C. M. CHUKWUMA-ENEH, J.
A. FABIYI, O. O. ADEKEYE, B. RHODES-VIVOUR, JJSC**

1. NEWMAN OLODO
2. WISDOM NEWMAN
3. GERSHOM NEWMAN
4. GRANVILLE NEWMAN
5. ONUMEYE NEWMAN
6. GODWILL NEWMAN APPELLANTS
7. OKPEYA NEWMAN
8. OTAVIE NEWMAN
9. LUCKY NEWMAN
10. DOGOOD NEWMAN
11. CHUKWU NEWMAN

(For themselves and representing
Tombo Family/unit of Izifa compound,
Akenfa-Epie Yenagoa Local
Government Area)

AND

1. CHIEF BURTON M. JOSIAH
2. CHIEF SYLVANUS AKPALO
3. MR. OKPOTO LYON
4. MR. AKIDA MAXWELL
5. MR. KWOTE NATHAN RESPONDENTS
6. MR. PIUS NATHAN
7. HELPME OGO
8. GODFREY OGO
10. PRINCE YAZI OKPOSO
10. TUG WELL ALBERT
11. SHEDUER ABAS
12. CROWDER JOHNSON

(For themselves and representing
Izifa Compound of Akenfa)

EVIDENCE - Land law - Appeals - Reevaluation - Propriety - Where
trial court fails to make a finding - On a material issue of fact as in this

case - Appellate court is correct to consider vital evidence adduced - In proof of radical title to land (H1)

LAND LAW - Evidence - Root of title - Proof - Where a party claiming title - Gives conflicting history of root of title - From that given by his witnesses - Such root will be treated as unreliable (H2)

LAND LAW - Family lands - Common property - Exclusive ownership - Burden of proof - Where parties agree that the land was common property originally - The onus rests on the party now claiming exclusive ownership to prove same (H3)

PRACTICE & PROCEDURE - Land suits - Joint defence - Effect on individual rights - Where defendants claim individual ownership of specific portions - Without filing separate survey plans for their desired portions - Joint defence may weaken their case (H4)

FACTS

The respondents as plaintiffs, in suit No. YCC/63/95 sued appellants as defendants, before the customary court of Bayelsa State claiming that the land in dispute - Okpuza lands and creeks - were part and parcel of Azingene land which they owned in common with the appellants. Accordingly, respondents asserted that the land in dispute was not exclusively owned by appellants. On the other hand appellants as plaintiffs, in suit No. YCC/64/95 sued respondents as defendants, claiming exclusive ownership of the land in dispute. The two suits were consolidated on order of court before hearing whereby suit No. YCC/64/95 became a counterclaim to respondents' suit. From the evidence led, the case of respondent was that both parties are descendants of one Izifa, who was the original owner of both the land in dispute and the entire Azingene land. It was as descendants of the said Izifa that each of the parties had any right to the land, albeit a joint right of ownership with every other member. For appellants, it was contended that Izifa did not found Azingene and the land in dispute but that it was his sons who individually founded portions of the entire land and that the descendants of each son of Izifa exclusively owned what part was founded by their father. Accordingly, they claimed the land in dispute as having been founded by their

ancestor - Tombo the son of Izifa.

Nonetheless, appellants gave conflicting evidence in proof of the founding of the land in dispute, from that given by their witnesses. Yet, at the end of trial, the trial court found in favour of appellants. Aggrieved, respondents appealed to the High Court which reversed the judgment of trial court and gave judgment to respondents. In doing so, the High Court held that the trial court failed to properly evaluate the evidence led before it thereby causing a miscarriage of justice; especially the evidence that the parties had filed a joint defence in an action brought against them in respect of the entire land of Azingene and the land in dispute. Dissatisfied, appellants appealed to Court of Appeal against the judgment of the appellate High Court but the appeal was dismissed. Still aggrieved, appellants have come on a further and final appeal to the Supreme Court.

ISSUE FOR DETERMINATION

“Whether or not the Court of Appeal was right in affirming the decision of the learned Chief Judge (as he then was) having regard to the facts, the state of the law and the approach adopted.”

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

EVIDENCE - Land Law - Appeals - Reevaluation - Propriety

1. Where a trial court fails to make findings on material and important issues of fact by brushing them aside or approaches the evidence called by the parties wrongly, the appellate court will act as the circumstance dictates to do substantial justice.

In my considered opinion, the Court of Appeal did the correct thing by considering the evidence adduced by the appellants in proof of their radical title to Okpuza land. Since this is the crux of the case of the appellants, it was not out of place for the Court of Appeal to have considered, as it did, the vital evidence jettisoned by the trial Customary Court. (p. 2979 F)

LAND LAW - Evidence - Root of title - Proof

2. The court below, rightly in my view, appraised the above. It found that from the evidence of Gershom Newman and the D.W.3, there emerged a major conflict. It felt that the effect of it was that it succeeded to destroy the case of the appellants and knocked off the bottom of their claim to title and left the case of the respondents solid

and monolithic.

I agree with same. This is because where as in this case for a claim for a declaration of title, the appellants and their witnesses gave conflicting history of the appellant's root of title, such root would be treated as unreliable.

B The court below was on a firm stance in the position taken by it. I cannot fault same. (p. 2980 E)

Common property - Exclusive ownership - Burden of proof

C 3. The appellants admitted at page 60 lines 18-20 of the Record that the whole of Azigene Bush is the common property of the Izifa compound .

D The appellants had the onus to prove exclusive ownership of the land they called Okpuza. This is as dictated by section 135 of the Evidence Act, 1990. It is incumbent on a party who asserts the existence of a fact to prove same. As found by the learned Chief Judge and the court below, there was no evidence of partition. In this case, the burden of proof rests on the appellants.

E Since the appellants failed to discharge the onus of proof which rests on them, their claim must fail. (p. 2981 A)

Land suits - Joint defence - Effect on individual rights

F 4. At pages 175-176 of the Record, the court below pronounced as follows in respect of Exhibit 'A' -

G *"The above apart, there was evidence that the Azigene land is the subject matter of suit No. YHC/3/86 (see Exhibit A) - The suit is pending. There was evidence that the Izifa family was sued in a representative capacity. There was evidence that Chief Sylvanus Akpalo with Mr. Gershon Newman and two others are the representative of the Izifa family in the suit. There was evidence that the Izifa family made a survey plan of the Azigene land or- bush inclusive of the Okpuza land now being claimed by the appellants. A natural question to ask is this: why did the appellants not file their separate Statement of H Defence, make their survey plan to defend their own land?.... It is my view that had the trial Customary Court properly evaluated the evidence before it, it certainly would have reached a decision different from its judgment."*

I perfectly agree with the above. A joint defence culminating

in the filing of Exhibit 'A' wherein the appellants did not file their own separate survey plan of their desired Okpuza land does not advance their case to any considerable length. (p. 2981 H)

NOTABLE POINT OF INTEREST

CHUKWUMA-ENEH JSC

1. *Individual title in family land is limited to possessory title*

As to the interest of an individual of a Community in the land, the court in *Shelle v. Chief Asajon* (1957) 2 FSC 65 said:

"It is a well settled principle of native law and custom that the family property belongs to the family as a whole and that all individual members of the family are entitled to enjoy the property. Family property does not cease to be so because a member of the family has improved upon it."

Indeed, the necessary deduction from the above cited cases is that the maximum interest of a family over the land has been put as high as, *"for simple absolute, absolute title, absolute ownership"*, otherwise implying that an individual cannot have an identical interest as the family as his interest to the land must have arisen initially by allotment to him of a portion of land by the family meaning that he has mere possessory title; thus also implying that where otherwise it is not the case, the burden is on the individual as the person so alleging exclusive ownership of the land to prove his specific or absolute title as the case be. (p. 2986 H)

REPRESENTATION

J. H. Igbikibenesima for Appellants.

I. I. Evans for Respondents.

CASES REFERRED TO

Obodo v. Ogba (1987) 2 N.W.L.R. (Pt. 54) 1

Akpan v. Otong (1996) 10 NWLR (Pt. 476) 108

Ike v. Ugboaja (1993) 6 NWLR pt. 301, pg. 539

Ogbu v. Wokoma (2005) All FWLR (Pt. 277) 815

Balogun v. Agboola (1974) 1 ALL NLR (Pt. 2) 66

Ajuwon v. Akanni (1993) 9 NWLR pt. 316 pg. 182

Bamgbose v. Oshoko (1988) 2 NWLR pt. 78 pg. 509

Adesanya v. Otuewu (1993) 1 NWLR pt. 270 pg. 414

- Adeleke v. Asani (1940) 1 NWLR (pt. 322) 536 at 539
 Onwugbufor v. Okoye (1996) 1 NWLR pt. 424, pg. 252
 Onobruhere v. Esegine (1986) 1 NWLR pt. 19 Pg. 799
 Mogaji v. Cadbury Nigeria Ltd. (1985) 2 NWLR (Pt. 7) 393
 Ogundele & Anr. v. Agiri & Anr. (2009) 12 SC (Pt. 1) 135 at 173
 B Acru Builders Ltd. v. K. S. W. B. (1999) 2 N.W.L.R. (Pt. 590) 288
 Nwosu v. Board of Customs & Excise (1988) 5 NWLR (Pt. 93) 225

STATUTE REFERRED TO

- C Evidence Act, L. F. N., 1990, s. 135

LEAD JUDGMENT BY FABIYI JSC

This is an appeal against the judgment of the Court of Appeal, Port Harcourt Division, delivered on 5th June, 2002.

- D The respondents herein, were the plaintiffs in suit No. YCC/63/95 at the Customary Court, Onopa-Yenagoa filed by them in representative capacity. In their 'Amended Claim', they claimed against the defendants/appellants herein in a representative capacity i.e. 'for themselves and as representing Tombo family Unit of Izifa Compound, Akenfa Epie, Yelga'
 E as follows:-

"A. A declaration that the plaintiffs (Izifa Compound) are vested with Customary Right of Occupancy over and covering the piece or parcel of land known and Called Azigene bush situate in Akenfa Epie, Yelga.

- F *B. A declaration that the defendants who are descendants of one of Izifa's daughters are not vested with an exclusive right or better right of ownership (title) than the plaintiffs over the land known and called Azigene bush situate in Akenfa Epie, Yelga.*

- G *C. An order of perpetual injunction restraining the defendants by themselves, their agents, assigns, servants or successors-in-title from exercising further acts of trespass or exclusive right over the said Azigene bush."*

- H The appellants, as plaintiffs in Suit No. YCC/64/95 (for themselves and as representing Tombo family Unit, Akenfa-Epie, Yelga) also claimed as follows:-

"A. Declaration that the plaintiffs are vested with an exclusively Customary Right of Occupancy over and covering the piece or parcel of land known and called OKPUZA LAND and the creeks therein situate in Azigene Bush Akenfa, Epie.

B. An order of perpetual injunction restraining the defendants by themselves, their successors-in-title, agents servants, assigns or privies from further acts of trespass. ”

On 23rd November, 1995, the trial Customary Court ordered the consolidation of the two suits for purpose of hearing. Each party adduced evidence and called witnesses. At the conclusion of evidence, the court inspected the land in dispute in company of the parties/representatives. In its judgment delivered on 25/6/96, the trial Customary Court found in favour of the defendants and pronounced at page 70 of the Record as follows:-

“Having carefully considered the evidence before us, we hereby give the following judgment-

1. That the portion or piece of land called Azigene (excluding Okpuza land and creeks) belong to the people of Zifa family of Akenfa town. Accordingly, the Customary Right of Occupancy over the said Azigene land excluding (Okpuza lands and creeks) is hereby awarded to the plaintiffs.

2. The land known and called Okpuza land that is - the portions or parcels of land surrounding the four Okpuza creeks including Ozinkoye and Olodo fishing channels which the defendants inherited from their own grand father belongs exclusively to defendants. In this regard, the Customary Rights of Occupancy over the lands surrounding the said Okpuza creeks including Ozinkoye and Olodo fishing channels is hereby awarded to defendants.

3. Both parties are hereby ordered to restrict their farming and fishing activities to their respective portions only. ”

The plaintiffs felt unhappy with the stance posed by the trial Customary Court and appealed to the High Court of Appeal. Thereat, Ungbuku, CJ on 21st October, 1999 upturned the judgment of the trial Customary Court. The reason given by the learned Chief Judge was that the trial Customary Court failed to properly evaluate the evidence before it and thereby caused a miscarriage of justice.

The defendants who were not pleased with the judgment appealed to the Court of Appeal which heard the appeal. In its own judgment handed down on 5th June, 2002, the judgment of the learned Chief Judge was affirmed. The defendants have, *ex debito justitiae*, appealed to this court.

On 11th October, 2010 when the appeal was heard, learned

counsel on each side of the divide adopted and relied on the brief of argument filed on behalf of each party. Each counsel also advanced useful oral argument.

On page 3 of the appellants' brief of argument, the issue couched for determination is:-

B *"Whether or not the Court of Appeal was right in affirming the decision of the learned Chief Judge (as he then was) having regard to the facts, the state of the law and the approach adopted."*

On behalf of the respondents, the issue formulated on page 3 of their brief reads as follows:

C *"Whether the Court of appeal was right in affirming the judgment of the High Court which awarded the entire Azigene Bush to the plaintiffs."*

It is clear to me that the complaint of the appellants relates basically to the re-evaluation of the evidence adduced - both oral and documentary by the High Court and the Court of Appeal.

This court has, in a number of cases, set down guiding principles to be followed. An appellate court should not ordinarily substitute its own views of fact for those of the trial court. See: *Ebba v. Ogodo* (1984) 1 SCNL 372; *Balogun v. Agboola* (1974) 1 ALL NLR (Pt. 2) 66.

An appellate court will not interfere with findings of fact except where wrongly applied to the circumstance of the case or conclusion reached was perverse or wrong. See: *Nwosu v. Board of Customs & Excise* (1988) 5 NWLR (Pt. 93) 225; *Nneji v. Chukwu* (1996) 10 NWLR (Pt. 578) 265.

It is settled that ascription of probative value to the evidence of witnesses is pre-eminently the business of the trial court which saw and heard the witnesses. An appeal court will not lightly interfere with same unless for compelling reasons. See: *Ogbechie v. Onochie* (1988) 1 NWLR (Pt. 470) 370.

The law is firmly established that where a court of trial fails to make findings on material and important issues of fact by brushing them aside or approaches the evidence called by the parties wrongly, the appellate court will have no alternative than to act accordingly as the circumstance dictates. See: *Akpan v. Otong* (1996) 10 NWLR (Pt. 476) 108; *Morenikeji v. Adegbosin* (2003) FWLR (Pt. 163) 45; *Ogbu v. Wokoma* (2005) All FWLR (Pt. 277) 815.

In cases tried by Native or Customary Courts, it is desirable

and necessary to look at the whole of the proceedings - the whole evidence of the parties and the judgment in order to arrive at a correct conclusion as to what the case is about. 'Substantial justice' should be the watch words. If it arrives at a reasonable decision, such is acceptable. See: Efi v. Eyinful (1954) WACA 424, Ajayi v. Aina 16 NLR 67 at 71; Ekpo v. Utong (1990) LRCN 1473 at 1587; Onuma v. Ezekoli (2002) 2 S.C (Pt. 11) 76; Ogundele & Anor. v. Agiri & Anor. (2009) 12 SC (Pt. 1) 135 at 173. B

It is the business of the trial court to put evidence with probative value as adduced by both sides on an imaginary scale to ascertain who has the upper hand. See: Mogaji v. Odofoin (1978) 4 SC 91 at 93; Bello v. Eweka (1981) 1 SC 101; Aromire v. Awoyemi (1972) 1 All NLR (Pt. 1) 101; Owoade v. Omitola (1988) 2 NWLR (Pt. 77) 413; Adisa v. Ladokun (1973) 1 All NLR (Pt. 2) 18. C

The learned counsel for the appellants had axe to grind with the position taken by the court below in considering the evidence adduced by them in proof of their radical title to Okpuza land. He contended that it was not one of the points raised at the trial court and in the High Court of Appeal. As stated above in this judgment, since the matter originated in the trial Customary Court, it is necessary for the appellate court to look at the whole proceedings - the evidence of the parties and the judgment in order to arrive at a correct conclusion as to what the case is all about. The totality of the evidence adduced should be appraised so as to enable the appellate court do substantial justice in the matter. See: Efi v. Eyinful (supra); Ajayi v. Aina (supra). D
E
F

I have also stated it earlier in this judgment that ***where a trial court fails to make findings on material and important issues of fact by brushing them aside or approaches the evidence called by the parties wrongly, the appellate court will act as the circumstance dictates to do substantial justice.*** See: Morenikeji v. Adegbosin (supra). ***In my considered opinion, the Court of Appeal did the correct thing by considering the evidence adduced by the appellants in proof of their radical title to Okpuza land. Since this is the crux of the case of the appellants, it was not out of place for the Court of Appeal to have considered, as it did, the vital evidence jettisoned by the trial Customary Court.*** G
H

The appellants traced their root of title to Tombo, their ancestor. On the point in issue, Gershom Newman testified at pages 44/45

of the Record as follows:-

B “The land North Nyon-obi creek was occupied by many wild beasts, such as guerrillas, elephants, tigers etc, so only brave people will be able to enter into that land to farm. Our grand father Tombo was a very brave hunter, so he was the first person to establish fishing channel in the forest ----- He also had two big fish ponds which we have presently inherited. Late Tombo established farms also in the said forest some of which we are still using.”

C The appellants called Leadus Canus (DW. 3) from Otobogbeli Compound to support them. On page 56 lines 1 to 4 of the Record, he testified as follows:-

D “---- the first person who crossed to farm and utilise the land in question is Olodo family people -----In the ancient time only Olodo had the courage to venture into the said land to drive away the Gbarian clan and used the said land. When Mr. Newman Olodo grew up, he took over from his late father. Mr. Newman used to go into the said forest to cut timber. After a firm possession of the said land, Mr. Newman called this land Okpuza.”

E Under cross-examination, D.W.3 at page 56 said ‘late Olodo was a good hunter so he first ventured into the said land and took possession of same.’ At page 56 line 12, he pointedly said - ‘I do not know the land called Azigene.’

F **The court below, rightly in my view, appraised the above. It found that from the evidence of Gershom Newman and the D.W.3, there emerged a major conflict. It felt that the effect of it was that it succeeded to destroy the case of the appellants and knocked off the bottom of their claim to title and left the case of the respondents solid and monolithic.**

G **I agree with same. This is because where as in this case for a claim for a declaration of title, the appellants and their witnesses gave conflicting history of the appellant’s root of title, such root would be treated as unreliable.** See: Mogaji v. Cadbury Nigeria Ltd. (1985) 2 NWLR (Pt. 7)393. **The court below was on a firm stance in**

H **the position taken by it. I cannot fault same.**

The D.W.3 who admitted that he did not know the Azigene bush, did not testify that any member of his Otobogbeli compound or his ancestors /predecessors gave any land to the Izifa compound as asserted by the appellants. At a point, the appellants said Otobogbeli, as first set-

ter, allocated farm land to the sons of Izifa. They then argued that it was through the exceeding bravery of their unidentified ancestor (Tombo according to Gershom Newman or Olodo according to D.W.3) that they became exclusive owners of the portion of land called Okpuza.

The appellants admitted at page 60 lines 18-20 of the Record that the whole of Azigene Bush is the common property of the Izifa compound. ^B

The appellants had the onus to prove exclusive ownership of the land they called Okpuza. This is as dictated by section 135 of the Evidence Act, 1990. It is incumbent on a party who asserts the existence of a fact to prove same. As found by the learned Chief Judge and the court below, there was no evidence of partition. In this case, the burden of proof rests on the appellants. See: Osawaru v. Ezeiruka (1978) 6-7 SC 135. Since the appellants failed to discharge the onus of proof which rests on them, their claim must fail. ^C ^D

Much effort was employed by the Court of Appeal in interpreting the meaning of ‘ownership’ as used by the parties at the trial customary court. The court below felt that the word - ‘ownership’ as used by the parties, does not create an estate. The cases of Enimil & Ors. v. Tuakyi (1952) 13 WACA 10; Amodu Tijani v. Secretary, Southern Provinces, Nigeria (1921) 2 A.C. 39, where it was observed that the ‘...notion of individual ownership of land is quite foreign to native ideas; land belongs to the community, village or family, never to individual’ were cited. As well, the case of Eze v. Samuel Igilegbe (1952) 14 WACA 61 was referred to by the Court of Appeal. ^E ^F

In this matter, it is Tombo family members; not an individual that is laying exclusive claim to Okpuza land. The effort dissipated on the interpretation of the word ‘ownership’ was not apt. It was undeserving. However, it is not a big deal. ^G

On the use of paragraph 4 of the statement of Defence, Exhibit ‘A’ filed in suit No. YHC/3/86 by the trial Customary Court, the Court of Appeal had this to say -

“It is sufficient for me just to say that the submission is wholly unacceptable. Paragraph 4 of Exhibit ‘A’ is no evidence in proof of any fact in issue.” ^H

The learned counsel for the appellants tried to fault the above stance of the court below. I feel such was to no avail. ***At pages 175-176***

of the Record, the court below pronounced as follows in respect of Exhibit 'A' -

"The above apart, there was evidence that the Azigene land is the subject matter of suit No. YHC/3/86 (see Exhibit A) - The suit is pending. There was evidence that the Izifa family was sued in a representative capacity. There was evidence that Chief Sylvanus Akpalo with Mr. Gershom Newman and two others are the representative of the Izifa family in the suit. There was evidence that the Izifa family made a survey plan of the Azigene land or- bush inclusive of the Okpuza land now being claimed by the appellants. A natural question to ask is this: why did the appellants not file their separate Statement of Defence, make their survey plan to defend their own land?.... It is my view that had the trial Customary Court properly evaluated the evidence before it, it certainly would have reached a decision different from its judgment."

I perfectly agree with the above. A joint defence culminating in the filing of Exhibit 'A' wherein the appellants did not file their own separate survey plan of their desired Okpuza land does not advance their case to any considerable length.

It is clear to me that if the trial Customary Court had appropriately appraised the totality of the evidence adduced before it and placed same on an imaginary scale as propounded by Fatai- Williams, JSC, (as he then was) in *Mogaji v. Odofin* (supra) at page 93 and further stressed by Esho, JSC in *Bello v. Eweka* (supra) it should have found that the evidence of the respondents far outweighed that of the appellants. Their attempt at embarking upon 'secession' from Izifa Compound where they belong as the fifth (5th) family got crushed through the employment of due judicial process.

I cannot see my way clear in tampering with the balanced judgment of the court below. The appeal is devoid of merit. It is hereby dismissed. The judgment of the Court of Appeal of 5th June, 2002 which affirmed the decision of the High Court of Appeal delivered on 21st October, 1999 is hereby confirmed. The appellants shall pay N50,000.00 costs to the respondents.

MOHAMMED JSC

This appeal arose from the decision of the Port-Harcourt Division of the Court of Appeal which affirmed the decision of the Bayelsa State High Court of Justice in a family land dispute between the parties in this appeal. The land dispute started at the Onopa-Yenagoa Customary Court where both parties in representative capacities, filed separate suits numbers YCC/63/95 and YCC/64/95 claiming declaration of title and injunction in respect of parcels of land called Azigene land/bush and Okpuza land respectively. The suits were consolidated by the trial Customary Court which at the end of the hearing, found for the Plaintiffs now Appellants in their action against the Defendants now Respondents. The judgment of the Customary Court was however set aside on appeal by the High Court of Justice Bayelsa State which decision was affirmed on appeal by the Court of Appeal to give rise to the present appeal.

It is significant to note that at the Court of Appeal at the hearing of the appeal filed by the Respondents who were the Appellants in that Court, the only issue that arose for determination was whether or not the Hon. Chief Judge was right when he set aside the judgment of the Customary Court. The case was therefore determined by the Court of Appeal mainly on the question of re-evaluation of the evidence on record carried out by the High Court in the hearing of the appeal before it from the decision of the Customary Court. The central issue in this appeal therefore is whether the re-evaluation of the evidence on record embarked upon by the High Court on appeal resulting in setting aside the decision of the trial Customary Court which was affirmed by the Court of Appeal, is in order having regard to the circumstances of the case.

The law is well settled that an appellate Court which was what the High Court was when the appeal from the decision of the trial Customary Court was heard, should not ordinarily substitute its own views of fact for those of the trial Court which saw and heard the witnesses testify. See *Ebba v. Ogoto* (1984) 4 S.C. 84. It is also the law that an appellate Court will interfere with a wrong finding by a trial Court where it is the basis of the decision of that Court; or where the finding leads to a miscarriage of justice. In the case at hand, in its decision, the High Court gave reasons for interfering with the decision of the Customary Court which were affirmed by the Court below. One of

such reasons was-

“It is therefore clear that whatever rights or benefits the Defendants/Respondents must have enjoyed in respect of that portion of land in Azigene bush called OKPUZO, do not ripen to ownership of that particular portion of land to the Defendants/Respondents.”

B I agree with the Court below that the High Court was right in interfering with the decision of the Customary Court particularly when the evidence shows quite clearly that the Okpuzo land being claimed by the Appellants forms part of Azigene bush/land occupied and used by both parties as members of the same Izifa Compound. See Obodo v. Ogba (1987) 2 N.W.L.R. (Pt. 54) 1, Okafor v. Idigo (1984) 1 S. C. N. L. R. 481 and Acrue Builders Ltd. v. K. S. W. B. (1999) 2 N.W.L.R. (Pt. 590) 288.

D It is for the foregoing reason that I entirely agree with my learned brother Fabiyi, JSC in his leading judgment that this appeal is not meritorious. Accordingly, I also dismiss this appeal with N150,000.00 costs to the Respondents.

E **CHUKWUMA-ENEH JSC**

I have read in advance the leading judgment of my learned brother Fabiyi JSC in this matter. I agree with his reasoning and conclusion in dismissing the appeal.

F However, in this land matter before the customary court Onopa Yenogea, the parties have brought cross actions against themselves to wit: YCC/63/95 and YCC/64/95 and the suits have been consolidated. In the suit No. YCC/63/95 the appellants herein as defendants have been sued by the respondents as plaintiff claiming communal ownership of the land called “Okpuzu” which is situated within a vast expanse of their land known as Azigene Bush situate in Akenfa Epie, Yelga as belonging exclusively to the appellants.

H In the suit No. YCC/64/95 the appellants as plaintiffs have thus challenged the respondents as regards the defendants’ claim of the land called “Okpuzu” and the creeks therein as belonging exclusively to the appellants/plaintiffs.

The trial Customary Court in its judgment has awarded the land called “Okpuzu” to the appellants and has concluded its decision thus:

“1. That the portion or piece of land called Azigene (excluding OKPUZA LANDS and CREEKS) belong to the people of Zifa family of Akenfa town. Accordingly, the Customary Right of Occupancy over the said Azigene land (excluding the OKPUZA lands and Creeks) is hereby awarded to plaintiffs.

2. That the land known and called Okpuza Land, that is the portions or parcels of land surrounding the four Okpuza Creeks including Ozinkoye and Olodo Fishing Channels, which defendants inherited from their own grand father belongs exclusively to defendants. In this regard, the Customary Right of Occupancy over the lands surrounding the said Okpuza Creeks including Ozinkoye and Olodo Fishing Channels is hereby awarded to defendants.

3. Both parties are hereby ordered to restrict their farming and fishing activities to their respective portions only. No cost is awarded. Exhibits to be released after 30 days from the date of this judgment.”

The respondents herein being dissatisfied with the decision have appealed the matter to the High Court which has upturned the decision of the customary court and has found for the respondents in the following terms;

“It is therefore clear that whatever rights or benefits the defendants/respondents must have enjoyed in respect of that portion of land in Azigene bush called Okpuza do not ripen to ownership of that particular portion of land to the defendants/respondents.

It is to be observed that there was no evidence of partition of the said Azigene land by the sub units of Zifa family to own portions of the said land. The evidence given by the defendants/respondents is all on allotment by their own particular ancestor which by the authorities referred to do not give them title or ownership of the said portion of land. The allotment of a family land does not divest the family of the title of the piece or parcel of land allotted.”

The High Court at page 111 of the record LL 18-30 has held in addition as follows:

“It is an accepted fact by both parties as evidenced in the proceedings that they i.e. the plaintiffs/appellants and the defendants/respondents are from a larger family called Zifa and that the ancestor of the said family is late Zifa. That the said Zifa has five (5) children namely, Ishie, Biriyegehe, Usi, Abas and Igigi. That the descendants of the said children later became sub-units of the larger Zifa family. The plaintiffs claim is that all the land owned by their ancestor Zifa had been

jointly owned and used by all of them. It is also the contention of the plaintiffs/appellants that the Azigene Bush founded by their ancestor Zifa is also jointly owned and used by all the families.”

The Court of Appeal in affirming the judgment of the High Court in its judgment held at page 176 LL.17-30 of the record as follows:

B *“In my judgment the trial Customary Court did not properly evaluate the evidence before it. I am, therefore, in full agreement with the Court below when it wrote at page 114 of the record, inter alia:*

C *I am of the view that the Customary Court failed to properly evaluate the evidence before it and thereby caused miscarriage of justice.”*

D Upon the decision of the Court of Appeal dismissing the appellants appeal they (the appellants) have now appealed to this court as per the Notice of Appeal filed on 23/2/2004 and have raised the sole issue for determination as follows:

“Whether or not the Court of Appeal was right on affirming the decision of the learned Chief Judge (as he then was) having regard to the facts the state of the law and the approach adopted.”

E In the light of the sole issue for determination, I take in this contribution to re-emphasis the right of the community vis-a-vis that of the individual in regard to the ownership of land in our native communities and on whom otherwise lies the burden of proof thereof as the underlying principles in that regard as laid down in the cases of Tijani & Ors. V. Secretary Southern Nigeria (1921) 3 NLR 56 and Balogun v. Oshodi F (1931) 10 NLR 3C appear completely lost to the appellants in their serial appeals doggedly pursued from the customary court to this court.

G Having perused the cases of the parties in this matter as per their respective briefs of argument, I find that central to their dispute has come to this narrow compass of, on whom lies the onus on the facts of this case in the face of the well settled presumption that the title in the land belongs to the family or community as espoused in the cases of Amodu Tijani v. Secretary Southern Nigeria (1921) 3 NLR 56 and Balogun v. Oshodi (1931) 10 NLR 36. In the latter case the court held that;

H *“the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual.”*

As to the interest of an individual of a Community in the land, the court in Shelle v. Chief Asajon (1957) 2 FSC 65 said:

“It is a well settled principle of native law and custom that the family property belongs to the family as a whole and that all individual members of the family are entitled to enjoy the property. Family property does not cease to be so because a member of the family has improved upon it.”

Indeed, the necessary deduction from the above cited cases is that the maximum interest of a family over the land has been put as high as, *“for simple absolute, absolute title, absolute ownership”*, otherwise implying that an individual cannot have an identical interest as the family as his interest to the land must have arisen initially by allotment to him of a portion of land by the family meaning that he has mere possessory title; thus also implying that where otherwise it is not the case, the burden is on the individual as the person so alleging exclusive ownership of the land to prove his specific or absolute title as the case be. See: Kasumu Ajeja v. E. A. Ajayi (1969) 1 ANLR 73. The point must be made that in a proper High Court setting as the trial court (that is in a matter of similar facts as here) the right to begin at the trial should have been on the party as the appellants here who is urging the contrary to the settled principle as in Tijani’s case (supra).

However, in this case that has commenced at the Customary Court the respondents as plaintiffs have all the same proved their absolute title to “Okpuzu” land as forming part of a vast area of bush land called “Akenfa” as their communal property i.e. as belonging to both parties as has been so found by the High Court in its decision reversing the Customary decision in this matter. In this regard they have called PW1 and he has testified at the trial as follows:

“We as representatives of the Izifa Compound want to emphasise that the land in dispute belongs to the entire Izifa Compound. It does not belong to any single family unit within Izifa Compound. All land rents accruing from this land are usually paid to the entire Izifa family and not to a single individual in the family: (see Exh.B)”

PW2 in suit YCC/63/95 in tracing their genealogy and family tree has testified as follows:

“The man called Zifa, the founder of our compound, begat Ogun who later begat Ishie, Biriyegehe and Amagboto. 1st defendant’s mother is the daughter of late Ogun.... But she later came to settle in her maiden home with all her children including 1st defendant and late Tombo the elder brother of 1st defendant. 1st defendant and his

brother grew up and settled permanently at Akenfa in Zifa Compound. Now 1st defendant is claiming ownership over entire lands of Zifa Compound by saying he inherited the lands from Tombo. I am emphasizing that the land in dispute does not belong to 1st defendant; it belongs to Zifa Compound. The land in dispute is called
 B Azigene..... There is a mutual understanding amongst members of the Zifa Compound that no single individual should claim exclusive right over any portion of the land in dispute. Our family members are free to farm on any part of the land but after harvesting the crops
 C another member of the family has right to farm on that particular portion. Contrary to the agreement reached by the family, the 1st
 D defendant has refused to release any portion farmed by him to the family for the purpose of leasing same to prospective farmers.”

The PW3 also in substantial particular has collaborated the evidence
 D of PW2 as thus:

“The prevailing tradition in the Izifa Compound is that no single individual is entitled to claim any part of the said Azigene land as his personal property. Thus farms are established indiscriminately by Izifa family members. As a result of the operations of the Shell Petroleum
 E Development Company in the said land, 1st defendant is presently claiming exclusive ownership of the said land. We the other members of the Compound are opposed to this idea as the said land had all along been jointly owned by the entire Izifa Compound. This is the cause of the
 F present action. The portion where the 1st defendant claims to be his late father’s fishing channel is a swamp within the land in dispute. It is not his own father’s exclusive property. My own late grand father also set some fishing traps on this particular portion where 1st defendant claims as his own father’s fishing channel. 1st defendant and myself share the
 G same grandfather. As my blood relation, I have advised 1st defendant to withdraw from the case but he refused.”

From the foregoing extracts the respondents have proved by their traditional history and acts of ownership and possession that the vast Azigene land of which Okpuza land forms a part is the communal property of
 H Izifa Compound. And thus they have discharged the onus that lies on them. It is also settled that this onus never shifts except in a few cases where the defendant claims as here, exclusive ownership of the family land. I now go to examine the defendants/appellants case here to see if they have discharged that onus. At the locus in quo one Gershon

Newman as the 3rd defendant/appellant said and I quote:

“We want to add that the Okpuza land is part of the Azigene land. The parcel of land stretches from the Iyonbi Creek southwards to Epie Creek is being commonly used by the Zifa Compound; individual family units own their respective farmlands. But the Okpuza land was discovered by our grandfather so it is being exclusively used by members of the Tombo family only.” B

(underlining for emphasis).

Before then he has testified at pp. 44/45 of the record as follows:

“The land North of the Nyon-obi Creek was occupied by many wild beasts such as Guerilla, Elephant, Tiger, Leopard etc, so only brave people were able to enter into that land to farm. Our grandfather Tombo was a very brave hunter, so he was the first person to establish a fishing channel in the said forest. The said fishing channel is now called after his name. He also had two big fish ponds which we have presently inherited. Late Tombo established farms also in the said forest some of which we are still using”. C

At p. 57 line 12 DW3 has blundered when he said and I quote:

“I do not know the land called “Azigene”. The land that is presently in dispute between Ogbeloma and Zifa Compound is called Okpuza. The entire land beyond the Iyonbi Creek is called Okpuza.” E

This evidence by DW3 has raised a material contradiction to the evidence of Gershon Newman to the effect that DW3 a member of the appellants’ family does not know the land in dispute i.e. “Okpuza” within Azigene land. See: Kahi v. State (1988) 10-11 SC. 19. The contradiction is on a material point. On the whole therefore the High Court has rightly found as a fact that the respondents have successfully proved their communal ownership of the land in dispute as belonging to Izifa Compound as against exclusively to Tombo family unit as they the appellants have not discharged the onus on them in that regard. See: Adeleke v. Asani (1940) 1 NWLR (pt. 322) 536 at 539 and Agbomeji v. Bakare (1998) 9 NWLR (Pt). This is so based on the strength and cogency of the respondents’ traditional evidence and numerous and positive acts of ownership and possession going back to the founding of the land Azigene by their ancestor as their root of title. See: Ekpo v. Ita (1932) 20 NLR 68, Mogaji v. Cadbury (1985) 7 SC. 59 and Kodilinye v. Odu (1935) 2 WACA 396. I have taken pains to examine the appellants’ complaint as expressed in the sole H

issue for determination raised in this matter on the backdrop of the above critical extracts of the testimonies of the appellants and respondents and their witnesses at the trial court and how the two lower courts have treated both of them in arriving at their respective findings. And the two lower courts have severally upheld the respondents' case in the matter as having been proved on the balance of probability; and their respective conclusive findings in this matter cannot be faulted. I wholly agree with the High Court's finding that the appellants who are urging the contrary to the settled presumption have defaulted in discharging the onus of proof on them based on the principle established in Tijani's case (*supra*) as I have stated above. That is to say, proving their exclusive ownership of Okpuzu land.

More importantly, I have particularly identified the foregoing extracts from the testimonies of the parties and their witnesses to underscore the just intervention by the High Court as an appellate court in this respect to reverse the perverse findings of facts by the Customary Court here. It is trite that an appellate court as the High Court in this respect can rightly interfere with the decision of a Customary Court as the trial court as is the case here to avert a substantial miscarriage of justice.

The conclusion that has irresistibly followed is that the appellants have failed to rebut the presumption that the land called "Okpuzu" belongs to them to the exclusion of the respondents.

By so holding it also follows that the appellants have not been able to dislodge the principle of concurrent findings of facts of the two lower courts in this matter, thus implying that this court cannot intervene in any respect in the matter, even then, as there is clearly no miscarriage of justice. See: *Okulate v. Awosanya* (2000) 1 SC. 107. I uphold the High Court's award of the case to the respondents as per their claim, as affirmed by the lower court.

For these reasons and upon a much fuller reasons contained in the lead judgment I agree with my learned brother Fabiyi JSC that the appeal has no merit and should be dismissed. I also dismiss it and abide by orders contained in the lead judgment.

ADEKEYE JSC

I had read before now the judgment of my Learned Brother J. A. Fabiyi JSC. This appeal commenced at the trial Customary Court

of Onopa, Yenagoa in Bayelsa State - as suit No. YCC/63/95 and YCC/64/95. Both parties sued in a representative capacity - the plaintiffs before the Customary Court - are now Respondents, while the defendants are now Appellants. The suits were consolidated before it proceeded to trial. The parties were at the Customary Court claiming ownership of a vast area of land - known and referred to as Azigene Land while the real bone of contention was a portion of that vast land known as Okpuza land. There is evidence of common ground that both parties belong to the same group of families of Izifa compound in Akenfa Community of Bayelsa State. Furthermore the Plaintiffs/Respondents gave evidence that the entire Azigene Bush is the common property of the family units belonging to this same group of families in Izifa Compound in Akenfa Community. The averments in their amended Statement of Claim particularly paragraphs 1, 2 and 5 were to this effect. The relevant paragraphs read as follows:

Paragraph 1

Both plaintiffs and defendants are native of Akenfa, Epie, Yelga within the jurisdiction of this honourable court.

Paragraph 2

Plaintiffs and defendants are all members of one and the same compound Izifa compound - Akenfa, Epie, Yelga. The defendants being members of Izifa compound by virtue of their great grand mother Ogu being Izifa's daughter. Therefore right of ownership of land belonging to Izifa cannot be vested on the defendants who are offspring of a daughter.

Paragraph 5

Plaintiffs and defendants inherited the said Azigene bush from their forebear Izifa as descendants Vide page 6 of the Record.

The defendants/appellants claimed Okpuza land as their exclusive property of the immediate family - the Tombo family of Izifa Compound and pleaded in paragraphs 1, 2, 3 and 4 their Statement of Claim as follows:

Paragraph 1

Both plaintiffs and defendants are natives of Akenfa Epie in Yenagoa Local Government Area within the jurisdiction of this Honourable Court.

Paragraph 2

Plaintiffs and defendants are all members of Izifa Compound, Akenfa Epie. The said Ezifa Compound comprises five (5) family units namely - Osi family, Ishie family, Biniye family, Abas family and Tombo

family.

Paragraph 3

The plaintiffs are members of the Tombo family unit while the descendants are representatives of the other four family unit owns their exclusive properties such as land and creeks.

B Paragraph 4

The plaintiffs (Tombo family) are the bona fide owners and had been in actual and peaceable possession of the land known and called Okpuza land and the Creeks therein namely Okpuza Creek, Uku-Gbele Creek, Abanfa Creek, Ulu-Uzikoren Creek, Ulu-Tombo Creek and Ulu Olodo Creek (Vide pages 13 - 14 of the Record).

C
D
E
F At the consolidation of the suits on the 23rd of November, 1995 - the Customary Court pronounced that the Suit No. YCC/64/95 becomes a counter claim. The suit proceeded to trial with parties claiming in the main action for declaration of title in respect of the entire area of land known and called Azigene bush situate at Akenfa Epie Yelga and an order of perpetual injunction from keeping the opponent to their claim and from exercising further acts of trespass or exclusive right over the said Azigene bush. The counter claim emphasized that the Tombo family claimed exclusive right of Customary Right of Occupancy over and covering the piece or parcel of land known and called Okpuza land and the Creeks therein situate in Azigene bush Akenfa, Epie and perpetual injunction restraining the defendant to the counter claim from further acts of trespass.

The undisputed facts before the Customary Court were that:-

1) Azigene bush had become the joint property of the plaintiffs and the defendants - as the bush originally belonged to common ancestor of the parties - Izifa.

G 2) That all members of Izifa family compound gave mandate to the 1st defendant to represent them at Shell BP in respect of the company's oil prospecting activities in that land.

H 3) That the same 1st defendant, Newman Olodo is One of the representative of Izifa Compound defending the joint ownership of the Izifa Compound in the Suit PHC/149/22 on a vast land where the Igbeinbin family of Ogboloma Community was challenging the interest of the Izifa compound.

4) That the five (5) sub-family units constituted the main Izifa family or compound and they all originated from the direct descendants

of Izifa.

5) That Azigene Bush is one expanse of land with various contiguous portions - with Okpuza now claimed by the defendants/appellants as their exclusive property as one of those portions.

6) No evidence that the various portions of Azigene Bush were ever partitioned - on the contrary, there was evidence of communal use and enjoyment of the land by all the units of the Izifa family. B

The Yenagoa Customary Court gave judgment to the defendants/appellants in respect of Okpuza lands and Creeks - and awarded the remaining portion of Azigene land to the Plaintiffs/Respondents. C

The judgment of the Customary Court was reversed on appeal to the Appellate Division of Bayelsa State High Court. On a further appeal to the Court of Appeal Port Harcourt, the judgment, of the High Court of Bayelsa State was affirmed. The appellants being aggrieved by that judgment made a final appeal to this court. The sole issue for the determination at this court in this appeal reads:- D

"Whether or not the Court of Appeal was right in affirming the decision of the learned Chief Judge (as he then was), having regard to the facts, the state law and the approach adopted."

The Respondents formulated a single issue which is:- E

"Whether the Court of Appeal was right in affirming the judgment of the High Court which awarded the entire Azigene Bush to the Plaintiffs."

The question to be addressed, gleaned through the issue raised by each of the Parties, revolves round the evaluation of evidence by the learned Chief Judge of the High Court of Bayelsa State in its appellate jurisdiction as affirmed by the Court of Appeal. F

I have given a catalogue of the facts in common between the parties with emphasis on their family relationship -as they, both plaintiffs/respondents and the defendants/appellants belong to a community or village called Akenfa, Epie in Yenagoa Local Government Area of Bayelsa State. They all belong to the Izifa family of Akenfa - which consists of five families namely Ishie, Biriyege, Ushi (Amagboto) Abas and Tombo. G H

The Plaintiffs/Respondents are the first four families while the defendants/appellants belong to the fifth - the Tombo family. Their family compound was founded by their ancestor, Izifa who had five children - and these five children Ishie, Biriye, Ushi, Abas and Tombo

each perpetuated the family lineage - as each of them founded the respective families that make up the Izifa group of families. Azigene land which is made up of smaller portions of land belongs to the groups of families and not individual or family unit within Zifa. By the tradition of the Community none of the family units or sub families
 B or individuals within the Zifa family compound could claim exclusive rights over any portion of Azigene land which land they claimed was founded by their ancestor Zifa. The plain tiffs/respondents gave descriptions of the extent of the different portions of land which together is known and called Azigene bush - the portion in dispute is
 C described as the hinterland between Osomo Creeks and Ikime Creeks. It is however admitted that each individual or family unit is entitled to own his or her portion of land.

The defendants/appellants disputed the plaintiff's contention that
 D it was Zifa who founded the parcels of land Azigene as Zifa died at the old settlement. The present settlement called Akenfa Village was founded by his five children who crossed over from the old settlement. It was one Otobogbeli whom they met on the land who gave them portions of land in the Northern part of Akenfa
 E village.

Each of the sons ventured thereafter to secure land individually and exclusive to themselves which is the reason why portions of land belonging to the five sub families are scattered in Akenfa bush. Though
 F the Customary Court which in addition to hearing and taking the evidence of the parties visited the locus in quo with the parties, gave judgment to the defendants/appellants.

In the High Court of Bayelsa State, the learned Chief Judge reversed the judgment. The reason being that the Customary Court did not
 G properly evaluate the evidence leading to a miscarriage justice. The learned Chief Judge relied on Exhibit A - a statement of defence in a High Court Suit No. YHC/3/86 - PHC/149/72 which suit was instituted by the Igbeinbini family of Ogbolomo Community against Zifa group of families of Akenfa - the defendants/appellants and plaintiffs/respondents in this
 H suit and the subject matter of dispute being Azigene land.

The learned Chief Judge held that the defendants did not put up a separate defence or case of ownership of a portion of land in the Azigene land.

The learned Chief Judge concluded that the evidence of the defen-

dants/appellants were all on allotment and that since there was no evidence of partitioning of the larger parcel of land called Azigene land - allotment alone did not give title to the defendants/appellants.

In land matters, the burden of proof is on the party who claims title to or ownership of land - which in most cases is the plaintiff.

Adenle v. Oyegbade (1967) NWLR 136

B

Oyeyiola v. Adeoti (1975) NWLR pg 10

Onobruhere v. Esegine (1986) INWLR pt. 19 Pg. 799.

Where the land in dispute is deemed to be a communal property - the onus is on the party who asserts that the communal property belongs to him to show how exclusive ownership devolved on him. A party, who claims exclusive title to communal or family land against the entire family or community, must cogently prove that there had been a partition of the land claimed.

C

Adesanya v. Otuewu (1993) INWLR pt. 270 pg. 414

D

Ajuwon v. Akanni (1993) 9 NWLR pt. 316 pg. 182

Bamgbose v. Oshoko (1988) 2 NWLR pt. 78 pg. 509

The burden of showing that Azigene farmland has been partitioned as a result of which the defendants/appellants can claim exclusive ownership of Okpuza land lies on them. Until it is shown that family or communal land has been partitioned, individual member of the family has no distinct interest in the land which is alienable.

E

Ajayi v. Pabiekun (1970) 1 ALL NLR pg. 142 Miller Bros. of Liverpool Ltd. V. Ayeni Re Sonni Ayeni 5 NLR pg. 42

F

The contention of the defendants/appellants is that the Court of Appeal wrongly affirmed the decision of the learned Chief Judge of the High Court of Bayelsa State and set aside that of the trial Customary Court which properly evaluated and appraised the evidence before it and made appropriate findings of fact before ascribing probative value thereto. The Court of Appeal on the other hand wrongly held that there was no proper evaluation and proceeded to wrongly re-evaluate the evidence of the parties.

G

This court is urged to set aside the decisions of both the Court of Appeal and learned Chief Judge and restore the trial Customary Courts judgment in YCC/64/95, while the suit No. YCC/63/95 be dismissed.

H

I must emphasize once again that evaluation of evidence is an exercise which involves ascribing probative value to the evidence adduced at the trial which have been pronounced by our superior courts on

numerous occasions to be the primary function of the trial court which had the singular opportunity of seeing and listening to the witnesses whom it also assesses.

The Court of Appeal or the appellate court would not normally intervene in such an exercise or substitute its own view to that of the trial court except in very rare circumstances, which are:-

a. Where the trial judge failed to make proper use of his opportunity of seeing, hearing and observing the witnesses.

b. Where he failed to exercise his discretion properly or judiciously

c. Where the trial judge drew a wrong conclusion from the accepted evidence or formed an erroneous view thereon.

d. Where the findings or evaluation are perverse.

Mogaji v. Odofoin (1978) 4SC 91

Ebba v. Ogodo (1984) 15 NWLR pg. 372

D Woluchem v. Gudi (1981) 5 SC 291

Onwugbufo v. Okoye (1996) 1 NWLR pt. 424, pg. 252

Ike v. Ugboaja (1993) 6 NWLR pt. 301, pg. 539

Oyadiran v. Oke (1997) 11 NWLR pt. 530, pg. 606

Akinloye & Anor v. Eyiyiola & ors (1968) NMLR pg. 92 at E pg. 95

Enang v. Adu (1981) 11 - 12 SC pg. 25

Odofoin v. Ayoola (1984) 11 SC 72

It is only where an appellate court is in as good a position as the trial court to evaluate evidence which has been given in a case, such as where the issues is essentially a matter of inference that can be drawn from proved facts, not resting on the credibility of witnesses as a result of their demeanour in the witness box or of the impression of them by the trial court that it must not hesitate to do so.

However, the need for the appellate Courts to exercise caution in dealing with the findings of fact of trial courts, becomes greater and more compelling where the trial courts are Area or Customary Courts as was observed in the case of Emarieru v. Ovirie (1977) SC 81 where this court said -

“suffice it is to say that in our view the Customary Court showed proper and sufficient appreciation of the issues in controversy between the parties which issues may accurately be described as peculiarly within its judgment in such matters should not be disturbed”.

Abakah Nathan v. Bennieh 3 WACA 1

Nor v. Tarkaa (1998) 4 NWLR pt. 544 pg. 130 at pg. 140.

The real issue between the parties for resolution in the instant appeal is, whether a communal property - a family land - which has not been partitioned can be owned exclusively by an individual or a sub-unit of the larger family.

The learned Chief Judge of the High Court affirmed by the Court of Appeal rightly found that the defendants/appellants failed to discharge the onus of proving that the family property has been partitioned - so as to vest exclusive ownership of Okpuza land - a portion of Azigene family land on them. These are concurrent findings of fact of two lower courts which this court has no reason to disturb *Ibodo v. Enarofia* 1980 12 NSCC 195.

With fuller reasons giving by my learned brother Fabiyi, JSC in the lead judgment, I also dismiss this appeal - and abide his consequential orders including order as to costs.

RHODES-VIVOUR JSC

This suit, in the main for Declaration of Title to land commenced in the Customary Court and is finally before this court simply because the trial court failed to evaluate evidence. I intend to comment on proceedings in customary courts, and the fundamental requirement that evidence must be properly evaluated before a considered judgment is delivered.

Pleadings are usually not filed in customary courts, and so it was in this case. A court sitting on appeal from a judgment of the customary court must first identify the issues in dispute between the parties in the customary Court. This is done by the court examining the whole proceedings and the judgment. The court must not delve into form but examine the substance and proceed to see if the customary court was fair in the judgment it eventually arrived at. See: *Udofia v. Afia* 1940 6 WACA p. 216; *Ajayi v. Aina* 1942 16 NLR p. 67.

In the Customary Court, rules of procedure were followed and both sides were given opportunity to present their case. The standard of procedure is acceptable. The problem has to do with evaluation of evidence by the Customary Court.

It has been said in a plethora of cases that the evaluation and as-

sessment of evidence led in a case and the ascription of probative value to such evidence are the primary functions of the trial court which saw, heard and assessed the witnesses.

See *Akibu v. Opaleye* 1974 11 SC p. 189;

Yusuff v. N. T.C. Ltd. 1977 6 SC p. 39.

B The appeal court is in as good a position as the trial court to evaluate evidence but would only interfere if the trial court that heard and saw the witnesses made an improper use of that opportunity. In the Onopa/Yenogoa Customary Court the appellants as plaintiffs, sued the respondents as defendants, in the main for declaration of title to land. Evidence accepted by both sides and the court is that the parties have a common ancestor. The late Zifa. He owned all the land, the subject matter of the suit. All the land had been jointly owned and used by all of them, and there was no evidence that the land had been partitioned. Despite overwhelming and compelling evidence that both sides own the land, the Customary Court proceeded to deliver judgment which shows that the appellants are entitled to a part of the land while the respondents are entitled to the other part. The High Court sitting on appeal was correct to evaluate evidence and render the correct judgement. The Court of Appeal was correct to affirm the judgment of the High Court. I agree that the decision arrived at by the Customary Court was wrong due to improper or imperfect evaluation of evidence.

F On a final note I must observe that family land is rarely owned individually. It belongs to the community or family. It never loses its common ownership, and so family land is always family land. Where family land is allotted to a member of the family, he cannot alienate the land without the consent of the family.

G For this and the much fuller reasoning in the leading judgment of my learned brother, Fabiyi, JSC I would dismiss the appeal. The appellants shall pay costs of N50,000.00 to the respondents.

H