IN THE CUSTOMARY COURT OF APPEAL
EDO STATE OF NIGERIA
HOLDEN AT AUCHI

ON MONDAY,THE 25TH DAY OF JANUARY, 2010
BEFORE THEIR LORDSHIPS

PETER OSARETINMWEN ISIBOR é é JUDGE (PRESIDED)

TIMOTHY UKPEBOR OBOH é é é JUDGE

PETER AKHIMIE AKHIHIERO é é é JUDGE

OHIMAI OVBIAGELE é é é é é JUDGE

APPEAL NO. CCA/11A/2008

BETWEEN
1. FESTUS AFESO
2. ANDREW AFESO
(Suing for themselves and on behalf of Iyorogu family, Ososo) é APPELLANTS

AND

1. SEGUN SMART
2. MUSA YUSUF
3. OLORUNFEMI YUSUF
4. OLUWAYEMI OLATUNDE
(Suing for themselves and on behalf of Okhare family, Ososo) é RESPONDENTS

JUDGMENT

DELIVERED BY PETER AKHIMIE AKHIHIERO (JCCA)

This is an appeal against the judgment of the Akoko Edo Area

Customary Court, Igarra, delivered on the 29th day of June, 2007, in Suit No.AEACCI/33/2000.

In the said suit, the appellants (as plaintiffs), suing for themselves and on behalf of the Iyorogu family of Ososo, claimed against the respondents (as defendants) jointly and severally as follows:

ñ(a) An order that the plaintiffs are entitled to the grant of a customary right of occupancy over that piece or parcel of land situate, lying and being at Ikpobaka, Ososo Akoko-Edo Local Government Area, which is well known to both parties to the dispute and within the jurisdiction of this Honourable Court.

(b) ₦7,000.00 (seven thousand naira) being damages for trespass committed by the Defendants on the said parcel of land which is in long possession and occupation of the plaintiffs.

(c) An order of perpetual injunction restraining the Defendants by themselves, their servants, agents and/or privies from further acts of trespass on the said parcel of land.ò

In the same suit, the respondents counter-claimed jointly and severally against the appellants as follows:

ñ1. A declaration that the Defendants are entitled to the grant of a customary right of occupancy over that piece or parcel of land situate and lying at Ikpobaka in Ososo,

Akoko-Edo Local Government Area of Edo State (which land is known to both parties to the dispute) within the jurisdiction of this Honourable Court.

2. An order of perpetual injunction restraining the plaintiffs by themselves, their agents, servants, privies, or anybody or group of persons claiming through them from further trespassing into the Defendants said piece or parcel of land or in any way allocating any part of the land to any person or persons dealing with the said land in any manner inconsistent with the rights of the Defendants.

3. Seven thousand naira (₦7,000.00) being damages for trespass when sometime in 1999, the Plaintiffs trespassed into the land aforementioned without the consent and or permission of the Defendantsò

The appellantsô case at the trial court was that their great grand father named Iyorogu, originally deforested the land in dispute and planted ducanuts, cashews, locust beans, pears, mangoes and other crops on it. On his death, the land passed on to one Afeso, and upon the demise of Afeso, the land was inherited by one Chief Buoro Afeso, the present head of the Iyorogu family.

Furthermore, the appellants maintained that the land shares a common boundary with the respondentsô family land towards the upper part, while at the lower part, they have a common boundary with the Makeke stream. The land is situated at Ikpobaka along the Ogori ï Ososo road. There are stones

which demarcate the boundary between the appellantsô land and that of the respondents. The stones were arranged by their ancestors.

At the trial, the respondents gave their own version of the traditional history of the disputed land. According to them, the land was deforested by their great grand father called Okhare. Upon his death, the land passed on to one Uhuoma, and subsequently to Ashefor, Egbriefor, Smart and the 1st respondent in that order. The land is situate at Ikpobaka along Ogori/Ososo road and they share a common boundary with the appellants on the left hand side when leaving Ososo for Ogori. The boundary mark is an open gutter for erosion which runs to the Ikpobaka stream. On the right hand side, it is bounded by the Oshenu family land and the boundary marks are big stones called Igberikpe which are natural. Their great grand father planted cashew nuts, kolanuts, mangoes and plantain trees on the land, while locust beans and date palms grew wild on it.

At the conclusion of the trial, the court dismissed the appellantsô claim and gave judgment in favour of the respondents on their counter-claim. It awarded the sum of ₦5,000.00 (five thousand naira) damages against the appellants.

Being dissatisfied with the judgment, the appellants filed a notice of appeal with two original grounds of appeal.

Subsequently, with the leave of this Court, the appellants filed three additional grounds of appeal. The original grounds of appeal and the additional grounds of appeal are reproduced as follows:

ORIGINAL GROUNDS OF APPEAL

ñ1. That the decision of the Honourable Court in Suit No. AEACCI/33/2000 of 29th June, 2007 was altogether unwarranted and cannot be supported having regards to the weight of evidence.

2. That the decision is erroneous on point of lawò

ADDITIONAL GROUNDS OF APPEAL

ñGROUND I

That the trial court misdirected itself in fact when it held to wit:

ñFrom the analysis above, we prefer the version of the traditional history as presented by the Defendants to that of the Plaintiffs.ò That aspects (sic) are more probable in view of the reasons given aboveò, and therefore came to a wrong conclusion by dismissing the Plaintiffsô case.

Particulars of Misdirection

(a) Whereas from the printed records the evidence of the Plaintiffs in terms of their traditional history was very cogent, consistent and more probable than the evidence of the Defendants.

(b) Whereas none of the evidence of the Defendants was either in part or in whole, in conflict with itself or with those of the Plaintiffs.

GROUND 2

The trial court misdirected itself on the facts, dismissing the Plaintiffôs case by wrongly adopting the principles as enunciated in Kojo II v Bonsie 1957 WLR 1223 and therefore came to a wrong conclusion.

Particulars of Error

(a) Whereas both the traditional history of the Plaintiffs and the Defendants are not in conflict with each other.

(b) Whereas both traditional history of their evidence were not traced to a common source.

(c) The plaintiffsô acts of possession in the recent time was more cogent and probable.

GROUND 3

The trial court misdirected itself in fact when it held to wit. ñFrom the above analysis, we are of the strong view that the plaintiffs in this case cannot resile from the decision so pronounced by the customary law arbitrators, more so, they took the matter to the customary law arbitratorsò, and therefore came to a wrong decision.

Particulars of Error

(a) Whereas there was no evidence as to the finding of facts at the customary law arbitrators (sic) before the court.

(b) Whereas the appellants have the constitutional right to any court of their choice having been dissatisfied with the decision of the customary law arbitrators.

(c) Whereas the customary law arbitrator is not the final court on land matters.ò

With the leave of this Court, the appellants filed their brief of argument. In the course of this appeal, the respondents and their counsel abandoned the proceedings. Despite several adjournments, they did not file any respondentsô brief.

In the appellantsô brief of argument, the learned counsel for the appellants, O. F. Asemokhai Esq. formulated three issues for determination as follows:

ñ1. Whether the trial court was right in dismissing the appellantsô claim and granting the respondentsô counter- claim not withstanding the clear and unbroken evidence of traditional history as adduced by the appellants.

[Original Ground I and Additional Ground I]

2. Whether the trial court was right in adopting the rule in Kojo II v Bonsie, in the absence of any conflicting historical evidence between the appellants and respondents having regard to the evidence before court adduced by them in the printed records.

[Original Ground II and Additional Ground II]

3. Whether the trial court was right in dismissing the appellantsô

claim by relying on the decision of the customary arbitration in the absence of any finding of fact on that issue.ò

[Additional Ground III]

Upon a careful examination of the issues as formulated above, we are of the view that the issues as raised, are quite germane to the determination of this appeal. Consequently, we adopt the three issues as formulated by the appellants.

Arguing issue one, the learned counsel for the appellants submitted that where both parties are relying on traditional evidence to prove title to land under customary law, the accepted methods of proof are as follows:

1. Traditional history of ownership.
2. Acts of undisturbed and unchallenged occupation or use of the land for a long period from any other claimant.
3. Exclusive possession without permission.

He maintained that any of the above methods will suffice to prove title. He cited the cases of: Amayo v Erinmwingbovo (2006)11 NWLR (Pt. 992), 671-672; and Onwuka v Ediala (1989) 1 NWLR (Pt. 98) 182 at 186.

The learned counsel referred to the evidence of the 2nd Plaintiff who testified as P.W.1, to establish the fact that his great grand father deforested the land. He maintained that this evidence was never challenged throughout the trial, and was enough to sustain the claim.

Furthermore, counsel submitted that the appellants discharged the onus of proving their root of title. He referred the Court to the evidence of P.W. 1 and the case of Archibong v Edak (2006) 7 NWLR (Pt. 980) 485 ratio 7.

He maintained that there was no proper evaluation of evidence by the trial court before arriving at its conclusion to wit:

ñIt thus appears to us that the Plaintiffs have no in-depth knowledge of their ancestral history over the land.ò He argued that there is no relationship between the identification of features at the ***locus in quo*** and the traditional history of evidence between the parties.

Learned counsel submitted that the trial court made a finding of fact that the appellant led evidence to establish their root of title to the land and agreed that the appellantsô discharged the onus placed on them.

He finally submitted that the appellants led evidence to prove their acts of possession and enjoyment of the land over the years. He relied on the decision of the Supreme Court in Ayorinde v Kuforiji (2007) 4 NWLR, (Pt.1024) (sic).

He urged the court to allow the appeal on this issue.

We have carefully considered the submissions of the learned counsel for the appellant on this issue. Under this issue, the counsel has seriously

contended that the preponderance of evidence of traditional history is in favour of the appellants. It is settled law that evidence of traditional history, if found to be cogent and accepted by the court, can support a claim for declaration of title to land. See F. M. Alade v Lawrence Awo (1975) 4 S.C. 215 at 228; Olujebu of Ijebu v Oso (1972) 5 S.C. 143 at 151; Nwosu v Udeala (1990) 1 N.W.L.R. (Pt. 125) 188; and Alli & Ors v Alesinloye & Ors (2000) 6 N.W.L.R. (Pt. 660) 177 at 201 ï 202.

In the instant case, the appellants led evidence of traditional history to prove their root of title to the land. The respondents also led their own evidence of traditional history to prove their title to the same land.

In the face of the conflicting evidence of traditional history, the trial court had a duty to evaluate the evidence and make findings of fact. The law is well settled that the evaluation of evidence and the ascription of probative value are the primary functions of the trial court which saw, heard and assessed the witnesses.

See the following cases: Okwejiminor v Gbakeji & Anor (2008) 5 NWLR (Pt. 1079) 172 at 181; Agbeje v Ajikola (2002) 93 LRCN 1; and Abidoye v Alawode (2001) 85 LRCN 736.

Furthermore, an appellate court may only interfere with the findings of fact of a trial court when such findings are found to be perverse or wrong

because of the violation of some principles of law or procedure. See Osolu v Osolu (2003) 8 All NLR 525 at 537.

In the instant case, the trial court carefully evaluated the evidence of traditional history adduced by both parties and found that of the respondents more credible, hence it dismissed the appellantsô claim and granted the counter- claim of the respondents.

The appellants have not faulted the findings of fact of the trial court on the grounds of perversity or the violation of any principle of law or procedure.

Consequently, the decision of the trial court that the respondents have a better title to the land in dispute, is in our view unimpeachable since there was a preponderance of proof by credible and accepted evidence in favour of the respondents.

In the event, we resolve issue one in favour of the respondents.

Issue two is challenging the application by the trial court of the rule in the case of Kojo II v Bonsie (1957) 1 W.L.R. 1223, to resolve the conflict in the evidence of traditional history adduced by the parties.

Arguing this issue, the learned counsel for the appellants submitted that in the application of the principle in the case of Kojo II v Bonsie (supra), it is not the duty of the trial court to place the competing history on an imaginary scale to determine which is more probable. He maintained that

the trial court was wrong when it held that from the analysis, it preferred the version of the traditional history as presented by the respondents to that of the appellants.

According to him, the acts in recent years should be the yardstick to determine which of the versions is more probable.

He posited that having agreed that both parties have discharged the onus of proof in terms of their traditional history, the only course open to the court was to apply the test of recent acts of possession. He referred the Court to the case of Archibong v Edak (2006) NWLR (Pt. 980) 485, ratio 8.

Counsel further contended that the acts of recent possession adduced by the appellants included the allotment of part of the land to one Peter Legbeti in 1998 and the planting of crops on the land over the years without being challenged. He concluded that the evidence of acts of possession adduced by the appellants were more recent than those adduced by the respondents.

The position of the law is that where there is conflict in traditional evidence adduced by the parties, such conflict can only be resolved by reference to acts of ownership and possession in recent times.

See the following cases:

(1) Kojo II v Bonsie supra;

(2) Alade v Awo (1975) 4 S.C. 215;

(3) Oje & Anor v Babalola & Ors (1991) 4 NWLR (Pt. 185) 267; and

(4) Olohunde v Adeyoju (2000) 10 NWLR (Pt. 675) 562.

Upon a careful perusal of the judgment, we observed that the trial court was quite conversant with the rule in Kojo II v Bonsie (supra) and applied same when it held thus ñWe shall attempt finding out which of the two histories is more probable by testing it against other evidence in the case as well as deciding the case on the basis of numerous and positive acts of possession and ownershipò (See pp 82 ï 83 of the judgment).

Applying the aforesaid principles the trial court painstakingly considered the evidence of both parties and preferred the version of the respondents, based on their findings of fact during their visit to the ***locus in quo***. For example, at the visit, the court observed that contrary to the version of the appellants, the open gutter was not created by ancestors but it is a natural phenomenon.

Furthermore, we are of the view that contrary to the submission of the appellantsô counsel, the application of the rule in Kojo II v Bonsie (supra) does not preclude the court from placing the evidence of competing history on an imaginary scale in order to determine which is more probable.

For the avoidance of doubt, the practice of placing evidence on an imaginary scale is predicated on the standard of proof required in civil actions in contradistinction to criminal actions.

In a criminal case, the standard of proof is beyond reasonable doubt. See section 138 (1) of the Evidence Act, Cap. E14, Vol. 6, L.F.N. 2004.

However in a civil case, the standard of proof is on the preponderance of evidence. See section 137 (1) of the Evidence Act..

The analogy of using an imaginary scale was given pre-eminence in the celebrated case of Mogaji v Odofin (1978) 4 S.C. 91 at 93 ï 94, where Fatayi - Williams J.S.C. (as he then was) stated the position thus: ñTherefore in deciding whether a certain set of facts given in evidence by one party in a civil case before a court in which both parties appear is preferred to another set of facts given in evidence by the other party, the trial Judge after a summary of all the facts must put the two set of facts in an imaginary scale, weigh one against the other, then decide upon the preponderance of credible evidence which weigh more, accept it in preference to the other and then apply the appropriate law to it.ò

In view of the foregoing, we hold that the trial court rightly applied the rule in Kojo II v Bonsie (supra), by testing the conflicting evidence of

traditional history by reference to recent acts in recent years as established by evidence.

Accordingly, we resolve issue two against the appellants.

Arguing issue three, the learned counsel for the appellants submitted that the provisions of section 1 (2) of the Evidence Act does not preclude any court from examining the record of proceedings of an arbitration panel. He maintained that the respondents who relied on the decision of the council of chiefs and elders of Ikpena ought to have called at least one of the members of the customary arbitration, to testify at the trial.

He argued that the courts action in dismissing the appellantsô case without any evidence from the members of the council, occasioned a marriage of justice. He referred the court to the case of Aigbobabi v Aifuwa (2006) 6 NWLR (Pt. 976) 270, ratio 6.

He submitted that the trial court acted on evidence not before it and departed from the proper judicial procedure. He contended that an appellate court can interfere with the evaluation of evidence of a trial court on the following grounds:

1. When they were not based on proper and dispassionate appraisal of evidence given in support of the case.

2. Where such findings are perverse in the nature of evidence and pleadings.

3. Where in the face of the record, justice has not been done in the case.

He referred the Court to the case of Sale v B.O. N. Ltd. (2006) 6 NWLR (Pt. 976) 316, ratio 6, and submitted that the trial court was in error when it held that the appellants cannot resile from the decision of the customary law arbitrators.

Learned counsel submitted that the court should have obtained the evidence of at least one witness from the Council of elders or ***suo motu***, called for the record of the arbitration proceedings to resolve the controversy. He referred to the following cases: (1) Ojoikeabor v Elosuba (1994) 8 NWLR (613) 153 at 156, ratio 6 & 7; (2) Mohammed Ali v Abrosimi 6 WACA 148; (3) Fasaya v Adekoya (2000) 15 NWLR (Pt. 698) ratio 1 & 2, and maintained that the record from the Council of elders is a vital document.

Finally, he urged the Court to allow the appeal.

The gravamen of the appellantsô counsel submission under issue three is that the trial court wrongly relied on the decision of the customary arbitration without hearing from any member of the arbitration panel or seeing the record of proceedings of the panel. Simply put, the learned

counsel is contending that there was no evidence of the arbitration proceedings before the trial court to support the decision of the court, dismissing the appellantsô claim.

It is settled law that where two parties to a dispute voluntarily submit their matter in controversy to an arbitrator according to customary law, then once the arbitrators reach a decision, it will not be open to either party to subsequently back out of such a decision. A party rejecting such a decision must prove that it was wrong in principle. See the following cases: Omanhene Kobina v Akese I W.A.C.A. 1 at 2; Michael Ojibah v Ubako Ojibah (1991) 5 NWLR (Pt. 191) 296; and Anyabunsi v Ugwunze (1995) 6 NWLR (Pt. 401) 255 at 272.

In the instant case, it is common ground that the parties submitted themselves to customary law arbitrators, to wit: the Council of elders of Ikpena quarters, Ososo. At the end of the arbitration, the appellants were not satisfied with the decision of the arbitrators, hence they instituted the instant case at the trial court. On the authorities cited above, the onus is on the party rejecting the decision of the arbitrators, to prove that such a decision was wrong in principle. See Anyabunsi v Ugwunze (supra) ratio 11.

Thus it was the duty of the appellants to lead evidence to prove that the decision was wrong in principle. They were entirely at liberty as

plaintiffs before the lower court, to either call members of the arbitration panel or tender the record of proceedings of the panel.

Upon a careful perusal of the record of proceedings, we observed that the submission of the appellants counsel that the trial court dismissed the appellantsô case without any evidence by any member of the Council is clearly misconceived. At the trial court, one John Olatunde Otagbo, testified as D.W. 1 and told the court that he was the secretary to the Council. Thereafter, one Omolafe Orifa, who testified as D.W. 2, told the court that he was a member of the Council and that they investigated the matter and found in favour of the respondents.

On the submission that the court should have ***suo motu*** called for the record of proceedings of the arbitration panel, we are of the view that it is not the duty of the court to prove the case of a party. The court should play the role of a neutral umpire. Furthermore, the submission that the record from the Council of elders is a vital document is clearly not tenable in a trial before a customary court. It is settled law that documents are unknown to native law and custom.

See the following cases on the point:

(1) Ajadi v Olarenwaju (1969) 1 All N.L.R. 382;

(2) Egwu v Egwu & Ors (1995) 5 NWLR (Pt. 396) 351 at 493.

In view of the foregoing, we resolve issue three against the appellants.

Having resolved the three issues against the appellants, we hold that this appeal lacks merit. It is accordingly dismissed. Consequently, the judgment of the Akoko Edo Area Customary Court, Igarra, delivered on the 29th day of June, 2007 in respect of this case and the consequential orders made therein are hereby affirmed.

The appellants are to pay the respondent costs assessed at ₦3,000.00 (three thousand naira).

HON. JUSTICE PETER OSARETINMWEN ISIBOR

HON. JUSTICE TIMOTHY UKPEBOR OBOH

HON. JUSTICE PETER AKHIMIE AKHIHIERO

HON. JUSTICE OHIMAI OVBIAGELE

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