IN THE CUSTOMARY COURT OF APPEAL
EDO STATE OF NIGERIA
HOLDEN AT BENIN CITY
ON WEDNESDAY, 18TH MARCH, 2009

BEFORE THEIR LORDSHIPS

PETER OSARETINMWEN ISIBOR é é JUDGE (PRESIDED)

TIMOTHY UKPEBOR OBOH é é JUDGE

PETER AKHIMIE AKHIHIERO é é JUDGE

APPEAL NO. CCA/11A/2007

BETWEEN:

1. MR. ISOKEN OHUIMU
2. MISS IFUEKO OHUIMU
3. OSARUMWENSE OHUIMU
4. OSAROBO OHUIMU
5. SUNDAY A. ODOKO
6. MR. SAMUEL IYARE

é APPELLANTS

AND

MR. EBO OHUIMU é é RESPONDENT

JUDGMENT
DELIVERED BY PETER AKHIMIE AKHIHIERO (JCCA)

This is an appeal against the judgment of the Oredo Area Customary Court No. 1, Benin City delivered on Friday, the 11th day of November, 2005. The respondent (as plaintiff), claimed against the appellants (as defendants), jointly and severally as follows:

ñ1. An order of this Honourable Court affirming that as the eldest surviving son of late Pa Samuel Ohuimu Odoko, the Plaintiff is the only person rightly entitled to exclusive possession and the legal estate in respect of all that building lying on a parcel of land measuring approximately 100 feet by 100 feet situate at No.4, 3rd Nekpen-Nekpen lane, off Second East Circular Road, Benin City.

2. An order of perpetual injunction restraining the Defendants, their servants, privies, and assigns from trespassing on, entering upon, and in any way committing any act(s) prejudicial to the Plaintiffôs exclusive possession of and title to all that building lying on a parcel of land measuring approximately 100 feet by 100 feet situate at No. 4, 3rd Nekpen-Nekpen lane, off Second East Circular Road, Benin City.

3. An order compelling the 6th Defendant to surrender the document of title belonging to the Plaintiffôs late father in respect of all that building lying on a parcel of land measuring approximately 100 feet by 100 feet situate at No. 4, 3rd Nekpen-Nekpen lane, off Second East Circular Road, Benin City.ò

On the other hand, the appellants counter-claimed against the respondent at the trial court as follows:

ñ1. A declaration that the August 12th, 1981 sharing of late Ohuimu Odokoôs estate by the family members is proper and in accordance with Bini native law and custom.

2. A declaration by this Honourable Court that the building comprising of nine rooms and forming part of the property lying 25 and situate at No. 4, Nekpen-Nekpen Street, Benin City belongs to the 1st Defendant and co-siblings of the same parents, (the 1st to 4th Defendants), the adjoining vacant plot measuring 25 feet by 50 feet also inclusive, having been properly so shared by the family in accordance 3with Bini native law and custom.

3. Perpetual injunction restraining the Plaintiff from further dealing

5 with the property in any manner.ò

The respondentôs case at the trial court was that the 1st to the 4th appellants and himself are the children of Pa Samuel Ohuimu Odoko, who died intestate on the 27th day of January, 1980. Their deceased father was a Bini man from Iyekeorhionwon, but he lived and died at No.

10 4, 3rd Nekpen-Nekpen lane, Benin City. The respondent as the eldest surviving son of their father performed all the burial traditional rites up to the Ukomwen, in accordance with Bini customary law.

After the burial, the 1st to the 4th appellants lived with the respondent in the said house at No. 4, 3rd Nekpen-Nekpen lane, and he

15 took care of them as their senior brother.

Sometime in 1996, the 1st to 4th appellants went on rampage and destroyed several things in the compound. The respondent invited the Okaegbe of the family, Pa Ogbe and other members of the family, including the 5th appellant to mediate.

Again, early in 2002, there was a major fracas between them which culminated in the arrest of some of the appellants by the police at the instance of the respondent, consequent upon which the police advised the respondent to go to court.

The respondent and the 5th appellant are cousins. At present, the 5th appellant is the most senior person in their family. After the burial of Pa Samuel Odoko, the title documents of the house were handed over to the 6th appellant who has refused to hand over same to the respondent. The property in question does not consist of two buildings but it is one building, which extends backwards with an ***oteghodo*** **.**

On the other hand, the appellantsô case was that all the children performed the first and final burial rites of their father. Thereafter, their father's properties were shared. There are two houses at No. 4, 3rd Nekpen-Nekpen lane, one at the front and another at the back. The house at the front was given to the respondent together with the vacant plot beside it, while the building at the back was given to the 1st to 4th appellants together with the adjoining land behind it.

The sharing was done in 1981, after which the 1st appellant took possession of the building at the back and let out some of the rooms to tenants. This sharing was documented by the family.

At the conclusion of the trial, the trial court gave judgment in favour of the respondent. The court held that the house at No. 4, 3rd Nekpen-Nekpen lane is the Igiogbe of the late Pa Samuel Ohuimu Odoko. Being an Igiogbe, the house devolved on the respondent absolutely, having performed all the burial rites. The court declared that the purported sharing of the house by the family, whether verbally or in writing, was a nullity.

It dismissed the counter-claim and ordered the 6th appellant to

return the title documents to the registrar of the lower court for onward transmission to the respondent.

Dissatisfied with the judgment, the appellants filed a notice of appeal with an ñomnibus groundò of appeal, dated the 8th of December, 2005.

With the leave of this Court, the appellants filed two additional grounds of appeal. All the grounds of appeal are reproduced hereunder as follows:

ORIGINAL GROUND OF APPEAL

ñ(Omnibus) complaint against the entire judgment (sic)ò

ADDITIONAL GROUNDS OF APPEAL

ñ1. The learned trial President erred in law when he failed to set out or comprehend what issues were disclosed by the evidence of the parties for determination.

PARTICULARS:

(i) The learned trial President failed to evaluate the evidence of each of the witnesses on the all-important issue of whether or not the property in dispute consist of two buildings.

(ii) In relying on the case of Idehen V Idehen (sic) to define an Igiogbe, the court did not appreciate the fact that the issue in that case was not whether the deceased was buried in both houses but whether he lived in both houses at the same time.

(iii) The non-visit of the court to the ***locus in quo*** to determine whether there were two houses occasioned a miscarriage of justice.

2. The learned President erred in law when he marked órejectedô the document of sharing tendered by the defendants even though the learned defence counsel withdrew it promptly and thus occasioned a miscarriage of justice.

PARTICULARS:

(i) In the course of the proceedings a further attempt to tender the said sharing document through another witness was refused on the ground that it had been marked órejected.ôò

The parties filed their briefs of argument in accordance with the rules of this Court.

In his brief of argument, C. E. Agbonwanegbe Esq., learned counsel for the appellants, formulated two issues for determination having abandoned the omnibus ground of appeal. The said omnibus ground is hereby struck out. The two issues formulated by him are as follows:

ñ1. Whether the trial court can be said to have done substantial justice when it failed to identify the real issue for determination?

2. Whether the trial court was right to have marked órejectedô a document tendered and withdrawn?ò

In his own brief of argument, Edoba B. Omoregie Esq., formulated three issues for determination on behalf of the respondent as follows:

ñ(i) Whether from the state of Bini Customary law and the evidence adduced by the parties, the lower court was correct to have affirmed Respondentôs exclusive possession and title to all that building property (sic) lying on a parcel of land measuring approximately 100 feet by 100 feet and situate at No. 4, 3rd Nekpen-Nekpen lane, off Second East Circular Road, Benin City.

(ii) Whether the non-visit of the lower court to the ***locus in quo*** occasioned a miscarriage of justice.

(iii) Whether by rejecting the alleged document of partition of the disputed property and marking same accordingly, the lower court had occasioned a miscarriage of justice.ò

The learned counsel for the respondent formulated three issues from the two grounds of appeal. It is trite law that the issues for determination must not exceed the grounds of appeal. This will amount to a proliferation of issues, which is not permissible. See the following cases:

1. Megwalu V Megwalu (1994)7 NWLR (Pt 359) p. 718
2. Oyekan V Akinterinwa (1996) 7 NWLR (Pt. 459) p. 128

3. Federal Republic of Nigeria V Olafisoye (2004) 117 LRCN 3632 at 3641.

Upon a careful consideration of the issues formulated by the parties, we adopt issue (i) as formulated by the appellants, and issue (iii) of the respondent and tie them to the two grounds of appeal as follows:

1. Whether the trial court can be said to have done substantial justice when it failed to identify the real issue for determination? (Ground I).
2. Whether by rejecting the alleged document of partition of the disputed property and marking same accordingly, the lower court had occasioned a miscarriage of justice (Ground II).

Arguing the first issue for determination, learned counsel for the appellants, submitted that from the evidence adduced at the trial, the primary issue for determination was whether or not the deceased had two houses and whether he lived in one of them or both. He referred to some pieces of evidence from the respondent and the appellants to establish the fact that there were two houses in the said compound. He submitted further that if the trial court had made a proper evaluation of the evidence, it would have determined

the issue of whether the property in 15 dispute consist of two buildings or not. This made it expedient for the

court to have visited the ***locus in quo*** and failure of the court to do so was fatal to the appellantsô case.

Counsel submitted that if the court had properly evaluated the

evidence, it would not have applied the case of Idehen V Idehen (1991) 6 20 N.W.L.R (Pt.198) 382 in relation to the place where the deceased was

buried alone because the essence of that case was whether the deceased lived in both houses. This principle was applied by the Supreme Court in the case of Agidigbi V Agidigbi (1996) 38 L.R.C.N. 907 at 914, ratio 2.

Finally, he submitted that by section 77(d) ii of the Evidence Act, the court ought to have visited the property in dispute, as this would have

answered the question of how many buildings were in the said premises.

He urged this Court to hold that the trial court failed to do substantial

5 justice because it did not evaluate the entire evidence.

Replying to Issue 1, learned counsel for the respondent submitted that under Bini Customary law, having performed the second and final burial rites of the deceased, the respondent being the eldest surviving son was entitled to possession and title to the house or houses where the deceased lived and died, to the exclusion of all other persons. He cited the following authorities ***inter alia***:

(i) Obaro V Probate Registrar (2002) 6 N.W.L.R. (Pt. 762) p. 56.
(ii) Ovenseri V Osagiede (1998) 11 N.W.L.R. (Pt. 572) 1.
(iii) Ogiamien V Ogiamien (1967) N.M.L.R 245.
(iv) Arase V Arase (1981) 5 S.C. 33
(v) Lawal - Osula V Lawal Osula (1995) 9 NWLR (Pt. 419) 259
(vi) Handbook on some Bini Customs and Usages (1996) issued under the authority of the Oba of Benin and the Benin Traditional Council.

The learned counsel argued that it was common ground that the deceased lived and died in No.4, 3rd Nekpen-Nekpen lane, Benin City. He referred to the evidence of the 5th appellant who confirmed that while the deceased was alive, his second wife who was the mother of the 1st to the 4th appellants, lived in the extension behind the premises where the

deceased lived and died. In other words, while the deceased was alive, he used the two houses together with his wife and children at the same time. He submitted that under Bini customary law, where the deceased is

shown to have lived in more than one house in his life time, the houses 5 constitute his Igiogbe. He cited the case of Idehen V Idehen (supra), and urged the court to hold that regardless of the structure, nature, size,

dimension, scope, or location of the property of the deceased, since it has been established that he lived and died in the disputed premises, the same constitutes his Igiogbe and the possessory title and legal estate vests on 10 the respondent, to the exclusion of the 1st to 4th appellants.

We have carefully considered the submissions of the learned

counsel on this issue. The bone of contention is whether the trial court failed to identify the real issue for determination in this case. Learned counsel for the appellantsô has strongly contended that the primary issue 15 is whether or not the deceased had two houses and whether he lived in one of them or both. He maintained that a visit to the locus would have resolved the dispute.

Upon a careful perusal of the evidence adduced at the trial, together with the arguments canvassed by both counsel in their briefs, it is an incontrovertible fact that there are two buildings in the said premises. The only contention is whether the deceased lived in the two buildings or in only one of them. This raises the pertinent question of what constitutes the deceasedôs Igiogbe in the instant case. The law is now settled that the Igiogbe is the house or houses where a Bini man lived and died. See the following cases:

(i) Lawal ï Osula V Lawal Osula (supra) at 263; and
(ii) Idehen V Idehen (1991) 6 NWLR (Pt.198) 382.

Thus, the Igiogbe can be a single house or building or it can be two separate buildings which are several kilometres apart as in the case of Idehen V Idehen (supra). The important consideration is whether there is evidence to support this fact in this case. The respondent gave evidence that the deceased lived in the said compound with the mother of the 1st to 4th appellants. The 5th appellant categorically stated that while the

deceased was alive, he lived in the building at the front, while the 1st to
15 4th appellants lived in the building at the back with their mother, the wife of the deceased. The sum total of the evidence is that the deceased, together with his wife and children lived in the house at No. 4, 3rd Nekpen-Nekpen lane, Benin City, comprising of two buildings and the

trial court was right when it held that the house being an Igiogbe,
20 devolved on the respondent absolutely.

We are of the view that the complaint of the failure of the trial court to visit the ***locus in quo*** is quite misconceived. Such a visit would have served only to resolve the issue of whether there is one building or two buildings in the premises. The learned counsel for the respondent has conceded the fact that there are two buildings in the premises and he
5 has submitted that they both constitute the Igiogbe. On the authorities cited above, we agree with the respondentôs counsel and we resolve issue I against the appellants.

Issue II is on the document marked ñrejectedò by the trial court. Arguing this issue, the learned counsel for the appellants submitted

that once a counsel withdraws his application to do anything, the situation returns to ***status quo***. In this case, the counsel having withdrawn his earlier application to tender the document, the court ought not to have marked the document órejectedô. This occasioned a miscarriage of justice. Moreso, the document was not admitted subsequently when the defence applied to tender it through another witness. Counsel further submitted that this document was relevant to the proceedings and this other witness, having laid a proper foundation as borne out from the evidence, the document was wrongfully rejected. He relied on Section 95 of the Evidence Act and maintained that a customary court is a court of summary jurisdiction which ought not as a matter of necessity, adhere to strict rules of evidence. He cited the case of Buhari V Obasanjo (2004) F.W.L.R. 1487 at 1499 ratio 18 where the court condemned the application of legal technicalities to frustrate the course of justice.

He finally urged this Court to hold that the sharing document

was wrongly rejected.

Replying to Issue II, E. B. Omoregie Esq., submitted that the document was rejected and so marked because it was a photocopy and no foundation had been laid to enable the court admit same. He relied on the case of Babatola V Aladejana (2001) 12 NWLR (Pt. 728) 597. He maintained that the evidential value of the document was further depleted by the evidence of the respondent who challenged the authenticity of the alleged document of sharing. This testimony was never controverted by the appellants.

Finally, he maintained that since the property in dispute was the Igiogbe of the deceased, it belongs exclusively to the respondent and the family has no power to distribute or partition the property. Moreso, since the respondent had objected to the alleged sharing. He finally urged the Court to hold that the rejection of the alleged document was proper and did not occasion any miscarriage of justice.

We have considered the arguments of both counsel under this issue. The gravamen of the complaint of the appellants is that the trial court went ahead to mark the document ñrejectedò after the counsel

had applied to withdraw same. It is not in dispute that the document was inadmissible for failure to lay a proper foundation. The appellantsô counsel at the trial court conceded that much, hence the application to withdraw the document. But the trial court went ahead to mark the document ñrejected.ò The consequence of a document being marked ñrejectedò is that it cannot be tendered again in that same proceedings. See the following cases:

1. Oyetunji V Akanni (1986) 5 NWLR (Pt. 42), 461
2. A.C.B. V Gwagwada (1994) 4 NWLR (Pt.342) 25
3. Nwosu V Udeaja (1990) 1 NWLR (Pt. 125) 188

To that extent, we are of the view that since the appellantsô counsel applied to the court to withdraw the document, the court should have granted the application and ought not to have gone ahead to mark the document ñrejected.ò

However, the issue for determination in this appeal is whether by rejecting the alleged document of sharing of the disputed property and marking same accordingly, the lower court had occasioned a miscarriage of justice.

Upon a careful consideration of the totality of the evidence at the trial and upon our finding that the two buildings constitute the

Igiogbe of the deceased, it is settled law that by operation of Bini customary law, the Igiogbe of a deceased Bini man devolves exclusively on his eldest surviving son. It cannot be shared or partitioned among the other children. The authorities are settled that even if the deceased made a will devising the Igiogbe to any person other than his eldest surviving son, such a devise will be null and void. See the cases of Idehen V Idehen (supra) at pp. 387 – 389 and Lawal-Osula V Lawal Osula (supra) at pp 264 – 265.

We agree with the submissions of the learned counsel for the respondent that the family has no power to distribute or partition the Igiogbe. They can only do so in respect of any other property of the deceased. Consequently, we hold that the rejection of the alleged document of sharing by the trial court did not occasion any miscarriage of justice.

We therefore resolve Issue II against the appellants.

Having resolved the two issues against the appellants, we hold that this appeal lacks merit and it is accordingly dismissed. The judgment of the Oredo Area Customary Court No. 1, Benin City,

delivered on the 11th of November, 2005 and the consequential orders made therein are hereby affirmed. The sum of N3,000.00 (three thousand naira) costs is awarded in favour of the respondent.

HON. JUSTICE P. O. ISIBOR

HON. JUSTICE T. U. OBOH

HON. JUSTICE P.A. AKHIHIERO

C. E. Agbonwanegbe Esq., é é Counsel for the Appellants

E. B. Omoregie Esq., é . é Counsel for the Respondent