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

ON TUESDAY, THE 28TH DAY OF APRIL, 2009

BEFORE THEIR LORDSHIPS

PETER OSARETINMWEN ISIBOR - JUDGE
(PRESIDED)

TIMOTHY UKPEBOR OBOH - JUDGE

PETER AKHIMIE AKHIHIERO - JUDGE

APPEAL NO. CCA/13A/2008

BETWEEN:

MABEL OVIOSUN é é é APPELLANT
(For herself and on behalf of Oviosun family of Avbiosi New Site, Iuleha)

A N D

FRIDAY OHONYA é é é RESPONDENT

JUDGMENT
DELIVERED BY PETER AKHIMIE AKHIHIERO (JCCA)

This is an appeal against the decision of the District Customary Court, Uzebba, delivered on the 5th day of May, 2008, in Suit No. UDCC/7/2007.

In the said suit, the appellant (as plaintiff) sued for herself and on behalf of the Oviosun family of Avbiosi New Site, Iuleha, as follows:

ñ1. A DECLARATION that the Plaintiff is the holder or a deemed holder of a customary right of occupancy over all that piece or parcel of land lying and situate on the left hand side (when coming from Avbiosi New Site to Uzebba) along Avbiosi New Site ï Uzebba old Road in a place called Igue-Uhomugbawe (or ñIgue-Ugbaweò for short) which said place is within the jurisdiction of this honourable court. The said land is known to the parties.

2. The sum of N50,000.00 being damages for trespass when sometimes late 2006, the Defendant either by himself, or through his agents, servants, privies or those acting through or under him, broke into the said land and buried a relation thereon in spite of protest from the Plaintiff and against stern warning by the police not to do so.

3. An order of mandatory injunction compelling the Defendant either by himself or through his agents, servants or privies or whoever he may so authorise, to exhume the body or remains of the said relation from the said land anytime before or soon after the judgment in this case.

4. An order of perpetual injunction restraining the defendant, his agents, servants or privies from any further acts of trespass into the said land after carrying out the order in relief No. 3 above.ò

The appellantôs case at the trial court was that the land in dispute is called Igue ï Uhomugbawe. The land was deforested by her father Oviosun Ejemai (now deceased). Upon his death, the land was inherited by his

children, who have been in possession ever since. Sometime in the year 2006, the mother of the respondent died and he dug a grave in the disputed land with the intention of burying his mother there. When the appellant discovered what was going on, she warned the respondent not to bury his mother on their land. She also reported the matter to the police who advised the respondent not to bury his mother there. The respondent did not heed the advice but went ahead to bury his mother on the said land.

The appellant informed the members of her family of the action of the respondent and they gave her permission to file a suit against him on behalf of the family.

She called three witnesses during the trial and testified for herself. While the respondent was cross-examining the appellant, the respondent raised the point that the appellant had no **locus standi** to institute the case on behalf of her family. The counsel to the appellant replied and submitted that from the evidence adduced so far, the appellant was mandated by the family to institute the suit. The court adjourned the matter for ruling.

On the 5th day of May, 2008 in a majority ruling, the President and the 2nd member of the trial court held that the appellant had no **locus standi** to institute the action. They struck out the suit, awarded ₦1,500.00 costs in

favour of the respondent and ordered that the costs should be paid through the court within seven days of the ruling.

However, in a dissenting ruling, the 1st member of the court overruled the objection and held that the appellant had the **locus standi** to institute the suit.

Aggrieved by the verdict of the court, the appellant appealed against the said majority decision, and filed a Notice of Appeal with three original grounds of appeal. Subsequently, with the leave of this Court, three additional grounds were filed. All the grounds of appeal without their particulars are reproduced verbatim as follows:

ORIGINAL GROUNDS OF APPEAL

ñ1. That the President and 2nd member of the Uzebba District Customary Court, Uzebba erred in law in their majority ruling/decision on the above date in this matter when they held that the Plaintiff/Appellant had no locus standi i.e. a standing in law to institute this suit against the Defendant/Respondent, and thereby came to a wrong conclusion occasioning a miscarriage of justice, when as a result they struck out the Plaintiff/Appellantôscase which was part-heard.

2. The President aided and abetted by the 2nd member erred in law when they became biased, compromised their exalted positions and took personal interest in the matter, which eventually beclouded their

vision as they took side with the Defendant/Respondent, that the Plaintiff/Appellant had no locus standi thereby coming to a wrong conclusion, occasioning a miscarriage of justice.

3. The President and 2nd member erred in law in their majority decision when they did not only award the sum of ₦1,500.00 cost against the Appellant but ordered same to be paid within 7 days from the date of the ruling notwithstanding that the Plaintiff/Appellantôs right to appeal subsists in an interlocutory matter till 14 days thereafter.

ADDITIONAL GROUNDS OF APPEAL

1. That the majority decision of the trial District Customary Court, Uzebba is against the facts stated in the claim and the evidence in support adduced at the trial before the ruling appealed against in this case.

2. The President and 2nd member of the trial court erred in law when they held at page 16 lines 5 to 6 of the printed record that because the Plaintiff/Appellant failed to tender a letter of authority to sue it is fatal to her case and therefore lack the locus standi to institute this case. This was despite the fact that it alluded to the fact and the law, that in a native Customary Court, it is enough if the party states that she/he is prosecuting/defending for herself/himself and persons she /he represents at page 16 lines 7 to 9.

3. The President and 2nd member of the District Customary Court, Uzebba erred in law when they failed to consider whether from the facts of the case before the court, the Plaintiff/Appellant had satisfied the requirements of establishing her locus standi to institute the case. But, instead allowed the issue of whether or not the Plaintiff/Appellant has the

permission or authority of Oviosu family to represent them, to be proved according to them, only by tendering a letter of authority to that effect to becloud their view and proper consideration of the requirements or principles of locus standi; thereby, coming to a wrong conclusion that the Plaintiff/Appellant lacks locus standi, which had occasioned a miscarriage of justice.ò

The parties filed and exchanged their briefs of arguments in consonance with the rules of this Court.

The learned counsel for the appellant O.D. Ejere Esq., formulated four issues for determination as follows:

ñ1. Whether having regard to the writ of summons and or claim filed in this case, which clearly discloses, the capacity in which the Plaintiff/Appellant instituted this case and the evidence tendered in support by the Plaintiff/Appellant and her witnesses, the trial court was right when it held in its majority decision that the Plaintiff/Appellant lacks the locus standi to institute the action and thereby struck out same with ₦1,500.00 costs in favour of the Defendant/Respondent. (This issue is distilled from original ground 1 and additional ground 1 of the Appeal when read together).

2. Whether the trial court was right to have ordered the costs of ₦1,500.00, awarded against the Plaintiff/Appellant to be paid within 7 days from the date of its ruling in an interlocutory matter, where the partyôs right of appeal against such decision

subsists in law to the 14th day after such ruling. (This issue is distilled from original ground 3).

3. Whether having regard to the holding of the court at page 16 lines 7 to 9 that in a native court it is enough if the party states that she is prosecuting/defending for herself and persons she represents, the native/customary court could in spite of the facts disclosed in the case still hold that the Plaintiff/Appellant lacks **locus standi** because she did not tender a letter of authority permitting her to sue in a representative capacity. (This issue is distilled from additional ground 2)

4. Whether the trial court has not in its said ruling failed to consider the requirements or principles of **locus standi** and wrongly allowed the issue of whether or not the Plaintiff/Appellant was authorized or permitted to sue on behalf of Oviosun family to becloud its visions of the fact that Plaintiff/Appellant had by her claim and evidence tendered in the case disclosed sufficient interest in the subject matter of the case. (This issue is distilled from additional ground 3)ò

The learned counsel for the appellant expressly abandoned original ground 2 because there is no evidence to support same. Accordingly, the said original ground 2 is hereby struck out.

On his part the learned counsel for the respondent, A. A. Atemoagbo Esq., formulated three issues for determination as follows:

ñ1. Whether from the judgment and the grounds of appeal filed, this Honourable Court has jurisdiction to entertain this appeal in

view of section 282 (1) CFRN 1999 and the High Court Laws of Bendel State?

2. Whether the trial court was right as it did in determining first, the issue of locus standi of the appellant to institute the action, the subject of this appeal.

3. Whether the abridgement of the time within which the appellant is to comply with the judgment order, invalidated the entire judgmentò

It is pertinent to note that earlier on, the respondentôs counsel filed a Notice to raise and rely upon a preliminary objection to the hearing of the appeal, dated the 22nd day of September, 2008. The ground of the said objection is that this Court lacks the jurisdiction to hear and determine this appeal. According to him, the grounds contained in the Notice of Appeal are not cognizable before this Court, by virtue of section 245(1) (sic) of the 1999 Constitution of the Federal Republic of Nigeria.

It would be observed that Issue 1 as formulated by the respondent is not

predicated on any of the grounds of appeal but it is based on the notice of preliminary objection filed by the respondent. This is quite a curious and an unusual approach. It is settled law that an issue for determination must be founded on a ground of appeal. See the following cases:

1. Odife v Aniemeka (1992) 7 N.W.L.R (Pt. 251) 25;

2. Kalu v Odili (1992) 5 NWLR (Pt. 240) 130;

3. Ceekay Traders Ltd. v General Motors Ltd (1992) 2 N.W.L.R (Pt. 222) 532

Since the parties have incorporated the arguments on the preliminary objection in their respective briefs of argument, the proper approach is to first canvass the arguments on the objection before going into the arguments on the issues as formulated from the grounds of appeal. The learned counsel for the appellant adopted this approach.

The preliminary objection is on the jurisdiction of this Court to entertain this appeal. This is a fundamental point and it is expedient to deal with it first.

Arguing the objection, the learned counsel for the respondent relied on section 282 (1) of the 1999 Constitution which provides that:

> ñA Customary Court of Appeal of a State shall exercise appellate and supervisory jurisdiction in civil proceedings involving questions of customary lawò

He maintained that a court of law is a creation of statute and is bound by the jurisdiction conferred on it by the enabling statute. The court cannot exercise any jurisdiction outside the one vested by the enabling statute. He cited the case of Soyannwo v Akinyemi (2001) 8 N.W.L.R (Pt. 714), p. 95 at 120.

He submitted that from section 282 (1) of the Constitution, this Court can only exercise appellate and supervisory jurisdiction on issues of customary law. He maintained that it is not the claim before the lower court that determines the jurisdiction of this Court but the grounds of appeal or the issues raised from the grounds.

The learned counsel stated that the issues raised from the grounds relate to **locus standi**, proper evaluation of the evidence and abridgement of time. All these are not issues of customary law. He cited the following cases in support:

1. Pam v Gwon (2000) 2 NWLR (Pt. 644) at 322;
2. Hirnor v Yongo (2003) 9 NWLR (Pt. 824), 77 at 84;
3. Agwaramgbo v UBN Plc. (2001) 4 NWLR (Pt 702) at p. 6 ratio 6;
4. Tiza v Begha (2005) 33 WRN 158 at 164.

Counsel further argued that the additional grounds of appeal filed by the appellant cannot cure this defect. He cited the following cases to buttress the point:

1. Uwazurike v A.G. Federation (2007) F.W.L.R (Pt. 381), p. 1852
2. Maltumba v Adamu (2002) F.W.L.R. (Pt. 85), p. 213

Finally, he urged the Court to dismiss this appeal as this Court cannot go further to determine the merit or otherwise of the appeal.

Responding to the preliminary objection, the learned counsel for the appellant submitted that this appeal emanated from the ruling of the District Customary Court, Uzebba, on a claim for a declaration that the appellant for herself and on behalf of the Oviosun family of Avbiosi New Site, Iuleha, is a holder or deemed holder of a customary right of occupancy over a parcel of land. The grounds of appeal are based on the claim and the ruling of the trial court on that claim.

Counsel further submitted that customary law and its correlative facts as well as the procedure for establishing the facts are interwoven, interdependent and inseparable.

He added that an issue of customary law cannot be formulated without having regard to the facts necessary to prove the customary law in question. He cited the several decisions of this Court on the point as follows:

1. Moses Okhiran v Kokuman Aizebeoje, CCA/12A/2005, delivered on 9/02/06 (unreported)

2. Obokhai Oratokhai & Anor v Mrs. D.O. Imiere & Anor, CCA/25A/2006 delivered on 25/02/08, (unreported)

3. Rose Aigbodion (nee Ikpefan) v Samuel Ehimika Aigbodion, Appeal No. CCA/13A/2005, delivered on 23/06/08 (unreported)

Counsel further argued that the issue of **locus standi** is a principle of general application, which cuts across all recognized systems of law including customary law. According to him, it will be unimaginable to conceive of a situation where a complete stranger who has no interest in the subject matter would be allowed to institute or defend any matter under our customary law.

He concluded that **locus standi** and the other grounds of appeal are cognizable before this Court under section 282 (1) of the 1999 Constitution. He urged the Court to dismiss the preliminary objection as unmeritorious.

We have carefully considered the submissions of both counsel on the preliminary objection. This Court has maintained in a line of cases that customary law is a matter of fact to be proved by evidence. It is not practicable to formulate grounds of appeal or issues of customary law without recourse to the facts that are necessary to prove the customary law in question.

The learned counsel for the appellant has cited our previous decisions on the matter and we endorse all the authorities cited by him. See also our recent decision in the case of Mrs. Nene Amoni v. Mr. Smart Amoni:CCA/4A/2006, delivered on 31/03/09 (unreported).

We agree entirely with the learned counsel for the appellant that the issue of **locus standi** is quite germane in every trial. It is cognizable in proceedings dealing with questions of customary law. To hold otherwise will amount to a legal absurdity.

In the event, we hold that the preliminary objection lacks merit and it is accordingly overruled.

Having disposed of the preliminary objection, we shall consider the appeal on its merits.

Upon a careful examination of the issues as formulated by counsel, we are of the view that the issues distilled by the appellantôs counsel are more germane to the determination of this appeal. However, we observed that some of the issues on **locus standi** are repetitive. It is settled law that issues for determination in an appeal should not be prolix nor verbose. See the following cases:

1. Paye v Gaji (1996) 8 N.W.L.R (Pt. 450) 589
2. Egbe v Alhaji (1990) 1 N.W.L.R (Pt. 450) 546
3. Oyekan v Akinterinwa (1996) 7 N.W.L.R (Pt. 459) 128.

In the event, we shall adopt Issues 1 and 2 as formulated by the appellantôs counsel with some modifications, as these two issues sufficiently cover the grounds of appeal. They are as follows:

1. Whether having regard to the claim filed in this case, which clearly discloses the capacity in which the appellant instituted this case and the evidence adduced so far, the trial court was right when it held in its majority decision that the Appellant lacks the **locus standi** to institute the action and thereby struck out same with ₦1,500.00 costs in favour of the respondent (This issue covers original ground 1, and additional grounds 1, 2 and 3)

2. Whether the trial court was right when it ordered that the sum of ₦1,500.00 costs awarded against the appellant be paid within 7 days from the date of its ruling in an interlocutory matter, where the partyôs right of appeal against such decision subsists in law to the 14th day after such ruling. (This issue covers original ground 3).

Arguing issue one, the learned counsel for the appellant submitted that the President and the 2nd member of the trial District Customary Court, erred in law when they ruled that the appellant lacked the **locus standi** to institute this action against the respondent. He maintained that **locus standi** is the right or competence to initiate proceedings in a court of law for redress or assertion of a right enforceable at law. He cited the cases of: Attorney General of Kaduna State v Hassan (1985) 2 N.W.L.R. (pt. 453) 496 and Adefulu v Oyesile (1989) N.W.L.R (pt.122) 377.

He submitted further that in order to ascertain whether a plaintiff has **locus standi,** the claim should be looked at. He referred the court to the following authorities:

1. Adesokan v Adeforolu (1997) 3 SCNJ 1; and
2. Ajilowuru v Disu (200^) 10 MJSC 78.

Counsel maintained that from the claim of the appellant, together with the evidence adduced at the trial, it was clear that the appellant instituted the suit in a representative capacity for herself and the Oviosun family of Avbiosi New Site, Iuleha. He referred the Court to the relevant pieces of evidence in the records.

The learned counsel argued that from the available evidence and the claim, the appellant had sufficiently established her personal interest and the common interest with the other members of the Oviosun family. He submitted that the issue of **locus standi** does not depend on the success or the merit of the case but on whether the plaintiff has sufficient interest or legal right in the subject matter of the dispute. He cited the cases of Abraham Adesanya v President of the Federal Republic of Nigeria (1981) 2 NCLR 358 and Ighiwiyisi v Uzoma (2005) 4 F.R.I rr 1, 2 & 3.

In his further submission, the learned counsel maintained that a person has a right to protect his family interest or title to a property and can sue for himself and on behalf of the family in a representative capacity. He cited the following cases:

1. Ladejobi v Oguntayo (2004) 121 L.R.C.N. 4912;
2. Sogunle v Akerele (1967) N.M.L.R 58;

3. N.T.A. v Anigbo (1972) 5 S.C. 156;
4. Melifonwu v Egbuji (1982) 9 S.C. 145; and
5. Atanda v Olanrewaju (1988) 4 N.W. L.R (pt. 89) 394

Counsel contended that from the records, there is no evidence of any opposition to deprive the appellant from representing the Oviosun family, and that by insisting on the production of a letter of authority from the family, the trial court went into the realm of legal technicalities. He maintained that the present trend is to shift from legal technicality to substantial justice. He referred to section 55 of the Customary Courts Edict of 1984 of Bendel State, now applicable to Edo State, which enjoins the court to do substantial justice in all trials. He further submitted that being a customary court, it was not necessary to tender a letter of authority to prosecute or defend in a representative capacity. He cited in support the case of Apala v Ogbeki & Others (1955/56) (Pt. 3) W.R.L.R 73.

In a rather brief response to the appellants arguments under issue one, the learned counsel for the respondent submitted that **locus standi** can be raised at any stage of the proceedings and once raised must be determined first as it is an issue relating to jurisdiction. He cited the following cases in support:

1. Arowolo v Akapo (2003) 8 N.W.L.R. (Pt. 823) 451;
2. Agwaramgbo v U.B.N. Plc. (2001) 4 N.W.L.R. (Pt. 702)6

Counsel submitted that the trial court was therefore right when it first considered the issue of **locus standi** and ruled on it. He maintained that the question of whether the judgment was right or wrong is a separate issue to be ascertained from the proceedings.

Finally, counsel referred the court to some portions of the record of proceedings where the appellantôs counsel promised to send his authorities to the court but failed to do so. He maintained that the trial court being a District Customary Court manned by laymen, their judgments should not be considered with the strict rules of practice and evidence.

We have carefully considered the submissions of both counsel on this issue. Essentially, the issue is on whether the appellant had the **locus standi** to institute the suit. It is settled law that the issue of **locus standi**, being a fundamental one, should be determined at the earliest stage of the proceedings and in deciding it, the court should look at the plaintiffôs claim. See the following cases:

1. Nwosu v Ofor (1991) 2 N.W.L.R (Pt. 173) 275
2. Busari v Oseni (1992) 4 N.W.L.R (Pt. 237) 557
3. Thomas v Most Rev. Olufosoye (1996) 1 N.W.L.R (Pt.18) 669

Upon a careful perusal of the claim at page 1 of the record of proceedings, it is evident that the appellant instituted the suit, ñfor herself and on behalf of Oviosun family of Avbiosi New Site, Iuleha.

Furthermore, the appellant in evidence before the court categorically stated as follows:

> ñI sued the defendant to this court. I sued him because he trespassed into our land and the family asked me to sue him because I am the person at homeò

Thus, the capacity in which the appellant instituted the action and her interest in the subject matter of the suit were clearly disclosed. It is pertinent to note that there was no contrary evidence on the record controverting or challenging the authority of the appellant to institute the suit on behalf of her family.

The rule as to representative action has been described as a rule of mere convenience and so it ought not to be applied as rigid but as a flexible tool of convenience in the administration of justice. See the cases of Anatogu & Ors v A.G. of East Central State of Nigeria (1976) 11 S.C. 109 and Obiode & Ors v Orewere & Ors (1982) 1 All N.L. R. (Pt. 1) 12.

Moreover, it is settled law that in order to ascertain the capacity of a party to initiate or defend an action in a customary court, the whole proceedings should be looked at and considered with greater latitude and broad interpretation being placed on the proceedings and the judgment in that court. See the cases of: Ajayi v Aina, The Oba of Ibese 16 N.L.R. 67 and Ajuwon v Adeoti (1990) 2 N.W.L.R. (Pt. 132) 271.

Applying the foregoing principles, it is quite evident that the trial court erred in law when in its majority decision, it held that the appellant lacked the **locus standi** to institute the suit, in the face of the claim and the evidence adduced so far, which clearly disclosed the capacity in which the appellant instituted the action.

Furthermore, the court held that the failure of the appellant to tender the letter of authority which she alleged was in the possession of her lawyer, was fatal to her case. This was a clear error of law and a misdirection on the part of the court. In the first place, it is settled law that documents are unknown to customary law. See the following cases on the point:

1. Ajadi v Olarenwaju (1969) 1 All N.L.R. 382;
2. Folarin v Durojaiye (1988) 1 N.W.L.R. (Pt. 70) 342;
3. Egwu v Egwu & Ors (1995) 5 N.W.L.R (Pt. 396) 351, 493.

Secondly, the appellant had not closed her case when the trial court brought the trial to an abrupt end through its ruling on **locus standi.** But for the action of the court, the appellant was still at liberty to tender the said letter of authority before closing her case. The appellant was thus foreclosed by the court.

In the event we hold that the majority verdict of the trial court amounted to a travesty of justice. The court was clearly wrong when it held

that the appellant lacked the **locus standi** to institute the said action. We therefore resolve Issue one in the negative.

We are of the view that the resolution of Issue one is sufficient to determine this appeal. Issue two which borders on the award of costs is merely ancillary to Issue one. It will amount to a mere academic exercise to embark on a consideration of the second issue.

Having resolved Issue one in favour of the appellant, we hold that this appeal succeeds.

Consequently, the judgment of the Uzebba District Customary Court delivered on the 5th day of May, 2008 is hereby set aside together with its consequential orders.

As the proceedings were terminated abruptly, the appropriate order to make is one for a retrial. We hereby order that Suit No. UDCC/7/2007 be remitted to the Owan West Area Customary Court, Sabongidda-Ora for hearing and determination **de novo.**

We make no order as to costs.

HON. JUSTICE P. O. ISIBOR

HON. JUSTICE T.U. OBOH

HON. JUSTICE P. A. AKHIHIERO

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