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

ON MONDAY, THE 24TH DAY OF OCTOBER, 2011

BEFORE THEIR LORDSHIPS

PETER OSARETINMWEN ISIBOR	- - - -	JUDGE (PRESIDED)
MARY NEKPEN ASEMOTA	- - - -	JUDGE
TIMOTHY UKPEBOR OBOH	- - - -	JUDGE
PETER AKHIMIE AKHIHIERO	- - - -	JUDGE
OHIMAI OVBIAGELE	- - - -	JUDGE

APPEAL NO.CCA/18A/2008

B E T W E E N:

MR. SYLVESTER AJEYEMI ODIDIGUN .... APPELLANT
(For himself and on behalf of
Lawrence Odidigun's family of Ekor)

AND

1. MR. ANTHONY LAWANI
2. CLEMENT JONATHAN
3. MR. UGUOFO OBAMILA
4. CHIEF LAWRENCE ALUFA
(Sued for and on behalf of
Ekor Community)

.... RESPONDENTS

J U D G M E N T
DELIVERED BY PETER AKHIMIE AKHIHIERO (JCCA)

This is an appeal against the judgment of the Akoko-Edo Area Customary Court, holden at Igarra, delivered on the 10th day of April, 2008, in Suit No. AEACCI/44/2005.

In the said suit, the appellant (as plaintiff) sued for himself and on behalf of the Lawrence Odidigun family of Ekor village claiming as follows:

"1 The sum of N500,000.00 (five hundred thousand naira) being the total amount, price or value of plaintiff's two hundred palm trees felled or destroyed by 1st to 3rd defendants at the plaintiff's plantation at Azor farm land in Ekor at ₦2,500.00 (two thousand, five hundred naira) per palm tree.

2. An order of perpetual injunction restraining the defendants, their servants, agents and privies from entering into the plaintiff's plantation at Azor farm land in Ekor.

3. The sum of ₦50,000.00 (fifty thousand naira) being general damages suffered by the plaintiff as a result of the said acts of the 1st to 3rd defendants."

Succinctly put, the appellant's case at the trial court was that his deceased father, a native of Ekor in Edo State, was the owner of a plantation called Azor plantation at Ekor village. His father had some cash crops on the plantation which he maintained during his life time. Sometime ago, one Kpakamudi Balogun entered the land on the ground that the Ekor community gave him permission to do so. The matter was litigated upon at the Ibillo District Customary Court and the judgment was in favour of the appellant's father. The certified true copy of the judgment was admitted as Exhibit "B" at the trial.

Upon the demise of his father in 1993, the appellant and his siblings inherited the plantation and have been in possession ever since. While in possession, the 1st to

3rd respondents encroached upon the plantation and destroyed 200 palm trees valued at ₦500,000.00 (five hundred thousand naira). The appellant sued the 1st to 3rd respondents for the said trespass and the 4th respondent obtained the leave of the trial court to join and defend the suit for and on behalf of the Ekor community.

On the other hand, the respondents maintained that the appellant's father and his family are not natives of Ekor but Lampese. They posited that the palm trees in question belonged to Ekor community and that they cut them down on the instructions of the community head for use during a traditional festival. They asserted that the Azor farm land belongs to the Ekor community and was reserved for future development.

During the trial, the respondents tendered as Exhibit "C", a judgment of the Western Region High Court sitting at Benin City, delivered in 1962, wherein the Ekor community sued in a representative capacity against the Ibillo community. They also tendered as Exhibit "D", another judgment delivered by the Igarra High Court on 15th of December, 2004, wherein the Ibillo community were declared to be the tenants of Ekor community on the said Azor farmland. The respondents also tendered Exhibit "E", a survey plan of the entire land. The respondents did not counter-claim at the trial.

At the conclusion of the trial, the court gave its judgment dismissing the appellant's claim and made a forfeiture order against the appellant in respect of the disputed land.

Dissatisfied with the judgment of the trial court, the appellant filed a notice of appeal containing the omnibus ground of appeal. Subsequently, with the leave of this Court, seven additional grounds were filed. All the grounds of appeal bereft of their particulars are reproduced and re-numbered as follows:

"GROUND 1

That the judgment is overwhelmingly against the weight of evidence.

GROUND 2

The lower court erred in law and occasioned a miscarriage of justice in:

(a) Entering judgment in favour of the defendants/respondents who did not institute the suit.

(b) Granting reliefs under the suit to the defendants/respondents who did not claim for any relief by way of counter claim; and

(c) Refusing appellant's claim for the palm trees destroyed while holding that the plaintiff's claim for possession failed when the plaintiff did not make any claim for possession.

GROUND 3

The lower court erred in law and misdirected itself which occasioned a miscarriage of justice in holding that the Ibiillo District Customary Court has no jurisdiction in declaration of title to land and that the cause of action that led to the suit in Exhibit "B" was stealing of palm fruits and not ownership of land which error weighed heavily upon its mind to dismiss appellant's suit.

GROUND 4

The lower court erred in law in re-trying the issue of the nativity of the appellant's father, the same issue having been tried before by a competent court and same having been caught by issue estoppel (res

judicata) and thereby wrongly holding that the appellant is not a native of Ekor village.

GROUND 5

The lower court erred in law and misdirected itself in respect of Exhibits 'B', 'C' and 'D', when it held that exhibits 'C' and 'D' being High Court judgments are superior to Exhibit 'B' which is Ibillo District Customary Court judgment and this occasioned a miscarriage of justice.

GROUND 6

The lower court erred in law and misdirected itself which occasioned a miscarriage of justice when it stated that the plaintiff/appellant should claim for declaration of title to the land first before he can claim for damages and injunction which error weighed heavily on the mind of the court and misled it to dismiss the appellant's suit.

GROUND 7

The lower court erred in law in its finding that the appellant could not describe the land to the extent that any surveyor can produce a survey plan of the land in dispute when in fact the land in dispute is well known to the parties in addition to the fact that the appellant established the identity of the land.

GROUND 8

The lower court erred in law in dismissing the appellant's suit when the appellant was entitled to judgment on the preponderance of evidence."

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

In the appellant's brief of argument, the learned counsel for the appellant, R. O. Ashava Esq., distilled seven issues for determination as follows:

"1. Was the lower court right in:

(a) Entering judgment in favour of the respondents who did not claim for any action;

(b) Granting the relief of forfeiture to the respondents who did not claim for any relief by way of counter-claim;

(c) Holding that the plaintiff's claim for possession failed when the plaintiff (appellant) did not make any claim for possession; and

(d) Refusing appellant's claim for the palm trees destroyed.

2. Was the lower court in error in holding that the Ibillo District Customary Court has no jurisdiction in declaration of title to land and that the cause of action that led to the suit in exhibit "B" was stealing palm fruits and not ownership of land, and if so, whether the error weighed heavily upon its mind to dismiss the appellant's suit.

3. Whether the issue of the appellant's father being a native of Ekor constitutes an issue estoppel (res judicata) having been decided by a court of competent jurisdiction such that the retrial of same by the lower court occasioned a miscarriage of justice and whether on the other hand the appellant established that he is a native of Ekor.

4. Whether the lower court erroneously applied the law to Exhibits "B", "C" and "D" and thereby came to a wrong conclusion, which occasioned a miscarriage of justice.

5. Was the lower court right in stating that the appellant should claim for declaration of title to land first before he can claim for damages and injunction.

6. Whether the lower court was right in holding that the appellant could not describe the land in dispute.

7. Giving the totality of the evidence led, whether the appellant was entitled to judgment upon his claims"

In his brief of argument, the learned counsel for the respondents, A.A. Atemoagbo Esq., framed two issues for determination as follows:

"1. Whether the trial court properly evaluated the evidence (oral and documentary) of the parties, before dismissing the Plaintiff/Appellant's case?

2. Whether the finding that the Plaintiff/Appellant's father was a tenant to Ekor Community and the consequential order made by the trial court directing the Plaintiff/Appellant not to enter the disputed land when the Defendants/Respondents did not counter-claim, invalidated the entire judgment of the trial court?"

In the course of the exchange of briefs, the respondents' counsel filed a Notice of Preliminary Objection to this appeal, dated the 21st day of March, 2011. The grounds of objection are:

1. That the Notice of Appeal, the additional grounds of appeal and the appellant's brief of argument are incurably defective and therefore has robbed this Court of the jurisdiction to hear and determine the appeal; and

2. That the appellant unilaterally altered the parties in the aforesaid processes without the leave of court.

The preliminary objections relate to the issue of the jurisdiction of this Court to determine this appeal. This is a fundamental point and it is expedient to consider it first. Both learned counsel incorporated their arguments on the preliminary objections in their respective briefs of arguments.

Arguing the objections, the learned counsel for the respondents submitted that

the Notice of Appeal is incurably defective as it does not disclose who are the respondents to this appeal. He referred the Court to the Notice of Appeal at page 50 of the records.

Counsel submitted that where the Notice of Appeal is defective, the court should strike it out. Furthermore, he maintained that the grounds of appeal filed with the defective notice are equally incompetent. He cited the following cases:

(i) Udoete v Heil & Anor (2003) F.W.L.R. (Pt. 143) 362 at 364, ratio 5; and

(ii) Wema Bank Plc v Awotunde (2010) 25 W.R.N. 142 at 147, ratio 8.

Arguing further, the learned counsel submitted that it is settled law that no party to a suit can unilaterally alter the parties in the suit on appeal. According to him, alteration of the parties must be with the leave of the court. He maintained that the appellant's counsel deliberately removed the names of the respondents in the Notice of Appeal.

Counsel argued that in the additional grounds of appeal and the appellant's brief of argument, the appellant's counsel omitted the capacity in which the appellant instituted the suit. He maintained that this omission rendered all the processes pertaining to the appeal incurably defective. He relied on the provisions of Order 7, Rule 3 (1) of the Customary Court of Appeal Rules 2000 and urged the Court to strike out the appeal.

Responding to the preliminary objections, the learned counsel for the appellant submitted that the Notice of Appeal is valid and in compliance with Order 7 Rule 1 of

the Customary Court of Appeal Rules, 2000. He maintained that the Notice of Appeal filed by the appellant complied with Form E (i) of the Rules in all its details. He explained that it stated the suit number at the lower court which refers to the suit between the appellant and the respondents and submitted that it is unreasonable and absurd to think that the appeal is against some of the parties and not the other parties.

Counsel further stated that the respondents and their counsel appeared before this Court without any objection. He submitted that assuming, without conceding that there was such an error on the Notice of Appeal, the respondents by appearing before this Court and having taken steps to participate in the appeal, are deemed to have waived their rights to object. He accordingly urged the Court to dismiss the objection.

We have carefully considered the arguments of counsel on the preliminary objections on the competence of this appeal. The question whether a proper Notice of Appeal has been filed against the judgment of the lower court is a matter which touches on the jurisdiction of this Court.

Order 7 Rule 3 (1) of the Customary Court of Appeal Rules 2000, provides as follows: "the Notice of Appeal shall set out the reference number of the proceedings in which the decision complained of was given, the names of the parties, the date of such decision and the grounds of appeal in full and the reliefs sought." A cursory examination of the Notice of Appeal at page 50 of the records will reveal an obvious

defect. While the appellant is listed thereon as a party, the respondents are not listed. This is the first ground of objection of the respondents' counsel. According to him, this defect is fatal to the entire appeal. The appellant's counsel has argued otherwise.

What then is the position of the law in relation to such a defect on the face of the Notice of Appeal? The present position of the law is that where a Notice of Appeal is wrongly headed, the court should not strike out the appeal but should, in the interest of justice, hear it on its merits. See the following cases on the point: Onwunafi v The State (1982) 9 S.C. 95; Maiwa v Abdu (1986) 1 N.M.L.R 437; and Ohuta v Okigbo (1995) 4 NWLR (Pt. 389) 353 at 368 – 369.

Furthermore, in the case of Oruobu v Anekue & Ors (1997) 5 NWLR (Pt. 506) 618, where the appellant's name was not listed in the Notice of Appeal as a party directly affected by the appeal, the Court of Appeal held that the mistake was an irregularity which should not affect the hearing of the appeal on its merit.

In the light of the foregoing decisions, we hold that the first ground of the preliminary objection is not valid. The failure to list the names of the respondents amounts to an irregularity which cannot affect the hearing of the appeal on its merits.

The second ground of objection is that the appellant unilaterally altered the parties in the subsequent court processes without the leave of Court. Here again, the problem is that of the failure to describe the capacity in which the appellant filed the suit.

We agree with the learned counsel for the appellant that this error is not fatal to this appeal. Where an error does not occasion a miscarriage of justice and where the parties have not been misled by the said error, an appellate court will regard such an error as a mere irregularity which cannot vitiate the appeal. See the cases of Agu v NICON (2000) 1 NWLR (Pt. 677) 187 at 193 – 194 and Maska v Ibrahim (1999) 4 NWLR (Pt. 599) 415 at 421.

Having overruled the preliminary objections in view of what we have said above, they are hereby dismissed.

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

Upon a careful consideration of the issues as formulated by counsel, we are of the view that the issues as identified by the appellant's counsel, appear more germane to the determination of this appeal. However, we observed that some of the said issues are rather verbose. In the event, we shall adopt the issues with some modifications as follows:

1. Whether the lower court was right when it granted the relief of forfeiture to the respondents who did not file any claim or counter-claim for the said relief. (Ground 2)
2. Whether the lower court was right when it held that the Ibillo District Customary Court has no jurisdiction in respect of declaration of title to land. (Ground 3)

3. Whether the lower court was right in stating that the appellant should claim for declaration of title to the land first, before claiming for damages and injunction. (Ground 6)
4. Whether the lower court was right in holding that the appellant could not describe the land in dispute. (Ground 7)
5. Whether in view of the totality of the evidence, the appellant was entitled to judgment upon his claims. (Grounds 1, 4, 5 & 8)

Arguing issue one, the learned counsel for the appellant submitted that it is trite law that a party who did not institute an action cannot obtain any relief from the court. He maintained that the court not being a Father Christmas, cannot grant to a party a relief not claimed. He submitted that the relief of forfeiture granted to the respondents was clearly erroneous on this ground. He maintained that this error occasioned a miscarriage of justice.

Responding to this issue, the respondents' counsel submitted that once a plaintiff's case is dismissed, he no longer has a right to assert on the land. He maintained that whoever is in possession at that point in time remains in possession thereafter.

Counsel further submitted that it is not every mistake or error in a judgment that will result in the appeal being allowed. He argued that it is only when it is substantial or has occasioned a miscarriage of justice that the appellate court can interfere with such findings. He cited the following cases to butress his point: Ibbuluya v Dikibo (2011) Vol. 3 W.R.N. page 1, ratio 3; and United Bank for Africa Ltd

v Mrs. Ngozi Achoru (1990) 6 NWLR (Pt. 156) 254 at 270.

We have carefully considered the arguments of counsel under this issue. It is trite law that a party cannot be awarded a relief not claimed or sought by way of a counter-claim. See the following cases on the point: Nnaji v Ede (1996) 8 NWLR (Pt. 466) 332; Onu v Agu (1996) 1 NWLR (Pt. 451), 652; and Akinbobola v Plisson Fisko Nig. Ltd (1991) 1 NWLR (Pt. 167) 270 at 278.

At the lower court, the respondents did not file any counter-claim for the relief of forfeiture. For inexplicable reasons, the court granted them the relief. This was clearly erroneous in law as the court except for consequential reasons cannot grant a relief not sought. We therefore hold that the trial court reached a wrong verdict when it granted the relief of forfeiture to the respondents who did not seek such relief. Issue one is accordingly resolved in favour of the appellant.

Arguing issue two, the learned counsel for the appellant submitted that the lower court was in error when it held that the Ibillo District Customary Court has no jurisdiction in respect of declaration of title to land. Counsel submitted that by virtue of section 20 (1) of the Customary Courts Edict 1984, particularly in the First Schedule to the Edict, all District Customary Courts in Edo State are vested with the jurisdiction to entertain matters on declaration of title to land.

Surprisingly, going through the entire gamut of the respondents' brief of argument, there was no response to the arguments raised by the appellant in respect of issue two. The respondents are deemed to have conceded the point

raised by the appellant. See the case of Okongwu v N.N.P.C. (1989) 4 NWLR (Pt. 115) 296 at 309.

This issue raises a salient point of law. Whether the trial District Customary court has the jurisdiction to entertain matters on declaration of title to land. It is unfortunate that such a straight forward matter should arise on appeal. It is more unfortunate that the President of an Area Customary Court is ignorant of the fact that a District Customary Court is seised with the jurisdiction to determine such matters by virtue of item 1 of the First Schedule made pursuant to section 20 (1) of the Customary Courts Edict 1984.

We therefore agree with the submission of the learned counsel for the appellant that the Ibillo District Customary Court (and we hereby add, all Customary Courts in Edo State) is vested with jurisdiction to entertain matters relating to declaration of title to land in rural areas.

We accordingly resolve issue two in favour of the appellant.

Arguing issue three, the learned counsel for the appellant submitted that the lower court was wrong when it held that the appellant should claim for declaration of title to the land before claiming for damages and injunction. He submitted that this error misled the court to wrongly dismiss the suit. Counsel submitted further that there are several instances in law when a party can claim for damages and injunction over land without claiming for declaration of title to the land. He cited the instance of when a party is in lawful possession as a tenant. He posited that such a

tenant can maintain an action for trespass, damages and injunction without claiming for declaration of title to the land. He referred this Court to the case of Owhonda v Ekpechi (2003) 113 LRCN 2525 ratio 5.

Counsel further submitted that the appellant is in lawful possession of the land and claimed ownership of the land. He argued that the appellant led evidence of possession from his father's life time till the time of filing the action. He pointed out that the respondents did not lead any evidence to dislodge the appellant's proof of possession. He urged the Court to resolve this issue in their favour.

It is pertinent to observe once again that the respondents' counsel did not address this issue as canvassed by the appellant.

The point must be made at this stage that at the lower court, the appellant did not make any claim for a declaration of title to the land in dispute. His claims were for damages for trespass and for an order of perpetual injunction against the respondents.

It is settled law that a claim for trespass to land is rooted in exclusive possession and all that a plaintiff needs to prove is that he has exclusive possession of the land or that he has a right to such possession.

The absence of a claim for declaration of title to land cannot defeat a claim for damages for trespass. See the following cases on the point: Akano v Okunade (1978) 3 S.C. 129 at 137; Oluwi v Eniola (1967) NMLR 339; and Ekretsu & Anor v Oyobebere & Ors (1992) 9 NWLR (Pt. 266) 438 at 455.

Also in the case of Olaloye v Balogun (1990) 5 NWLR (Pt. 148) 24 the Supreme Court held that where a plaintiff fails to prove a claim for a declaration of title to land, it does not necessarily follow that the claim for damages and for injunction must fail.

From the totality of the evidence adduced at the trial, it is an incontrovertible fact that the appellant has been in possession of the disputed land. The trial court found as a fact that the appellant and his family are customary tenants. The court ***suo motu*** made an order of forfeiture of the land against the appellant. The court went further to introduce the issue of declaration of title to land which was never part of the claim before the court. This is where the trial court confused the issues at stake and this occasioned a miscarriage of justice.

From the foregoing, we hold that the trial court erred in law when it held that the appellant should have claimed for declaration of title to the land before claiming for damages and injunction. In the event, we resolve issue three in favour of the appellant.

Arguing issue four, the appellant's counsel submitted that the trial court was wrong when it held that the appellant and his witness could not describe the land in dispute. He maintained that the appellant led cogent and uncontroverted evidence to identify the land in dispute. Furthermore, counsel maintained that the land in dispute is known to both parties.

Responding to this issue, the learned counsel for the respondents referred to some pieces of evidence adduced at the trial and submitted that the description of the land by the appellant was not precise enough to enable a surveyor to prepare a survey plan based solely on that description. This he claimed is the yardstick to determine proper description of the land. For this proposition, he cited the case of Ekpemupolo &Ors v Edremoda (2009) Vol. 32 WRN 1 at 6-7 ratio 3 & 6.

Furthermore, the respondents' counsel submitted that at the trial, the appellant failed to call any of his boundarymen to establish the boundaries of the land. Also, he pointed out that the appellant claimed that he had some Igbira farmers on the land but he failed to call any of them as a witness.

We have considered the arguments on this issue. It is settled law that the burden of proving the identity of the land in dispute is on the plaintiff but the plaintiff will be relieved of that burden if the identity of the land is not in dispute. See the cases of Fatunde v Onwonmanam (1990) 2 NWLR (Pt. 132) 222 and Ologunleko v Ikuemelo (1993) 2 NWLR (Pt. 273) 16 at 25.

We have gone through the evidence adduced by both parties, together with the addresses of their counsel at the trial and we are satisfied that the identity of the land was never in dispute at the trial. The land in dispute was known to both parties.

The issue of description of the land in dispute was introduced from nowhere by the trial court in its judgment. There was no basis whatsoever for the trial court's

finding that the appellant and his witness could not describe the land in dispute to enable a surveyor produce a survey plan of the land in dispute.

In the event, we resolve issue four in favour of the appellant.

Coming to issue five, in a nutshell, counsel for the appellant submitted that given the totality of the evidence led at the trial, the appellant is entitled to judgment on his claims. The learned counsel made copious references to the evidence led at the trial and urged the Court to resolve this issue in favour of the appellant.

In his brief of argument, the learned counsel for the respondents submitted that the evaluation of evidence is the exclusive preserve of the trial court. For this proposition he referred to the dictum of Musdapher JSC in Agbi v Ogbeh (2006) 7 M.J.S.C. 1 at 6 ratio 5.

Counsel further submitted that the trial court properly evaluated the evidence of the parties before giving its judgment in favour of the respondents. Counsel made several references to the evaluation of the evidence of the trial court and urged the Court to resolve the issue in favour of the respondents.

We have examined the arguments of counsel on this issue.

Generally, it is the primary duty of the trial court to evaluate the evidence and make findings of fact. However, when a trial court fails to evaluate properly the evidence before it, or makes wrong inferences from admitted facts, an appellate court can interfere by making the proper findings of fact justified by the evidence.

See the following cases on the point: Chief Patrick Abusomwan v Mercantile Bank of Nigeria Ltd (1987) 3 NWLR (Pt. 60) 196 at 207 – 208; Woluchem v Gudi (1981) 5 S.C. 291 at 309; and Ogbokwelu &Ors v Umeanafunkwa (1994) 4 NWLR (Pt. 341) 676 at 697.

In the course of this judgment, we have highlighted some of the lapses on the part of the trial court on the evaluation of the evidence adduced at the trial.

We find that the appellant was the party in possession and the respondents trespassed on the land in his possession and destroyed his crops. This evidence was not substantially challenged at the trial. The appellant is therefore entitled to judgment based on the totality of the evidence.

We accordingly resolve issue five in favour of the appellant.

Having resolved all the issues in favour of the appellant, we hold that this appeal succeeds.

Consequently, the judgment of the Akoko-Edo Area Customary Court delivered on the 10th day of April, 2008 in respect of this case is hereby set aside together with its consequential orders. In its place, we make the following orders:

1. We award the sum of N500,000.00 (five hundred thousand naira) as special damages to the appellant, for the destruction of his two hundred palm trees valued at N2,500.00 (two thousand, five hundred naira) per palm tree, at the Azor farm land in Ekor village.
2. An order of perpetual injunction restraining the respondents, their servants, agents and privies from entering the appellant's plantation at

Azor farm land in Ekor.

3. We award the sum of ₦10,000.00 (ten thousand naira) as general damages to the appellant for the acts of the 1st to 3rd respondents.

Costs assessed at the sum of N3,000.00 (three thousand naira) is to be paid by the respondents in favour of the appellant.

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HON. JUSTICE PETER OSARETINMWEN ISIBOR

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HON. JUSTICE MARY NEKPEN ASEMOTA

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HON. JUSTICE TIMOTHY UKPEBOR OBOH

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HON. JUSTICE PETER AKHIMIE AKHIHIERO

_____
HON. JUSTICE OHIMAI OVBIAGELE

R. O. Ashava Esq. … … … Counsel for the appellant

A. A. Atemoagbo Esq. … … … Counsel for the respondents