IN THE CUSTOMARY COURT OF APPEAL
EDO STATE OF NIGERIA
HOLDEN AT BENIN CITY

ON TUESDAY, THE 3RD DAY OF FEBRUARY, 2009

BEFORE THEIR LORDSHIPS

PETER OSARETINMWEN ISIBOR - JUDGE (PRESIDED)

MARY NEKPEN ASEMOTA (MRS) - JUDGE

PETER AKHIMIE AKHIHIERO - JUDGE

APPEAL NO. CCA/28A/2006

B E T W E E N

1. CHIEF DICKSON EVBADAZE
   (the Enogie of Iyekeze/Otobaye)
2. EMMANUEL ACHA
3. RAPHAEL EBOSE
   (for themselves and on behalf of Otobaye Community, Otobaye except the Respondents)

é é APPELLANTS

A N D

1. BENEDO OGISO
2. FESTUS OGISO

é é é é é é RESPONDENTS

J U D G M E N T
DELIVERED BY MARY NEKPEN ASEMOTA (MRS) JCCA

This is an appeal against the judgment of the Orhionmwon Area Customary Court, Abudu delivered on the 28th day of November, 2005. By a further amended claim dated the 15th day of August, 2001, the appellants (as plaintiffs) claimed against the respondents (as defendants) as follows:

ñ1. The plaintiffs are representatives of Otobaye Community within jurisdiction and bring this action in a representative capacity.

2. The defendants reside at Otobaye village within jurisdiction and are sued jointly and severally.

3. The plaintiffs are the owners and in possession of a parcel of land lying and situate at Otobaye village within jurisdiction.

4. In or about the month of January, 1999 the defendants broke and entered into the communal land, without the consent or authority of the plaintiffs and committed wanton acts of trespass thereon.

5. Wherefore the plaintiffs bring this action against the defendants claiming as follows:

(i) Declaration that the plaintiffs are entitled to the customary right of occupancy of all that piece of land lying and situate at Otobaye village.

(ii) One hundred thousand (₦100,000.00) being general damages for trespass.

(iii) Perpetual injunction restraining the defendants, their agents, servants or privies from committing further acts of trespass on the said land.ò

The appellantsô case at the trial court was that the land in dispute was communal land, having become so after the Supreme Courtôs judgment in a

dispute between the Enogie of Evbuoghae and Enogie of Iyekeze was decided in favour of the latter. One Mr. Igbinigie Ode, Mr. Erharuyi, Mr. Jegbefumwen Oke, Mr. Ughadije and Mr. Egharevba were farming on the land before it became communal land, after which it was demarcated into two parts, a part was used to establish a school as well as a market while the other part was left for allocation for farming to members of the community on request. The land in dispute is the old settlement of the 1st appellantôs grandfather, Egharevba Erumwunse and Chief Ode Egharevba.

The Ika immigrants came to Otobaye and were given land for farming purposes. Sometime in 1999, the respondents who are Ika immigrants, entered the land without the appellantsô consent to erect a building, hence this action.

The case for the respondents is that they are settlers from Abavo and the land in dispute was deforested by their father, an Ika immigrant who came to Otobaye fifteen years before the eclipse of the sun in 1947. Their father and some other Ika immigrants founded Otobaye, and planted rubber trees on the land and thereafter used it for farming purposes. The community approached their father to give them a portion of the land to establish a school and the community was obliged. Attempts by the community to take over the other portion of the land were rebuffed by them. The case in the Supreme Court between Otobaye and Evbokabua is not in respect of the land in dispute in this case.

After a review of the evidence, in a considered judgment, the trial court dismissed the appellantsô case in its entirety and awarded five hundred naira as costs in favour of the respondents.

Dissatisfied with the judgment, the appellants filed a notice of appeal with two grounds of appeal. With leave of this Court, the appellants amended their notice of appeal and filed additional grounds of appeal

All the grounds of appeal and their particulars are reproduced below as follows:

ñ1. The judgment is against the weight of evidence.

2. The trial Area Customary Court erred in law when it held that the plaintiff did not prove the boundaries of the land satisfactorily.

PARTICULARS OF ERROR

(a) The Plaintiffs described the land and gave convincing evidence of the boundaries.

(b) The identity of the land in dispute was not in doubt.

(c) Both parties know the land in dispute.

(d) The Court did not visit the locus to enable it clear any doubt about the identity of the land.

(e) The court itself had ruled on the identity of the land when it made orders maintaining the status quo during the interlocutory

application and there was no appeal challenging the ruling and the findings of fact therein.

3. The trial Area Customary Court erred in law when it held that the plaintiffs have not been able to establish facts in recent years pointing to exclusive acts of possession.

PARTICULARS OF ERROR

i. The trial court admitted the crucial fact that the land in dispute became communal land in 1972 when the suit between the Enogie of Iyeke-Eze and Enogie of Evbuoghae went in favour of Enogie of Iyeke-Eze who was the 1st plaintiff in this suit.

ii. The evidence of the 2nd plaintiff to the effect that after the Supreme Court judgment the land was divided into two parts to wit: some parts for market and school while other parts were reserved for farming process were never challenged during cross examination.

iii. The defendants never challenged the salient fact that they were invited by the community and the 2nd defendant showed up when summoned by the community.

iv. The court cleverly refused to comment on these unchallenged evidence as to how the land was founded till date.

v. While the 1st Defendant who migrated to the land stated that his father and himself deforested the land, he however admitted that the land is a Bini land and it was given to them by Enogie of Ewokaba and the said Enogie nor any of his representatives were never called to testify.

vi. The defendant never called any of his boundary men that he mentioned while testifying.

vii. The evidence of the 1st plaintiff who testified as the Enogie of Iyeke-Eze of Otobaye to the effect that the land belong to Iyeke-Eze Otobaye community was never challenged by defendantsô counsel.

viii. The defendants were summoned by the community after they trespassed on the land and only the 2nd defendant appeared and he refused to give evidence to deny or affirm same.

ix. P.W.1 whom court claimed that he stated did not know who founded the land in dispute never said so but said he never knew who deforested the land.

x. 1st Plaintiff clearly mentioned the person who founded the land and that piece of evidence was unchallenged but the trial court overlooked the said evidence for no reasons whatsoever.

4. The trial judge erred in law when she held that the mere fact that Iyeke-Eze/Otobaye Community litigated upon and got judgment over the land in dispute did not make privately owned land in Iyeke-Eze Otobaye communal property.

PARTICULARS OF ERROR

(i) There is evidence on record that the lower court accepted the fact that the people of Iyeke-Eze Otobaye won the case in Supreme Court which led to the land in dispute becoming communal land.

(ii) The defendants did not challenge the evidence of the plaintiffs that the land in dispute became communal land after the judgment at the Supreme Court in 1972 was delivered.

(iii) The lower court raised the issue suo motu in favour of the defendants without calling on counsel to the plaintiffs to address the issue thus compromising the case of the plaintiffs.

5. The lower court erred in law when it dismissed the claim for damages for trespass and injunction sought by the plaintiffs as not having been proved on the balance of probability.

PARTICULARS OF ERROR

i) There is unchallenged evidence that the defendants cleared the land and started building on it as stated by P.W. 1 and 2nd

plaintiff.

ii) The defendants did not deny the fact that they encroached on the land and started building on the land.

iii) Trespass is actionable per se and this fact was completely forgotten by the lower court.

iv) There is unchallenged evidence that the defendants were invited by the community when they encroached into the land and only the 2nd defendant showed up.

v) The 2nd defendant did not give evidence to deny whether he did not encroach and whether he was not summoned by the community.

6. The lower court erred in law when it held that the defendants has led evidence in proof of their title to the land and that the defendant has met the burden placed on him by the plaintiffs.

PARTICULARS OF ERROR

i) The defendant did not file counter claim at the lower courtò

Subsequently, with leave of this Court, the appellantsô counsel, O. Afolabi & Co. filed their brief of argument.

From available records, the 1st respondent appeared in this court on a number of occasions and specifically on the 12th day of June 2008 the respondents were represented by their counsel, J.C. Ebu Esq.

In subsequent adjournments, neither the respondents nor their counsel were present in court despite the fact that the respondentsô counsel was served with the appellantsô counselôs motion seeking leave to file his brief of argument out of time. The appellants filed two separate briefs of argument dated 23rd September 2008 and 3rd October 2008 respectively. On the 16th day of October 2008, learned counsel for the appellants applied to withdraw the motion and appellantsô brief dated 23rd September 2008. Consequently, the application was granted and the motion was struck out.

On the 18th of November 2008, O. Afolabi Esq., counsel for the appellants, adopted his written brief and the appeal was adjourned for judgment. This Court made an order that fresh hearing notice be served on the respondents. This was done in order to give the respondents ample opportunity to file their brief of argument. However, no respondentsô brief was filed. This Court therefore had only the appellantsô brief to consider.

The appellantsô counsel formulated two issues for determination as follows:

ñ1) Having regards to the crucial finding of fact by the trial court about the Supreme Court judgment delivered in 1972 in respect of the land in dispute in favour of the appellants whether the trial court was justified when it had recourse to the rule in KOJO II v. BONSIE.

2) Having regards to the unchallenged evidence of the appellants before the lower court, whether the lower court was right when it refused the claim for trespass and injunction sought by the appellant.ò

We have carefully considered the two issues formulated by the appellantsô counsel and adopted same. We however observed that the issues as formulated were not tied to the grounds of appeal. We have tied the grounds of appeal to the two issues as follows:

1) Having regards to the crucial finding of fact by the trial court about the Supreme Court judgment delivered in 1972 in respect of the land in dispute in favour of the appellant, whether the trial court was justified when it had recourse to the rule in KOJO II v. BONSIE. (This issue covers grounds 1, 2, 3, 4 and 6)

2) Having regards to the unchallenged evidence of the appellants before the lower court, whether the lower court was right when it refused the claim for trespass and injunction sought by the appellant. (This Issue covers ground 5)

On issue one, counsel for the appellants submitted that the trial court having made a finding of fact that the appellants got judgment in the Supreme Court in their favour in respect of the land, could not depart from that crucial finding of fact. Counsel cited the dictum of Chukwumah Eneh JCA in Ushae v. C.O.P.

(2005) 2 N.W.L.R. (Part 937) 499 at 535 where the learned Justice stated ñwith respect courts are not known to indulge in legal double talk.ò

Counsel contended that the 2nd appellantôs evidence that after the Supreme Courtôs judgment the land was divided into two parts with a portion used for a market and school while the other part was reserved for farming purposes was unchallenged. He further contended that the crucial evidence of the 1st appellant as to the ownership of the land was never challenged under cross-examination. Counsel submitted that the trial court ought to have accepted these pieces of evidence as true and correct. He relied on the case of Fan Milk Ltd. v. Edemeroh (2000) 9 NWLR (part 672) 402 at 408 ratio 13.

Counsel submitted that since the respondents did not file a counterclaim and the trial court made a finding of fact that the appellants got judgment in the Supreme Court in respect of the land, the court could not turn around to hold that the Supreme Court judgment would not make private property in the community communal land. More so, when the respondents did not lead evidence to show who the community gave the land after their victory in 1972 at the Supreme Court.

Counsel submitted that the trial court was wrong when it held that the appellants did not lead evidence to show whether or not the land in dispute is the same as that adjudicated upon at the Supreme Court, after it had agreed that the land in dispute became communal land after the Supreme Court judgment. According to counsel, the court committed a ñjudicial somersaultò.

He submitted that the issue of the identity of the land in dispute was never raised during the proceedings and contended that the land in dispute was well known to the parties. He relied on the following cases:

a) Ugoji v. Onukogu (2005) 15 NWLR (part 950) 97 at 104

b) Osanyinbi v. Sokenu (2007) 3 NWLR (part 699) 170 at 172 ratio 2

Counsel contended that the version of traditional history of how the appellant became the owner of the land was preferable and the trial court ought not to have had recourse to the rule in KOJO II v. BONSIE. The trial court in the circumstance should have made a finding of fact in that respect.

He referred to the case of Olarewaju v. Oyeyemi (2001) 2 NWLR (part 697) 229, at 253.

He submitted that the trial court was wrong when it failed to accept its own finding of fact of traditional history which even occurred in 1972.

He submitted that where the conclusion arrived at by the trial court was not justified by the evidence led, the decision is said to be perverse and it becomes a miscarriage of justice and this will result in the decision being nullified. He referred to the cases of NMS Ltd v. J.P Ent. Ltd (2005) 5 NWLR (part 972) 127 at 132 and Ojo v. F.R.N. (2008) 11 NWLR (part 1099) 467 at 537.

Finally, counsel contended that the mere fact that respondents stated that they were ready to eat the roots of plants on the land is not evidence of title which

the trial court should believe and anchor its decision. He submitted that this Court is in a position to evaluate such evidence and make a finding of fact thereon.

We have carefully examined the submissions of counsel on this issue and read the authorities cited by counsel. The main thrust of counselôs argument under this issue is that the trial court made a finding of fact that the Supreme Court delivered a judgment in 1972 in respect of the land in dispute and thereafter departed from the crucial finding of fact. According to counsel, the trial court went ahead to hold that it was faced with conflicting evidence of traditional history put up by the parties and resolved it by having recourse to the rule in KOJO II v. BONSIE (1957) 1 W.L.R. 1123.

Having carefully read the judgment of the trial court, we are unable to see how counsel came to the conclusion that the trial court made a finding of fact concerning the Supreme Court judgment and the land in dispute. The trial court in our considered view was reviewing the evidence as put forward by the appellants as well as the respondents when it referred to the Supreme Court judgment. The statement in contention followed the trial courtôs summary of the evidence of the parties and the addresses of their counsel. The trial court stated at page 114 of the Record of Appeal lines 2 ï 5 as follows:

> ñIn this suit we are aware that there was a dispute between the Enogie of Iyeke-Eze and that of

Evbuoghae in 1972 which was contested as far as

the Supreme Court é .ò

Can the above statement on the face of it be construed to mean that the trial court made a finding of fact on this issue? We do not think so. The said statement *simpliciter* does not qualify as a finding of fact by the trial court. When that statement is considered along with subsequent part of the trial courtôs judgment it will be difficult to conclude that it is a finding of fact. The trial court at that stage had not even reviewed the case for the respondents.

A finding of fact involves the credibility of opposing witnesses and their conflicting testimonies See the case of Olufosoye v. Olorunfemi [1989] 1 NWLR (part 95) 26 at 29 ratio 11.

Furthermore, even if counselôs argument that the trial court made a finding of fact at that stage is considered it would not help the appellantsô case in so far as a copy of the said judgment was not before the trial court on which it could have made a finding of fact.

The appellantsô counsel has argued strenuously that the trial court made an erroneous appraisal of facts and thereby came to erroneous conclusions in this case. We are satisfied that the trial court evaluated the evidence adduced by the appellants and came to the conclusion at page 115 of the record of appeal that the appellants have not been able to prove that the land in dispute was the same as the one litigated on up to the Supreme Court. The trial court went further to evaluate

the evidence of the respondents and held that the traditional history as led by them that their father deforested the land was conclusive as to their ownership of the land. The trial court preferred the version put forward by the respondents to that of the appellants which was within its prerogative to do.

The trial court noted that while the 1st appellant claimed that the land was founded over 200 years ago by Ode, the 1st Enogie, his great grand father, the 2nd appellant stated that the land became communal land as a result of a dispute between the Enogie of Iyeke-Eze and Evbuoghae which was contested up to the Supreme Court.

The above were the findings of the trial court which had the privilege of seeing the witnesses and assessing their credibility. There are a plethora of authorities that an appellate court will not interfere with the findings of fact of a trial court unless such findings are found to be perverse. See the following cases:

a) Fashanu v. Adekoya (1974) 1 All NLR 35

b) Woluchem v. S. Gudi (1981) 5 SC 319

c) Bamgbade v. Balogun (1994) 1 NWLR (Part 323) 718.

d) Popoola v. Adeyemo (1992) 8 NWLR (part 257) 1

e) Alhaji S. A. Kazeem & anor. v. Madam Wemimo Mosaku & 2 ors (2007) 17 NWLR (part 1064) 523 at 527 ratio 4.

f) Okegbemi v. Akintola [2008] 4 NWLR (part 1076) 53 at 58 ratio 7.

The appellants relied on traditional history in proof of their claim to title. As rightly observed by the trial court, the appellants failed to prove the particulars of the intervening owners through whom they claim. See:

i) Ojoh v. Kamalu (2005) 18 NWLR (part 958) 523

ii) Oyadare v. Keji (2005) 7 NWLR (part 925) 571

iii) Okegbemi v. Akintola (2008) 4 NWLR (part 1076) 53 at 56 ratio 2.

At this stage, it is necessary to examine learned counselôs complaint under this issue about the trial courtôs application of the principle in Kojo II v. Bonsie & anor. (1957) 1 WLR 1223. The principle enunciated in that case is that where there is conflict in traditional history as between the two contending sides, ñthe best way is to test the traditional history by reference to facts in recent years as established by evidence and seeing which of the two competing histories is the more probable.ò ï See the case of Okegbemi v. Akintola (supra) ratio 3. The trial court observed that it was faced with conflicting evidence of traditional history and had recourse to facts in recent years established by evidence to determine the version which is more probable.

The trial court rightly in our considered view applied the principle in Kojo II v. Bonsie (supra) when it accepted the evidence of the respondents that the land was deforested by their father fifteen years before the eclipse of the sun in 1932 and had exercised acts of ownership over the land by planting rubbers trees,

banana etc. on the land. This was most probable as the appellants could not prove to the satisfaction of the trial court how the land became communal land in 1972.

The above questions of facts determined by the trial court based on the oral testimonies of witnesses cannot be disturbed by this court as learned counsel has strenuously urged us to do.

It is appropriate also to comment briefly on the issue of the identity of the land in dispute. The trial court in its judgment held that there was contradiction in the evidence of the 1st and 2nd appellants with respect to the boundaries. Learned counsel in his argument under the first Issue submitted that the parties did not at any stage raise any issue as to the identity of the land in dispute. We agree with learned counsel that parties in this case at the trial court knew the land in dispute and joined no issue on it. We are therefore at a loss why the trial court devoted time on a non-issue. However, it is well settled that it is not every mistake or error in a judgment that will result in the judgment being set aside. The appellate court is bound to interfere when the error is substantial and has therefore occasioned a miscarriage of justice. See the case of Oje v. Babalola (1991) 4 NWLR (part 185) 267 at 271 ratio 5. This error by the trial court is certainly not substantial and it did not occasion a miscarriage of justice.

Issue one is resolved in the affirmative.

Issue two is whether the lower court was right when it refused the claim for trespass and injunction sought by the appellants having regard to the unchallenged evidence of the appellants before the lower court.

Counsel submitted that the appellants proved their claim for trespass and injunction. He contended that the 2nd appellantôs evidence that the land became communal land after the Supreme Courtôs judgment as well the testimony of 1st appellantôs witness (Donatus Okafor) that the appellants were in possession and the respondents encroached on the land were unchallenged.

He submitted that the trial court was bound to accept the unchallenged evidence as true and correct.

He relied on the case of Adeleke v. Anike (2006) 16 NWLR (part 1004) 131 at 154 ratio 5.

Counsel submitted that trespass is an infraction of a right of possession into the land of another however minute without the consent of the owner. He contended that trespass is actionable without proof of damage. He relied on the case of Ajibutu v. Ajayi (2004) 11 NWLR (part 885) 454 at 463.

We have also carefully considered the submissions of counsel on this issue. The main argument of counsel is that the trial court ignored the unchallenged evidence of the appellants and their witness on the issue of trespass on the land in dispute by the respondents.

We have sufficiently dealt with the issue of the evaluation of the evidence of both the appellants and the respondents by the trial court when we considered Issue One. We therefore do not see the wisdom in reopening the issue whether or not the appellants evidence at the trial court was unchallenged.

Trespass to land has been held to be ñan entry upon land or any direct or immediate interference with the possession of land é where indeed both parties are in a field claiming possession, the possession being disputed, trespass will be at the suit of that one who can show that a better title is in him.ò ï Awoonor Renner v. Annan 2 WACA 258.

It is also the law that the fact that a plaintiff fails in his claim for a declaration of title to land does not mean that his claim for trespass must necessarily fail. See Ayinde v. Salawu [1989] 3 N.W.L.R. (part 109) 297 at 300 ratio 5; Salami v. Lawal [2008] 14 NWLR 546 at 552 ratio 6.

The appellantsô evidence that a portion of the land in dispute was given to indigenes for farming purposes was rejected by the trial court as none of the farmers was called to prove the act of possession. On the other hand, the trial court believed the evidence of the respondents that they had been in possession and had bananas and other cash crops on the land, and that it was in 1989 when the respondents started to put up a foundation for a house that they were challenged by the appellants.

The findings of the trial court were in accordance with the principle of law decided in Kojo II v. Bonsie supra. The trial court found that the respondents were in possession of the land in dispute.

A claim in trespass to land is rooted in exclusive possession. The plaintiff has to prove exclusive possession of the land in dispute and show that he has a better title to that of the defendant. This, the appellants in this case have failed to do.

The trial court was therefore right to have refused the appellantsô claim for damages for trespass and injunction, the appellants having failed to establish exclusive possession.

Issue two is therefore answered in the affirmative.

Having resolved the two issues in favour of the respondents, we hold that this appeal lacks merit and is accordingly dismissed. The judgment of the Orhionmwon Area Customary Court, Abudu delivered on the 28th day of November, 2005 and the consequential orders made therein, are hereby affirmed.

We award ₦3,000.00 as costs in favour of the respondents.

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HON. JUSTICE P. O. ISIBOR

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HON. JUSTICE M. N. ASEMOTA

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HON. JUSTICE P. A. AKHIHIERO

E. O. Afolabi Esq. é é é é é é Counsel for the appellants