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

ON MONDAY, THE 23RD 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/2007

B E T W E E N:

DANIEL OMOLOWO JIMOH é é é é é APPELLANT

A N D

SUNDAY BOYI
(FOR HIMSELF AND ON BEHALF OF
AFEKHUA FAMILY OF OGBE VILLAGE) é é RESPONDENT

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

This is an appeal against the judgment of the Akoko-Edo Area Customary Court, Igarra in Suit No. AEACC1/28/1995.

In the trial court, the respondent (as plaintiff) for himself and on behalf of the Afekhua family of Ogbe village, claimed against the appellant (as defendant) a declaration that he is entitled to a customary right of occupancy over a piece or parcel of farmland situate at Ifouchama in Ogbe village, Akoko-Edo Local Government Area. He also claimed the sum of ₦7,000.00 (seven

thousand naira) as damages for trespass and sought a perpetual injunction to restrain the appellant, his servants, agents or privies from further acts of trespass.

Similarly, the appellant counter-claimed against the respondent for a declaration of title over a piece or parcel of land known as Arerume farmland situate at Ogbe village, ₦7,000.00 (seven thousand naira) damages for trespass, as well as an order of injunction restraining the respondent, his servants, agents, or privies from committing further acts of trespass on the land.

The respondentôs case at the trial court was that the land in dispute known as Ifouchama farmland belongs to Afekhua family of Ogbe-Oke village. The first settlers on the land were led by one Ogbe. They migrated from Benin many years ago and settled first at a place called Eganyi and thereafter moved to Ugberume and finally settled at Ogbe-Oke. The first settlers were Itiri of Afaigbure family, Okaku of Afekhua family, Aimoya of Afighomu family and Fila of Afeghunu family. They deforested and settled on Ifouchama farmland. Houses were built on a part of it and farms were made on the other part. Afekhua family which traces its lineage to Okaku one of the first settlers, have been on Ifouchama farmland without hindrance until sometime ago when the appellant trespassed into the land and he was sued.

The appellantôs case, on the other hand, was that the farmland in dispute is known as Arerume and is situated at Orukpa. The first settlers on the land

were Orudu from Afoko family, Iteri from Afegbure family and Ugbesa from Afegbun family. These settlers migrated from Benin to Eganyi in present day Kogi State and thereafter to Ugbererume (present day Ugboshi-Afe) and finally settled near a big rock, Oru, from which Orukpa derived its name. Orudu was the first person to farm on Arerume farmland which derived its name from a pond located on the land.

After the death of Orudu, it passed to Ayeanmudokhai, and thereafter to Otagbomuekpen and to Ogah and finally to Jimoh, the appellantôs father. Jimoh farmed on the land without disturbance from anyone until he died in 1985. The appellant approached his family who gave him permission to farm on the land and in 1989 he started to farm on it and planted cocoa, banana, kola nut and pineapples.

Only three families make up Orukpa namely Afebun, Afoko and Afaiyobure. Afekhua family to which the respondent belongs, is not one of them.

After hearing evidence in the case, the trial court found in favour of the respondent, and dismissed the appellantôs counterclaim.

Dissatisfied, the appellant filed a Notice of Appeal with five grounds of appeal, including an omnibus ground of appeal. With leave of this Court, the appellant amended the notice and grounds of appeal by abandoning them save

for the omnibus ground and substituting them with six additional grounds of appeal.

The seven grounds of appeal and their particulars are reproduced as follows:-

ñ1. Judgment is against the weight of evidence.

2. The Akoko-Edo Area Customary Court erred in Law by holding as follows:

> óFrom the evidence of traditional history as presented by the parties, it thus (sic) appears to us that the plaintiffôs version is more cogent, plausible and probable. We say so because the plaintiff chronologically traced how his family came to possess Ifuochama farmland contrary to the defendantôs history of how his family came to settle at Orukpa also known as Ogbe-Oke not how the family, came to own the land in dispute.ô

PARTICULARS OF ERROR

a. The same Farmland in dispute called Ifuochama was also called by the defendant as Arerume farmland.

b. There exists evidence from the defendant stating that Orudu from whom the defendant descended was the first to farm at Arerume called Ifuochama by the plaintiff.

c. The findings of the trial customary court is contrary to evidence.

3. The Akoko-Edo Area Customary Court erred in law by holding as follows:

> ôWe are not unmindful of the facts that Orudu whom he traced his ancestors to, farmed on the disputed land. However, he did not state in his evidence that Orudu was the first to have his farm, on the disputed land.ô

PARTICULARS OF ERROR

a. Evidence of the defendant shows that Orudu was the first to farm at Arerume farmland which the plaintiff also called Ifuochama.

b. First to farm at Arerume means first to have his farm on the land in dispute.

4. The Akoko-Edo Area Customary Court erred in law by granting the relief of the plaintiff and dismissing the counterclaim of the defendant on the ground that the defendantôs evidence is replete with material contradictions.

PARTICULARS OF ERROR

a. In law, the onus of proof lies on the plaintiff to prove his case not relying on the weakness of the defendant.

b. Evidence of tradition of the plaintiff never stated how genealogically Okaku is connected with the plaintiff.

c. No evidence from the plaintiff showing how the land devolves and on whom such land devolves from Okaku before getting to the generating (sic) of the plaintiff.

d. The aspect of contradictions stated are not material.

5. The Akoko-Edo Area Customary Court erred in law by holding as follows:-

> őTo this end, we prefer the plaintiffôs title to the disputed land as being superior to that of the defendant and therefore constructed (sic) to be in legal possession of the disputed land as compared to defendant defacto possessionô

PARTICULARS OF ERROR

a. The traditional evidence of the defendant showing how Orudu got to the place called Orukpa and first to farm on the land in dispute called Arerume is better or superior.

b. The defendantôs traditional evidence also shows how it devolves from Orudu before getting to the defendantôs father.

c. The plaintiffôs evidence never showed how the land devolved from Okaku to his generation.

6. The trial Area Customary Court erred in law in failing to admit the document certified by one Mrs. V. O. Aribusola, Archival Officer for Director of National Archives dated 23-9-98.

PARTICULARS OF ERROR

a. The rejected document is a photocopy of a certified true copy showing the mark or stamp of National Archives and duly signed.

b. The plaintiff admitted during cross examination that elders informed him of the existence of the said Intelligent Report relating to town and villages especially as it relates to Ogbe.

c. The plaintiff admitted that Ogbe is made up of two quarters, which are Orukpa and Ikologbe with Orukpa forming the present Ogbe-Oke.

d. The trial court failed to take judicial notice of the said document from the national Archives and admit it.

7. The trial Area Customary Court failed to properly evaluate the evidence before it, thereby occasioning a miscarriage of justiceò

Counsel for both parties filed their briefs of argument.

S. Isumede Esq., learned counsel for the appellant, formulated five issues for determination from the seven grounds of appeal as follows:

ñ1. Whether the trial Area Customary Courtôs reliefs granted in favour of the respondent, followed by the dismissal of the appellantôs counter-claim, is justified.

2. Whether the trial Area Customary Court rejection of a document called Intelligence Report of towns and villages which include Ogbe is right.

3. Whether non cross-examination of the appellant on non-existence of Afekhua family was not sufficient to dismiss the respondentôs case.

4. Whether there was proper evaluation of the evidence led at the trial.

5. Whether contradictions stated could be so regarded. If yes, the materiality of such contradictions.ò

On his part, learned counsel for the respondent, P.T. Braimoh Esq., did not formulate issues for determination but merely canvassed arguments in response to the issues as formulated by the appellantôs counsel. He is therefore deemed to have tacitly accepted the issues as formulated by the appellantôs counsel

We have carefully considered the five issues formulated by the appellantôs counsel. We observe that issue 3 is not based on any ground of appeal. It is hereby struck out.

We adopt Issues 1, 2, and 4 as formulated and slightly modify issue 5 as it is inelegant.

The issues are as follows:

1) Whether the trial Area Customary Courtôs reliefs granted in favour of the respondent, followed by the dismissal of the appellantôs counter claim is justified. (Grounds 2, 3 and 5).

2) Whether the trial Area Customary Courtôs rejection of a document called Intelligence Report of towns and villages which include Ogbe is right. (Ground 6).

3) Whether there was proper evaluation of the evidence led at the trial. (Grounds 1 and 7).

4) Whether the appellantôs evidence was replete with material contradictions. (Ground 4).

In our view, issue two is fundamental because it raises an issue of law. We shall therefore consider it first.

Arguing this issue, learned counsel for the appellant submitted that in law a photocopy of a certified true copy of the document containing part of the history as told by the appellant is admissible. He contended that the said document was duly certified by V. O. Aribusola (Mrs), Arch. Officer for Director of National Archives. He relied on the case of Chief F.R.A. Williams v. Daily Times of Nigeria Ltd [1986] 4 N.W.L.R (part 526) at 536 para F ï G

and the book: Law and Practice relating to Evidence in Nigeria by T. Akinola Aguda, 2nd Edition, page 281 para 18.12.

Counsel submitted that in the said document which was rejected by the court it was stated that two quarters, Orukpa and Ikologbe consists of three families each and Afekhua the family of the respondent was never mentioned as one of the families in the two quarters of Ogbe.

He contended that had the document been admitted, it would have affected the case of the respondent, and the trial courtôs judgment would have been otherwise. He relied on the case of Buhari v. Obasanjo [2005] 13 N.W.L.R (part 941) 1 at 87.

Finally on this issue, counsel submitted that the rejection of the said document by the trial court was wrongful.

In his reply, counsel for the respondent submitted that the trial court rightly rejected the document because it was not relevant. According to counsel, admissibility of a document is based on its relevance. He contended that the said document does not satisfy the requirement of section 6 of the Evidence Act, 1990 and that the appellant could not prove by traditional evidence his title to the land to the satisfaction of the trial court.

Finally he submitted that documentary evidence is unknown to customary law. He relied on the case of:

1. Momodu Olubodun & 4 ors v. Oba Adeyemi Lawal & anor. [2008] All FWLR 1434 at 1468 ratio 2, page 1472-1473.

We have carefully considered the submissions of both counsel on this Issue.

The contention of the appellantôs counsel under this issue is that the trial court wrongly rejected the admission of the Intelligent Report in evidence.

Under the Evidence Act, only certified true copies of public documents are admissible as secondary evidence. See sections 95(a) and 97(1)(e) of the Act. A photocopy of a public document is inadmissible as secondary evidence of a public document. It must be certified. See the case of: Shell Dev. Co. Ltd. v. Nwolu [1991] 3 NWLR (part 180) 496 at 498 ratio 2.

The Intelligent Report sought to be tendered, is a photocopy of a certified true copy with an endorsement by one Mrs. V.O. Aribusola for the Director of National Archives.

In Daily Times v. F.R.A. Williams (supra) cited by counsel for the appellant, it was held that a photocopy of a certified copy of writ of summons was admissible.

See also the case of: Magaji v. Nigerian Army [2008] 8 NWLR (part 1089) 338 at 357 ratio 20.

The learned counsel for the respondent in his response to this Issue argued strenuously that the said document was not relevant and was rightly rejected by the trial court.

It must be pointed out that the trial courtôs rejection of the document was not based on relevancy but on the fact that it was a photocopy of a certified true copy of the Intelligent Report. The said document falls within the purview of a public document as envisaged by section 109 of the Evidence Act. On the face of it, it is a photocopy of a certified true copy. Following the authorities cited above, the trial court erred when it refused to admit the said document in evidence.

He also contended that documentary evidence is unknown to customary law. We agree that this was the position of the law, as customary law is largely unwritten. However, contemporary law and practice now admit documentary evidence in customary law matters.

The Evidence Act which is now applicable in all our Customary Courts in this State provides in section 59 as follows:

> ñIn deciding questions of customary law, the opinions of native chiefs or other persons having special knowledge of customary law and any book or manuscript recognized by natives as legal authority are relevant.ò

This leads to whether the action of the trial court occasioned a miscarriage of justice. A careful consideration of the appellantôs case at the trial court reveals that he had intended to make the Intelligent Report the main thrust of his defence. This was to establish that Afekhua family, which is the respondentôs family, was not one of the families of Ogbe-Oke and therefore could not have owned land there. The effect was that the exclusion of that piece of evidence put the appellant at a disadvantage which became detrimental to his case.

In the circumstance, we are of the considered view that the wrongful exclusion of the Intelligent Report by the trial court occasioned a miscarriage of justice.

Issue one is therefore answered in the negative.

It has been held that where it is impossible to determine what could have been the decision of a trial court had it not made a fundamental error, a retrial would be ordered. See the cases of:

1) Umeadi v. Nnamani (2007) 3 N.W.L.R (part 1021) 219 at 220 ratio 3.

2) Okomalu v. Akinbode & 2 ors [2006] 9 NWLR (part 985) 338 at 343 ratio 6.

In the case of Peter Ezeani & ors v. Nneli Ezere & ors (1935) 2 WACA 342, in a claim by the plaintiffs for special damages being value of properties

allegedly wilfully damaged and looted by the defendants, the trial court refused to admit a certified copy of the criminal proceedings in which the defendants were convicted of taking part in a riot during which the plaintiffsô properties were destroyed. It was held that the trial court erred in refusing to admit the said document. The appeal was allowed and the case sent back for retrial.

Having held that the wrongful exclusion of evidence occasioned a miscarriage of justice for which a retrial is most appropriate, it becomes unnecessary to consider the other three issues as to do so would be futile and a mere academic exercise which will serve no useful purpose.

This appeal succeeds. Accordingly, it is hereby ordered that Suit No. AEACC1/28/1995 be remitted to the Etsako West Area Customary Court, Auchi, for hearing and determination ***de novo***.

We make no order as to costs.

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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

S. Isumede Esq. é é é é é Counsel for the appellant
P.T. Braimoh Esq. é é é é é Counsel for the respondent