

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

ON THURSDAY, 15TH MAY, 2008

BEFORE THEIR LORDSHIPS

PETER OSARETINMWEN ISIBOR - JUDGE (PRESIDED)
MARY NEKPEN ASEMOTA (MRS) - JUDGE
PETER AKHIMIE AKHIHIERO - JUDGE

APPEAL NO. CCA/29A/2006

BETWEEN:

MR. SYLVESTER UWADIALE : : : APPELLANT

A N D

MRS. MONICA UWADIALE : : : : RESPONDENT

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

This is an appeal against the judgment of the Igueben Area Customary Court, Igueben, delivered on the 6th day of June 2006.

The respondent herein who was the petitioner in the court below filed a divorce petition against the appellant (as respondent) asking for the following
5 reliefs:

õ(1) An order of dissolution of the marriage contracted between the parties at Igueben in the year 2000 in accordance with the Esan Native Law and Custom prevalent at Igueben, a place within the

jurisdiction of this Honourable Court on ground of quarrels and abandonment asking the petitioner to pack out of his house since 31st day of December, 2003.

(2) An order of refund of the sum of ~~N~~400.00 as dowry paid on the petitioner to the respondent.

(3) An order of court on the respondent to allow the petitioner the following items specified hereunder to be removed from his house.

The items are as follows:-

- A. Two stoves
- B. 4 sets of stainless dish
- C. Five sets of flower plates
- D. One electric sealing machine
- E. Three sets of Irish plates or dish
- F. Basket of glass cups
- G. Saucer plates and cups for tea
- H. Electric blender
- I. 7 coolers big and small
- J. One stainless Jug
- K. Two crates of mineral and two crates of maltexö

The appellant (as respondent) counterclaimed against the respondent (as petitioner) as follows:

5 01. An order of this Honourable Court that the petitioner returns to the respondent the under-listed items which were taken away from the house of the respondent by the petitioner without his consent, permission and/or authority. The said items having been purchased by the respondent for family use.

The said items are:

- (a) One 12 inches foam
- (b) Four (4) big coolers
- 10 (c) Giant album (spiral type) (containing pictures taken during their marriage and at the burial ceremony of petitioner's father and mother)
- (d) One (1) Native Attire

15 2. A further order of this Honourable Court that items A, B, D-J being claimed by the petitioner in her petition, are the rightful property of the respondent/counterclaimant, who bought them with Receipts acknowledging their purchase.

- (a) That item -Cø (five sets of flour) got spoilt on its own due to time lapse and no longer good for human consumption in that the expiry date had long elapsed.
- 20 (b) That item -Kø were actually purchased by the respondent/counterclaimant during the Burial ceremony of the petitioner's father and the empty bottles got missing during the ceremony.
- (c) That the petitioner hired a pick-up van to carry away all her belongings including those bought by the

respondent/counterclaimant, including some of the items she is now claiming.

3. That the respondent has no objection to Reliefs 1 & 2 being sought by the petitioner in her Divorce petition.

5 (a) But the respondent is vehemently contesting ownership of the items in Relief 3 of the petitioner's claim as well as other items unlawfully taken away from the matrimonial home by the petitioner.

10 4. And for such Order or further Orders as this Honourable Court may deem fit and proper to make in the circumstances of this case.ö

At the commencement of trial, the respondent pleaded liable to reliefs 1 and 2 of the petition for a dissolution of the marriage and for a refund of the ~~₦~~400.00 dowry paid by the petitioner to the respondent. The contending issues were narrowed down to relief 3 of the petition and the counter-claim.

15 The respondent's case at the trial court was that she got married to the appellant sometime in the year 2000 at Igueben under Esan Customary Law. They lived together until 2003 when the respondent started to threaten her and she left the matrimonial home. When the respondent failed to ask her to return home, she approached the respondent to allow her collect her properties from
20 the house. When she got to the house she discovered that her properties had been tampered with by the respondent. She could not find the properties as contained in her claim. The items were bought by her and she had receipts for some of them.

The appellant's case on the other hand, was that the items claimed by the respondent were bought by him at various times for the use of the family and had purchase receipts for some of the items. The respondent removed the items in the counter-claim from the house without his consent. He denied that he prevented the respondent from packing her properties out of his house because she had no issue for him. The appellant admitted that as a polygamist his wives sometimes buy household properties for use in the house.

The trial court, in a considered judgment, allowed the respondent's petition in its entirety and dismissed the appellant's counter-claim with ₦10,000 as costs in favour of the respondent.

Aggrieved by the decision of the trial court, the appellant filed nine original grounds of appeal. With leave of court the appellant filed thirteen amended and further grounds of appeal. The grounds of appeal without their particulars are set down below.

- I. The decision is against the weight of evidence
- II. The trial court erred in law when it acted or relied on a receipt purportedly issued in respect of the Native attire but not tendered in court as an Exhibit by the petitioner.
- III. The trial court misdirected and contradicted itself on the facts when it held that the petitioner/respondent removed her own property and some items belonging to the respondent/appellant with the consent of the appellant.
- IV. The trial court misdirected itself on the facts when it held that the petitioner/respondent should continue to be in possession and

control of the items she packed away from the appellant's house, including the Giant type Album.

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- V. The trial court erred in Law in holding that the items purchased by the appellant and for which Receipts were issued and tendered as Exhibits in Court are the bona-fide property of the petitioner/respondent.
- VI. The trial court erred in Law when it relied on a clearly forged Receipt tendered by the petitioner and marked as Exhibit -Aø in spite of glaring irregularities on the face of it.
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- VII. The trial court misdirected itself when it held that all the household utensils as claimed by the petitioner actually belong to her.
- VIII. The trial court erred in Law and also misdirected itself on the facts when it awarded an outrageous cost of ₦10,000.00 (Ten thousand Naira) against the appellant when even the total sum of the items being claimed by the petitioner/respondent in monetary value is less than ₦10,000.00 (at present) even if the said items were to be in possession of the appellant.
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- IX. The trial court misdirected itself on the facts when in spite of the glaring evidence before the court it entered judgment against the appellant and further ordered an outrageous cost of ₦10,000.00 against the respondent/appellant.
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- X. The trial court erred in law when it failed to grant the Reliefs sought by the respondent/appellant in the counter-claim when the appellant successfully established his case.
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- XI. The trial court misdirected itself on the facts when it stated in its judgment that the respondent/appellant said "he bought the Electric Sealing Machine Exhibit -Bø for the petitioner/respondent for use for her Ice Cream Business."
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- XII. The trial court misdirected itself on the facts and drew a wrong conclusion, when it held in its judgment that all the items listed in Relief (3) of the petition belong to the petitioner/respondent and are personal to her.

XIII. The trial Court erred in law and contradicted itself in its judgment when it held that "the issue for the Court to determine is who in fact owns the property, irrespective of in whose names the Receipt were endorsed."

5 The appellant through his counsel, M. E. Eigbe Esq., filed the appellant's brief of argument and formulated two issues for determination. The respondent was duly served with all the processes in this appeal but she neither put any appearance nor was she represented by counsel.

The two issues formulated by the appellant's counsel are as follows:

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1. In the circumstance of this case who as between the respondent and the appellant is entitled to the items being sought for in "Relief 3" of the respondent's petition and Reliefs 1 & 2 of the appellant's counter-claim.
 2. Whether or not the Lower Court failed to discern the real question to be considered."
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Having critically examined Issues 1 & 2 formulated by appellant's counsel, we are of the view that Issue 2 is subsumed in Issue 1. The contention of the appellant in the main is that the trial court did not properly evaluate the evidence adduced before it arrived at a decision that the respondent is entitled to the items sought in Relief 3 of the petition and Reliefs 1 & 2 of the counterclaim. We therefore adopt Issue 1 as formulated by counsel and slightly reframe it as produced hereunder.

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We have observed from the issues formulated above that Grounds VIII and IX, of the grounds of appeal which complained about the costs awarded by the trial court, was lumped into the second issue. It is our considered view that this issue is fundamental and should stand on its own. A second issue is therefore formulated by this court as follows:

2. Whether the costs awarded by the trial court in the circumstance was excessive.

Arising from the above the two issues for determination are as follows:

1. Whether the trial court was right when it held that the respondent is entitled to the items sought in Relief 3 of the respondent's claim and Reliefs 1 & 2 of the appellant's counter-claim. (Issue covers grounds 1, 2, 3, 4, 5, 6, 7, 10, 11, 12 & 13)
2. Whether the cost awarded by the trial court in the circumstance was excessive. (Issue covers grounds 8 & 9)

Arguing the first issue, counsel for the appellant submitted that the production of the purchase receipt for the items by the appellant was sufficient proof of ownership of the disputed properties.

Counsel also submitted that there was sufficient evidence before the trial court that before the appellant married the respondent, the appellant had other wives and children who were making use of the household utensils. He contended that all the receipts of purchase bore the name of the appellant.

Counsel further submitted that the trial court wrongly evaluated the evidence adduced before it. He contended that this court can rightly re-evaluate the evidence and enter judgment in favour of the appellant.

He cited in support the following cases:

- 5 1. Iwuoha v. NIPOST (2003) 110 LRCN 1622 at 1627 and 1628,
2. Okoh v. Osidia (1991) 1 LRCN 41 at 42 ratio 2,
3. State v. Ajie (2000) 80 LRCN 2513 at 2517 ratio 6,
4. Karibo v. Grend (1992) 9 LRCN 766 at 768 ratio 1

10 Counsel submitted that the lower court erred in law when it granted to the respondent ownership of the spiral album which relief she never sought. He referred to the following authorities:

1. Agu & Anor v. Odojin & Anor. (1992) 9 LRCN 665 at 685 and 686 ratios 10 & 25,
2. Olurotimi v. Ige (2000) 1 NLLC 247 at 249 ratio 1,
- 15 3. Akinterinwa v. Oladunjoye (2000) 77 LRCN 673 at 677 ratio 4

Counsel contended that despite the unchallenged and uncontroverted evidence of the appellant that the spiral photo album belonged to him the trial court awarded it to the respondent. He relied on the following authorities:

1. I.B.N v. A.T.M Co. (1996) 42 LRCN page 1523 at 1527 ratio 3,
- 20 2. Aigbadon v. State (2000) 77 LRCN page 820 at 826 ratios 7 & 8

Counsel further submitted that the trial court's reliance on a receipt purportedly issued to the respondent for the native attire in the counter-claim which was not tendered as an exhibit was fraught with illegality. Counsel relied on the following authorities:

- 5 1. Asafa Foods v. Alraine (2002) 99 LRCN 1517 at 1519 ratio 3
2. State v. Onyeatoelu (2002) 2 LRCN 236 at 237 and 238,
3. Igidi v. Igbo & Ors. (1999) 70 LRCN 1852,
4. Section 91(3) of the Evidence Act (Cap. 112) 1990

Counsel submitted that the trial court was wrong in relying on the receipts
10 -A, -B, -C1-C3 in spite of the irregularities on the face of them.

Counsel submitted that the appellant having discharged the onus of proof by tendering the purchase receipts, the trial Court ought to have granted ownership of the said property to the appellant rather than going outside the evidence before it and finding in favour of the respondent.

15 He contended that the trial court failed to discern the real question to be considered when it stated in its judgment:

õí í . In any event the issue for the court to determine here is who in fact owns the properties irrespective of in whose names the Receipts were endorsed.ö

20 He cited the following cases in support:

1. Udengwu v. Uzuegbu (2003) 110 LRCN 1701 at 1702; and
2. Iwuoha v. NIPOST (supra)

Counsel submitted further that the judgment of the trial court is perverse in that it went outside the evidence adduced when it held that the appellant should allow the respondent to remove the properties she left behind in the appellant's house unhindered. He stated that there was ample evidence that the respondent brought a vehicle to remove her properties from the house.

Counsel contended that this is a proper case in which the appellate court can re-evaluate the evidence by the lower court and come to a proper decision. He relied on Iwuoha v. NIPOST (supra) at 1652.

We have carefully considered the submissions of counsel for the appellant on this issue. The contention here is that the trial court did not properly evaluate the evidence adduced before it.

The trial court considered the case and came to a conclusion that:

it is clear that the properties named in relief (3) of the petition were in possession of the petitioner and belong to her irrespective of who bought which of them

The appellant had in his evidence asserted that he bought the properties in contention for the respondent for household use. However, under cross-examination, his statement was that being a polygamist each of his wives owns separate household properties.

Furthermore, the trial court made specific findings that while some of the items are household properties, others like the electric sealing machine, coolers and crates of minerals have nothing to do with day to day household duties.

The trial court in its judgment observed that a receipt tendered by the appellant to show that he bought the thirty litre cooler was doubtful because the endorsement on the receipt showed it was bought in Benin while the appellant's story was that he bought the said cooler at Igueben.

5 Flowing from the above, we hold that the trial court was right when it held at page 31 of the records that it prefers the case of the petitioner (respondent herein) to that of the respondent (appellant herein) and accordingly upheld the respondent's claim and dismissed the appellant's counter-claim.

10 Counsel in his submission claimed that the court made reference to the spiral album and awarded same to the respondent in spite of the fact that she did not claim for it. We have examined the entire judgment and observe that there is nowhere the trial court made such an award to the respondent. The properties awarded to the respondent are clearly set out in the trial court's judgment at page 31 of the Record of Appeal.

15 The first issue is therefore resolved in the affirmative.

On the second issue which is whether the costs awarded were excessive, counsel submitted that the appellant did not contest the dissolution of marriage and the refund of bride price.

20 We have considered this issue and observe that the respondent was not subjected to unnecessary stress because the appellant did not contest the dissolution of the marriage and refund of bride price. The only issue contested

was ownership of property. We also observe that this case is in respect of a divorce petition which should downplay bitterness. We therefore agree with the appellant's counsel in his submission that ~~₦~~10,000 costs is excessive.

Issue 2 is therefore resolved in the affirmative.

5 This appeal therefore succeeds in part. Consequently, the judgment of the Igueben Area Customary Court, Igueben delivered on the 6th of June, 2006 in respect of this case and the consequential orders made therein except as to costs are hereby affirmed. Ten thousand naira costs awarded by the trial court is hereby set aside. In its stead, we hereby award two thousand naira (~~₦~~2,000.00) costs in favour of the respondent.

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We make no order as to costs in this appeal.

HON. JUSTICE P. O. ISIBOR

HON. JUSTICE M. N. ASEMOTA (MRS)

HON JUSTICE P. A. AKHIHIERO

M. E. Eigbe Esq. í í í Counsel for the Appellant