IN THE HIGH COURT OF JUSTICE EDO STATE OF NIGERIA
IN THE BENIN JUDICIAL DIVISION HOLDEN AT BENIN CITY
BEFORE HIS LORDSHIP HON. JUSTICE E.O. AHAMIOJE ï JUDGE
ON THURSDAY THE 11TH JANUARY 2007

BETWEEN SUIT NO: B/395/2002

MR. EKIUWA INNEH é é é PLAINTIFF

AND

MR. BLESSING OSULA é é é . DEFENDANT

JUDGEMENT

The Plaintiff herein, filed this action on the 17/6/2002 and claimed in paragraph 28 of the Amended Statement of claim as follows:

ñ28 ï WHEREOF the Plaintiff claims from the Defendant as follows:

(i) A DECLARATION that the Plaintiff is the owner in possession and entitled to be granted a Statutory Right of Occupancy over the parcel of land measuring One Hundred Feet by One Hundred Feet (100ft x 100ft) bounded by Beacons Nos. CP 1, CP 2, EDC 2662 AND 2663 as shown in the litigation Survey Plan situate at Okundia Street, Elema Estate, Elema Quarters, Benin City which said land shared common boundary with the Defendantôs land.

(ii) A DECLARATION that the Defendantôs said land sharing the same boundary with Plaintiffôs land is only One Hundred Feet by One Hundred Feet (100fet x 100ft) and that the act of the Defendant in extending the frontier of his said land into the Plaitiffôs land is unlawful and amount to trespass into Plaintiffôs land.

(iii) AN ORDER that the Defendant abates whatever nuisance he has caused or created on the Plaintiffôs land by erecting illegal and unauthorized structure on Plaintiffôs said land without her prior consent.

(iv) AN OREDER OF PERPETUAL INJUNCTION restraining the Defendant whether by himself, his Agent, Servants, Cohorts, Representatives and Assigns from trespassing into the Plaintiffôs land measuring 100ft x 100ft situate at Okundia Street, Elema Quarters, Benin City.

Pleadings were duly filed and exchanged between the parties. The Plaintiff testified on her behalf and called two witnesses. The Defendant also testified and called no witness.

The case for the Plaintiff can be summarized as follows:

The P.W1 is Thompson KpakpoKpeji, a Registered Surveyor and a fellow of the Nigerian Institute of Surveyors. He testified that on the 12/11/02, the Plaintiff commissioned him to carry out a litigation survey of

her land along Okundia Street, in Ward ñAò, Elema Quarters, Benin City. That the Plaintiff took him to the site and showed him the boundaries and the features therein. That he reflected the boundaries and features shown to him by the plaintiff on the survey plan, Exhibit óAô. He stated that the Plaintiff land measuring 100ft by 100ft is verged pink. That the portion occupied by the Defendant measuring 100ft by 131ft is verged GREEN. That the portion of the Plaintiffôs land trespassed into by the Defendant which is measuring 31ft by 100ft is verged YELLOW, which is the portion of the land in dispute. He stated that both parties occupy a space of land measuring 100ft by 200ft. he testified that some years ago he carry out property survey plan for the Plaintiff bearing 69ft by 100ft of the same land in dispute, vide Exh. óBô. He testified that before he carried out the survey plan in Exh. óBô, the plaintiff informed him that the dimension of her land is 100ft by100ft. He stated that when he finished Exh. óBô, he told the Plaintiff that 31ft had been taken away from her land from the length on the northern south which he verged yellow in Exh. óAô.

Under cross-examination by P.A. Ugheoke, Esq., PW1 stated that before he carried out his work on Exhibits ñAò and ñBò, he did not know the land. That the land occupied by the Defendant is completely fenced with a high wall. That the fence has a gate at the Northern side by Okundia Street.

That he saw the broken blocks of the Plaintiff on the ground, and also a concrete wall fence at the eastern side of the Plaintiffôs land, and at the Southern side of the land. That he also saw a well at the Western side Of the Plaintiffôs land. He stated that he followed the instruction given to him by the plaintiff when he carried out the survey plan.

Re-examined by E.F. Osifo, Esq., he stated that the portion of the land shared by the parties is 200ft by 100ft.

P.W.2 is Prince Sunday Elema J.P. . He is the Chairman of the Elema Estate Administrators, being the Eldest son of late Elema. He stated that as a Chairman of the Estate administrators he signs the document of allotment of parcel of land to anybody. He testified that the plaintiff was allotted a parcel of land measuring 100ft by100ft in appreciation of agreeing to marry their brother, Mr. Daniel Inneh. That the land is situate at a place known as Okundia Street, Elema Quarters, Benin City. That the Plaintiff was given a title document in respect of the land bearing ñElema Application formò, Exhibit óCô. He testified that Mr. Daniel Inneh, the husband of the Plaintiff has a parcel of land measuring 100ft by 200ft, which said parcel of land has a common boundary with the land of the Plaintiff. He stated that the parcel was given to him because the mother is the Eldest surviving daughter of their late father, Chief Felix Elema. He stated that he knew the Defendant.

That the Defendant was introduced to him by the Plaintiff as a family friend who needed a parcel of land.That they gave the Defendant a parcel of land measuring 100ft by100ft. He stated that the Plaintiff, the Defendant and Mr. Daniel Innehhas a common boundary. That the three parcels of land are in the same block. He stated that standing on Oknundia Street, Mr. DaneilInneh's land is on the right, to the left is the Defendant's land facing Okundia Street. That the Plaintiffôs land is immediately behind the Defendantôs land. He denied the suggestion that after the death of Chief Jonathan Elema, the roads in the Elema Estate was adjusted which led to the Plaintiff and the Defendant loosing some portions of their land.

Cross-examined by P.A. Ugheoke, Esq., learned Counsel for the Defendant, P.W.2 stated that he was a pointer and co-signatory to the allotment of the parcels of land to the parties. He maintained that it was the Plaintiff who introduced the Defendant to him. He stated that they gave the piece of land to the Defendant almost at the same time they gave the piece of the Plaintiff.That Mr. Daniel Inneh was first given his piece of land before the Plaintiff and the Defendant. That the parties were given the parcels of land in 1976. He stated that he did not know when the defendant built his house on the parcel of land. He stated that the Plaintiff has not built on the land but has fenced same. That he could not remember whether the

Defendant has fenced his land when the Plaintiff was fencing her own piece of land. That the parcel of land belonging to Mr. Daniel Inneh is a subject of litigation in the High Court. That he did not come to court to give bias evidence.

The Plaintiff gave her name as Mrs. EkiuwaInneh. She testified that she knew the Defendant, as well as the land in dispute. She was given a parcel of land measuring 100ft by 100ft by the Trustees of Elema as a gift for agreeing to marry their relation, Mr. Daniel Inneh. That the land in dispute is at Okundia Street, Elema Quarters, Benin City. The parcel of land was given to her in 1976. She was taken to the piece of land in dispute and physically shown the land. That she made an application to the Trustees of Elema Estate for the parcel of land the same was duly signed which was admitted and marked Exh. óCô That the husband, Mr. Daniel Inneh has a parcel of land within the location of the land in dispute measuring 100ft by 200ft. That his land is adjacent to the land in dispute. He stated further that the Defendant has a parcel of land within the location of the land in dispute. That the dimension of the Defendantôs land is 100ft by 100ft. she stated that her parcel of land and Mr. Daniel Innehôs land put together forms a square of 200ft by 200ft. That herself and the Defendantôs wife are co-teacher at Asoro Grammar School, Asoro, Benin City, and they are family friends and

relations. That the Defendant and his wife approached her and her husband to assist them acquire a parcel of land measuring 100ft by 100ft at the Elema Estate. They then took the Defendant and his wife to the family of Elema and made request on their behalf. Thereafter, a parcel of land measuring 100ft by 100ft forming a part of the square of land measuring 200ft by 200ft was given to the Defendant. That after the parcels of land were given to her and the husband forming an ñLò shape, they took physical possession of the parcels of land.

That in 1989, she visited her land, anddiscovred that the defendant is fencing his portion of land included a portion of land belonging to her. When she discovered it, she went to the Defendant in his office. She confronted the Defendant who denied trespassing on her land. That the Defendant told her he fenced a portion of her land to prevent miscreants from encroaching into the land. That a proper demarcation will later be done. They then agreed to meet at the site the following day to have a look at the entire land. She then went to the land as agreed. When she got to the site at the agreed time, she met thugs with matchetes waiting for her. She confronted the thugs and with the intervention of passerby she left the site. After this, she went and reported to the elder brother of the Defendant, Mr. Ephraim Osula. The brother intervened and the Defendant agreed to move

his fence away from her portion of land. That the Defendant that the Defendant actually moved his fence to the appropriate place. That in 2001, Defendant again erected his fence into her portion of land. At that point, she engaged the services of a photographer who took photographs of the fence. She also got a Surveyor (P.W.1) to survey the parcel of land belonging to her. The Surveyor after carrying out the survey, informed her that the parcel of land is now 79ft by 100ft. after this, she consulted her Solicitors to write a letter to the Defendant, Exh. óDô. After Exh. óDô, the Defendant did nothing to properly relocate the erected fence on her piece of land.

In 2002, the Defendant started constructing a soak-way and a Boys Quarters on her parcel of land. When she discovered this, she instructed her Solicitors to institute this action. She later commissioned a Surveyor (P.W.1) to prepare a litigation survey plan. The Surveyor informed her that the Defendant trespassed into her parcel of land by 31ft. she denied the fact that when the Defendant trespassed into her parcel of land in 1989, she did nothing. She stated that she was not aware that miscreants adjusted the parcels of land in the area for access road in 1984. She stated that it is not true that in 1984, she went to the Defendant to assist her locate the position of her portions of her land. She denied the fact that the Defendant acquired his land 2 years before she acquired her own. She finally urged the court to

award her the reliefs as claimed in paragraph 28 of the Amended Statement of Claim.

Cross-examined by P.A. Ugheoke Esq., the Plaintiff stated that she could not remember the exact time she took the Defendant to the Trustees of Elema Estate. She maintained that it was in 1976.She denied the suggestion that the land was given to the Defendant in 1974 by the Trustees of Elema Estate. She stated that the proper documentation of her parcel of land was done in 1976 because the husband was an undergraduate at the University of Nsukka at that time. She stated that the parcel of land was given other earlier than 1976. She maintained that she discovered the Defendantôs act of trespass into her land in 1989.

PW3 is David Omorara, a professional photographer. He stated that he knew the land in dispute which is situate at Okundia Street, Elema Quarters, Benin City. He stated that he took photographs (*Exhibits E1 & E2)* of a damaged fence on the land in dispute in 2001.

Under cross-examination, P.W.3 stated that it was a woman who invitedhim to take photographs Exhibits E1 & E2.

The Defendant testified in his defence and stated that he lives at No. 10 Okundia Street, Elema Quarters. He stated that he knew the plaintiff who has been their long close family friend.

That in 1974, he applied to the Administrators ofthe Elema Estate for a parcel of land measuring 100ft by 100ft at the present Okundia Street. That the parcel of land was duly approved for him, vide *'Exhibit F'.* After the acquisition, he employed the services of a licensed surveyor who prepared a survey plan, *Exhibit 'G'.*

That in 1984, he started to erect a building on the parcel of land. He also erected a dual fence of two blocks, which were done some months after the death of Chief Elema. That as a result of his death, some land miscreants came to the Area and demarcated the land, and sold some to other persons. That the land the miscreants sold a small portion ofhis land including the adjoining road to his land. That the miscreants took about 32ft from his portion ofland.

That as at 1989, he had already completed his building and erected the fence round the house. That he moved into the house in April 1989.

In 1987, he met the Plaintiff when he wanted to visit his piece of land. The Plaintiff told him that she could not locate her piece of land. He took the Plaintiff in hiscar, and showed her the land, that of her husband, and his house. He told her that land miscreants had encroached on her land including his own portion of land.

He stated that in 1989, when he had moved into his house the plaintiff came and alleged that he encroached on her parcel of land. He stated that the length of his present piece of land is 90ft, while the breadth is 70ft. He stated thatthere had been no dispute over his piece of land between himself, the Plaintiff or any other person until 2002 when the Plaintiff sued him in this case. He denied He denied the fact that he trespassed into the Plaintiffôs land. He denied ever threatening the Plaintiff with thugs. He admitted that he did not allow the surveyor commissioned by the Plaintiff to enter the premises because he did not know him. He denied the fact that in 2001, he broke down his fence and took part of the Plaintiff land. He stated that the plaintiff is not the owner of the land in dispute, and that he did not build any house on the Plaintiffôs land.

Under-cross-examination, he stated that the parcel of land given to him by the Administrators of Elema Estate was 100ft by 100ft, which parcel of land he fenced in 1984. He admitted that there was supposed to be a road by the side of his land. He stated that the proposed road was to the left of his land when facing Okundia Street. That the land miscreants sold is the land ear marked for the proposed road including part of his land. He stated that the Plaintiffôs land is directly behind his land. He admitted that Exh óGô showed his land to be 100ft by 100ft. That his land has not been fenced

when he made Exh. óGô. He stated that he had completed and packed into the house before the Plaintiff went to lodge a complaint with his elder brother, Mr. EmphraimOsula. That he packed into the house in April 1989. That the Plaintiff alleged in her complaint to his brother that he trespassed into her land. He denied the fact that in 2001, the plaintiff complained to him that he trespassed into her land. He also denied the fact that before he received a letter from the Plaintiffôs Solicitor in 2002, he destroyed part of his fence. He stated that he could not remember when he received the Solicitorôs letter in 2002. That he did not respond to the letter. That he did not know the Plaintiffôs surveyor who came to the land when he moved into the house.

In his address, P.A. Ugheoke, Esq., Learned Counsel for the Defendant submitted that from the totality of the evidence before the court and the pleadings the following issues arise for consideration:

(i) Whether from the totality of evidence the action or suit is not caught by statute of limitation? In other words, whether the action is not statute barred?

(ii) Whether by the ample evidence before the court, if the Courtsô jurisdiction has not been ousted? And

(iii) Even if the action is not caught by limitation whether the Plaintiff is not caught by the doctrine of ñstanding byò.

On issue (1) above, he submitted that the plaintiffôs action is statute-barred having waited for more than stipulated time before bringing the action. He submitted that the Plaintiff stated in his evidence before the court that she visited the land in 1989. That the present suit was files in 2002, and referred to Exh. óDô. That the cause of action in the instant case accrued in 1989, which was pleaded in paragraph 18 and 19 of the Statement of Defence. He referred to Section 6(1) of Limitation Law of Bendel State 1976. That the plaintiff joined issues on this in paragraph 5 of the Amended Statement of Claim. He submitted that the averments in paragraphs 4 and 5 of the Statement of Claim are figments of the imagination of the plaintiff and referred to paragraph 7 of the Plaintiffôs reply to the Statement of Defenc,and submitted that no evidence was led by the plaintiff in support thereof. That the pleading is therefore deemed abandoned. He submitted that during cross-examination, the plaintiff maintained that she discovered the act of trespass in 1989. On the issue of computation of time for limitation Act, he cited the case of OWIE V IGHIWI (2005) 3 MJSC 82 AT 90 RATIOS 13 AND 14. He urged the court to hold that the action is caught by limitation law, and therefore statute-barred having been filed after 12 years.

On issue 2, he submitted that the jurisdiction of this court by virtue of the statute of limitation has been ousted, and cited the case of *EMEKA NJOKANMA & ANR. V. PATRICIA UYANA (2006) 13 NWLR (PT. 997) 433 RATIO 10*. He submitted that the subject matter which was initially within the jurisdiction was taken away by the operation of the law. That this court lacks jurisdiction to entertain the suit. He urge the court to so hold and dismiss the matter.

On issue 3, he submitted that the plaintiffôs action is caught by the doctrine of laches and acquiescence having discovered that her land was fenced round in 1989,and did nothing till 2002. That she stood by and waited till the completion of the act after 12 years to lay claim over what is not her property. He submitted that the plaintiffôs land is still much intact.

He urged the court to hold that Exhibit B, the survey plan being the property of the plaintiff and nothing more. He urged the court not to rely on the evidence of the plaintiff and PW2 in that the plaintiff and her witness did not know who first applied and obtained title in the land in dispute. He submitted that the Defendant applied first and obtained title over the land in dispute before the plaintiff, and referred to ExhibitsóCôand óFô. That the Defendant took possession of the land and developed same, and moved into the house before the Plaintiff came to the land in dispute in 1989. He

submitted that Exhibit A, the litigation survey plan, and Exhibits E1 & E2, are figments of the plaintiffôs imagination. That the surveyor stated that he was not allowed access into the premises of the Defendant which at the time of the survey had been fenced. He referred to Exh óGô, the property survey plan or the Defendant, and urged the court to hold that the land in dispute is the property of the Defendant having acquired same in 1974and being possession of the land wherein he built and packed in house in 1989 without challenge from anybody. He finally urged the court to dismiss the Plaintiffôs claim as being vexatious but calculated as gold digging.

In reply, E.F. Osifo, Esq. of Learned Counsel for the Plaintiff submitted that issues for determination are:

(i) Whether the plaintiff action is sufficiently shown to be statute barred as alleged by the Defendant.

(ii) Whether having regardto the pleadings and evidence adduced at the trial, the plaintiff has not sufficiently shown that the Defendant trespassed into her land by extending the frontiers of his land to annex part of plaintiffôs land, so as to entitle the Plaintiff to judgment against the Defendant? And

(iii) Whether the failure of the Defendant to file a litigation plan is not fatal to the defence?

The Defendant pleaded that the action is statute barred. He submitted that any action relating to land must be brought within a time frame of 12 years by virtue of Section 6(2) of the Limitation Law of Bendel State 1976. He submitted that in determining whether the action is statute barred, the relevant documents are the writ of summons and the statement of claim. That the oral evidence of witnesses are nor relevant, and cited the case of P.N UDOH TRADING COY V. ABERE (2001) 11 NWLR (PT. 723) 114 AT 119 RATIO 7. He submitted that by Paragraph 14 and 20 of the Amended Statement of claim, the Plaintiff pleaded that the Defendant first manifested intention to annex part of Plaintiffôs land in 1989, when he fenced part of it to include his own. That due to the intervention of some persons including the Defendantôs brother, the Defendant relocated the fence to mutual boundary between him and the plaintiff. He submitted that by that act, the cause of action that accrued in 1989 abated; and the plaintiff was not expected to institute an action in 1989 when the cause of action was not in existence. He referred to paragraphs 4, 5, 7 & 8 of the Amended Reply to the Statement of Defence. He submitted that the cause of action on which this suit is predicated arose in 2001 when the Defendant resumed his acts of trespass to annex part of the plaintiffôs land. That the Defendant broke down the fence and extended into the frontiers of the plaintiffôs land again. That upon the Plaintiffôs protest, the Defendant broke part of the fence to accurately relocate the exact boundary as he

did in 1989, and referred to Exhibit E2. He submitted that P.W.3 stated that he took Exh. óE2ô in 2001, andtherefore clear on the issue. That the Plaintiff engaged PW1 to prepare Exh.óB, the survey plan. That Exh óBô alerted the Plaintiff that the length of her land was short of 31ft, the loss being the consequence of the annexation of the part of the Plaintiffôs land. That the present cause of action might have the same coloration with that of 1989, but they are not one and the same thing. He submitted that the writ of summons was filed on the 17/6/2002, about one year after the accrual of the present cause of action. That the in the circumstance, the cause of action is not statute barred, and urged the court to so hold. In the alternative, he submitted that the statute of limitation does not apply in the instant case. He submitted that Exhibits C and Fare the parties respective title documents derivable from one source. That the mode of acquisition is almost the same where the acquisition is under Benin Native Law and custom. He submitted that it has been held that acquisition of land under Benin Native Law and Custom is not caught by statute of limitation, and cited the case of EDIGIN V. OVBIAGBONHIA (1993) 5 NWLR (PT. 293) 367 AT 368 RATIO 1.

He submitted that section 1(2) of the Limitation Law is not applicable to land that is held under the Customary Tenure, and cited the case of OGUNKO V. SHELLE (2004) 6 NWLR (PT. 868) 17 AT 23. He urged the court to hold that the action is not affected by the Limitation Law.

On the issue of jurisdiction, he submitted that if the court agrees that the action is not caught by statute of limitation, then the issue of jurisdiction is of no moment. On the issue of laches and acquiescence, he submitted that for any conduct to amount to laches, it must be conduct that is repugnant to equity and good conscience and cited the case of EKPE V. OKE (2001) 10 NWLR (PT. 721) 341 AT 346,RATIO 5. He submitted that there is nothing in the evidence which makes the conduct of the Plaintiff repugnant to equity and good conscience. That the Defendant must plead the conduct for him to rely on such conduct. He submitted that where he fails to plead it, it cannot raise it by way of address, and cited the case of ADENIRAN V. ALOA (2001) 18 NWLR (PT. 745) 361 AT 374. He urged the court to discountenance the submission.

On issues 2 and 3, he submitted that certain facts are not in dispute. That the parties have a parcel of land of 100ft by 100ft each with a common boundary. He submitted that by Exhibits ñC and Fò the parties derived their titles from the same source. That the issue before the court is one of boundary and not to the land indispute. He submitted that in paragraphs 15 ï 21 of the Amended Statement of Claim and the Plaintiffôs evidence, she stated how the Defendant trespassed on her piece of land by extending his frontiers in 1989 and 2001. That upon the Plaintiffôs protest, the Defendant

pretended to revert to the original boundary. That the Plaintiff made Exhibit óBô to know if the boundary was properly re-established. That PW1 stated that after making Exh. óBô, he found that the Plaintiffôs land had been encroached upon by 31 feet. Based on this, the Plaintiffôs Solicitors wrote Exh óDô. After the case was institute, the Plaintiff made Exh. óAô, THE litigation plan wherein the land in dispute was verged yellow. That the Defendantis now occupying the said portion verged yellow. He submitted that the Defendant pleaded in paragraphs 16 and 17 of the Statement of Defence that he will show that the Plaintiffôs land verged yellow did not extend to the portion as contained in Exh óAô that the Defendant did not give any evidence in support of this averment. That the Defendant gave evidence that his own land is now 97ft by 70ft and that he was within the confines of his own hand.

He submitted that this is grossly insufficient to rebut the Plaintiffôs case. He submitted that a party who intends to join issues with his adversary regarding a litigation survey plan must do so properly, and cited the case of AKERE V. ADESANYA (1993) NWLR (PT. 288) 484 AT 487. RATIO 5.That where evidence is not led in support of the pleadings the pleading is deemed to have been abandoned. He submitted that where a Defendant intends to join issue with the Plaintiff regarding the Plaintiffôs litigation, the

Defendant must file a litigation survey plan that will show his own version the case. That he cannot do so by oral evidence. That where he fails to file his litigation survey plan, he is bound by the plaintiffôs litigation survey plan, and cited the case of ADEAGBO V. WILLIAM (1998) 2 NWLR (PT 536) 120 AT 122, RATIO 4. He submitted that the evidence captured by Exh. óAô regarding the boundary trespass by the Defendant is uncontested in the absence of any litigation plan filed by the Defendant. He submitted that the Plaintiffôs witnesses were not discredited under cross-examination and it is irrelevant whether it was the Plaintiff or Defendant who got the land first. He submitted that the dimension of the land occupied by the Defendant is measurable from outside the fence. That the Plaintiff need not go into the fence of the Defendant to carry out the litigation survey plan. He finally urged the court to hold that the Plaintiff has proved her case as required by law and give judgment in her favour.

Replying on points of law, P.A. Ugheoke, Esq submitted that the issue whether the land is governed by customary law is not applicable. That Section 1(2) of the limitation law is not applicable. He submitted that the production of a litigation survey plan is not a mandatory requirement to the proof of a case, provided that the identity of the land is known and ascertainable.

Before I proceed to appraise and evaluate the evidence and submissions of learned counsel for the parties, let me quickly deal with the issue of the action, being statute ï barred.

The General principle of law is that where a statute proves for the institution of an action within a prescribed period, proceedings shall not be brought after the time prescribed by such statute. Any action that is instituted after the period stipulated by the statute is totally barred as the right of the Plaintiff or the injured person to commence the action would have been extinguished by such law. In other words, if the action is brought after 12 years, it would be un-maintainable

See (1) OBIEFUNA V. OKOYE (1961) ALL NLR 357

(2) ELABANJO V. DAWODU (2006) 15 NWLR (PT. 1001) 76

(3)FRED EGBE V. ADEFARASINN (1985) 1 N.W.L.R (PT. 3) 549

(4) OWIE V. IGHIWI (2005) 3 M. J.S.C &82

(5) FADARE V. A.G. OYO STATE (1982) N.S.C.C. 643

In other words, where an action is statute barred, a Plaintiff who might have had a cause of action loses the right to enforce the cause of action by judicial process

because the period of time laid down by the Limitation Law for instituting an action has elapsed.

See JOHN EBOIGBE V. N.N.P.C (1994) 18 A. L.R.C.N. 54

Put differently, a cause of action is said to be statue barred if in respect of it proceedings cannot be brought because the period laid down by the Limitation Law had elapsed.

One of the principles of the statute of limitation is that a person who sleeps on his right should not be assisted by the courts in an action in respect of any tortuous act or acts committed against him or his property; equity aids the vigilant and not the indolent. See NWADIARO V. SHELL PETROLEUN DEV. COY LTD. (1990) 5 N.W.L.R (PT .180) 332.

The law will not wake him up and equity will also not wake him up.The only live issue for consideration now is whether the Plaintiffôs suit was commenced within the time stipulated by law. In other words, when did the cause of action rose in the instant case?

It is settled that date is very material when an occasion arises for finding out when a cause of action arose, for as soon as the cause of action arises, time begins to run against the person in whose favour the cause of action has arisen.

See also OMOTAYO V. NIG RAILWAY CORPORATION (1992) 7 N.W.L.R (PT. 284) 474 RATIO 7.

How then is time computed for the purpose of ascertaining when the cause of action arose? In EBOIGBE V. N.N.P.C. (SUPRA) 69, RATIO 7, the Supreme Court held that in computing time when the statute of limitation begins to run, the day the cause of action arose is as a rule excluded and the day of filing the action is included.

See OMOTAYO V. N.R.C (SUPRA) RATIO 8

In other words, to determine the period of limitation, one has to look at the writ of summons and the statement of claim and compare the averments in the statement of claim as to date the wrong was committed with the date the writ of summons was filed. If the period between those two events is no longer than the period prescribed by the relevant law as the period of limitation, the action is statute-barred.The verification of the facts of whether an action is statute-barred can even be done by a court without taking oral evidence from the witnesses. See the following cases:

(1) ABIOLA V. OLAWOLE (2006) 13 NWLR (PT. 996) 1 AT 22

(2) GRAINS PRODUCTION AGENCY V. EZEGBULEM (1999) 1 NWLR (PT. 587) 399.

(3) ETHOPIAN AIRLINES V. AFRI BANK NIG. PLC (2006) 17 NWLR (PT. 1008) 245 AT 258

By section 6(2) of the Limitation Law of the Defunct Bendel State Applicable in Edo State, on action to recover land, no action shall be brought after the expiration of twelve years from the date on which the right of action accrued to the person bringing it or if it first accrued to some person through who he claims. From this provision of the law, it is clear that the limitation period applicable to this matter is twelve (12) years.

Now, the question here is whether the Plaintiff initiated the action outside the limitation period of twelve (12) years from the date on which the right of action accrued to her. I have myself carefully examined or scrutinized the writ of summons, the Amended Statement of Claim, the Statement of Defense and the Amended Reply to the Statement of Defence. Form the endorsement on the writ of summons, it is manifestly clear that the Plaintiff initiated this action on the 17th June, 2002. In paragraph 21, of the Statement of Defence, the Defendant pleaded that the suit is statute barred. Learned Counsel for the Defendant submitted that the cause of action arose in 1989. The Plaintiff filed an Amended Statement of Claim. In paragraph 14, she stated that the Defendant first manifested intention to annex part of her land in 1989 when he fenced part of it to include his own. In

paragraph 20, 21 and 22, the plaintiff pleaded that due to the intervention of some persons including the Defendantôs brother, Mr. Ephraim Osula, the Defendant relocated the fence to the mutual boundary between him and the Plaintiff for some years, until sometime in the first quarter of 2001, when he again broke down the fence and fenced it again into the Plaintiffôs land for the second time. In paragraphs 4,5,7 and 8 of the Amended Reply to the Statement of Defence, the Plaintiff pleaded that the parties maintained and respected their mutual boundaries peacefully until 2001, when the Defendant appeared again on the portion he had earlier attempted to annex and started a small building, and a soak-away and further expanded his fence on that portion. The Plaintiff led evidence in support of the pleadings and called PW3who testified that he took Exhibit E2 in 2001.

Form the state of pleadings and the evidence led, I am of the view that the cause of action that accrued in 1989 when the Defendant allegedly erected a fence on the portion of the land in dispute was abated when the Defendant relocated the fence on the intervention of some persons, including Mr. Ephraim Osula. It is my view that the

Plaintiff was not expected to institute an action in 1989 when the cause of action was no longer in existence or rather has abated.

In the case of ADIMORA V. AJUFO (1988) 1 N.S.C.C. 1005 AT 1008, it was held that the accrual of a cause of action is the event whereby a cause of action becomes complete so that the aggrieved party can begin to maintain his cause of action.

In the instant case, I find as a fact and so hold that the Plaintiffôs cause of action arose in 2001. It is my view therefore, that in 2001 when the Plaintiffôs cause of action arose, and on the 17th June, 2002 when the action was filed, (a period less than 2 years) is within the 12 years period provided for in Section 6(2) of the Limitation Law of Bendel State. Thus, I am satisfied that the Plaintiffôs action is not statute barred. The result of this finding is that the issue is resolved against the Defendant.

This would have been the end of the matter in respect of this issue. But Learned Counsel for the Plaintiff submitted that the customary acquisition of land is not caught by statute of limitation. This the correct position of the law. But, I must say that in the instant case, what is before the court is not acquisition under the Benin Native Law and Custom ExhsñC and Fò which are the parties

respective title documents are deeds of conveyance. Exhibits ñC and Fò are not Obaôs approvals, but deeds of conveyance between the Administrators of Elema Estate and the parties. There is nothing in Exhs. ñC and Fòwhich has the toga of customary acquisition. It is, therefore my view, that Section 1(2) of the Limitation Law is not applicable in this case. This takes me to the next issue.

Learned Counsel for the Defendant submitted that the Plaintiffôs action is caught by the doctrine of laches and acquiescence. That the Plaintiff having discovered that her land was fenced in 1989 did nothing until 2002 when she filed this suit.

Now, what is laches in law? It is simply an equitable doctrine which postulates that it would be practically unjust to give a remedy, either because the party has, by is conduct, done that which might be fairly regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted.

See FAGBEMI V. ALUKO (1968) 1 ALL NLR 233

On the other hand, the term ñacquiescenceò is properly used where a person having a right, and seeing another person about to

omit or in the course of committing an act of infringements upon that right, stands by such a manner as really to induce the person committing the act and who might otherwise have abstained from it, to believe that he assents to its being committed, the person standing by cannot afterwards be heard to complain of the act. See OGUNKO V. SHELLE (SUPRA) AT 38.

It must be emphasized that in considering the equitable doctrine of laches, two factors are paramount, which are length of delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice. For there to be delay in taking action, there must be knowledge on the part of the Plaintiff of all the facts giving him a cause of action. See KAYODE V. ODUTOLA (2001) 11 NWLR (PT. 725) 659.

It must also be pointed out that the acquiescence which will deprive a person of his legal right must amount to fraud.

In EKPE V. OKE (SUPRA) AT 355Kutigi J.S.C. held that the type of conduct that will amount to laches and acquiescence will be such that will be repugnant to equity and good conscience.

In the instant case, I have myself examined the evidence led. A calm and cool consideration of the entire evidence demonstrably

shows that the Plaintiff took all reasonable steps to warn the Defendant by protesting every acts of the Defendant complained of. I cannot therefore infer form the plaintiff any act that could give rise to the conclusion that she willfully remained passive or indifferent when she became aware that the Defendant was erecting a fence on the land in dispute.

It is therefore my humble but firm view that the Defense of acquiescence and laches cannot stand in the circumstances of this case.

Assuming for a moment (but not conceding) that I am wrong. I shall go further that the Defendant having not so pleaded the defences in his Statement of Defence cannot rely on it.

It is settled law that the Defences of laches and acquiescence are required by law to be specifically pleaded with full particulars. The facts must be adequately and carefully stated. In the instant case, the Defences were raised for the first time in Learned Counselôs final address.

It is trite law that address of Counsel cannot be used to raise issues which do not emerge from the pleadings and evidence. See ODUBEKO V. FOWLER (1993)7 NWLR (PT. 308) 637;

BURAIMOH V. BAMGBOSE (1989)3 NWLR (PT. 109)352;and OMOTOSHO V. B.O.N. LTD. (2006)9 NWLR (PT. 986) 573 & 587.

In the instant case, the Defendant having not conformed withpleading procedure cannot raise the Defences. After all, it is good law that parties are bound by their pleadings. Our adversary system of administration of Justice has no room for hide and seek game. In the result, I hold that the Plaintiffôs action is not caught by laches and acquiescence.

Let me now deal with the last issue, which is whether the plaintiff has proved her claim as required by law.

It is pertinent to state that under the Nigerian Land law, it has long been established that there are five ways of proving or establishing title to land. These five ways of proving title to land weren approved by the Supreme Court in its decision in the case of **IDUNDUN v OKUM AGBA (1976)9 – 10 SC 227.**

One of the five ways is by the production of the document of title executed in favour of a claimant by an acknowledged owner of the land in dispute.

In the instant case it is self evident from pleadings that both parties traced their root of title to a common vendor, i.e the Administrator ofElema Estate. See Exhibits ñC and Fò In other words, it is without doubt established that both parties herein are ad-idem.As to the roots of their title through a common vendor.

Therefore, from the pleading and the evidence adduced by the parties, it is obviously clear that title is not in dispute. The campus belli of the entire controversy between the parties is simply boundary dispute. The pleadings of the parties have obviously narrowed down considerably the question in dispute between parties.

From the pleadings and evidence adduced in this case by the parties, certain facts are really not in dispute. Firstly, it is admitted by the parties that the Plaintiff and the Defendant were allotted a parcel of land measuring 100ft by 100ft each by the Administrators of Elema Estate. This assertion is purely buttressed by Exhibits óôC and Fô their respective title documents. It is also a common ground that the parties have a common boundary.

In the instant case, the plaintiff in proof of her case gave evidence that the Defendant encroached on her land by erecting a fence in 1989. She further testified to the effect that when she protested and through the intervention of some persons, the defendant relocated his fence and maintained the mutual boundaries. We stated that sometime in 2001, the defendant again trespassed into her portion of the land by erecting a fence and soak-away and a foundation of a boys quarter on her parcel of land. That all entreaties to have the Defendant relocate the fence to the mutual and the exact boundary proved abortive. She then consulted her solicitors who instituted this suit after the defendant refused to hid to the warning to relocate his

fence videExh óDô. The plaintiff in support of her case called PW1, a Registered Surveyor. P.W1 gave evidence to the effect that when he carried out a survey of the Plaintiffôs Land, he discovered that the plaintiffôs land was short by 31ft. He testified that the Defendant occupies a portion of land measuring 100ft by 131ft, which he verged **"GREEN"** onExhñ Aò. That the Defendant trespassed into the plaintiffôs portion of land by 31ft, which he verged yellow on Exh. ñAò. P.W.1 also testified that he equally carried out a litigation survey plan for the plaintiff, vide Exhibit ñBò. That before he carried out the survey, the plaintiff told him that the dimension of her land is 100ft by 100ft. He further averred that when he finished Exhibit ñBò, he discovered that 31ft has been taken away from the Plaintiffôs land by the Defendant, which he verged yellow in Exhibit óAô. The evidence of the plaintiff is substantially corroborated by the evidence of P.W.2 as to the dimension of land allotted to the parties, which is 100ft by 100ft each.

The Defendant in is his defenec stated that he was allotted a parcel of land measuring 100ft by 100ft in 1974 by Administrators of the Elema Estate vide Exhibit óFô. He surveyed the land vide ExhibitóGô in 1979. In 1984 he started the erection of a building which he completed in1989. He stated that as a result of the death of Chief Elema, land miscreants demarcated the land and sold a small portion of his land including the adjoining Road. That the land miscreants sold 32ft of his portion of land. He stated that it was when moved into his house in 1989 that

the plaintiff alleged that he encroached into her parcel of land. He stated that the present dimension of his land is 90ft by 70ft.

In the instant case it manifestly clear that the Defendant joined issues with the Plaintiff on the extent, area or boundaries of the land in dispute in paragraphs 15-21 of the Amended Statement of Claim vis-à-vis paragraphs 16 and 17 of the Statement of Defense allegedly encroached on it. PW1 corroborated the dimension of the plaintiffôs land by preparing litigation survey plans, vide Exhibits óA & Bô.

As I earlier started, the Defendant joined issues with the plaintiff on the extent or area or boundaries of the land in dispute. The onus is therefore on the Plaintiff to establish the area or boundaries of the land in dispute. This the plaintiff has done videExhs. ñA&Bò and the evidence of PW1.

How did the Defendant rebut this? The Defendant gave evidence in his defense called no witness and tendered no survey plan.

After a calm and cool consideration of the entire evidence adduced by the parties and weighing the evidence of the Plaintiff and her witnesses vis-à-vis that of the Defendant, I must say straight away that I believe the candid and compelling evidence of the PW1, the Registered surveyor that the present dimension of the Defendantôs land as depicted in Exh. óAô verged ñGreenò is 100ft by 131ft. I also believe his credible evidence that the portion of the plaintiffôs parcel of land

trespassed in to by the defendant is 31ft by 100ft verged Yellow in Exh óAô. PW1 impressed me immeasurably as a truthful witness and I have no reason whatsoever to doubt his credibility. I therefore believe the evidence of the Plaintiff and her witnesses that defendant encroached on her portion of land by 31ft.

On the contrary, I disbelieve the evidence of the Defendant that upon the death of Chief Elema, land miscreants sold small portion of his land measuring 32ft and the adjoining road. The evidence of PW2 completely knocked out the bottom of the spurious and puerile story, which the Defendant laboured to build. I equally disbelieve the evidence of the Defendant that his present piece of land is 90ft by 70ft. I regard his cock and bull story as an afterthought to hoodwink this court and accord it no credence what so ever.

Additionally, it is my view that the defendant having failed to file a survey plan in rebuttal of the plaintiffôs survey plan is deemed to have approved of the plaintiff plan as to the boundaries of the land in dispute. The Defendant is stopped from say that the exact portion of the plaintiffôs land depicted in Exhs. óA and Bô is the figments of the Plaintiffôsimagination without filing one.

In the case of ADEAGBO V. WILLIAMS (SUPRA) AT PAGE 128 Acholonu JCA (as he then was) held thus:

ñIt is presumed that a defendant who failed to file any survey plan to particularize the area of land in dispute and to counteract that filed by the plaintiff is inevitably bound by the plan filed by the plaintiff. The defendant will be deemed to have approved of the plaintiff plan regardless of his denial as his mere ipse-dixit without plan in order to identify and particularize the land in dispute, he cannot be allowed to say that the area of land depicted in the Respondentôs plan does not represent the geographical areas of the land in dispute. He is presumed to be inevitably bound by the respondentôs plan.ò

Before I conclude this judgment, it is necessary for me to say a word on the submission of learned counsel for the Defendant that the Defendant got his parcel of land long before the Plaintiff. I think this submission is rather otiose and of no moment on the simple ground that title is not in issue in this case. The issue of priority of interest does not arise in this case since the main issue is that of boundary dispute.

In the final result, and having weigh the evidence adduced by the plaintiff in support of her claim including her witnesses and the documentary evidence tendered, and placed side by side the evidence of the Defendant on the imaginary scale of Justice, I prefer the case of the Plaintiff to that of the Defendant. On the whole, and after one consideration, I am satisfied that the Plaintiff has successfully proved her claim on the balance of probability as required by law.

In the result, I hereby enter judgment in favour of the Plaintiff against the Defendant as follows:

(i) A DECLARATION that the plaintiff is the Owner in possession and entitled to be granted a statutory Right of Occupancy over the parcel of land measuring hundred feet by hundred feet(100ft by 100ft) bounded by beacons Nos. CP1. CP2. EDC2662 AND 2663as shown in the litigation survey plan situate at Okundia Street, Elema Estate, Elema Quarters, Benin City which said land shared common boundary with the Defendantôs land.

(ii) A DECLARATION that the Defendantôs said land sharing the same boundary with Plaintiffôs land is only One Hundred feet by One Hundred feet (100ft by 100ft) and that the act of the Defendant in extending the frontier of his said land into Plaintiffôsland is unlawful and amount to trespass into Plaintiffôs land.

(iii) I hereby order that the Defendant abate whatever nuisance he has caused or created on the Plaintiffôsland by the way of erecting illegal and unauthorized structure on Plaintiffôssaid land without her prior consent.

(iv) AN ORDER OF PERPETUAL INJUNCTION restraining the Defendant whether by himself, his agent , servants, cohorts,

Representative and Assigns from trespassing into the plaintiffôs land measuring 100ft by 100ft situate at Okundia street, Elema Quarters, Benn City.

I accordingly award the Plaintiff costs, which I assess and fix at N5000.

_____

HON. JUSTICE . E.O. AHAMIOJE

(JUDGE)

11/01/2007.

COUNSEL:

SOLO EGHOBAMIEN, ESQ. é é é .. FOR THE PLAINTIFF

(WITH HIM IS E. F. OSIFO, ESQ.)

P.A. UGHEOKE, ESQ é .. é é .. FOR THE DEFENDANT