

**IN THE HIGH COURT OF JUSTICE,
EDO STATE OF NIGERIA
IN THE BENIN JUDICIAL DIVISION**

HOLDEN AT BENIN CITY

BEFORE HIS LORDSHIP, HON. JUSTICE N.A. IMOUKHUEDE - JUDGE

ON MONDAY THE 19TH DAY OF MAY, 2014

B E T W E E N:

SUIT NO. B/A/2013

PASTOR VICTOR OMOIKE
(For and on
behalf of Christ Revival
Mission Benin City)

APPELLANT

AND

MR. RICHMAN AWO Ó OSAGIE

.....

RESPONDENT

J U D G M E N T

This is an appeal from the judgment of M. E Itsueli, President Special Grade of the Area Customary Court in which judgment was given in favour of the Respondent/Defendant.

The Appellant filed the following Grounds of Appeal:

1. The Trial Court erred in law in revisiting and relying on the issue of jurisdiction earlier raised in the Trial Court presided over by A.T. Momodu in the ruling dated 7th of April 2008.
2. That the Trial Judge misdirected itself on facts when it gave judgment against the Plaintiff on the ground that the Plaintiff was in breach of the agreement between the father of the Defendant and the Plaintiff in Exhibit E.
3. That the Trial Court misdirected itself on facts and came to a wrong conclusion and gave judgment against the Plaintiff by relying on Exhibit B.
4. The trial Court misdirected itself on fact when it gave judgment in favour of the Defendant against the Plaintiff in respect of the counter claim and therefore came to a wrong conclusion.

In arguing his Appeal, the Appellant formulated the following Issues for Determination:

1. Whether in the light of evidence before court the court was right in declaring the representative capacity of Victor Omoike null and void on the ground that he was not given a Power of Attorney which that capacity was challenged for lack of jurisdiction of the court vide the

Defendant/Respondent's Application dated 26th of June, 2007.

2. Whether the trial court was right in declaring that the Plaintiff was in breach of Exhibit E without a proper evaluation of Exhibits F and G that led to Exhibits J & J3 and Exhibits H1 & H4 as well as the other evidence before court.

3. Whether the trial court was right in giving validity to Exhibit B and relying on same when there was no consensus reached between the parties and same not executed by both parties.

4. Whether the trial Court was right in granting the counter claim in the absence of evidence to establish same.

On issue one- Whether in the light of evidence before court the Court was right in declaring the representative capacity of Victor Omoike null and void- Counsel to the Appellant submits that that in a representative action, both the named and unnamed parties properly represented by others named in the Writ are all parties to the action, that they all have common interest in the suit and therefore cannot be separated and refers the Court to the case of Amachree Vs. Princewill (2008)12 NWLR Pt. 1098 pg. 345 Counsel to the Appellant submits that the trial court without proper evaluation of evidence before it came to a wrong conclusion and held that the Appellant had no locus standi to prosecute the case. Counsel to the Appellants submits that in his evidence, Appellant told Court that he is a member and Pastor of the Church and that he has shown that he has a common interest with Christ Revival Mission and with any of its members, whether they are named or not and relies on the case of Ejezie Vs. Anuwu (2008) 12 NWLR Pt. 1101

pg. 446

Counsel to the Appellant submits that the court in another panel had earlier ruled on jurisdiction on the 3rd of April 2008, therefore the court was functus officio and committed an error of law when he revisited the matter again.

On issue no 2- Whether the trial court was right in declaring that the Plaintiff was in breach of Exhibit E without a proper evaluation of Exhibits F and G that led to Exhibits J & J3 and Exhibits H1 & H4 as well as the other evidence before court-Counsel to the Appellant submits that from the evidence on record, it was clear that the Plaintiff at no time breached Exhibit E, which is the lease agreement between the father of the Defendant and the church.

Counsel to the Appellant submits that Exhibit E still subsisted and that the failure of the Appellant to pay the rent within the said period cannot amount to breach of Exhibit E, since the Defendant had not inherited the property between 1993 and 1999. Counsel to the Appellant submits that there was no breach of Exhibit E and relies on the case of Best (Nig) Vs. B.H (Nig) Ltd, (2011) 5 NWLR Pt. 1239 at 95

On issue no 3 -Whether the trial court was right in giving validity to Exhibit B and relying on same when there was no consensus reached between the parties and same not executed by both parties. Counsel to the Appellant submitted that there is ample evidence in the record that based on the

negotiation between the parties, the Plaintiff agreed with the Defendant to enter into a new tenancy agreement subject to certain conditions which were never met, therefore the new lease agreement Exhibit B was never executed by the parties.

Counsel to the Appellant submits that a document not signed cannot be given any validity and that the trial court was therefore in error when it came to the conclusion at page 121 paragraph 1-10 of the records that the Plaintiff breached Exhibit -Bø

Counsel to the Appellant submits that there is no consensus ad idem between the Appellant and the Respondent and that the mere fact that the Plaintiff performed his own part by paying the rent as per Exhibit -Aø does not create a binding contract and refers to the case of Agona Vs. Guinness Nig. Ltd 1995 2 NWLR Pt. 380 at pg. 672.

Counsel to the Appellant submits that the failure of the Respondent to incorporate a renewal clause in Exhibit -Bø shows that he was not prepared to enter into any legal relationship with the Plaintiff.

Counsel to the Appellant submits that from the evidence led, Exhibit B cannot be said to be a binding agreement and relies on the cases of Opra D.S. Nig. Ltd 1995 4 NWLR Pt. 390 Pg.440 and Green Finger Agro Ind. Ltd Vs. Yusufu (2003) 12 NWLR Pt. 835 pg. 488

Counsel to the Appellant submits that though Exhibit -Bø created a new contract it cannot in any way be inferred that the earlier Agreement Exhibit -Eø between the father of the Respondent and the Appellant is breached and relies on the case of SPDC Ltd Vs. Nwawka (2013) 6 NWLR Pt. 815 at pg. 184. Counsel to the Appellant insists that Exhibit E, the old contract still subsisted.

On issue no 4 -Whether the trial Court was right in granting the counter claim in the absence of evidence to establish same- Counsel to the Appellant submits that the basis of Exhibit C, the rent receipt was in respect of Exhibit A and not Exhibit E. Counsel to Appellant submits that the Appellant refused to pay further rent after Exhibit -Aø because the parties did not reach an Agreement based on Exhibit -Bø and relies on the case of U.A.C. Vs. Macfoy 1961 AELR Vol. 3 pg. 1169.

Counsel to the Appellant further submits that the Court did not properly evaluate the evidence before it. The evidence of the Defendant was that Exhibit A was a receipt for the payment of rent subject to a new lease agreement. Counsel to the Appellant submits that to say that Exhibit -Cø, the Notice to quit was issued because the Appellant breached Exhibit -Eø the original lease agreement of 1987 is totally unfounded. Counsel to the Appellant further submits that there has been an improper evaluation of evidence by the trial court in terms of Exhibits A, B, C and E and refers to the case of Lawal Vs. U.T.C. Nig. Plc (2005) 13 NWLR Pt. 943 pg. 601.

Counsel to the Respondent also filed his brief and formulated the following issues for determination:

Issue 1- Whether or not the consideration of issue of jurisdiction after the ruling of 7/4/08 has occasioned a miscarriage of Justice that will warrant the setting aside of the Judgment of the Lower Court.

Issue 2- Whether or not the Lower Court was correct when it held that the Plaintiff was in breach of Exhibit E (Original Lease Agreement for 50 years) and gave judgment in favour of the Defendant.

Issue 3 - Whether or not the Lower Court was correct when it held that the Plaintiff was in breach of Exhibit E (Original Lease Agreement for 50 years) and gave judgment in favour of the Defendant.

Counsel to the Respondent also raised a preliminary objection against Ground 3. Counsel submits that Ground 3 of the Appellant's Notice of Appeal is not competent because the issue for determination does not flow from the decision reached by the court on Exhibit B. Counsel to the Respondent submits that the court did not give validity to the said document. Counsel to the Respondent further submits that Ground 3 is a total misrepresentation of the Judgment of the Lower Court since it raises an issue that was not decided or pronounced upon by the Lower Court and refers to pages 120-121 of the Records.

Counsel to the Respondent submits that a competent ground must be founded on a complaint in the judgment and refers to the case of Hon. Zakawanu I. Garuba Vs. Hon. Ehi Bright Omokhodion (2011) NWLR (Pt. 1269) 145 at 177 and Ohakin Vs. Agbaso (2010) 19 NWLR (Pt. 1226) 172 at pp. 255 & 256.

Ground 3 of the Appeal states that the Trial Court misdirected itself on facts and came to a wrong conclusion and gave judgment against the Plaintiff by relying on Exhibit B. In order to first deal with the preliminary objection I have looked at pages 120 -121 of the records of proceedings and I find that the trial court did not give validity to Exhibit B contrary to the statement in ground 3. On the contrary, the lower court at pages 120-121 of the records the court found as follows:

On the fifth issue for determination, whether Exhibit B, the draft lease is enforceable, we completely disagree and align ourselves with the submission of Learned Counsel for the Plaintiff that a lease agreement is a simple contract founded on offer and acceptance and that Exhibit B was not executed.

See *Olaopa Vs. Obafemi Awolowo University* (1997) vol. 51, LRCN Pg. 1598. There is evidence from both parties that Exhibit B was not executed therefore there was no offer and acceptance. However, there is evidence before us that the Defendant and Prophetess Okeke orally agreed on N120,000.00 as rent per annum for the lease. This fact was established by the tendering of Exhibit A which is the receipt evidencing payment of N120,000.00 as rent for 22nd July, 2005.

The Lower Court continued Now can Christ Revival Mission resile from it? We believe that they cannot. Having agreed to pay N120,000.00 and actually paid for the tenancy year May, 2005 to April, 2006, they cannot be heard to resile from it. In *Pan African Bank Ltd Vs. Ede* (1998) 7 NWLR (Pt. 558) pg. 422 at 424 Ratio 1, the Court of Appeal held on how a contract is created.

A contract could be in writing. It could also be on parole. The law even allows the courts to infer the existence of a contract by the conduct of the parties in the circumstances of the case. From the records it is clear that the lower court did not recognize Exhibit B, the draft lease as an enforceable contract, neither did they rely on it in coming to their decision and I so hold. I agree with Counsel to the Respondent that Ground No. 3 of the Appellant's Notice of Appeal is a misrepresentation of the findings and decisions of the Lower Court and so Ground 3 of the Appeal is hereby struck out.

On issue 1- Whether or not the consideration of the issue of jurisdiction after the ruling of 7th of April 2008 has occasioned a miscarriage of justice that will warrant the setting aside of the judgment of the Lower Court-Counsel to the Respondent submitted that the court was right in considering the issue of jurisdiction after the ruling of 7/4/08. Counsel to the Respondent submits that the panel that gave the

ruling of 7/4/08 is not the same panel that reconsidered the issue of jurisdiction raised in the final address.

Counsel to the Respondent submitted that the Court evaluated the evidence before it correctly and it also considered the addresses of counsel before arriving at its decision on the issue of jurisdiction and locus standi. Counsel to the Respondent submits that the court can revisit jurisdiction and relies on the case of Alhaji Shehu Bakule Vs. Tanerewa Nig. Ltd (1995) 2 NWLR (Pt. 380) p. 728 at 738.

Counsel to the Respondent submits that the lower court evaluated the evidence of both parties before concluding that the Defendant had established his Counter Claim. Counsel to the Respondent submits that that justice was done in this case and that if there was any error, such error is not substantial enough to warrant the setting aside of the Judgment of the Lower Court and relies on the case of Ohakin Vs. Agbaso (2010) 19 NWLR (Pt. 1226) 172 at Pg. 222.

Counsel to the Respondent submits that the Appellant has not even alleged that he has suffered any miscarriage of justice and states that that in cases decided by Customary Courts, it is substantial justice that should guide an Appellate Court rather than the form and relies on the case of Olodo Vs. Josiah (2010) 18 NWLR (Pt. 1225) 653 at 671.

On whether the lower court was correct when it held that the Plaintiff was in breach of Exhibit E, Counsel to the Respondent submitted that from the evidence led, the lease was valid and subsisting until the Plaintiff was in breach of Clause 4 of the Agreement. Counsel to the Respondent submits that the findings of the Lower Court are reasonably justified by the evidence on records and urges this Court not to disturb the judgment of the lower court and refers to the case of Ibuluya V. Dikibo (2010) 18 NWLR (Pt. 1225) 627 at 647

On issue no 3 -whether or not the Lower Court was correct when it granted the Defendant's Counter Claim and gave judgment in his favour. Counsel to the Respondent submitted that the Respondent at the Lower Court adduced both oral and documentary evidence in support of his Counter Claim which the Appellant failed to challenge or contradict.

Counsel to the Respondent submits that the assessment of the credibility of witnesses in a case is primarily the function of the trial court which alone has the opportunity of seeing and hearing them and refers to the case of Ibuluya Vs. Dikibo (Supra). Counsel to the Respondent therefore urges the Court not to interfere with the findings of the trial court.

Finally Counsel to the Respondent urges court to uphold the judgment of the lower court and dismiss this Appeal.

I have carefully read the Records of Proceedings and considered the Grounds of Appeal and Issues for determination as well as the submissions of Counsel in their briefs. In considering the issues for determination I had earlier ruled on the Respondent's preliminary objection and struck off Ground 3 of the Appeal. I therefore strike out the Appellant's Issue 3 because it flows directly from Ground 3.

On the issue of the previous ruling on jurisdiction which was an issue formulated by both parties I prefer to adopt the Respondent's issue 1 which is:

Whether or not the consideration of issue of jurisdiction after the ruling of 7th of April 2008 has occasioned a miscarriage of Justice that will warrant the setting aside of the Judgment of the Lower Court. -The records show that the panel that gave the ruling of 7/4/08 is not the same panel that reconsidered the issue of jurisdiction raised in the final address.

In the case of Alhaji Shehu Bakule Vs. Tanerewa Nig. Ltd (1995) 2 NWLR (Pt. 380) p. 728 at 738 the court held that: "The effect of starting a case afresh before another judge is to sweep clean all previous proceedings in the case. Any of the parties therefore is free to bring afresh any application brought before the previous judge and in which he gave an adverse ruling against the party".

I find that the lower court was right in considering the issue of jurisdiction raised before it and that there was no miscarriage of justice occasioned by the said ruling and I so hold. On Counsel to the Appellant's submission that the trial court without proper evaluation of evidence before it came to a wrong conclusion and held that the Appellant had no locus standi to prosecute the case; I find from the records that in spite of the fact that the court held that the Appellant had no locus standi to prosecute the case, the Court still went on to fully evaluate the evidence led, before coming to its decision. I find therefore that no miscarriage of justice had occurred and I so hold. I have also looked at Issue no 2 formulated by both parties and I prefer to adopt the Respondent's issue which is- Whether or not the Lower Court was correct when it held that the Plaintiff was in breach of Exhibit E (Original Lease Agreement for 50 years) and gave judgment in favour of the Defendant.- Exhibit E was admitted in evidence through Pastor Victor Omoike the Plaintiff on the 23rd of February, 2009, see pages 79 & 80 of the Records. This was the original lease agreement for a term of 50 years between Mr Idahosa Awo Osagie (LANDLORD) and Prophetess Okeke representing Christ Revival Mission. Under cross examination at page 81 of the Records of Proceedings the Plaintiff stated as follows:

"I am aware that there is a clause in the 1987 lease agreement that states that a breach of any of the fundamental clauses in the lease agreement will terminate it. The Defendant led evidence to show at pages 85 to 87 of the Records that the Plaintiff was in breach of Exhibit E. The Trial Court has the unique opportunity to observe the witnesses and determine whether they are witnesses of truth. The trial court evaluated the evidence adduced by both parties and came to the following conclusion at pages 119- 120 of the Record of proceeding:

-the Plaintiff admitted the existence of a clause in Exhibit E which says that the agreement will be determined by a breach in the terms of payment. We have reproduced in extenso the relevant clause;

(4) This agreement shall be determined forthwith by notice given by the Landlord if at any time any payment due hereunder is unpaid for three months after becoming due (whether demanded or not). Exhibits F and G tendered by the Plaintiff are letters written by Ken E Mozia & Co., on behalf of the Administrators of the Estate of Awo-Osagie to Prophetess Okeke notifying her of outstanding unpaid rents between 1994 and 1999 and the mode of instalment repayments to be made by her as agreed.

Going by this unchallenged evidence, it is clear that the church through Prophetess Okeke defaulted in payments of rent. It is clear in our minds also from Exhibit F and G that there was breach of clause 4 of Exhibit E. Once there is evidence of noncompliance, proof is not necessary. Parties are bound by their evidence.

Furthermore from the records, evidence was led by both parties that the Plaintiff began to pay new rent after a series of negotiations between them. The payment of new rent shows the creation of a new

contract which parties negotiated and agreed to be bound by. Evidence led by the Appellant shows that the new rent was paid for two consecutive years. Thus by their conduct the parties had jettisoned Exhibit E and created a new tenancy agreement albeit oral, but still a contract.

I cannot fault the findings of the lower court and I hold that they properly evaluated the evidence before them before coming to the decision that the Plaintiffs were in breach of Exhibit E.

Issue 3 of the Respondent's brief is - Whether or not the Lower Court was correct when it granted the Defendant's Counter Claim and gave judgment in his favour.- After a careful perusal of the evidence led in the Records of Proceedings, I find that the Respondent at the Lower Court adduced both oral and documentary evidence in support of his Counter Claim which the Appellant failed to challenge or contradict. In the case of *Olodo Vs. Josiah* (2010) 18 NWLR (Pt. 1225) 653 at 671 paras C ó E 691 paras F ó G, the Supreme Court held as follows:- "In cases tried by native or customary courts, it is desirable and necessary for a court sitting on appeal thereon to look at the whole of the proceedings ó the whole evidence of the parties and the Judgment in order to arrive at a correct conclusion as to what the Judgment is about. Substantial justice should be the watch word í í í í í í ..ö

The court must not delve into form but examine the substance and proceed to see if the Customary Court was fair in the Judgment it eventually arrived at í í í í í í ..ö

The lower court was therefore right in granting the Defendant's counter-claim and I so hold.

On the whole I find that the judgment is reasonable, fair and in line with the evidence led, I therefore uphold the judgment of the lower Court and dismiss this Appeal.

HON. JUSTICE NOGI IMOUKHUEDE
JUDGE
19/5/2014

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