IN THE SUPREME COURT OF NIGERIA

Suit No: FSC162/1960

Petitioner: Momo Dabiri & Ors
And
Respondent: Chief A.B. Gbajumo

Date Delivered: 1961-05-01

Judge(s): Adetokunbo Ademola (Chief Justice of the Federation) Unsworth (Federal Justice) John Idowu Conrad Taylor (F

Judgment Delivered

The defendants/appellants have appealed to this Court, being dissatisfied with the Judgment of Coker, J. of the High Court of Lagos, delivered on the 25th May, 1959, which said judgment declared the plaintiff respondent chieftaincy family the owner in fee simple of the area in dispute. The appellants were ordered to give up possession of the said premises on or before the 30th June, 1959.

At the hearing of the appeal, Chief Williams abandoned the original grounds of appeal and argued the five additional grounds of appeal under the following three heads:

1. That in view of the claim and the evidence before the Court the Trial Judge should have granted the respondent family a declaration of title under Native Law and Custom and not in fee simple. Chief Williams conceded that this Court was empowered to make the necessary amendment on appeal and made it quite clear that he was in no way attacking the findings of the Trial Judge on the issue of title.

2. That the Trial Judge erred in law in making the order for forfeiture when there was no such claim in the writ or Statement of Claim.

3. That even if it could be said that there was such a claim, the order for possession should not have been made as the conduct complained of was not of a sufficiently serious nature as to warrant an order for forfeiture under Native Law and Custom.

As to the first point, little more need be said than that the contention of Chief Williams is sound and in view of the powers of this Court to make an order or give a judgment which the Lower Court should have given, I would amend the judgment by granting the respondent family a declaration of title to the area in dispute under Native Law and Custom.

The second point necessitates a scrutiny of the pleadings in this appeal to see what the real issues were between the parties. Mr. Agusto (Junior) argued for the respondent family that the Statement of Claim sufficiently discloses that the action was one, inter alia for forfeiture under Native Law and Custom, and I am inclined to agree with him. It is true that if

the writ were to stand alone, the claim being one for title and possession, a possible construction could be that the claim for possession was a claim made against trespassers and not one against tenants under native law and custom who had forfeited their fights. The claim as it stood on the writ was, however; amplified in the Statement of Claim and in this respect I refer to paragraphs 7, 8, 9 and 12 of same. I quote Paragraphs 7, 9, and 12 as follows: -

7. The defendants and their ancestor one Dab*i have been allowed by the plaintiff the use and occupation only under Yoruba Native Law and Custom of portion of the rear of 136 Great Bridge Street, Lagos, which adjoins the rear of 20 Bridge Street, Lagos, as shown in the plan to be filed later.

9. The defendants in pursuance of the said judgment have partitioned the portion referred to in paragraph 7 above as forming part of 20 Bridge Street, Lagos, contrary to the terms and conditions under which they were permitted to use and occupy same.

12. The defendants deny plaintiff\'s title to the portion in question and such denial is against Yoruba Native Law and Custom and a gross violation of it. In the foregoing circumstances the plaintiff claims as per writ of summons.

There can be no doubt at all from the pleadings and particularly from the four paragraphs mentioned above that what the respondent family is in effect saying is this-\"The Eletu Washe family is the owner of this area in dispute by native law and custom. You are our tenants under such law and custom. Under such law and custom you are not to deny our tide nor are you to partition the property as you did, therefore we are entitled to possession.\" These are the material facts which are required to be pleaded. In addition to these paragraphs is the fact that the case was conducted in the lower Court on the basis that the plaintiff family were claiming that they were entitled to possession of the premises by reason only of the respondents\' breach of the terms of their tenancy under Native Law and Custom, and that under such custom such breach entitled the family to come to Court for possession of the property. In his address, learned counsel for the respondent family is recorded as saying that; -The defendants have also asserted ownership of the property. Their interests are forfeited and possession should be given to us. Even if they are members of the family, plaintiffs would still be entitled if they had forfeited their fights.

In my view the mere absence of the technical word \"forfeiture\" from the pleadings cannot be fatal in the circumstances where, as it is here, the nature of the claim is abundantly clear, and it is in this respect that this case on appeal is to be distinguished from Lawani v. Tadeyo and anor 10 WA.C.A. 37 and the unit-ported case of Chief Secretary to the Government v. Musa Apena and ors. R57 cyclostyled report for July to November 1946 to which our attention was drawn. There is no substance in this point and it is dismissed.

On the third point Chief Williams contended that the previous action to which reference is made in the paragraphs of the Statement of Claim already referred to does not show that the action of the appellants amounted to a denial of the title of the respondent family. The claim for possession or forfeiture is based, in accordance with paragraph 9 above, on the appellants breach of their terms of occupation by partitioning the property at 136 Great Bridge Street and denying the title of the respondent family. Unfortunately the copy of the motion paper, the affidavit in support thereof, and, counter-affidavit if any, in respect of the respondent\'s application to be joined in suit LD/55/57 were not made exhibits in these proceedings. Suit LD/55/57 was an action brought by the 4th appellant in this appeal against the 1st, 5th to 8th,

lOth to 13th appellants and two others referred to in exhibit \"D\" as A. Dabiri and Abiodun Dabiri. Here too I have only exhibit \"D\" without the writ, or Statement of Claim or Statement of Defence, if any were filed. It is therefore a little difficult to ascertain the real nature of the suit and the contentions of the parties thereto. It was however settled and the properties were partitioned. Exhibit \"D\" represents the terms of settlement, paragraph 2 of which reads as follows: -

This agreement is subject to alteration if as a result of any defect in the title of Aibu Dabiri the original owner, part of the two buildings 132 Great Bridge Street, and or 20 Bridge Street, is Lost.

As was contended by Chief Williams at the hearing of the appeal it would seem, by the wording of this paragraph, that the present appellants entertained some genuine doubt as to their title to the properties therein mentioned. In sup-port of this is the fact that as far as No.20 Bridge Street is concerned the respon-dent himself deposed that it was the property of the appellants. In further support is the fact as deposed to by the respondent that no partition exists between the two properties (No. 132 being referred to as No.136 Great Bridge Street) the rear of the one (No.20 Bridge Street) adjoining that of the other (No.136 Great Bridge Street). There would therefore seem to be some support for this contention of Chief Williams. Be that as it may, I find it difficult to agree with Mr. Agusto\'s contention that an action for partition between occupiers of property under native law and custom without more would amount to a denial of the tide of the overlord. I fmd nothing repugnant to the tide of the overlord in such a step taken by the tenants to decide which of them shall occupy certain rooms in the building the subject matter of such tenancy under Native Law and Custom. Nor in my view does the fact that such tenants oppose successfully the application of the landlord to join in the action make such opposition a breach of their tenancy, provided tide was not in issue. That the action was no more than a partition action can perhaps in the absence of the writ be gathered from the ruling of Onyeama, J., in exhibit \"C\" in respect of the motion for joinder, where he says that: -

I consider that the applicants\' remedy is by way of a substantive claim for title or recovery of possession of whatever portion of the area in question in this case he claims. It appears to me to be inappropriate for him to seek an order to join in a partition suit when his interests are wholly at variance with the interests of the other contestants.

Further, Learned Counsel for the present appellants at the hearing of the motion is recorded as saying, inter alia, that:-

... an order for partition could be made without prejudice to the claimant\'s rights.

In fact, the witness called by the respondent to give evidence of the relevant native law and custom on the subject stated as follows:

if a person gives a house or room to his servant the servant does not obtain an absolute gift. It is a gift under native law and custom and if he does not comply with the rules of native law and custom he would be ejected, i.e., if he tries to claim the property as his own.

Under cross-examination he says this:-

if property were given to a person under native law and custom, he can cut the property away from the other portion by a partition, but he cannot do so as to claim the property himself.

This supports the view I have expressed earlier that a partition action as such cannot amount to a denial of the overlords\' tide. There is therefore no evidence on record in support of the contention contained in paragraph 9 of the Statement of Claim.

The Learned Trial Judge says that:-

In the present case, by paragraphs 3,5,7 and 8 of the Statement of Defence the defendants claim to be the owners of the property.

This is not, with respect, a correct statement of the position, in so far as the 2nd appellant filed a separate defence in which he made it clear that the property was the property of the respondent family and further stated that he had not up to then taken possession of the two rooms allotted to him by virtue of the partition action. No separate treatment was given to his defence by the Trial Judge.

With regard to the other appellants it appears from the record that their claim to ownership is based on their allegation that they are members of the Eletu Washe Chieftancy family. A perusal of paragraphs 3,4 and 5 of the Statement of Defence shows that they aver that Ogabi, who later became an Eletu Washe, was the original owner of the property. On this point the respondent himself says that:-

At the time of the Crown Grant, the Chief Eletu Iwashe was one Ogabi.

Now, in paragraph 7 of the Statement of Defence it is averred that one Shajobi was the grandfather of the present appellants. This is what the respondent says about Shajobi:-

Ogabi begat Shajobi. Shajobi begat Aina Gbajumo who was my own grandfather Only Ogabi was ever Chief Eletu Iwashe.... The first Chief Eletu Iwashe of Lagos was Kupa. He was succeeded by Ogabi, who was succeeded by Kushimi.

The Trial Judge found on the evidence before him that the appellants were descendants of slaves or servants of the respondent family and with that finding there has been no complaint, but that finding does not alter the nature of the appellants\' contention. In the past slaves, with particular reference to the Oshodi family, and their descendants, have

regarded themselves and been regarded as members of the family or household of the overlord under native law and custom\' and I would in this respect refer to the case of Sanusi Alaka V. Jinadu Alaka and another I.N.L.R. 55 at 56, where Nicoll, C.J., delivering the judgment of the Full Court, said:-

I am satisfied on the evidence that the land in question was given by Oshodi to the headman of his household in trust for all his (Oshodi\'s) house-hold, The appellant was clearly a member of his household, whether as son or slave or slave\'s slave is immaterial. As such, therefore, he has sufficient interest to oppose the property being sold for the debt of another member of the household.

I am unable to fmd a case on \"all fours\" with the present. The cases to which reference was made by the Trial Judge deal with instances where the slave or domestic or tenant claims to be absolutely entitled under such a grant or gift, for as was said in the case of Onisiwo V. Gbamgboye and others, 7 W.A.C.A. 69, at page 70:-

The real foundation of the misbehavior which involves forfeiture is the challenge to the overlord\'s rights. This is commonly shown by some form of alienation and such alienation may take the form, as in this case, of leasing under claim of ownership. But it is not difficult to imagine cases in which the granting of a lease, e.g., for a short period, would carry with it no challenge to the overlord\'s fight and consequently involve no misbehaviour or forfeiture. Every case must be considered on its own facts.

The challenge here is alleged to be shown by the act of partition, which in my view shows no more than that they were doing through the aid of the Court what the respondent witness Amusa Gbadesere said they were entitled to do between themselves. The facts of the present case do not in my view amount to misbehaviour and certainly not such \"serious misbehaviour\" as is envisaged in the following passage of the judgment of Tew, J., in Saka, Chief Oshodi v. Aworan Inasa quoted by Graham Paul, J., in ChiefAshoghon n Oduntan, 12 N.L.R. 7 at page 9, as follows:

The plaintiff himself and two other white-capped Chiefs gave evidence as to the fights of domestics, to whom land has been allotted by the head of the family, and the terms upon which they and their successors in title occupy such land. They were agreed that such a person could be evicted for serious misconduct, such as burglary, making bad medicines; adultery, etc., and also if he attempts to alienate the land allotted to him.

In my view this appeal must succeed, There is no need in view of the decision I have come to about the 1st and 3rd to 13th appellants to consider separately the position of the 2nd appellant, whose actions, if any, were of a less serious nature than those of the others.

I would therefore allow this appeal but only on the issue of forfeiture and pos-session. I set aside the judgment of the Learned Trial Judge ordering the appellants to give up possession of the premises in dispute on or before the 3Oth June, 1959, and in its place would dismiss the claim for possession.

As the respondent has succeeded only in part of his case in the Court of Trial, I would reduce the costs awarded him from 100 guineas to 75 guineas.

In this Court Notice of Appeal was filed against the whole judgment, but the appeal was argued only on this issue of forfeiture. I would make no order as to costs in this Court and each party would hear its costs, having succeeded equally.

Judgement delivered by Adetokunbo Ademola. CJF

I concur.

Judgement delivered by Unsworth. F.J.

I concur.