IN THE SUPREME COURT OF NIGERIA

Suit No: SC223/2000

Petitioner: Chief Falade Onisaodu & Anor
And
Respondent: Chief Asunmo Elewuji & Anor

Date Delivered: 2006-07-07

Judge(s): Idris Legbo Kutigi , Aloysius Iyorgyer Katsina-Alu , Ignatius Chukwudi Pats-Acholonu , Aloma Mariam Mukhtar , Fra

Judgment Delivered

This is an appeal against the judgment of the Court of Appeal, Ilorin Division given on 22 November 1999. The appellants herein were the defendants while the respondents were the plaintiffs respectively in the ease. In the writ of summons before the High Court the respondents as plaintiffs claimed against the appellants as follows:

'(1) Declaration that the plaintiffs are entitled to the Certificate of Customary Right of Occupancy in respect of a piece or parcel of land situate lying and being at Ofigba Street, Akinluaduse Sawmill Ise-Ekiti;

(2) N1000.00 being general damages for trespass which the defendants committed on the said land sometime during the year 1987 and which trespass still continues.

(3) A perpetual injunction restraining the defendants, their servants or agents from committing further acts of trespass on the said land.'

At the trial the plaintiffs called eleven witnesses and the defendants called seven witnesses in support of their respective claims. Counsel for the parties addressed the court and the learned trial judge in a reserved judgment delivered on 19th September 1994, dismissed the claims of the plaintiffs. The plaintiffs\' appeal to the Court of Appeal was allowed. The present appeal to this Court by the defendants is against that decision of the Court of Appeal.

In their brief of argument, the defendants as appellants submitted three issues for determination which read as follows:

'(1) Whether, in view of the evidence given by a witness to the appellants (DW2) under examination in chief, the seeming contradictory evidence given by him under cross-examination destroys the case of appellants especially with the evidence given by appellants and their other witnesses and bearing in mind that appellants have no counter-claim before the Court.

(2) Whether it could be held that the trial court failed to evaluate properly the evidence led by it and even if this is conceded, though not admitted, whether this is enough to destroy the defence of the appellants.

(3) Whether the decision of the lower court is reasonable and accords with the evidence led.'

For their part, the plaintiffs as respondents raised two issues for determination in this appeal. These are:

'1. Whether the Court of Appeal was right in holding that the admissions and contradictions in the appellant evidence in the Court of first instance have, reduced the weight of appellant\'s evidence before the court and have knocked out the bottom out of the case for the appellants.

2. Whether having examined the evidence before the trial Court and found that the trial Court had failed to appraise the evidence properly, the Court of Appeal was right, and it was its duty to give the proper appraisal to the evidence.'

Both sets issues are similar. I shall however determine this appeal in line with the issues raised by the respondents which 1 find more germane. I shall deal with the two issues together.

The claim before the trial court was for title to the piece of land in dispute, trespass and injunction. The plaintiffs in this case are members of Ofigba family in Ode Ise quarters in Ise Ekiti while the defendants are from Onisaodu family in Ise Ekiti. At the trial both sides gave traditional evidence as to how their ancestors migrated from other parts of the country to Ise Ekiti and how the families of both parties acquired land for building and farming. The issues revolve around the piece of evidence given by DW2 Chief Jacob Abiodun called by the defendants. This witness, in cross examination, testified as follows:

'I know the land in dispute, Eleigba is the owner of the land in dispute.'

This piece of evidence would appear to be evidence of admission against the interest of the defendants-appellants. This is because D.W. 2 was called by the defendants.

Although the learned trial Judge reviewed the evidence called by the plaintiffs, he failed to review the evidence led by the defendants. At the end of the review of the plaintiffs' evidence, the learned trial judge started and ended thus:

'It was said in Idundun & Ors. Vs. & Okumagba & Ors. (1976) 10 SC. 247 that there are five ways of proving ownership of land as follows:-

1. By traditional evidence.

2. By production of documents of title which of course must be duly authenticated in the sense that their due execution must be proved.

3. Acts of person claiming the land e. g. selling, leasing etc,

4. Acts of long possession of the land may be prima facie evidence of ownership.

5. Proof of possession of connecting or adjacent land.

There is historical evidence on both sides but evidence of recent acts of ownership in support of historical evidence will go to establish the true owner of the land in dispute.

The plaintiffs have the following as recent acts of ownership.

1. Alleged allocation of land to owners of Akinluaduse\'s Sawmill by PW4 although this was disputed by DW4.

The grant of land by 2nd plaintiff to PW8 although he later said under cross examination that he was begged to come and give evidence.

2. The grant of land to PW9.

3. The purported grant of land to PW10.

4. The allocation of land to PW 11.

On the side of the defendants are the following recent acts of ownership.

1. Allocation of building plot to DW4.

2. Allocation of building plot to DW 6.

3. Building on the site by the 1st defendant.

4. Defendants successful objection to the grant of Certificate of Occupancy to PW10.

5. Exhibit C and C1 which were addressed to the 2nd defendant and others by Ministry of Communications.

From these Exhibits it is obvious that these were applications for the acquisition of the present site for N1TEL which is situated on the land in dispute.

6. Exhibit D addressed to the 1st defendants towards acquisition of the present site for use by NITEL on the land in dispute.

Thus the acts of ownership make the historical evidence given by the defendants more probable than the evidence to the plaintiffs.

Furthermore I have considered all the evidence in this suit although DW2 later contradicted himself by saying that the land in dispute belonged to Eleigba family i.e. the plaintiffs' family, in all the weight of evidence goes more in favour of the defendants than the plaintiffs. In these circumstances the plaintiffs have not adduced sufficient evidence to support their claim to the land in dispute.'

The Court of Appeal, for their part reviewed the evidence of both the plaintiffs and the defendants. That is how it should be. It is the totality of the evidence that has to be evaluated and assessed together. The trial court cannot pick and choose the evidence to be assessed. See Mogagi & Ors. V. Cadbury (Nig.) Ltd. (1985) 2 NWLR (Pt.8) 393. At the end of the review, the Court of Appeal held as follows:

'In this case, the appellant called evidence of traditional history as to how their ancestors came from lle-Ife and with the permission of the Oba of lse-Ekiti, settled on a piece or parcel of land a portion of which is the land in dispute. They called evidence of how their ancestors were farming on the land in dispute and how they, the appellants have been in possession of the land exercising all rights of ownership.

The respondents also led evidence in support of their pleadings. A close look at the totality of the evidence led by the respondents seem to show a big crack, contradiction and discrepancy in the case of the respondents when the D.W. 2 positively stated that the land in dispute belongs to the appellants and not to the respondents who called him to give evidence. The learned Counsel for the respondents conceded in his brief of argument the fundamentality of the conflict in the evidence of the respondents, when he stated:-

'There is no doubt that D.W. 2 said the land in dispute belonged to the appellants, everybody was taken aback; the respondent's Counsel wanted to re-examine on it but the court disallowed and while the piece of evidence is conflicting, the Court held it was its duty to reconcile the conflicts.'

I have considered most carefully the pleadings, the evidence led by the parties and the findings of the trial court, as well as the briefs and arguments of Counsel on either side of this appeal in relation to the issues thereof. It is trite law that a declaration is a discretionary remedy, but a plaintiff seeking it has the same legal burden of proof as well as evidential burden under sections 135 to 137 of the Evidence Act, as in any other civil case, namely, proof on the balance of probabili'ties. sometimes styled preponderance of evidence. How then does a trial court decide that evidence is preponderant'

In Mogagi &Others .v.Odofin & Others (1978) 4 SC 91 at 93-95, the Supreme Court per Fatayi-Williams J.S.C. (as he then was) gave the following guidelines:-

'In short, before a judge whom evidence is adduced by the parties before him in a civil case come to a decision as to which evidence he accepts and which evidence he rejects, he should first of all put the totality of the testimony adduced

by both parties on that imaginary scale: he will put the evidence adduced by the plaintiff on one side of the scale and that by the defendant on the other side of the scale and weigh them together. He will then see which is heavier, not by the number of witnesses called by each party, but the quality or the probative value of the testimony of those witnesses. This is what is meant when it is said that a civil case is decided on the balance of probabilities.'

Applying the above principle to the present case, when the totality of the evidence led by the appellants is put on one side of that imaginary scale and the totality of the contradictory, conflicting and riotious evidence adduced by the respondents is put on the other side of the scale, it seems to me the evidence led by the appellants is heavier and weight of the evidence ought to go in favour of the Appellants. The P.W.6 is from Erinwa family and was called by the respondents. They both know the land of the appellants and the land of the respondents family and both of them said the land in dispute belong to the Appellants family. There can be no doubt that the evidence of the D.W.2 supports and strengthens the case of the appellants.'

I cannot agree more. D.W.2 is from Erinwa family. Now P.W.6 is also from the Erinwa family. In his evidence he testified thus:

'I know the plaintiffs in this suit, I also know the first defendant ..... I know the land in dispute. I have a boundary with the land in dispute ..... Ofigba family has the land in dispute. I am from Erinwa family. I represent Erinwa family. Erinwa family has a common boundary.'

Both witnesses PW 6 and DW 2 are from Erinwa family. Both gave evidence that the land in dispute belongs to the Respondent's family. The testimony of PW 6 clearly strengthens the admission made by D.W. 2 against the interest of defendants-appellants who called him as a witness.

It is now settled law that in a suit for a declaration of title to land, the onus of proof lies on the plaintiff who must succeed on the strength of his own case and not on the weakness of the defendant\'s ease: See Kodilinye v. Odu 2 WACA 336: Woluchem v. Gudi (1981) 5 SC 291. The plaintiff can however rely on the evidence of the defendant which supports his case.

It is plain from the record of this case that the learned trial Judge did not evaluate the admission of DW 2. He casually mentioned it in his judgment. He said:

'Furthermore I have considered all the evidence in this suit although DW2 later contradicted himself by saying that the land in dispute belonged to Eleigba family i.e. the plaintiff's family, in all, the weight of evidence goes more in favour of the defendants than the plaintiffs.'

I have indicated earlier on in the course of this judgment that the learned trial Judge did not review the evidence of the defendants. And without evaluating the evidence of admis'sion, he proceeded to give judgment for the defendants-appellants. What the learned trial Judge did was tantamount to saying that the plaintiffs had not made out a case for the defendants to answer even though he took their evidence at the trial.

The plaintiffs led evidence in line with their pleadings and so established a prima facie ease. As I have already pointed out, the evidence of D.W. 2, called by the defendants, to the effect that the land in question was owned by the plaintiff's family strengthened the plaintiffs\' case. This was an admission against the interest of the defendants. The said admission against interest is relevant and admissible evidence: See Ojiegbe & Ors. V. Okwaranyia & Ors (1962) ALL NLR 605. (1962) 2 SC NLR 358. I think it is pertinent to state here that the defendants did not treat their witness (DW2) as a hostile witness. In such a situation the evidence must be treated as an admission upon which the plaintiffs are entitled to rely as further reinforcement of his claim. The effect of the admission is that the learned trial Judge was wrong in giving judgment for defendants. The admission in my judgment was fatal to the case of the defendants-appellants.

In the circumstance, the Court of Appeal was right when it allowed the appeal brought by the plaintiffs. In the result, I dismiss this appeal and affirm the judgment of the Court of Appeal. There shall be costs of N10,000.00 in favour of the plaintiffs-respondents against defendants-appellants.

Judgement delivered by
Idris Legbo Kutigi. J.S.C.

I read before now the judgment just delivered by my learned brother Katsina-Alu JSC. I agree with him that the appeal lacks merit and ought to be dismissed. The appeal is accordingly dismissed with N10,000.00 costs against the Appellants.

Pronouncement by
Idris Legbo Kutigi. J.S.C.
(Presiding)

Pursuant to Section 294(2) of the Constitution of the Federal Republic of Nigeria

Hon Justice I.C. Pats-Acholonu who participated with us in the appeal agreed at our conference that the appeal be dismissed.

Judgement delivered by
Aloma Mariam Mukhtar. J.S.C.

In the High Court of Justice of Ondo State, the learned trial Judge dismissed the claim of the plaintiff/respondents contained in their amended Statement of Claim. The claims are:

1. Declaration that the plaintiffs are entitled to the Certificate of Customary Rights of Occupancy in respect of piece or parcel of land situate lying at Ofigba quarters, Akinluaduse Sawmill, Ise-Ekiti.

2. N1,000.00k (One Thousand Naira) being general damages for trespass which the defendants committed on the said land sometime during the year 1987 and which trespass still continues.

3. A perpetual injunction restraining the defendants, their servants or agents from committing further acts of trespass on the said land.

The plaintiffs were not satisfied with the dismissal of their claim. They appealed to the Court of Appeal, which in a well considered judgement, set aside the judgement of the trial Court, and granted the above reproduced claims. The defendants were aggrieved by the judgement and they appealed to this Court on three grounds of appeal. Both parties exchanged briefs of argument which were adopted at the hearing of the appeal. The appellants' brief of argument contained the following issues for determination:-

'(A) Whether, in view of the evidence given by a witness to the appellants (DW2) under examination in chief, the seeming contradictory evidence in chief, given by him under cross-examination destroys the case of appellants especially with the evidence given by appellants and their other witnesses and bearing in mind that appellants have no counter claim before the Court.

(B) Whether it could be held that the trial court failed to evaluate properly, the evidence led by it, and even if this is conceded, though not admitted, whether this is enough to destroy the defence of the appellants.

(C) Whether the decision of the lower Court is reasonable and accords with the evidence led.'

Three issues for determination were also raised in the respondents' brief of argument. The quarrel of the appellants as regards issue (1) supra is with the finding of the lower Court on the evaluation of the evidence of D.W. 2. The finding reads:-

'.....the trial Judge did not properly assess the evidence of D.W.2 Chief Abiodun Owaba and treat it as a fatal and fundamental contradiction in the evidence of the respondents. Indeed, the learned trial Court merely glossed over the evidence, otherwise it would not have held that in spite of the conflict in the evidence of the respondents, the weight of evidence was in favour of the respondents. The evidence of D.W.2 that the land in dispute belongs to the appellants reduced the probative value of the totality of the evidence led by the respondents'.

It is on record that D.W.2 in his evidence in chief after giving evidence of boundary between his family boundary and that of the appellants, in the course of cross-examination said the land in dispute belonged to the respondents notwithstanding that the appellants called him to testify for them. If the learned trial Judge had taken the trouble of evaluating and appraising the evidence of this witness, he would have taken the evidence of D.W.2 with a pinch of salt. Failure of proper evaluation and assessment led the learned trial Judge to wrongly hold as follows:-

'Further more I have considered all the evidence in this suit although D.W.2 later contradicted himself by saying that the land in dispute belonged to Eleigba family i.e plaintiff's family, all the weight of evidence goes more in favour of the defendants than the plaintiffs'

Besides, when the evidence of a witness supports the case of the opponent against whom he purports to give evidence, that opponent can take advantage of that evidence to strengthen his case, if it is consistent with, and collaborates his case, as in this case. See N.B.N Ltd. v. T.A.S.A. Ltd. 1996 8 NWLR Part 468, page 511.

The learned trial judge did not address the consequence of the evidence of D.W.2 properly, and so failed to give it the attention it deserved. Proper evaluation of evidence is absolutely important, for in order to determine a case and come to a just conclusion, it is trite that the learned trial Judge must assess and appraise all evidence before him. See Adeleke v. Iyanda 2201 13 NWLR Part 729, page 1, and Adeniyi v. Adeniyi .1972 4.SC. 10.

There was definitely no proper evaluation of all the evidence by the learned trial Judge and so the Court below was right when it set aside the decision of the trial Court and did not in any way misdirect itself in reaching its conclusion. I agree with my learned brother Katsina-Alu JSC that the appeal lacks merit and should be dismissed. I abide by the consequential orders in the lead judgement and also dismiss the appeal as done in the lead judgement.

Judgement delivered by
Francis Fedode Tabai. J.S.C.

I have had the benefit of reading the lending judgment prepared by my learned brother Katsina-Alu, JSC and 1 agree with the reasoning and conclusion reached therein.

The action was initiated at the Ikere Ekiti Judicial Division of the High Court of then Ondo State by the Plaintiffs who are the Respondents herein in June 1988 against the Defendants who are the Appellants herein. The three relief claim is set out in the writ of summons and paragraph 32 of the Statement of Claim. The trial involved the testimony of eleven witnesses for the Plaintiffs' case and seven for the defence. In a reserved judgment on the 19th of September 1994 the claim was dismissed by Adetosoye. J.

Aggrieved by the said judgment, the Plaintiffs appealed to the Court below. By its unanimous judgment on the 22nd day of November 1999 the appeal was allowed and the judgment of the High Court set aside and same was substituted with

a judgment for the Plaintiffs in terms of all the three reliefs claimed.

Dissatisfied, the Defendants have now come on appeal before this Court. The Appellants submitted three issues for determination, while the Respondents proposed two. In my consideration all the five issues dovetail into the main issue of preponderance of evidence. The question is whether in the light of the evidence on record, the court below was right in reversing the judgment of the trial Court and granting the claim in its entirety.

The main complaint in this appeal revolves round the issue of evaluation The established principle is that if there is proper evaluation of the evidence by the trial court in the sense that every material finding is supported by the totality of evidence on record, the appellate court has no business to embark on a re-appraisal of the evidence in order to arrive at a different conclusion. But where the findings and conclusion are not supported by the totality of evidence on record, and the evidence is such that does not entail the assessment of the credibility of witnesses, the appellate court is in as vantage a position as the trial court to embark on a re-appraisal exercise to asses the party in whose favour the weight of evidence tilts. See Woluchem v Gudi (1981) 5 SC 291, Chief Salami Olatunde & Anor. v Salami Afolabl Aridogun & Anor (2001) 18 NWLR (Part 746) 712 at 722-733; Danieil Basil & Anor v Chief Lasisi Fajebe & Anor (2001) 11 NWLR (Part 725) 592 at 608-609.

What the lower Court considered as a devastating evidence against the defence is the evidence of the DW2 Chief Jacob Abiodun from the Edemo family of Erinwa quarters. Under cross-examination he said:-

'I know the land in dispute. Eleigba is the owner of the land in dispute.'

(See page 83 lines 1-2 of the record)

Of this piece of evidence the learned trial Judge had this to say:-

'Furthermore I have considered all the evidence in this suit although DW2 later contradicted himself by saying that the land in dispute belonged to Eleigba family i.e. the Plaintiff family, in all the weight of evidence goes more in favour of the Defendants than the Plaintiffs.'

In the view of the trial Court therefore the evidence of the DW2 had no probative impact on the case of the defence. The lower Court thought otherwise. It considered the contradiction a fundamental one that reduced the strength of the evidence of the Appellants and that the conclusion of the learned trial Judge was the result of improper evaluation.

A.O. Akanle, learned Counsel for the Appellants urged this Court to treat the evidence as merely inconsequential to the probative value of the case of the defence particularly having regard to his evidence in Chief and the evidence of other witnesses for the defence.

I do not think that the stance of learned Counsel for the Appellants is borne out from the evidence on record. The evidence in chief of the DW2 is at pages 81-82 of the record. His evidence in chief did not make any specific reference to the land in dispute. His only evidence specifically on the land in dispute is that under cross-examination which stated in unequivocal terms that the land belongs to the Plaintiffs/Appellants Eleigba family. The evidence is therefore not a contradiction of his evidence in chief. Rather it is a contradiction of the entire case of the Defendants/Appellants and pointedly in support of the Respondents' case and which ought to he accorded its proper weight.

It is remarkable to note that from the same Erinwa family came the testimony of the PW6, Chief Ojo Oshogbon. The substance of his evidence is that he was sent by Erinvva family to testify and that his family and the Plaintiffs' Ofigba family share a common boundary marked by a foot path which runs from Ise town to Esi-Ekere, a shrine worshiped annually by both families. He also was specific that the land in dispute belongs to the Plaintiffs Ofigba family. Thus the two witnesses from the same Erinwa family testified that the land in dispute belong to the Plaintiffs Ofigba family.

In addition to the specific evidence of the PW6 and DW2 about the land in dispute, the PW2, PW3, PW4, the 100 year old chairman of the Akinluaduse Sawmill, PW9 and PW10 all gave detailed evidence of the Plaintiffs/Respondents' title

to the land in dispute. For the Defendants/Appellants only the DW4 and DW7 gave specific evidence about the land in dispute.

On the whole, the evidence on record clearly tilts in favour of the Plaintiffs/Respondents. I do not therefore appreciate any basis for interference with the reasoned judgment of the lower Court.

For the foregoing and the more detailed reasons articulated in the leading judgment of my learned brother Katsina-Alu JSC, I also dismiss the appeal for lack of merit. I abide by the consequential order as to costs contained in the leading judgment.