

# IN THE SUPREME COURT OF NIGERIA

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Suit No: SC208/2000

**Petitioner:** Chief Ugbor Ofia & 3 ors

And

**Respondent:** Chief Isaiah Mba Ejem & 4 ors

Date Delivered: 1969-12-31

**Judge(s):** Sylvester Umaru Onu , Akintola Olufemi Ejiwunmi , Dahiru Musdapher , Mahmud Mohammed , Walter Samuel Nka

## Judgment Delivered

This is an appeal against the judgment of the Port Harcourt Division of the Court of Appeal delivered in appeal No CA/PH/156/94 on the 27th day of January 2000 in which it allowed the appeal of the present Respondents against the judgment of the High Court of Imo State holden at Afikpo in suit No HAF/3/77 delivered by Anyanwu, J. on the 30th day of July 1991 in favour of the Appellants who were Plaintiffs before that Court was set aside.

On the 3rd day of February, 1977 the Appellants as Plaintiffs caused a Writ of Summons to be issued against the Respondents who were Defendants claiming the following reliefs:

1. The Plaintiffs claim against the Defendants jointly and severally as follows: -

(a) Declaration of title to the piece and portion of land called Nchara Edda situate in Edda within jurisdiction. The annual value is less than ten Naira (N10. 00).

(b) N50, 000.00 (Fifty thousand Naira) being general damages for trespass in that the Defendants without the consent and or permission sometime in 1973 broke and entered the Plaintiffs said Nchara Edda and made roads, made foundation for houses, made nursery for palm trees and cut many economic trees including palm trees and timber.

(c) Perpetual injunction to restrain the Defendants their servants and agents from trespassing unto the said land.'

The action was instituted by the Appellants for themselves and on behalf of the people of Etti Edda and Oso Edda, Respondents for themselves and as representing the people of Ukwa Nkporo village of Arochukwu/Ohafia Local Government Area. In other words, the action was in a representative capacity. From the record, Appellants were granted leave to sue in a representative capacity.

The case of the Appellants is that the land in dispute, which is shown verged pink in survey plan No MCE/414/78 and marked as Exhibit A is called Nchara Edda land and that they inherited same from their ancestor Omaka Okocha who founded same, that he was later joined by other settlers to make up their community. Appellants stated that they had all along been in possession of the land exercising acts of ownership thereon including farming, harvesting economic trees and founding lepper settlements without let or hindrance.

The Appellants also contend that in 1959, one Okpani Agwu, a relation of the 2nd Defendant came to the land and opened oil palm plantation but the Appellants engaged the services of the 2nd Defendant who wrote a petition on their behalf resulting in the removal of the said trespasser from the land. Appellants also stated that in 1962, the 2nd Defendant brought in Eastern Nigeria Development Corporation (ENDC) to the land in dispute which resulted in their lodging protests to the land in dispute which resulted in their lodging protests to the manager of ENDC, the District Officer for Afikpo and Bende and one Chief Emole Ururuka. The Appellants further stated that in 1966, the 2nd Defendant/Respondent invited PW1 to agree on the proposal by Chief Emole that the plantation when established would be called 'Edda and Nkporo Palm Estate', which arrangement was disrupted by the Nigerian Civil War of 1966. In 1970 one Reverend Aso Oji brought a farm settlement to the land to be managed by the Christian Council of Nigeria and one

Chief Okam Amaka of Amaosonta Oso protested and the settlement was removed; that the 2nd Defendant/Respondent without the knowledge and consent of the Appellants granted the land in dispute to ENDC leaving their own land intact.

The Respondents who were Defendants, denied the claims of the Appellants stating in the contrary that the land in dispute forms part of a large piece of land called Ala Ukwa which was de-forested by their ancestor by name Ala Ochie who led other founders to it and that they have a lepper settlement on the land and allowed Appellants to bring leppers from their community to their lepper settlement. In further exercise of their right of ownership and possession, the Respondents stated that they granted portions of their land, Ala Ukwa, to the Appellants who paid them annual rents but later laid adverse claims to the land resulting in the Respondents driving them away from same. Respondents also contend that in 1962 they granted the land in dispute to ENDC without protest from the Appellants and that there was no intervention by one Chief Echeme Emole who was a minister in the Government of Eastern Nigeria at the material time. As regards the sum of '10, 0.0 paid to the 2nd Defendant/Respondent by the Appellants, the Respondents stated that it was for procuring a hunter from Ikom who killed a wild animal that was harassing the Appellants on the land, and not for eviction of Okpainsi Agwu, his cousin, from the land in dispute.

At the trial, several issues were canvassed by the parties, one of which is the issue of representation of the Appellants, which the trial Judge resolved in favour of the Appellants by holding at page 236 of the record as follows:

'In considering the submission of both Counsel on this issue, I have had a look at the record of proceedings in this case. It is clearly shown that on 31st January 1991 this Court granted approval to the authority given to the present Plaintiffs on record to bring and 'prosecute this action for themselves and on behalf of the people of Etti Edda and Amaosonta in Oso Edda Communities. This approval has not been set aside and it subsists.'

The learned trial Judge then entered judgment for the Plaintiffs resulting in an appeal by the Defendants to the Court of Appeal. One of the issues raised by the present Respondents at the Court of Appeal is again the representative capacity of the Appellants. The Court of Appeal agreed with the Respondents and held that in view of the evidence before the trial Court, the action was not properly constituted but went ahead to consider other issues raised in the appeal and allowed the appeal.

The Appellants are not satisfied with the judgment of the Court of Appeal and have consequently appealed to this Court as a result of which ten issues have been formulated for determination in the appellant brief filed by Dr. Ego-Queen Ezuma. The issues are as follows: -

- (a) Was the Lower Court right in holding that the Plaintiffs did not prove title to the land in dispute'
- (b) Was the Lower Court right in holding that the finding of fact of the trial Court is perverse having regard to the evidence led by the Plaintiffs/Appellants in the case'
- (c) Having regard to the evidence led by the parties in the case, can it be said that the Judges of the Lower Court placed the evidence on that imaginary scale enunciated in the case of Mogaji vs. Odofin (1978) 4 S.C. 91
- (d) Can the Court of Appeal judgment be said to have been properly argued when that Court did not consider the plans filed by both parties and the boundaries of the land in dispute. Could the finding of the trial Court in that respect be said to be perverse'
- (e) Was the Court of Appeal right in holding that Exhibit 'B' issued by DW4 was contradictory' What does it contradict'
- (f) Did the Court of Appeal place right interpretation on Exhibit 'B' and did the wrong interpretation not cause a miscarriage of justice'
- (g) Could it be said that having regard to the evidence led by the Plaintiffs Appellants and the admissions of DW4, the Respondents and not the Appellants were in exclusive possession of the land in dispute'

(h) Is it fair on the Appellants for the Court of Appeal to conduct the appeal by descending heavily on the Appellants' Brief and picking what it calls contradictions without dealing with the Respondents' Brief in like manner on the Brief and issues raised by the Respondents'

(i) Having regards to the evidence led, could it be said that the Appellants have not made out a case to sue in a representative capacity'

(j) Would the judgment of the Lower Court be said to be justified when that Court did not consider the boundaries of the land in dispute and Exhibits 'A' and 'C' plans tendered by the parties' Can the findings of fact made by the trial Court in that regard be perverse"

On the other hand, learned Counsel for the Respondents, E.U. John Esq. in the Respondents' Brief identified four issues for determination, the original first issue have been withdrawn and consequently struck out by the Court on 14/2/06. The surviving issues are as follows: -

(1) Whether or not the Court below was right in holding that the Plaintiffs/Appellants did not make out a case in the capacity in which they brought the action;

(2) Whether or not the Court below was right in holding that the traditional history pleaded and given in evidence by the Plaintiffs/Appellants herein was inconclusive, unsatisfactory and unconvincing;

(3) Whether or not the Court below was right in holding that the findings of the trial Court as regards the Respondents' acclaimed act of possession in the land in dispute were perverse;

(4) Whether or not the Court below was entitled to consider the appeal in that Court on the issues raised by the Appellants in their Brief of argument and not on the grounds of appeal (if any) and issues raised by the Respondents.'

It is only proper to begin the consideration of the issues raised in this appeal from Appellants' issue (1), which is the same as Respondents' issue No 1 both reproduced earlier in this judgment. The issue attacks the competence of the action as constituted. It is settled law that where an action is not competent or properly constituted, it robs the Court of the jurisdiction to entertain same. In other words, such a complaint raises the issue of jurisdiction of the trial Court and ought to be dealt with first and foremost since a judgment delivered in action outside the jurisdiction of the Court amounts in law to a nullity irrespective of how well the proceeding was conducted by the trial Judge. Jurisdiction therefore is said to be a peripheral issue in any adjudication where it is raised.

In arguing the issue, learned Counsel for the Appellants in the Appellants' Brief filed on 24/6 /03 submitted that the Appellants have a joint interest or undivided shares in the subject matter in dispute and that PW1 gave evidence of their representative capacity, that PW1 testified that Appellants sued for Etitu Edda and Amoso Nta in Oso Edda and went on to identify the Plaintiffs with their respective communities which they represent. Learned Counsel then stated that these facts were never disputed by the Respondents and that the trial Court approved the Appellants' instituting the action in a representative capacity; that PW 3 and 5 also gave evidence of the representation and the trial Court found that the capacity in which the action was instituted was proper and urged the Court not to disturb the said finding.

Referring to the case of *Olatunji vs. The Registrar, Co-operative Society (1968) NMLR 393*, learned Counsel submitted that the Appellants and those they represent have a common interest in the land in question and that the reliefs claimed is also beneficial to all of them. Learned Counsel then urged the Court to resolve the issue in favour of the Appellants. On the other hand learned Counsel for the Respondents submitted that the Lower Court was right in coming to the conclusion that the Appellants ought to have brought separate actions against the Respondents having regards to the evidence of the Appellants which discloses that the Appellants do not have a common interest in the land with those of the class they purport to represent; that several and different ancestors of each village founded respective identifiable portions of the land in dispute, and that each village cannot deal with the portion belonging to another. Learned Counsel cited and relied on *Oragbade vs. Onitiju (1996) NWLR 32*, and urged the Court to resolve the issue against the

Appellants.

From the record it is not in dispute that the trial Court granted approval to the Appellants to prosecute the action against the Respondents in a representative capacity. It is however, a different thing whether the Appellants made out a case in the capacity in which the action was instituted. To resolve the issue, it is necessary to take a look at the evidence as adduced by the Appellants on record, the relevant testimonies being those of PW1 and PW3.

At page 68, PW1 stated under cross-examination as follows: -

'In Etit Edda, there is a village called Amaoba. That village did not authorise me to bring this action. I can show the various portions of land belonging to different owners on the land in dispute .....

Ezi Edda people cannot sell the portion of land belonging to Amaosonta. In fact none of the villages can deal with the portion belonging to another village ....'

Emphasis supplied by me.

At page 132 of the record, PW3 stated, also under cross-examination as follows: -

'The land in dispute does not belong to the entire community of Etit Edda.... It is not the entire community of Oso Edda that authorised the institution of this suit but a section of it called Amaosonta. There are ten villages in Oso Edda community of which Amaosonta is one. The other nine villages did not authorise this action. It is not the entire Etit Edda community that authorised this action...'

In the case of *Olatunji vs. The Registrar, Co-operative Society (Supra)*, this Court listed the essential requirements for people who desire to sue in a representative capacity to include the following:

- (i) There must be numerous persons interested in the case or the side to be represented;
- (ii) All those interested must have the same interest in the suit, i.e. their interest must be joint and several.
- (iii) All of them must have the same grievance.
- (iv) The proposed representative must be one of them, and
- (v) The relief sought must be in its nature beneficial to all the persons being represented.

Going by the evidence of some of the witnesses for the Appellants reproduced supra, can it be said that the representation of the Appellants in this case satisfies the requirements as laid down by this Court supra? I am of the firm view that it does not. The testimonies of PW1 and PW3 clearly demonstrate that the land in dispute between the parties is not a communal land of the Appellants particularly as each village is said to have its own portion and no village can sell the portion belonging to another village. It must be kept in mind that the action is for declaration of title to the communal land in dispute. If it is shown, as demonstrated in this case, that portions of the land are rather owned by constituent villages that make up the community sought to be represented and in whom it is alleged resides title, then only those constituent villages owning the portions in issue have the legal right to institute an action either to enforce or protect their rights thereto, definitely not the larger community. It must be noted that it is not the case of the Appellants that though the land is communally owned, possession of portions thereof, reside in individual villages constituting the community. That would have been a different thing and more understandable in view of the evidence more particularly as the term 'ownership' of land in traditional parlance is not technical but loss. Even in that case, the constituent villages can only maintain action for trespass to their various portions not declaration of title to the land.

That apart, the fact that each village owns its own portion of the land in dispute shows clearly that the Appellants do not have common interest in the land particularly as each village cannot deal with the land owned by other villages. I

therefore agree with the Court of Appeal that this is a proper case in which the Appellants could have brought separate actions against the Respondents in respect of their respective portions of land allegedly trespassed unto.

In the case of Oragbade vs. Onitiju supra at page 37, this Court stated the law as follows: -

'...On the evidence adduced for the plaintiff, it was plain that he and others claimed to have each an individual farm of his own within the area in dispute which means that Iferedo community as whole cannot claim the entire area as communal land....'

Having regards to the facts of this case relevant to the issue under consideration and the applicable law as laid down by this Court, I resolve the issue against the appellant. I therefore come to the conclusion that the action before the trial Court was not properly constituted, the same being incompetent. The appeal is therefore dismissed for lacking in merit while the action, suit No HAF/3/77, is hereby struck out for being incompetent.

I assess and fix the costs of this appeal at N10, 000.00 in favour of the Respondents.

Appeal dismissed.

Judgement delivered by  
Sylvester Umaru Onu, J.S.C

I have had the opportunity to read in draft, the judgment of my learned brother Onnoghen, J.S.C. just delivered. Limiting the case to one issue, namely Issue (1) which has been withdrawn, I too will strike out the appeal. Appeal struck out.

Judgement delivered by  
Akintola Olufemi Ejiwunmi, J.S.C.

Having read in advance, the draft of the judgment just delivered by my learned brother, Onnoghen J.S.C., I agree with him for the reasons given that this appeal lacks merit.

The main issue for determination in this appeal being whether the Appellants were right to have instituted this action in a representative capacity, when the evidence did not reflect the rules settled in *Olatunji vs. The Registrar, Co-operative Society (1968) NMLR 393*. These include the following:

- '(i) There must be numerous persons interested in the case or the side to be represented.
- (ii) All those interested must have the same interest in the suit, i.e. their interest must be joint and several.
- (iii) All of them must have the same grievance.
- (iv) The proposed representative must be one of them, and
- (v) The relief sought must be in its nature, beneficial to all the persons being represented.'

In the instant case, the evidence on record clearly shows that the disputed pieces of land belong to each of the communities who joined themselves to institute the action without any evidence that their individual interests have been subsumed to the body that instituted the action. I will therefore also dismiss this appeal for the above reasons and the fuller reasons given in the lead judgment. I also abide with the order made as to costs.

Judgement delivered by  
Dahiru Musdapher, J.S.C

I have read before now, the judgment of my Lord Onnoghen J.S.C. just delivered with which I entirely agree. For the same reasons contained in the judgment, I too, dismiss the appeal and order that the action of the Plaintiffs in suit No HAF/3/77 should be struck out on the grounds of incompetency. The Respondents are entitled to costs assessed at N10, 000.00.

Judgement delivered by  
Mahmud Mohammed, J.S.C

I have read before today, the judgment of my learned brother Onneghen J.S.C., which has just been delivered. I agree with him that this appeal ought to be dismissed.

The Appellants as Plaintiffs in a representative capacity brought an action for declaration of title, damages for trespass and perpetual injunction in respect of a parcel of land called Nchara Edda situated in Edda against the Defendants in the High Court of Justice of Imo State sitting at Afikpo in the Afikpo Judicial Division. At the end of the hearing in the matter, the trial Court in its judgment delivered on 30-7-1991, the Plaintiffs/Appellants were successful in their claims. Not happy with that judgment, the Defendants/Respondents appealed against it to the Court of Appeal, Port-Harcourt which in its judgment of 27-1-2000, allowed the appeal, set aside the judgment of the trial Court and dismissed the claims of the Plaintiffs/Appellants resulting in their appeal to this Court.

In the Appellants' Brief of argument, as many as ten issues were raised for the determination of the appeal. However, having regard to the evidence given by the Plaintiffs' witnesses in support of their claims, it turns out that the appeal could be determined on the Appellants' issue No (9) which states:

'Having regard to the evidence led, could it be said that the Appellants have not made out a case to sue in a representative capacity'

Although it is correct as argued by the Appellants that they have complied with the requirements of the rules of the trial Court in suing in a representative capacity in that the trial Court heard their application for leave to sue or bring this action in a representative capacity and granted the same, this requirement of leave is not even a necessary condition for maintaining an action in a representative capacity where a whole case from the beginning of it to the end including the pleading and evidence adduced by the parties in support of their respective positions, was fought on the basis that both parties were prosecuting and defending the action in a representative capacity, leave may not be necessary. In other words where the judgment of the trial Court was given for and against the Plaintiff and the Defendants in a representative capacity on the basis of the title of the action, Statement of Claim and Defence reflecting that capacity, even if an order to sue or be sued in a representative capacity or an amendment to reflect the capacity was not made or sought, a trial Court will be justified in entering judgment for or against one of the parties notwithstanding such omission. See *Bulai & Ors v. Omoyajowo* (1968) 1 All NLR 72; *Dokubo & Ors v. Bob-Manuel & Ors* (1967) 1 All NLR 113; *Mba Nta & Ors v. Anigbo & Ors* (1972) 5 SC. 156 and *Jack v. Whyte* (2001) 6 NWLR (Pt. 709) 266 at 279. Therefore, in the present case, although the Appellants as Plaintiffs sought and obtained the order of the trial Court to sue in a representative capacity which capacity was also reflected in the title of the action and the pleadings, the fact that the evidence of the witnesses called by the Appellants in support of their claims reveals that the communities represented in the action as Plaintiffs have separate and distinct interest in separate and distinct portions of the land in dispute, means that the requirement of clear joint interest in the subject matter of the action required in suing in a representative capacity has been destroyed by the evidence. This situation created by the Appellants themselves is enough to justify dismissing the appeal on this issue alone.

Accordingly I hereby dismiss the appeal and abide by the orders in the leading judgment including the order on costs.