IN THE SUPREME COURT OF NIGERIA

Suit No: SC132/1991

Petitioner: Mohammed Oladapo Ojengbede
And
Respondent: M. O. Esan (Loja-Oke), Olu Loja Oke

Date Delivered: 2001-12-14

Judge(s): Salihu Modibbo Alfa Belgore, Uthman Mohammed, Anthony Ikechukwu Iguh, Aloysius Iyorgyer Katsina-Alu, Emma

Judgment Delivered

The proceedings leading to this appeal were first initiated on the 8th day of September, 1982 in the High Court of Justice of Oyo State, holden at Ilesha. In that court, the plaintiff claimed against the defendants jointly and severally as follows: -
(i) Declaration that the plaintiff is entitled to the grant of certificate of statutory right of occupancy in respect of the piece or parcel of land situate at Omi Asoro, Ajipona, lbadan/Akure Express Road, Ilesha, Oyo State of Nigeria and more particularly delineated in survey plan, Exhibit. A.
(ii) Perpetual injunction restraining the defendants, their servants, agents or privies from further acts of trespass on the said land.
(iii) N20,000.00 being special damages for the cost of concrete blocks and pillars, iron gate and labour incurred in the erection of the fence and other structures destroyed by the defendants and their agents.
(iv) N80,000.00 general damages for trespass on the land in dispute.
Pleadings were ordered in the suit and were duly settled, filed and exchanged. The case accordingly proceeding to trial and the parties testified on their own behalf and called witnesses.
The plaintiff\'s case as pleaded and testified to is that he purchased the land in dispute in 1977 from the head and members of the Lokoyi family who were the original owners thereof. This transaction was evidenced by a sale agreement dated the 19th day of January, 1978, Exhibit E. The receipts against which he bought the land are Exhibits D-D2. The plaintiff paid the purchase price of N20,000.00 to the Lokoyi family in three installments. It was the plaintiff\'s case that he was duly put into possession of the said land. He claimed that the defendants were not members of the Lokoyi family by birth and that they had consequently no right whatever to the land in dispute. The Lokoyi family owned the land, having inherited it from their ancestor, Ojo Lokoyi, the father of Oniseyitan, Fatuase and other children. Oniseyitan and Fatuase were related to the defendants by virtue of being the children of the same mother with the 1st defendant\'s father, Loja-Oke and one Molare but were not of the same father. Loja-Okeand and Molare were born to a later husband of the mother of Oniseyitan and Fatuase whom she married at another village called Ijemba after the death of Lokoyi. He claimed that the defendants were therefore not members of the Lokoyi family, the vendors of the said plaintiff in respect of the land in dispute and had no right to the said land. The plaintiff stated that following the destruction of his shed and poles on the land in dispute by the defendants, he was obliged to file the present action against them.
The defendants, for their part, claimed that Oniseyitan, Fatuase, Loja-Oke and Molare were all children of the same father and mother. Their father was the said Ojo Lokoyi, who himself was a descendant of Ayankuna, the gentleman that brought the title of Lokoyi from Oyo, a title that remains the chieftaincy title of the family. The defendants stressed that they and the plaintiff\'s vendors were members of the same family; that they held their family meetings together and that they discharged their family responsibilities inter se as prescribed by customary law. The 1st defendant, being the oldest member of the Lokoyi family, was the head of that family at the time of the institution of this action. The 2nd defendant, his son, was appointed the secretary to the family meetings since the year 1970. It was the case of the defendants that on the 1st of October, 1972, a family meeting was held under the chairmanship of the late Catechist, Mogbonjubola, who was the then head of the family. At this meeting, the family landed properties were duly partitioned among the three principal components of the Lokoyi family. The land situate at Omi Asoro, now in dispute, was allotted to Loja-Oke, the sub-family of the defendants. The land at Orugbabu was allotted to the Oniseyitan sub-family. The third piece of the family land situate at Orogoji was allotted to the Dujuelewu sub-family. Each of the said three branches or sub-families accepted and remained in exclusive possession and ownership of the respective piece of the family land partitioned and

allotted to it. Each branch of the Lokoyi family controlled, managed and put in tenants on the land partitioned to it and collected Ishakole or rent from such tenants. The family minute book, Exhibit J, was tendered in evidence to buttress the issue of the 1972 partition of family land as testified to by the defendants.

At the conclusion of hearing, the learned trial Judge, Oloko, J. after a careful review of the evidence dismissed the plaintiff\'s claims in their entirety, holding that the plaintiffs\' alleged vendors had. no title to the land in dispute at the time they purportedly sold the same to him. He stated:

I am satisfied both by the oral evidence as clearly given by the 1st and 2nd D.Ws coupled with the record of the minutes of the meeting of the family held on 1/10/72 that the land at Omi Asoro had been partitioned to Loja-oke side as from that day. Arising from the above finding, the maxim nemo dat quod non habet comes into play. I therefore hold that, 3rd P.W. and members of Oniseyitan line have been divested of any interest in the property at Omi Asoro since 1/10/72. The sale made to the plaintiff in 1977 is an exercise in futility. In other words plaintiff bought nothing.

In sum, all the three legs of the plaintiff\'s claim against the defendants are hereby dismissed with costs.

Dissatisfied with this decision of the trial court, the plaintiff lodged an appeal against the same to the Court of Appeal, lbadan Division. The Court of Appeal in a unanimous decision delivered on the 12th day of July, 1998 dismissed the plaintiff\'s appeal and held thus:-

The appellant\'s claim was rightly dismissed. The third plaintiff\'s witness has been found not to be head of Lokoyi family and the land had been found to be partitioned, the transfer or sale to the appellant in 1977 was rightly found to be void. The P.W.3 and members of Oniseyitan line had been divested of any interest in the property of Omi Asoro from the date of partition;

Aggrieved by this decision of the Court of Appeal, the plaintiff has further appealed to this court. I shall hereinafter refer to the plaintiff and the, defendants in this judgment as the appellant and the respondents respectively.

Five grounds of appeal were filed by the appellant against this decision of the Court of Appeal. It is unnecessary to reproduce them in this judgment. It suffices to state that the parties pursuant to the Rules of this court filed and exchange their written briefs of argument. The five issues distilled from the appellant\'s grounds of appeal set out on his behalf for the determination of this appeal are as follows:-

1. Whether the Court of Appeal was right in affirming the judgment of the learned trial Judge having regard to the very serious allegation of unfairness, hostility and bias leveled against the learned trial Judge which were not effectively denied by him.

2. Whether there is a breach of the appellant\'s right of fair hearing under section 33(l) of the Constitution of the Federal Republic of Nigeria 1979 as amended.

3. Whether the Court of Appeal was right in holding that the purported decision of the family council to partition the land which is the subject matter of the action was proved when it ignored Exhibit J. the alleged council minutes, which were pleased, admitted in evidence, and read in open trial court proceedings in a language which was not the official language of the court.

4. Whether having regard to the pleadings of the parties before the court the exclusion of Exhibit J had not occasioned a miscarriage of justice in the Court of Appeal.

5. Whether this is not a proper case to order a retrial before another Judge of court of first instance.

The respondents, on the other hand, submitted that having regard to the appellant\'s grounds of appeal, only two issues arise for determination in this appeal. These they set out thus:

(i) Whether the lower court was not right in dismissing the appellant\'s appeal on the ground of bias and whether there was any basis upon which the lower court could hold that the trial was unfair or that same was a breach of appellant\'s right to fair hearing

(ii) Whether the lower court was not correct in its conclusion that Exhibit \'J\' was not the only document relied upon by the trial court and that without it the respondent\'s defence that the land had been partitioned was otherwise proved. I have given a close attention to the two sets of issues identified in the respective briefs of argument of the parties and it seems to me that having regard to the grounds of appeal filed, the two issues formulated on behalf of the respondents substantially cover and are enough for the determination of this appeal.

At the oral hearing of the appeal before us, both learned counsel for the parties adopted their respective briefs of argument and proffered additional submissions in amplification of the same. In particular, Mr. Okunloye of counsel for the respondents drew the attention of the court to the preliminary objection raised on behalf of his clients in their brief of argument concerning the appellant\'s grounds of appeal and the issue for determination formulated therefrom. In effect, his submission was that the appellant\'s grounds of appeal were invalid and incompetent on grounds which inter alia included lack of particulars and vagueness. Learned counsel for the appellant, on the other hand, argued that none of

the grounds of appeal was caught by any defect or procedural irregularity. He contended that the attack on the issues formulated by the appellant in his brief of argument was largely academic and irrelevant and must be disregarded.
In my view, the preliminary objection raised on behalf of the respondents lacks substance and it is hereby overruled.
I will now proceed to consider this appeal on its merits.
The main argument of learned counsel for the appellant, M. A. Ayoade Esq. under the respondents Issue 1 which covers his issues 1and 2 is that the affidavit of the appellant filed before the court below disclosed a weighty allegation of a likelihood of bias on the part of the learned trial Judge which the Court of Appeal failed to consider adequately. The allegation of the appellant in his affidavit before the court below is that the record of the trial court was inaccurate as vital evidence favourable to him but which he was unable to particularise were not recorded by the learned trial Judge. There was also the suggestion that the trial court was hostile to his case and did not record some relevant evidence which he led in support of his case. His submission, in effect, was that the appellant had no fair hearing before the trial court and that the Court of Appeal ought to have so held. Learned counsel argued that the right to fair hearing is a fundamental constitutional right guaranteed under section 33 of the 1979 Constitution and that its breach rendered any trial, no matter how well conducted, null and void.
For the respondent, it was argued that the appellant woefully failed to establish even a prima facie case that supported his allegation of bias, likelihood of bias or denial of right to fair hearing. Mr. Okunloye therefore urged the court to resolve Issue I against the appellant.
There can be no doubt that fair hearing is in most cases synonymous with natural justice, an issue which clearly is at the threshold of our legal system. Once there has been a denial of fair hearing as guaranteed under section 33 (l) of the Constitution of the Federal Republic of Nigeria, 1979, as amended, the whole proceedings automatically become vitiated with a basic and fundamental irregularity which renders them null and void. See Otapo v. Sunmonu (1987) 1 NWLR (Pt. 58) 587, Wilson v. Attorney-General of Bendel State (1985\' 1 NWLR (Pt.4) 572. However, in cases involving allegations of bias or real likelihood of bias, there must be cogent and reasonable evidence to satisfy the court that there was in fact such bias or real likelihood of bias as alleged. In this regard it has been said, and quite rightly too, that the mere vague suspicion of whimsical, capricious and unreasonable people should not be made a standard to constitute proof of such serious complaints. Accordingly in cases where a decision is impeached on the ground of bias or real likelihood of bias, the decision must turn on the facts whether or not under the circumstances alleged, there was or was not bias or a real likelihood of bias on the part of the court. See Deduwa v. Emmanuel Okorodudu & Ors (1976) 1 NMLR 237, Oguche v. Kano State Public Service Commission (1968) NMLR 128, Jeremiah Akoh & Ors v. Ameh Abuh (1988) 3 NWLR (Pt.85) 696 at 71 1. See also R. v. Sussex Justices, Ex parte McCarthy (1924) 1 K.B. 259 and R. v. Camborne Justices & Anr Ex parte Pearce (1955) 1 Q.B. 41.
As already pointed out, the basis of the appellant\'s complaint before the court below is that the trial court was hostile to his case and did not record vital evidence which he led in support of his case. This issue being one which was not evident from the record of proceedings, the appellant brought an application before the court below with a view, inter alia, to amend or correct the alleged errors in the said record of proceedings. The application was supported by deposition of facts in the affidavit of the appellant which the respondents in their counter affidavit vigorously denied. Additionally the Principal Registrar of the trial court on the instruction of the learned trial Judge similarly wrote to the Deputy Chief Registrar of the Court of Appeal denying and controverting the allegations of fact contained in the appellant\'s said affidavit.
It is significant that the court below in a considered ruling delivered on the 25th day of June 1987 refused the application, holding that the depositions in the affidavit of the appellant which concerned allegations of bias and want of fair hearing were generally irrelevant and, where relevant, were at large and amorphous. In dismissing the appellant\'s application, the Court of Appeal further held inter alia as follows:
(i) That the appellant \"was not decided as to what his complaints calling for the correction of errors in the record of proceedings ought to embrace\".
(ii) That the affidavits in support of the application did not give notice or particulars to the other side of \"what the matter is all about to rule out any element of surprise, the more so that the affidavit themselves equivocate and are riddled with \"maze of self-contradictions\" and therefore failed to make the application \"meaningful and acceptable in law.' (iii) That the affidavits did not disclose that the evidence of the appellant\'s witnesses sought to be corrected was anything other than as contained in the record of proceedings as the deponents did not allege that they took down any notes of evidence in court during that trial and no such notes of evidence were tendered or produced before the court below.
(iv) That from the respondents\' counter-affidavit, the parties were not in agreement that there is any omission or incorrect recording or any evidence of the proceedings of the trial court.

(v) That there was not enough evidence to sustain the application.

Two vital points need to be emphasised. The first is that the appellant in his brief of argument said nothing about these copious devastating findings of the court below in the matter of his application which directly involved his complaints of bias, likelihood of bias and want of fair hearing. The second is that it is clear from the record of proceedings before this court that the said findings are abundantly supported by the appellant\'s affidavit evidence before the court below which forms part of the record of proceedings in this appeal. I can therefore find no reason to fault the said findings of the Court of Appeal which in my view are impeccable and not open to criticism. In my judgment the appellant failed fully to appreciate the gravity of the allegations or complaints of bias or likelihood of bias he leveled against the learned trial Judge together with the precise magnitude of the burden of proof placed on him by the law in order to succeed. I am in entire agreement with the court below that the appellant would appear to have been contented with raking up accusations here and there from his personal memory which accusations were totally unsupported by any reliable evidence before the court. To charge a court with bias or likelihood of bias is clearly a grave matter and the accuser must be able to establish the facts and grounds he relies upon before he can succeed in his complaint.

Now dealing with this issue of bias and lack of fair hearing, the Court of Appeal stated:

Ground two of the additional grounds of appeal and issue six deal with the question whether the appellant had a fair hearing in the lower court. It is on record that the appellant made allegations that the record of the court below is inaccurate and that vital evidence favourable to him were not recorded by the trial Judge. These issues were raised earlier in this appeal when application was made to amend the record of the court below. The application was dismissed by this court on 25:6:87. From the record before the court, it is difficult to see how the trial was unfair. There is no basis or material for holding that the trial was unfair. The attack on the Judge\'s conduct in the case is unwarranted and not supported by the record. Section 33 of the Constitution was therefore not infringed. This court will not go outside the printed records to conclude that the trial is unfair.

I entirely agree with the above findings of the court below and fully endorse the same. I can find no substance whatever in the charge of bias or want of fair hearing leveled against the learned trial Judge in the present case and the court below was therefore right to have dismissed the appellant\'s appeal on those grounds. Issue I is accordingly resolved against the appellant.

Issue 2 deals with the question of partition of the family lands of the Lokoyi family and whether the same was established before the trial court as found by the Court of Appeal. It is the case of the appellant that the respondents that is to say, the Loja-Oke sub-family, are by birth not members of the Lokoyi family and that, at all events, no partition of family lands as alleged by the respondents was ever made.

On the question of whether the respondents' Loja-Oke sub-family are by birth, members of the Lokoyi family, the learned trial Judge after a careful consideration of the issue resolved the same against the appellant. He said:

Plaintiff\'s witness canvassed in vain that 2nd defendant was never the secretary at such family meeting. These witnesses embarked on deliberate falsehood in order to knock off the idea that 1st and 2nd defendants, i.e., Loja-oke descendants are related to a Lokoyi family and so entitle them to a share of Lokoyi family property. In so far as the question of holding family meetings is concerned, coupled with the participation of Loja-oke family at such meetings, I reject entirely the evidence of the 3rd to 8th plaintiff\'s witnesses where they expressed a contrary view.

I find as a fact that Lokoyi family which includes members of Loja-oke line holds family meetings together and at as per Exhibit \'J\' 2nd defendant used to be secretary at such meetings.

He went on:

I am satisfied and I do hold that having regard to the facts in recent years established by the defendants, the traditional history that Oniseyitan, Fatuase, Esan Lojaoke and Molare were born by Ojo Lokoyi and that they were all of the same mother is more probable.

I therefore reject the claim of the plaintiff that 1st and 2nd defendants, i.e. M.O. Esan Lojaoke and Olu Lojaoke are not members of Lokoyi family. I sustain the contention of the defendants that the four of them are of the same mother and father.

So, too, the Court of Appeal after a close examination of the issue affirmed the finding of the trial court and stated thus:-

The defendants are sued jointly as set out above. The members of Lokoyi family claimed that the defendants are not members of Lokoyi family by birth. The learned trial Judge found the plaintiff\'s witnesses embarked on deliberate falsehood in order to knock off the 1st and 2nd defendants i.e. Lojaoke descendants as not related to Lokoyi family and so not entitled to a share of Lokoyi family property. The learned trial Judge found that members of Lojaoke line are members of Lokoyi family and that Oniseyitan, Fatuase, Esan Lojaoke and Molare were born of Ojo Lokoyi and that they

were all of the same mother and father. This finding of fact by the learned trial Judge paved the way for other issues which arose for determination in the case ".. I am satisfied that the learned trial Judge evaluated the evidence and appraised the facts that the defendants are members of Lokoyi family and that the land in dispute was partitioned in 1972. It is therefore not the business of this court to substitute our view for that of the trial court which saw, heard and assessed the evidence of the parties.

There is next the equally important issue of whether the appellant\'s vendors had any legal interest in respect of the land in dispute to pass on to the appellant. Put differently, was there a partition of Lokoyi family and by which the land in dispute was allotted to the respondents with the result that the appellants\' purported vendors had no legal interest over the land and could therefore pass no interest therein to the appellant.

There can be no doubt that the learned trial Judge on issue of partition rightly placed the onus of proof of the same on the defendant/respondents who averred the same. This is as against the stand of the plaintiff/appellant to the effect that there had never been a partition of Lokoyi family land and that the same had remained communal. The principle of law is well established that where a plaintiff, as in the present case, leads evidence to the effect that a land in dispute is communal, the onus is squarely on the defendant who claims ownership thereof to establish that the land belongs to him exclusively. See Udeakpu Eze v. Igilegbe & Ors (1952) 14 WACA 61, Atuanya v. Onyejekwe (1975) 3 SC. 161 at 167.

Now on this issue of partition, the learned trial Judge posed the question:

The last issue to be resolved by the court is whether 3rd P.W and members of Oniseyitan family have any interest regarding the land at Omi Asoro to pass to the plaintiff M.O. Ojengbede.

He proceeded to answer the same as follows:

The defendants pleaded and proved satisfactorily that three farmlands belonging to Lokoyi family, namely, Arugbabu, on which the Oniseyitan side used to collect Ishakole, Orogoji on which Dujuelewu Fatuase side used to collect Ishakole and Omi Asoro on which Lojaoke side used to collect Ishakole. In fact 3rd P.W. - Chief David Oniseyitan Lokoyi admitted it clearly under cross-examination. I accept the evidence of the 1st D.W. which he gave vividly that the former head of the family partitioned the land in dispute before he died. He testified thus;

Mogbonjubola, the Catechist, partitioned the land at Omi Asoro before he died. MogbonjuboIa partitioned the one at Omi Asoro to Lojaoke. He partitioned the one at Arugbabu to Oniseyitan and the one at Orogoji to Dujuelewu. This was effected about 13 years ago.

This piece of evidence relating to the issue of partition was copiously corroborated by the 2nd P.W. who testified inter alia:

On 1/10/72 the head of the family then D.A. Mogbonjubola summoned a family meeting. I was the Secretary of the family in that meeting. At that meeting Arugbabu land was partitioned and allotted to Oniseyitan side, Orogoji land was partitioned and allotted to Fatuase side and Omi Asoro land was partitioned and allotted to Lojaoke side. The members of the meeting belong to Lokoyi Ayankuna family.

These two witnesses impressed me as truthful ones

He went on:-

Apart from giving oral evidence of partition, they also buttressed it by tendering Exhibit\' J\' which contains, among other things, the minutes of the meeting held on 1/10/72 in which the issue of partition was discussed at p.29. It is shameful that the 3rd P.W., the Lokoyi and the 5th P.W. and the 6th P.W. who were present at the meeting where the deliberation took place, should deny such discussion. The plaintiff\'s witnesses lied when they testified that what was discussed at that meeting, i.e. 1/10/72 was the settlement of the land dispute among some elder women of the family. Incidentally at the time the minutes were being taken, no one contemplated litigation. I am satisfied both by the oral evidence as clearly given by the 1st and 2nd D.Ws., coupled with the record of the minutes of the meeting of the family held on 1/10/72 that the land at Omi Asoro had been partitioned to Lojaoke side as from that day.

He concluded:

I therefore hold that 31 P.W. and members of Oniseyitan line have been divested of any interest in the property at Omi Asoro since 1/10/72. The sale made to the plaintiff in 1977 is an exercise in futility. In other words plaintiff bought nothing

Reference may also be made of other relevant findings of fact which were made by the learned trial Judge as follows:-

From the above I have tried to establish facts in recent years on the evidence adduced by both parties. By way of recapitulation the facts established are as follows:-

(1) 1st defendant was collecting Ishakole from tenants on Omi Asoro farm.

(2) 1st defendant represented the family of Lokoyi at omi Asoro farm.

(3) A member of defendant\'s family, i.e. 4th P.W. Celobia Satuo - was mentioned in Exhibits D- D2.

(4) A member of the defendant\'s family was a signatory to Exhibit \'E\' i.e., Madam Celobia Satuo
(5) Members of Lojaoke line attended Lokoyi family meetings and participated in their deliberation.
(6) 2nd defendant, Olu Lojaoke has been the Secretary to the family meetings since 1970.
(7) Oredola, daughter of Lojaoke, built on family land at Ijofi where 1st defendant\'s father lived, died and was buried; and lastly
(8) 1st defendant has been farming on Omi Ashoro since 1910
The Court of Appeal, for its own part, after a careful consideration of the above findings of the learned trial Judge had no difficulty in accepting them as fully established. On the issue of partition, the court below remarked:
The most crucial issue in this appeal is whether there was a partition of the landed property of Lokoyi and whether the land in dispute is the share of the defendants after the partition which was carried out in the Lokoyi family meeting held on 1: 10:72.
In this regard the Court of Appeal stated as follows:-
The learned trial Judge rightly placed the onus of proof of partition on the defendant/respondents. He reviewed the evidence on partition. He found that the evidence of D.W.1 on partition was copiously corroborated by the D.W.2. He was immensely impressed by D.W.I despite his age (over one hundred years old). He found that the defendants pleaded and satisfactorily proved that there are three farm lands belonging to Lokoyi family namely, Arugbabu on which Oniseyitan side used to collect Ishakole, Orogoji on which Dujuelewu Fatuase side used to collect Ishakole and Omi Asoro (the land in dispute) on which Lojaoke side used to collect Ishakole.
It then concluded:
It cannot be contended that the respondent did not establish the issue that there was a partition. The learned trial Judge came to the conclusion that there was partition from the oral evidence given by D.W. I and D.W.2 whom he believed ..... I am satisfied that the learned trial Judge evaluated the evidence and appraised the facts that the defendants are members of Lokoyi family and that the land in dispute was partitioned in 1972. It is therefore not the business of this court to substitute our view for that of the trial court which saw, heard and assessed the evidence of the parties,'
It is trite law that this court will not disturb concurrent findings of fact of both the trial court and the Court of Appeal unless a substantial error apparent on the face of the record of proceedings is shown or when such findings are perverse or not supported by evidence or reached as a result of a wrong approach to the evidence or a wrong application of a principle of law or procedure. See Enang v. Adu (1981) 11-12 S.C. 25, Woluchem v. Gudi (1981) 5 S.C, 291 at 326, Azuetonma Ike v. Ugboaja (1993) 6 NWLR (Pt.301) 539 at 569, lguwego v. Ezengo (1992) 6 NWLR (Pt.249) 561 at 576, Nwadike v. lbekwe (1987) 4 P\'WLR (Pt.67) 718. Both the trial court and the Court of Appeal, in the present case are ad idem that respondents, that to say, The Loja-Oke sub-family are by birth member of the Lokoyi family and are as such entitled to a share of the Lokoyi landed property, that Oniseyitan, Fatuase, Loja-Oke and Molare were born of Ojo Lokoyi and that all four are of the same father and mother, that there was a partition of the landed property of Lokoyi family on the 1st October 1972, that the land at Omi Asoro which is now in dispute was as a result of that exercise partitioned to the respondent\'s subfamily of Loja-Oke and that P.W.3 and members of the Oniseyitan sub-family had been divested of all their interest and rights in the property at Omi Asoro now in dispute from the date of the said partition. These concurrent findings of fact are neither perverse nor unsupported by the evidence before the court. They have also not been faulted in any way by the appellant in this appeal and this court has no reason whatsoever to disturb them. See too Lamai v. Orbih (1980) 5- 7 S.C. 28 and Ige v. Olunloyo (1984) 1 SCNLR 158. Now, it is evident that having regard to the above findings of fact, particularly to the fact that there was a partition of Lokoyi family land in 1972 and that the land in dispute was allotted to the respondents\' sub-family, it becomes clear that the appellant\'s purported vendors of the said land in dispute had at all material times no title of whatever nature or colour thereto. They could, therefore, not have effectively sold the said land to the appellant. This is by virtue of the well-established legal maxim, nemo dat quod non habet, which, in effect, means that no one may give that which does not belong to him. I am satisfied and I fully endorse the crucial findings of both courts below that D.W.3 and Members of the Oniseyitan sub-family having been divested of all their interest in the land in dispute situate at Omi Asoro since the 1st October, 1972 had no right whatever to sell the same to the appellant. The purported sale of the land in dispute by P.W.3 and members of the Oniseyitan sub-family to the appellant in 1977 was, therefore, a nudum pactum, an exercise in futility and null and void ab initio. See Sanyaolu v. Coker (1983) 3 S.C. 124 at 163 - 164 Senator Adesanya v. President Federal Republic of Nigeria (1981) 5 S.C. 112, Ugo v. Obiekwe (1989) 1WLR (Pt.99) 566 etc.
The point was also made by learned counsel for the appellant that a miscarriage of justice was occasioned because the document, Exhibit J., which contains the minutes in which the issue of partition was discussed by, the Lokoyi family was unlawfully made use of by the trial court in that it was recorded in Yoruba which is not the official language of the

superior courts of record in Nigeria. In this regard, the Court of Appeal stated:- The learned trial Judge came to the conclusion that there was partition from the oral evidence given by D.W.I and DW.2 whom he believed. He did not come to that conclusion solely on Exhibit \"J\". Had he based his finding on Exhibit \"J\" alone, or if the finding on partition cannot stand without Exhibit \"J\" then it would be the duty of this court to overrule that finding because Exhibit \"J\" was not written in the language of the court and there being no translation of it into English, the learned trial Judge should not have looked at it. As it were, Exhibit \"J\" is not before him and the use he made of it is not fatal to the case.

There can be no doubt that the official language of superior courts of record in Nigeria is English and that if documents written in an language other than English are to be tendered and properly used in evidence, they must be duly translated into English either by a competent witnesses called by the party to the proceedings who needs them to prove his case or by the official interpreter of the court. A Judge cannot on his own engage in the translation or interpretation of a document written in a language other than English since he is precluded from performing the role of witness and an arbiter at the same time in the same proceedings. See Damina v. The State (1995) 8 NWLR (Pt.415) 513 at 539 -540. It is not in dispute that the learned trial Judge before whom Exhibit J was tendered is Yoruba and must have made use of his private and personal knowledge of the language to translate the said Exhibit J. This exercise, however, he was not entitled in law to engage in. I am therefore in total agreement with the court below that as Exhibit J was not written in the language of the court and there being no translation of it into English in the course of the proceedings, the learned trial Judge was in definite error to have taken any notice of it in his judgment.

The relevant question in this case, however, is whether or not the landed properties of Lokoyi family was partitioned as alleged by the respondents. This issue of fact is clearly pleaded in paragraph 28 of the defendants/respondents\' statement of defence. The respondents sought to establish the fact of partition by:

(i) Direct oral evidence of the partition and

(ii) Record of the minutes of the meeting of the family held on the 1st October, 1972, Exhibit J. in which the issue of partition was discussed.

The oral evidence of the partition was testified to by D.\'W.1 and D.W.2. The testimony of these two witnesses was fully considered by the learned trial Judge who accepted the same as truthful and reliable. Additionally, Exhibit J was tendered as minutes of the meeting of the family in which the issue of partition was discussed. The learned trial Judge considered the oral evidence of the partition as well as Exhibit J and came to the conclusion that partition of the Lokoyi family landed properties had been established by the oral evidence of D.W.I and D.W.2 whom he believed as well as by virtue of Exhibit J. As the Court of Appeal rightly explained, the learned trial Judge did not arrive at the fact of partition solely on the basis of Exhibit J. It went on:

Had he based his finding on Exhibit J alone or, if the finding on partition cannot stand without Exhibit J, then it would be the duty of this court to overrule that finding because Exhibit J was not written in the language of the court

I agree entirely with the above observation of the Court of Appeal.

In this regard, the point must be stressed that what an appellate court ought to decide is whether the decision of the court below was right and not what its reasons for arriving at the decision were and a misdirection not occasioning injustice is immaterial and cannot affect an otherwise unimpeachable decision. See Emmanuel Ayeni & Ors. v. William Sowemimo (1982) 5 S.C. 60 at 73, Ukejianya v Uchendu (1950) 13 WACA 45. In the second place, it is not every mistake or error in a judgment that will result in the appeal being allowed. It is only when the error is substantial in that it has occasioned a miscarriage of justice that an appellant court is bound to interfere. See Onajobi v. Olanipekun (1985) 4 SC. (Pt.2) 156 at 163, Azuetonma Ike v. Ugboaja (1993) 6 NWLR (Pt.301) 539 at 556, Anyanwu v. Mbara (1992) 5 NWLR (Pt.242) 386 at 400 etc. In the third place, it is settled that wrongful admission of evidence shall not of itself be a ground for the reversal of a decision where it appears on appeal that such evidence cannot reasonably be held to have affected the decision and that the decision would have been the same if such evidence had not been admitted. See Emmanuel Ayeni & Ors v. William Sowemim (supra) Ukejianya v. Uchendu (supra). See Ezeoke v. Nwagbo (1988) 1 NWLR (Pt.72) 616 at 630, Umeojiako v. Ezenamuo (1990) 1 NWLR (Pt. 126) 253 at 270, Monier Construction Comany Ltd v Tobias I. Azubuike (I 990) 3 NWLR (Pt. 136) 74 at 88. See too Idundun & Ors v. Daniel Okumagba (1976) 9 - 10 S.C. 227 at 245. Although Exhibit J in the present case ought not to have been countenanced by the trial court in the absence of its translation into the English language, there. was the accepted evidence of D.W. 1 and D.W.2 before the court apart from Exhibit J in proof of the fact of partition. It is my view that the Court of Appeal can hardly be faulted when it applied the doctrine of severance in the present case. This is because when some evidence has been wrongfully admitted or used in a proceeding, an appellate court is entitled to expunge it and will go further to ascertain whether the remaining evidence on record can support the decision of the lower court. If they can, the judgment of the lower court will not be interfered with. See Aboyeji v. Momoh (1994) 4 SCNJ 302 or (1994) NWLR 646, Wankey v. The State (1993)

6 SCNJ 152 or (1993) 5 NWLR (Pt.295) 542 etc. In my view the Court of Appeal was right when it held that the exclusion of Exhibit J from the records was not fatal to the success of the respondent\'s case as it was not the only evidence relied upon by the trial court in its finding on the issue of partition. Issue 2 is therefore resolved in favour of the respondents.

The conclusion I therefore reach is that this appeal is without substance and the same is hereby dismissed with costs to the respondents against the appellant which I assess and fix at NI0,000.00.

Whenever there is a clear evidence of an incorrect record of proceedings this court will always demand that the correct proceeding be transmitted in accordance with laid down procedure of this court. But the person asserting incorrect or a faulty record of proceedings carries the burden of not only proving the incorrectness of the proceedings he also must supply clearly what the proceedings actually ought to be.

To posit simply that the proceedings are detective without more is not enough, it must be clearly indicated in the application what the true proceedings are. What is missing or what is a surplusage must be indicated. What the appellant has done is to make statement at large that the proceedings sent to the Court of Appeal are not only incorrect but that certain pieces of evidence had been deliberately omitted by trial Judge because of bias. Up to this moment we have not been told what had been left out in the proceedings and why the trial Judge would have bias. This appeal is based on diversionary strategy to avoid the consequence of concurrent findings of facts by the two lower courts. I find no solace for the appellant in this method much as I find no reason to disturb the concurrent findings of the trial court and the Court of Appeal. I therefore agree with my learned brother, Iguh, J.S.C. that the appeal has no merit and I also dismiss it. I make the same orders as to costs as made by Iguh, J.S.C.

Judgement delivered by

Uthman Mohammed. JSC

I agree that this appeal has failed. I had the privilege of reading the judgment of my learned brother, Iguh, J.S.C. in draft and for the reasons given in that judgment I shall dismiss this appeal. Commenting on the allegation of bias by the appellants counsel against the learned trial Judge, I must say that the argument is not convincing all. The failure of the learned trial Judge to file a counter-affidavit against the allegations made in the appellant\'s affidavit before the Court of Appeal is not enough to establish bias. What interest in a judicial or quasi-judicial proceedings does the law regard as sufficient to incapacitate a person from adjudicating or assisting in adjudicating it on the ground of bias or appearances of bias' I do not accept that any vague suspicion which is not rested on reasonable grounds would amount to \"a real likelihood of bias\" on the part of a judge whose decision the appellant now want to impugn. For a decision of a judge to be labeled biased, the test which has to be applied is whether or not a reasonable man, in all circumstances, might suppose that there was an improper interference with the course of justice. See Hewart C.J. in R. v. Sussex JJ. Exparte Mc Carthy (6) (1924) 1 K.B. 259

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I am satisfied that the court below is right in showing its concern over the failure of the learned trial Judge to swear to counter affidavit in answer to allegations in the affidavit filed in support of a motion seeking for an order to inter alia correct errors in the record before that the Court of Appeal. The court below is right to refuse to accept that the attitude of the learned trial Judge was prejudicial to the case of the appellant.

I also agree with the court below that the leaned trial Judge was right to hold that the oral evidence of D.W.I and D.W.2 coupled with Exhibit J had established that the land of Onu Aroso had been partitioned.

For these reasons and the fuller reasons in the judgment of my lean learned brother Iguh, J.S.C., this appeal has failed and it is dismissed. I affirm the decision of the court below. The respondents are entitled to the costs of this appeal which I assess at N10,000.00.

Judgement delivered by

Aloysius Iyorgyer Katsina-Alu. JSC

I have had the advantage of reading in draft the judgment of my learned brother Iguh, J.S.C. in this appeal. I agree with it, and for the reasons he gives, I too would dismiss the appeal. I abide by the order for costs.

Judgement delivered by

Emmanuel Olayinka Ayoola. JSC

I agree that this appeal lacks merit and should be dismissed. For the reasons given in the judgment just delivered by my learned brother Iguh, J.S.C. I too would dismiss the appeal with costs as ordered by him.