IN THE SUPREME COURT OF NIGERIA

Suit No: SC173/1997

Petitioner: Ayisatu Asabi Ewuoso & Ors
And
Respondent: Raufu Adeoye Fagbemi

Date Delivered: 2002-04-12

Judge(s): Abubakar Bashir Wali (JSC), Idris Legbo Kutigi (JSC), Michael Ekundayo Ogundare (JSC), Aloysius Iyorgyer Katsi

Judgment Delivered

By a writ of summons issued in May 1982 (and as subsequently amended) the plaintiffs (who are now appellants before us) sued the defendant (now respondent) claiming:

(a) A declaration that they are the persons entitled to a right of occupancy over a piece or parcel of land situate, lying and being at Sokori Abeokuta, Ogun State of Nigeria verged Green excluding the area sold to Kamoru Tijani Olaiya demarcated and verged black in the amended Plan drawn by Mr Banji Akinhanmi Licensed Surveyor.

(b) N200.00 (Two Hundred Naira) damages for trespass committed by the defendant on the said land.

(c) Injunction to restrain the defendant, his agents, servants and privies from further trespassing on the said land.

Pleadings were ordered, filed and exchanged. With leave of court the plaintiffs subsequently filed an amended writ of summons, statement of claim and plan. The case proceeded to trial at the conclusion of which the learned trial Chief Judge (Delano, C.J) dismissed plaintiffs' claims with costs to the defendant.

Being dissatisfied with the judgment of the trial court, plaintiffs appealed unsuccessfully to the Court of Appeal (Coram: Mukhtar, Oguntade and Azaki JCA). They have further, with leave of the Court of Appeal, appealed to this court upon three grounds of appeal which without their particulars read as follows:

1. (i) The learned Justices of Appeal erred in dismissing the appeal on the ground that the appellants failed to establish the identity of their land and the disputed land with certainty.
(ii) Alternatively, assuming the identity of the land was an issue before the High Court and the Court of Appeal, the learned Justices erred in law when they held that the appellants failed to prove with certainty the identity of their land and more fundamentally, the land in dispute.

2. The learned Justices of Appeal erred in law in dismissing the appellants\' appeal (without at least ordering a retrial) when:
(a) The court already found that the learned trial Chief Judge did not give extensive consideration (per Azaki, JCA) or evaluate the evidence of traditional history (per Oguntade, JCA) of the appellants.
(b) The two reasons given by the learned Chief Judge at page 129 lines 21-25 of the record preferring the traditional evidence of the respondent to the appellants were rejected by the court.
(c) Their Lordships of the Court of Appeal found that the learned trial Chief Judge did not evaluate the evidence before him properly.

3. The learned Justices having found that the learned Chief Judge did not make specific findings on the appellants' claim for trespass and injunction erred in law and on the facts in reviewing the evidence adduced at the trial court and making findings on them.
The facts of this case are rather simple. The plaintiffs claimed that the land in dispute belong to them through their ancestor, one Chief Olugbuji. The plaintiffs pleaded and testified that

4. The plaintiffs take this action for themselves and on behalf of Ewuosho Family.

5. The plaintiffs state that the whole area edged green in the said plan belonged originally to one Chief Olugbunji who came from Molakun\'s compound at Ago-Ika, Abeokuta to settle at Sokori many years ago.

6. The plaintiffs state that when Chief Olugbuji first settled on this land, he met nobody there as it was then a thick forest.

7. Chief Olugbuji begat Adeaga.

8. Adeaga begat Ewuosho.

9. Ewuosho begat six children; two males and four females, and one of them is Ayisatu (f) the 1st plaintiff.

10. Out of the six children of Ewuosho four had died while two are still living.

11. The 2nd and 3rd plaintiffs are the grand children of Ewuoso.

16. After Ewuosho\'s death, his six children inherited the land and exercised undisturbed right of ownership thereon.\"

It is their case also, that the land is situated in Oluwo\'s compound. They pleaded and testified that sometime in 1979 the defendant made a request to the 1st plaintiff for a grant of land to build his family house. After some protracted negotiation, the defendant paid the 1st plaintiff N200.00 in consequence of which the plaintiffs agreed to give the defendant a portion of their land. The portion had not been allotted when the defendant laid claim to the entire land in dispute and started using it as if it were his own. The plaintiffs subsequently instituted an action leading to this appeal. They pleaded and led evidence as to how they sold a portion of their land to one Kamoru Olaiya Tijani. They also pleaded, and testified, to the effect that they allowed some people to cultivate their land at one time or the other.
The defense was a denial of plaintiffs\' case. The defendant pleaded and led evidence to the following effect:

11. The land claimed by the defendant measures 5009.357 square meters and is situate, lying and being at Ikanra\'s compound, Sokori, Abeokuta and edged Red in plan No GCS.426/0G/85 drawn by Bode Adeaga, Licensed Surveyor and attached to this statement of defense.
11a. The original owner of the land in dispute is Fadayiro who came to settle on the land from Orile Ika about 30 years after the Egbas had settled at Abeokuta.

12. He came with his wife Iyadunni, his brother Amoloku and his friend Alasede.

13. Fadayiro was a hunter and Farmer.

14. He built a thatched house on part of the land. He gave a portion of the land to Amoloku and Alasede who jointly built a house thereon.

15. He continued to farm on the remaining part of the land planting yams, palm tree, coconut trees, vegetables and cassava.

16. As a hunter Fadayiro had to travel wide for hunting.

17. He begat Fagbemi, Anworuko, Sokunbi and Efunjoke.

18. Fagbemi begat Soyoye, Aribidege and Gbadamosi Ogundina.

19. Aribidege begat Rufai, Kelani Salami and Sunmola.

20. Soyoye begat Raufu Adeoye Fagbemi the defendant.

21. Anworuko Sokunbi and Efunjoke died childless.

22. In his lifetime, Fadayiro granted a portion of his land to Ewuoso to build a house upon. He built a house on the land. The house is still on the land and is now occupied by the 1st plaintiff.
22a. Before Ewuoso was granted land near the land in dispute by Fadayiro, he was living at Owowo village. Because he committed adultery with a woman who later died, he was driven away from Owowo and came to live at Ago-Ika in Abeokuta, he ran to stay with Fadayiro at Ikanran's compound on the land in dispute so as to hide there.
22b. when he was there, he was spotted out by those people who were looking for him. Fadayiro then took him to Alausa village near Itori now in Ifo/Otta Local Government area where he was given a farmland and settled down.
22c. About 20 years after the trouble generated by the death of the woman with whom he committed adultery died down, he came back to Abeokuta and was granted land by Fadayiro as earlier mentioned in paragraph 22 and he lived there until he died.
22d. Ewuoso begat two children in his lifetime. They are Ayisatu 1st plaintiff and John who had died. John be gat Folasade the 3rd plaintiff.\"
Explaining how he came to give the sum of N200.00 to the 1st plaintiff as claimed by the plaintiffs, the defendant pleaded and led evidence to the effect that:

5. As regards paragraph 21 of the statement of claim, the defendant states that the payment of the sum of N200.00 was made to the 1st plaintiff on the handing over of the land to the defendant. The payment was to compensate the 1st plaintiff for services rendered when taking care of the land in the absence of the defendant.\"
The learned Chief Judge after a review of the evidence led by the witnesses observed and found as follows:
'From above, there is no doubt the land in dispute as pleaded by the plaintiffs\' is not Oluwo compound. Oluwo family land is not in dispute. The land in dispute is a portion of lkanra compound which, from evidence generally, belongs to the ancestor of the defendant from the evidence on traditional evidence of the defendant which I prefer to that of the plaintiffs on whom the burden of proof lies for the following reasons:-

(i) The reliable evidence of the defendant, as confirmed by Exhibit E, that the plaintiffs executed Exhibit E when they were paid for maintaining the land while the defendant was at Alausa village. PW2 confirmed the evidence of the defendant that he lived in Alausa village. The submission of Fashanu, of counsel, that Exhibit E is void because it is a document to transfer land is misconceived. The land was never vested in the plaintiffs as whoever sold to them had no right to sell; that is the basis for which Exhibit E was executed.

(ii) The plaintiffs said that they sold because they are not satisfied with the decision of the chiefs this supports the evidence of the defendant that the chiefs said that the land belongs to his family.
On acts of ownership, the evidence of the 3rd defendant witness Rabiu Sanni and 5th defendant witness, Jimoh Lagunle, who both parties agreed farm on the land is to the effect that the defendant put them on the land. The evidence of 5th plaintiff witness, Tijani alias Olaiya does not help the plaintiffs in that, at the time he paid for the land, he did not survey it as to know the boundaries of the land he was purchasing. A small portion of the land is within Ikanra compound where according to the witness the defendant lives. The 5th plaintiff witness also said that his house is not within Ikanra compound. It is my view that at the time he purchased the land, he did not know that a portion of Ikanra compound is being sold to him. The evidence of 2nd defendant witness that Olaiya begged him on a payment of NI00,000.00 before he allowed him to complete the house is more plausible. I believe him. From above, the plaintiffs have not proved that they exercised sufficient acts of ownership on the land in dispute as to warrant inference that they own the land.

I just need to mention that the N200 allegedly paid by the defendant to the plaintiffs was paid in 1979. It has nothing to do with Exhibit E which was executed 1977. I do not believe their case on this issue.

From above, the plaintiffs have not established case to warrant a declaration to the ownership of the land being made in their favour. On the whole, the case fails, the claim is accordingly dismissed.\"

The Court of Appeal in the lead judgment of Azaki, JCA with which Mukhtar and Oguntade, JJ.CA agreed faulted the

reasons given by the learned trial Chief Judge in coming to his (latter\'s) conclusion. Azaki, JCA observed:
\"From page 129 of the records it is true that learned Chief Judge did not give extensive consideration to the traditional evidence before him. But he made a finding on the recent acts of possession or ownership by preferring the evidence for the respondent to that of the appellants for two reasons. Firstly because the appellants were paid money on Exhibit E for looking after the disputed land while the respondent was away to Alausa village. The other reason for preferring the traditional evidence of the respondent to that of the appellants was that the appellants said that:
'They sold because they are not satisfied with the decision of the Chiefs. This supports the evidence of the defendant that the Chiefs said that it belongs to his family.'

He proceeded to say:
\"I have carefully gone through the evidence of the material witnesses, PW 1 and PW2, and found no evidence with respect, in support of this reasoning. However, this is not enough for this court to interfere with the finding of fact by the learned Chief Judge without faulting the first reasoning for the finding. I shall return to Exhibit E later.\"
On Exhibit E which the learned Chief Judge relied heavily on in coming to his conclusion, Azaki, JCA observed:
\"What was giving me cause for anxiety is the contents of Exhibit E which the learned Chief Judge relied on heavily in preferring the evidence of the respondent to that of the appellants.\"

After quoting the contents of Exhibit E which I need not set out in this judgment the learned Justice of the Court of Appeal went on to say-
\"From the Exhibit it was clearly not a remittable instrument. The purpose of the payment of N200.00 was for a settlement for repossessing the land wrongfully sold to the 1st appellant\'s father by one Salami who was not a member of the respondent\'s family. It follows that the learned Chief Judge ought to have attached no weight to Exhibit E because its contents were at variance with pleadings and contradicted evidence of the respondent. \"

The Court of Appeal however, found that the plaintiff failed to prove the identity of the land to which they laid claim and on that ground dismissed their appeal. Azaki, JCA concluded thus:
\"Although the appeal partially succeeds, the appropriate order to make is to dismiss it as the appellants failed to establish the identity of their land and the disputed land with certainty.\"

In the appeal to this court, the plaintiffs have set out 3 issues as calling for determination to with
\"1. Having regard to the fact that the identity of the land was not an issue before the Court of Appeal, whether the learned Justices were right in dismissing the appellants\' appeal on that ground, namely, that the identity of the land was not proved with certainty.
2. Whether having regard to the several findings made the Court of Appeal in their judgment, the learned Justices were right in dismissing the appeal.
3. In view of the failure of the learned Chief Judge to evaluate the evidence on trespass and injunction and make necessary findings thereon, whether the learned Justices were right in embarking on evaluation of evidence which credibility of witnesses had a role to play) making findings thereon.\"

The issues as formulated by the respondent are not too dissimilar.
No doubt the learned Justices of the court below found for plaintiffs on a number of grounds of appeal placed before them. The
Parties pleaded and led evidence on two conflicting accounts of traditional history of the land in dispute. The two reasons given by learned trial Chief Judge for preferring the traditional history of defendant to that of the plaintiffs were both faulted, and quite rightly in my view, by the court below. The court below also upheld a complaint of the plaintiffs that their claims for damages for trespass and injunctions were not considered by the trial Chief Judge. More importantly the plaintiffs complained before the court below, and that court upheld the complaint, that the trial Chief Judge did not properly evaluate the evidence before him. I have mentioned earlier in this judgment the conclusion of the court below on Exhibit E, and a document which the defendant relied heavily on in proof of his case and which the learned trial Chief Judge also relied on in corning to his own
conclusion dismissing plaintiffs\' case. The court below faulted the learned Chief Judge on this and there has been no appeal by the defendant against the weighty findings of the court below. In the light of these findings one would think that the proper order to make is one sending the case back to the trial High Court for retrial. The court below however,

did not take this course of action for reason that the plaintiffs failed to establish the identity of their land. This conclusion has come under heavy attack in this appeal. The court below per Azaki, JCA observed:
\"In an action for title for trespass to land the primary duty of the claimant is to establish with certainty land to which the claim is related.\"

After citing authorities the learned Justice of the Court of Appeal went on:
\"The appellants sought to discharge this responsibility by Exhibit B a plan of their land showing the disputed land. This exhibit was prepared in 1989 and filed along with the amended statement of claim. The total area of the land claimed by them was 10,730.244sq meters. The disputed land of 2.196.259 sq. meters was shown completely enveloped in the said land. Before then the appellants had prepared a plan Exhibit C in 1984 describing the whole land of 2.909 acres claimed by them as the disputed land. The evidence on how the surveyor determined the disputed area on Exhibit B is interesting. He testified as PW6 in the cross-examination as follows:

\'The plaintiff showed me the area verged green as belonging to them. The plaintiffs did not show me the area in dispute. I determined the area in dispute from the plan of the defendant '.. If I could not see the plan of the defendant I would not have been able to identify the land in dispute on Exhibit B.\'

The evidence of Nuratu Aboaba, a boundary-man at South-west in Exhibit B was self contradictory and unhelpful to the appellants. Besides the inconsistency in the land size in Exhibits B and C there was inconsistency in the description of the boundary-man. It is amazing that the appellants who were present on land and showed the surveyor their land were unable to identify the disputed land. These fundamental defects in the case for the appellants could not be rectified by the weakness, if any, in the case for the respondent.

Strictly speaking the appellants failed to prove, with certainty, the identity of their land and more fundamentally, the land in dispute. On this alone their action ought to have been dismissed. Iyaji v Eyigebe (1987) 3 NWLR (Part 61) 523.\"

Are their Lordships right in this conclusion' This is the question I have to answer in this appeal.
Mr. Fashanu, learned counsel for the plaintiffs both in his brief and in oral argument, submitted that the identity of the land in dispute was never in issue between the parties. He referred to Exhibits C and D - the three plans tendered in this case and submitted that identity of the land in dispute was proved and that the land in dispute was the land the defendant went on to claim as his own. He submitted that on the findings of the Court of Appeal the proper order for this court to make is one of retrial. Mr. Okunloye learned counsel for the defendant argued in his brief that the court below rightly dismissed plaintiffs\' claim for their failure to discharge the onus on them of proving their case. He urged the court to dismiss the appeal.
From the pleadings and the plans tendered in this case, I am of the view that the court below was clearly in error when it held that the land the plaintiffs claimed was not proved. In paragraph 3 of the amended statement of claim the plaintiffs averred:

\"3. The plaintiffs state that the land in dispute is situate, lying and being at Oluwo's compound, Sokori, Abcokuta, Ogun State and is edged Red in Plan No BAG/1230 dated 30/3/89 drawn by Oyebanji Akinhanmi Esquire, Licensed Surveyor and attached to this amended statement of claim\"
The Plan BAG/1230 dated 30/3/89 was tendered in evidence as Exhibit B. The Plan showed the land claimed by the plaintiffs and thereon was edged Green. It also showed the area allegedly trespassed upon by the defendant and which land was edged Red on the Plan. The defendant tendered Exhibit D as the land he claimed to be his own. It was that land that was plotted and edged Red on Exhibit B, that is, Plan No BAG/1230. I think the lower court was a bit confused by Exhibit C, Plan No AK6667/0G which the plaintiffs earlier annexed to their original statement of claim. The area claimed by the plaintiff on that Plan was edged Red. If their Lord ships of the court below, with profound respect, had carefully examined the three Plans, they would have concluded that Exhibit B, that is, Plan No BAG/ 1230 is a composite Plan of Exhibits C and D and would not have come to the conclusion that the identity of the land being claimed by the plaintiff nor that of the land in dispute was not proved with certainty.

What was in dispute between the parties was the location of the land, whether it was in Oluwo compound or in Ikanran compound. The learned trial Chief Judge resolved that conflict in favor of the defendant who contended that the land

was in Ikanran compound. The Court of Appeal faulted the two reasons given by the learned Chief Judge in so holding. It follows, therefore, that by logical reasoning, the trial Chief Judge was in error to hold that the land was in Ikanran compound.

The conclusion I reach, therefore is that the plaintiffs were on a firm ground in contending that the land in dispute or the land claimed by the plaintiff's was proved with certainty. With profound respect to their Lordships of the court below I must hold that they came to a wrong conclusion on this issue and following their other findings which have not been appealed against, the proper order to make in this case is not one dismissing the appeal but one setting aside the judgment of the trial Chief Judge and an order that the case be tried de novo before another Judge of the Ogun State High Court.

In conclusion, therefore, I allow this appeal. I set aside the judgments of both the trial High Court and the Court of Appeal and order that this case be tried de novo before another Judge of the Ogun State High Court. In view of the age of the case I further order that the retrial be conducted expeditiously. I award to the plaintiff's N10, 000.00 costs of this appeal and N500.00 costs of the appeal at the Court of Appeal. The costs in the trial High Court shall abide the result of the retrial.

Judgment delivered by
Abubakar Bashir Wali. JSC

I have the privilege of reading before now, the lead judgment of my learned brother Ogundare, JSC, and I agree with his reasoning and conclusion.
For the same reasons, I also allow this appeal, set aside the decisions of the two courts below and make an order of trying the case de novo before another Judge of the Ogun State High Court. I adopt the order of costs made in the lead judgment.

Judgment delivered by
Idris Legbo Kutigi-Alu JSC

I read before now the judgment just delivered by my learned brother Ogundare, JSC I agree with his reasoning and conclusions. I also find merit in the appeal. I accordingly allow it. The judgments of the lower courts are set aside and an order that this case be tried de novo by another Judge of the High Court is hereby made. I endorse the order for costs.

Judgment delivered by
Aloysuis Iyorgyer Katstina. JSC

I have the privilege of reading in advance the judgment just delivered by my learned brother Ogundare, JSC in this appeal. I agree entirely with his reasoning and conclusion. I also would allow the appeal and order a retrial before another judge of the Abeokuta High Court.

Judgment delivered by
Umaru Atu Kalgo JSC

I have the privilege of reading in advance the judgment by my learned brother, Ogundare, JSC in this appeal. I agree entirely with his reasoning and conclusion reached therein which I adopt as mine and for which I also allow the appeal. The three issues for determination which arose in this appeal and which

(i) touched on the identity of the land in dispute.
(ii) Evaluation of evidence adduced at the trial and
(iii) failure of the trial court to consider and adjudicate on the plaintiffs/appellants' claim for trespass and injunction
were painstakingly dealt with in the said judgment and I have nothing useful to add thereon. I also agree that having regard to the circumstances of this case, an order of retrial is just and fair to properly determine the issues in controversy between the parties. This appeal is accordingly allowed. I set aside the decision of the Court of Appeal dated 20th June 1994 and order a retrial of the case before another Judge of Ogun State High Court. I abide by the order of costs made in the leading judgment.