**EZE A. A. UWANAMODO**

**V.**

**CHIEF SIR ERNEST NWOKAFOR**

IN THE COURT OF APPEAL OF NIGERIA

ON FRIDAY, THE 5TH DAY OF MAY, 2017

**CA/OW/45/2014**

**LEX (2017) - CA/OW/45/2014**

**OTHER CITATIIONS**

3PLR/2017/102 (CA)

(2017) LPELR-42451(CA)

**BEFORE THEIR LORDSHIPS**

MASSOUD ABDULRAHMAN OREDOLA, J.C.A

AYOBODE OLUJIMI LOKULO-SODIPE, J.C.A

ITA GEORGE MBABA, J.C.A

**BETWEEN**

EZE A. A. UWANAMODO - Appellant(s)

**AND**

CHIEF SIR ERNEST NWOKAFOR - Respondent(s)

**REPRESENTATION**

Absent For Appellant

AND

Absent For Respondent

**MAIN ISSUES**

TORT ANDPERSONAL INJURY LAW – TRESPASS TO LAND:- Meaning of trespass to land – Person on land/property legitimately, or with permission or consent of the owner of the land – Whether cannot be accused/held for trespass – Relevant considerations

REAL ESTATE AND PROPERTY LAW – LAND:- License or permission to do certain acts on land – When could found an action in trespass – Onus of proof – On whom lies – Whether on party alleging trespass

FOOD AND AGRICULTURE LAW:- Control of wild palm trees growing on land – Duty of care owed owners of adjacent/adjoining properties – Implications for justice administration

ENVIRONMENTAL AND NATURAL RESOURCES LAW:- Wild trees and safety of homes and neighbourhood – Private felling of same by person not in control of land – When will not constitute trespass

PRACTICE AND PROCEDURE - APPEAL - INTERFERENCE WITH EVALUATION OF EVIDENCE: Rule that it is the primary responsibility of the trial Court which saw and heard witnesses to evaluate the evidence and pronounce on their credibility or probative value and not the appellate Court which neither heard the witnesses nor saw them to observe their demeanors in the witness box – Legal effect

PRACTICE AND PROCEDURE - EVIDENCE - BURDEN OF PROOF/ONUS OF PROOF: Types/Classes of burden of proof in civil cases – Onus of proof – How determined – Person who instituted an action – Whether is expected or has the burden of proving with cogent and credible evidence, all the facts and or ingredients necessary to establish his case or secure the judgment of the Court in his/her favour – Exceptions thereto

**MAIN JUDGMENT**

**MASSOUD ABDULRAHMAN OREDOLA, J.C.A. (Delivering the Leading Judgment):**

This is an appeal against the judgment of the High Court of Abia State of Nigeria sitting at Umuahia (hereinafter referred to as the lower Court), delivered on the 5th day of November, 2013 , by Hon. Justice L. Abai, J. The suit which led to this appeal was commenced by the claimant/appellant (hereinafter referred to as the appellant) vide a writ of summons and statement of claim dated and filed on the 13th day of June, 2011 wherein the appellant sought for the following relief.

(a) The sum of N1m (One Million Naira) being special and general damages for trespass to the palm trees on land traditionally known as and called “Okporoama Dikenta” in Dikenta Ekenobizi in Umuokpara Umuahia South L. G. A. Abia State within the jurisdiction of the Court in possession of the claimant.

The appellants case against the defendant/respondent (hereinafter referred to as the respondent) is that the respondent was granted the permission to cut down some of the appellant’s palm trees which are wild, tall and overgrown, and are near to the respondent’s house and constituted danger to him and or his family. However, the appellant claimed that the respondent went beyond the said permission and cut down some of the appellant’s palm trees which are not near to the respondent’s house and did not by any means constitute any danger to him or his family. The respondent on the other hand, alleged that he cut down the said palm trees in accordance with the appellant’s permission as contained in Exhibit C and even went beyond, by obtaining the approval of Environmental Health Department of the Umuahia South Local Government Authority.

In his bid to prove his case, the appellant called four (4) witnesses including himself, while the respondent testified alone in his defence. At the close of hearing, the learned counsel for the parties filed their respective written addresses and adopted the same as their legal arguments in support of their respective client’s case. After due consideration of the counsel’s addresses vis-a-vis the evidence adduced before him, the learned trial judge dismissed the appellant’s case and entered judgment in favour of the respondent.

The appellant was dissatisfied with the decision of the lower Court and appealed against the same, vide a notice of appeal dated the 14th day of November, 2013 and filed on the 18th day of November, 2013. The appellant’s complaints against the judgment are grounded on six (6) grounds of appeal. They are reproduced without their particulars as follows:

“GROUND ONE

The learned trial Judge erred in law when in course of his evaluation of the evidence in this case, he misplaced the onus of proof in this case by saying:

The claimant must prove by credible evidence that trees cut were not close to the defendant’s house and that they did not constitute a nuisance or threat to the defendant. In the instant case, it is the defendant’s evidence and pleadings that the palms he cut were tall, wild and overgrown and constituted a danger to his house and his family. No evidence was led to show that they did not constitute a danger.

GROUND TWO

The learned trial Judge erred in law in relying on Exhibit H (letter from Environmental Health Department) in coming to the conclusion that the defendant was right in cutting the said palm trees of the claimant which is the cause of this action.

GROUND THREE

The learned trial Judge erred in law in his views in his judgment when he said that the fact that somebody climbed the trees to fell them, “does not however imply that the palm cut did not constitute a danger to the defendant.”

GROUND FOUR

The learned trial Judge erred in law when he held that the claimant’s letter acted as an authority to the defendant to enter the claimant’s said land and cut the said palm trees.

GROUND FIVE

The learned trial Judge erred in law when he held that the claimant did not prove special damages claimed by him by saying:

In the instant case, the claimant has not led credible evidence to prove that crops listed by him and the quality listed were destroyed. He did not lead evidence as to how he arrived at the price of the said crops, nor is it in his evidence that he visited the land after the incident and took count of the crops destroyed.

GROUND SIX

The judgment is against the weight of evidence."

In prosecution of this appeal, the parties filed their respective briefs of argument. The appellant’s brief of argument was dated and filed on the 14th day of February, 2014. The said appellant’s brief of argument was prepared by Dr. I. N. Ijiomah, SAN, KSC, Ph. D. On the other hand, the respondent’s brief of argument, dated and filed on the 1st day of June, 2015 was by the leave of this Court granted on the 26th day of May, 2015, whereat the respondent was given seven days extension of time within which the respondent’s brief of argument shall be filed. It was deemed as having been properly filed and served. The said respondents brief of argument was prepared by Uche Igwe Esq. In line with the rules of this Court, the appellant’s reply brief dated the 12th day of June, 2016 was filed on the same day.

The learned senior counsel for the appellant distilled three (3) issues in the appellants brief of argument for the determination of this appeal. The issues are as follows:

1. Whether the learned trial Judge misplaced the onus of proof as placed by the pleadings in course of his evaluation of the evidence in the case (Distilled from ground one (1)

2. Whether the trial Judge was right in relying on Exhibit “H” (letter from Environmental Health Department) in coming to the conclusion that the defendant was right in cutting the said palm trees of the claimant which is the cause of this action. (Distilled from ground 2).

3. Whether the final Judgment of the trial Court in this case against the Appellant and in favour of the Respondent is justified by the evidence on record. (Distilled from grounds 3, 4 and 5).

On his own part, the learned counsel for the respondent also distilled three (3) issues in the respondents brief of argument for the determination of this appeal. The issues are also as follows:

1. Whether the learned trial Judge was right in placing the onus on the appellant to prove material assertions of facts made by the appellant himself. (Distilled from ground 1)

2. Whether the reliance placed on Exhibit “H” by the learned trial judge occasioned a miscarriage of justice to the appellant. (Distilled from ground 2)

3. Whether the learned trial judge reached a just decision in the case based on available evidence before the Court. (Distilled from grounds 3, 4 and 5).

I have carefully examined the issues as formulated by the learned counsel for the parties and I found them to be in tandem, save for the variation in the use of words. However, the set of issues formulated by learned senior counsel for the appellant is more apt and the same is hereby adopted by me in the determination of this appeal. I also found the issues to be interrelated with one another, thus, the issues will be considered and resolved together.

On the 7th day of February, 2017 when the appeal came up for hearing, while the appellant was present in Court, the learned counsel for the parties and the respondent were absent. We were satisfied with the proof of service placed before us and thereby proceeded and treated the appeal as having been duly argued. See Order 18 Rule 9 (4) of the Court of Appeal, Rules, 2016.

LEGAL ARGUMENTS

The learned senior counsel for the appellant contended that the learned trial judge misplaced the onus of proof in the case by placing the same on the appellant who asserts negatively, that “the palm trees cut by the defendant (respondent) were not cut in line with the authority given to the defendant (respondent) by the claimant (appellant).” (bracket mine for clarification); instead of placing the onus on the respondent who asserts the positive of the said averment. The learned senior counsel strongly argued, that the said misplacement of onus of proof on the appellant by the learned trial judge, has occasioned miscarriage of justice to the appellant and has rendered the lower Court’s judgment to be perverse. He relied on and quoted from the following cases: Henshaw V. Effanga (2009) 11 NWLR (Pt. 1151) 65 @ 101; Plateau State of Nigeria V. Attorney General of Federation (2006) 25 WRN, 1 @ 85 and Ekennia V. Nkpakara (1997) 5 SCNJ, 70 @ 93 among others.

In addition, the learned senior counsel for the appellant contended in the appellant’s reply brief that the submission of the learned counsel for the respondent, that assertions couched in negative terms would not remove the onus of proving the facts so asserted and the cases cited in support thereof are not applicable to the instant case, because the cases and the submissions thereon were only applicable to statutory claims and not a case founded on tort as the instant case. He therefore urged this Court to discountenance this submission.

Again, the learned senior counsel for the appellant contended that the lower Court (with due respect) acted erroneously when it relied on Exhibit H (letter of approval from the Environmental Department of Umuahia South Local Government Authority) in holding that the respondent had the authority to cut down the appellant’s palm trees as he did. The learned senior counsel argued that the said Exhibit H does not qualify as an abatement notice and the lower Court acted wrongly when it relied on the said Exhibit H to enter judgment in favour of the respondent. Also, the learned senior counsel maintained that the said Exhibit H is not consistent with the respondent’s pleadings, and thus cannot be relied upon or regarded as a credible evidence, and the learned trial judge’ misevaluation of the evidence of the Respondent on Exhibit “H” rendered his decision, in this case based on Exhibit “H” perverse. He referred this Court to the case of Oshinaya V. C.O.P Lagos State (2004) 21 WRN, 153.

Additionally, the learned senior counsel argued that the evidence of the respondent is contradictory to his pleadings and the lower Court acted wrongly by relying on the same in entering judgment in favour at the respondent. The learned senior counsel further argued that, the trial judge failed to appreciate the fact that Exhibit “C” was a conditional permission given to the defendant by the claimant and thereby came to the wrong and perverse conclusion that Exhibit “C” gave the defendant permission to cut the said palm trees, a fact which the defendant failed to prove, by reason of the defendant’s failure to prove that the palm trees he cut on the claimant’s said farmland constituted a nuisance to his house. Put differently, that “the defendant was unable to prove that the palm trees were overgrown, fragile and unclimbable because of the contradiction between his pleadings on the issue and his evidence in cross-examination on the issue as aforesaid.” The learned senior counsel for the appellant further contended that the appellant having proved his case on credible evidence is entitled to judgment in his favour, as against the respondent who failed to adduce credible evidence to prove his case or support his averments with credible evidence. He therefore urged this Court to resolve these issues in favour of the appellant and allow the appeal.

In reply, the learned counsel for the respondent submitted that the burden of proof is on the appellant to prove his assertions as contained in Paragraphs 12 and 13 of his statement of claim. He relied on Section 133 (1) of the Evidence Act, 2011. The learned counsel contended that the appellant who made the assertions which are material; that the respondent cut down some palm trees which are not close to the respondent’s house and hazardous to the respondent and his family, has the burden of proving the said assertions. He relied on the case of Okaekwu v. Agufuori (2012) ALL FWLR (Pt. 621) 1620. The learned counsel argued, that the fact that the appellant couched his assertion in negative terms does not remove the burden of proving the said assertions from the appellant. It was therefore submitted that the appellant has the primary burden of proving his assertions and establishing his case on credible and cogent evidence, before the burden can be said to have shiffed to the respondent. He relied on the cases of Oraekwe v. Chukwuka (supra); Ohochukwu v. Attorney General of River State (2012) ALL FWLR (Pt. 626) 438 and Abubakar v. Yar???adua (2008) ALL FWLR (Pt. 404) 1409; (2008) 18 NWLR (Pt. 1120) 1.

Furthermore, the learned counsel for the respondent maintained that the defence of the respondent was not based on Exhibit H, and the judgment was equally not based on the said exhibit. According to the learned counsel that the exhibit only serves as a surplusage in entering judgment in favour of the respondent. The learned counsel for the respondent further argued, that the contradiction which the learned senior counsel for the appellant alleged existed in the evidence of the respondent, arose only due to the appellant’s misconception of the responden’s assertions. The learned counsel thereby submitted, that even if there is such a contradiction as regards Exhibit H, it does not vitiate the judgment of the lower Court, as the said judgment was based mainly on Exhibit C which is the letter of authority given by the appellant to the respondent to cut down some palm trees on the appellant’s farmland which are wild, tall and overgrown, and constituted danger to the respondent and his family. He relied heavily on the cases of Jeu V. Dolo (2012) ALL FWLR (Pt. 641) 1542 and Owoo V. Edet (2012) ALL FWLR (Pt. 642) 1796.

Again, the learned counsel for the respondent submitted that the evaluation of evidence and ascription of probative value to admissible and admitted evidence, are primarily within the purview of the trial Courts and appellate Courts are enjoined not to interfere with the findings of the trial Court, except where the same are found to be perverse. He relied on the case of Obueke v. Nnamchi (2012) ALL FWLR (Pt. 633) 1856. The learned counsel undertook what could be referred to as a graphic presentation/analysis of the evidence on record and submitted, that the trial Court aptly evaluated the evidence and exhibits presented before it and placed the apposite probative values on the said pieces of evidence where it rightly belonged before it arrived at its decision.

Additionally, that the trial Court did not in any way and it has not been shown by the appellant, that it ventured on a voyage of discovery outside what was presented before it at the trial. Hence, its decision did not occasion any miscarriage of justice but it arrived at a just decision of the issues between the parties herein. The learned counsel thereby urged this Court to resolve these issues in favour of the respondent and dismiss this appeal.

It is pertinent to observe that burden of proof has two distinct and frequently confused meanings. Firstly, burden of proof as a matter of law and the pleadings which is usually referred to as the legal burden or the burden of establishing a case. The second meaning, is referred to as the burden of adducing evidence, usually described as evidential burden. While the burden of proof in the first sense is always stable, the burden of proof in the second sense may shift constantly, according to the worth of evidence so adduced and placement on the imaginary scale of evidence and consequent or dependent as to or in which direction it preponderates. See Odukwe v. Ogunbiyi (1998) 8 NWLR (Pt. 561) 339. Thus, as in the first meaning above, a plaintiff who instituted an action is expected or has the burden of proving with cogent and credible evidence, all the facts and or ingredients necessary to establish his case or secure the judgment of the Court in his/her favour; except where the law places the said burden on the defendant; or specific class of the action requires or dictate that the defendant bears the burden. For example, action founded on strict liability. Therefore, it is only when the plaintiff has discharged the basic onus placed on him, that the evidential burden is then shifted to the defendant to establish his/her defence. See Section 137 of the Evidence Act, 2011.

Also, the burden of first proving the existence or non existence of a fact lies on the party against whom the judgment of the Court would be given if no evidence was produced on either side, regard being had to any presumption that may arise on the pleadings. See Section 136 of the Evidence Act, 2011. If a party adduces cogent and credible evidence which ought reasonably to satisfy the judge, that the facts sought to be proved are established, the burden of proof is shifted on to the other party against whom judgment would be given if no more evidence was adduced. See Osawaru v. Ezeiruka (1978) 6-7 S. C. (Reprint) 91; Egharevba v. Osagie (2009) 18 NWLR (Pt. 1173) 299; and Edeani Nwavu & Ors. V. Chief Patrick Okoye & Ors. (2008) 18 NWLR (Pt. 1118) 29. In the instant case, the question that needed to be asked and answered in order to determine on whom the burden of proof lies is that: who will lose if no evidence is adduced or if the averments are not established by credible evidence before the Court? Surely, the answer would be the appellant. Thus, he has the greater burden to establish his case on preponderance of evidence. It is only when he has successfully discharged the burden placed on him by law, that the burden could be held to have been shifted to the defendant. Also, it is a basic requirement or rule, that a plaintiff is generally expected to fail or succeed on the strength of his case and not on the weakness of the defence; except where the evidence adduced by the defence supports his case. Thus, the appellant herein cannot rely on the alleged failure of the respondent to establish a particular fact or fact(s), to expect that judgment would be given in his favour. He is expected to first of all endeavour to establish his case on the balance of probability or preponderance of evidence before he can be heard to complain that the respondent has not established his defence. In the instant case, it is the appellant’s contention (as can be gleaned from his pleadings), that the respondent exceeded the authority which he was granted, when he proceeded to cut down some palm trees which were not wild, tall and overgrown, and were not near the respondent’s house, thus, not constituting any danger to the respondent or his family. In this vein, the appellant has the burden in law to establish facts showing that the respondent exceeded the said authority granted to him by virtue of Exhibit C (appellant’s letter authorizing the respondent to cut down some of the appellant’s palm trees which are wild, tall and overgrown). The appellant’s couching of the averments in respect of the above issue in the negative and expecting the respondent to assist him in discharging his duty, would not by any means cut ice or help his case. Thus, issue one is resolved against the appellant and in favour of the respondent.

On the contention of the learned senior counsel that the lower Court (with due respect) acted erroneously when it relied on Exhibit H to enter judgment in favour of the respondent and therefore rendered the judgment of the lower Court to be perverse. I have carefully examined the said judgment and I agree with the learned counsel for the respondent that the decision of the lower Court was not based on Exhibit H (the approval letter from the Environmental Health Department Council, for the respondent to cut the appellant’s palm trees which are dangerous and hazardous). Rather the lower Court’s decision was primarily reached, due to the inability of the appellant to establish his case on cogent and credible evidence. In order to vividly make my point; I will undertake to reproduce the part of the lower Court’s judgment which in essence specified the reasons upon which the appellant’s case was dismissed.

It is trite that the onus is on a claimant to prove his case on preponderance of evidence or balance of probabilities. Sec 134 of the Evidence Act, 2011, as amended, and Ezemba vs. Ibeneme (2004) 14 NWLR (Pt.894) 617. The claimant must prove by credible evidence that the trees cut were not close to the defendant’s house and that they did not constitute a nuisance or threat to the defendant. In the instant case, it is the defendant’s evidence and pleadings that the palm he cut were tall, wild and overgrown and constituted a danger to his house and his family. No evidence was led by the Claimant to show how far the trees were from the defendants house, no evidence was led to show that they did not constitute a danger. Consideration of the photographs tendered indeed show that the palm cut were very tall. There is nothing to prove that if they fell they would not affect the defendants house.

It can be inferred from Exhibits C/G that the claimant was aware that there were palms on his land that could constitute a danger to the defendant otherwise he would not have given his consent in the first place.

(See pages 85 - 86 of the record of appeal.)

A clear and dispassionate perusal of the above quoted portion of the lower Courts judgment will show without any obfuscation that the appellants case was dismissed due to his serial and fatal failure to adduce credible evidence to prove every limb of his claim against the respondent. It was clearly not based on Exhibit H per se. Thus, it is my firm viewpoint that the contention of learned senior counsel for the appellant on the issue, is clearly misplaced and accordingly discountenanced. Hence, the said issue number two is also resolved against the appellant.

Finally, I have undertaken to examine, consider and place all the pieces of evidence on record against the parties’ averments. I agree with the decision of the learned trial judge that the appellant has failed to establish that the respondent went beyond the authority granted to him by the appellant with regard to cutting down some palm trees which are not wild, tall, overgrown, and not near the respondent’s house and constituted a danger to him or his family. I agree with the learned trial judge that the appellant has the burden to show on credible evidence the state and position of the palm trees that were cut by the respondent and their proximity to the respondent’s house. What is more; the appellant has failed in all ramifications to discharge the said burden. Thus, Issue No. 3 is also resolved against the appellant.

It is now settled law that it is the primary responsibility of the trial Court which saw and heard witnesses to evaluate the evidence and pronounce on their credibility or probative value and not the appellate Court which neither heard the witnesses nor saw them to observe their demeanors in the witness box. It follows therefore that when a trial Court unquestionably evaluates the evidence and appraises the facts of a case, it is not the business of the appellate Court to substitute its own views for the views of the trial Court. See Mogaji V. Odofin (1978) 4 S.C. 91; Odofin v. Ayoola (1984) 11 S.C. 72 and Agbeje v. Ajibola (2002) 2 NWLR (Pt. 750) 127. It is only where the trial judge abdicates his sacred duty of evaluation of the pieces of evidence and the ascription of weight thereto, or when he demonstrates that he had not taken proper advantage of his having heard and seen the witnesses who testified, that the matter now becomes one at large for the appellate Court to evaluate the evidence, provided the exercise does not involve the determination of the witnesses credibility. Briefly put, it is the primary duty of the trial Court to make findings on all the pieces of evidence adduced before it and base his decision on the said findings. An appellate Court has no power and or duty to interfere with the said decision of the lower Court, unless it found the said decision to be perverse (that is, not supported by evidence on the cold printed record or against an established legal principle or principles). As I have earlier observed, the decision of the lower Court was based on sound and impeccable findings, thus, this Court has no business or temerity, to interfere with the said judgment, unless to further affirm it. Therefore, this appeal is hereby found by me to be completely lacking in merit and it is accordingly dismissed.

Thus, the judgment of the lower Court delivered on the 5th day of November, 2013 by Hon. Justice L. Abai, J. in respect of this case is hereby affirmed by me. No order is made with regard to costs.

**AYOBODE OLUJIMI LOKULO-SODIPE, J.C.A.:**

I have had the privilege of reading in draft the leading judgment prepared by my learned brother MASSOUD ABDULRAHMAN OREDOLA, JCA. I am in complete agreement with the manner in which the issues considered in the appeal were resolved.

Accordingly, I too hold that the appeal is unmeritorious and dismiss it. I abide by the consequential orders made in the leading judgment including that in relation to costs.

**ITA GEORGEÂ MBABA, J.C.A.:**

I had the privilege of reading in draft, the lead judgment by my learned brother, M. A. Oredola JCA and I agree completely with his reasoning and conclusion that the appeal lacks merit.

It is difficult to contemplate how trespass can be committed by a Respondent who was permitted by the Appellant to enter his (Appellant’s) land to remove growths and afforestation that lodged/posed danger to the Respondent’s home, the land sharing neighbourhood with the Respondent! One who is in a property, legitimately, or with permission or consent of the owner of the land, cannot be accused/held for trespass. Sabamowo v. The Federal Public Trustee (1970) ALL NLR 261; Giwa & Anor vs. Akinlabi & Ors (2012) LPELR CA/I/265/2006; See also Anyabunsi vs. Ugwunze (1995) 6 NWLR (Pt.401) 255; where the Supreme Court held:

It is trite law that every unlawful and unauthorized entry on land in possession of another is an act of trespass for which an action in damages lies, per Iguh JSC."

I too dismiss the appeal and abide by the consequential order in the lead judgment.