**GILBERT EZEIGWE**

**V.**

**AWAWA AWUDU**

IN THE COURT OF APPEAL [PORT HARCOURT DIVISION]

23RD DAY OF MAY, 2008

CA/PH/96/98

**LEX (2008) - CA/PH/96/98**

**OTHER CITATIONS**

3PLR/2001/138 (CA)

**BEFORE THEIR LORDSHIPS**

JAMES OGENYI OGEBE, JCA (Presided and delivered the leading judgment)

SYLVANUS ADIEWERE NSOFOR, JCA

MICHAEL EYARUOMA AKPIROROH, JCA

**ORIGINATING COURT**

HIGH COURT OF RIVERS STATE [OKOR J. Presiding]

**REPRESENTATION**

I. A. OKAFOR, SAN with K.C.D. NJEMANZE for the appellant.

COLLINS N. OBULOR for the respondent.

**ISSUES FROM THE CAUSE(S) OF ACTION**

REAL ESTATE/LAND LAW:- Claim for declaration to possession and ownership of property - Duty of claimant to prove case on the strength of his own case and not on the weakness of the defendant’s case – Relevant considerations

COMMERCIAL LAW – BUILDING CONTRACT:- Validity of where acknowledged and pleaded by parties to same – Operation of Illiterate Protection Act – Where the illiterate obtained some benefits under that document – Whether would not be allowed to hide under the Illiterate Protection Law to renounce the document

COMMERCIAL LAW – BUILDING CONTRACT:- Privity and performance – Contract not fully performed by one party to it – Death of contractor - Whether heir or privies of that party can upon his becoming deceased enforce the contract against the other party

CRIMINAL LAW AND PROCEDURE:- Fraud – Proof of - Standard of proof required

CHILDREN AND WOMEN LAW: *Women and Property/Education* – Elderly illiterate woman – Defence of interest over property – Claim she irrevocably assigned her property to her building contractor while escaping from territory as a result of the Nigerian Civil War – How treated

EDUCATION AND LAW – ILLITERACY AND JUSTICE ADMINISTRATION:- Operation of Illiterate Protection Law regime – Purpose and effect – What constitutes minimum compliance with regards to legal document purportedly executed by an illiterate person – Whether enough that an illiterate person signed or executed document before a magistrate

ELDERS AND LAW:- *Elderly persons and justice administration* – Illiterate person stricken with old age and ill-health – Whether entitled to appoint an attorney to undertaken suit on her behalf – Where elderly person had already commenced testimony before withdrawal – Effect of adverting to her testimony where not cross-examined

HEALTHCARE AND LAW:- Ill-health – Whether ground for withdrawing from own suit and appointing an attorney as substitute – How treated

**PRACTICE AND PROCEDURE ISSUES**

EVIDENCE:- Pleadings - Binding nature of - Rule that issues in any civil case are defined and circumscribed by the pleadings of the parties – Admissibility of a contract pleaded by both parties – Duty of court thereto

EVIDENCE:- Evidence of a party which before cross-examination was substituted by a self-appointed attorney – Proper treatment of that party’s treatment by court – Options available to opposing counsel – Failure to exercise same – Effect

INTERPRETATION OF STATURE- LEGISLATION - Illiterate Protection Law of Rivers State - Requirements of

**MAIN JUDGMENT**

JAMES OGENYI OGEBE, JCA(Delivered the following judgment):

This is an appeal against the judgment of the Rivers State High Court, Port Harcourt in which the trial Judge Okor, J., dismissed the appellant’s claim against the respondent on the 2nd day of May, 1997. In his further amended statement of claim the appellant who sued through his attorney, John Chidozie claimed as follows:

"(1) A declaration that the plaintiff is entitled to the possession and ownership of plot 2, block 250 Orije Layout, Port Harcourt duly registered as No. 83 at page 83 in volume 433, Lands Registry, Enugu, now kept at the Port Harcourt Lands Registry.

(2) N100,000.00 (One hundred thousand naira) only as damages for trespass.

(3) Perpetual injunction restraining the defendant, her servants or agents from further interference with the said property."

Pleadings were duly filed and exchanged. The trial proceeded on the appellant’s further amended statement of claim and the respondent’s amended statement of defence. The appellant called two witnesses in addition to himself. At the close of his case the respondent began to testify as DW1 on the 3rd of May, 1995 and on the 16th of May, 1995. On the 16th of May, 1995 the respondent was granted leave to amend her statement of defence and to defend the suit through her attorney Alhaji Abdullahi Ibrahim. The attorney then took over the case and testified as a defendant in the lower court and was cross-examined.

The appellant’s case both in his pleadings and oral evidence was that his late father James Ezeigwe and the respondent entered into agreement in 1958 to construct for the respondent a 29-room building on the disputed land. The contract price for the erection of the building was £6,000.00 (N12,000.00). The appellant’s father completed only 19 rooms. When his father asked for payment from the respondent and she was unable to pay, the respondent applied for the land to be assigned to the plaintiff’s father as shown in exhibit E, F, & G contained in Land Registry file exhibit C. The appellant’s father died and the appellant stepped into his shoes and was given an irrevocable power of attorney: exhibit A dated 25th June, 1966 from the respondent.

The case of the respondent was that the plot was allocated to her by the defunct Eastern Nigeria Government in 1958. She entered into agreement with the late James Ezeigwe to erect a 29-room building but only 19 rooms were completed because the James Ezeigwe had no money to complete the rest. She herself had to complete the remaining 10 rooms. In September, 1966, the appellant assisted her to escape to the North because Northerners were being killed in Port Harcourt. The respondent was of Nupe origin and before she escaped she told the appellant’s to be collecting rents from the tenants. The appellant asked her to sign a paper which he would show the tenants as an authority to collect the rents. The appellant gave her such paper to sign but never interpreted it to her although she was an illiterate. She said that the appellant took advantage of her and induced her to sign exhibit A, the irrevocable power of attorney. At the end of the civil war the respondent returned to Port Harcourt and has been in possession of the property ever since.

The trial Judge reviewed the evidence given by the parties and dismissed the appellant’s claim.

The appellant was dissatisfied with the judgment and has appealed to this court. The learned senior counsel for the appellant filed a brief of argument in accordance with the rules of court and identified the following five issues for determination:

"(1) Whether the learned trial Judge was not in error in rejecting as inadmissible the building agreement made in 1958 between plaintiff’s late father and defendant?

(2) Whether the learned trial Judge was not in error when he held that the defendant had proved that she executed exhibit "A" through fraud perpetrated on her by the plaintiff?

(3) Whether the learned trial Judge ought to have expunged the evidence of the defendant, which evidence was uncompleted, and not subjected to cross-examination and if so, whether the omission resulted in a miscarriage of justice ?

(4) Whether the learned trial Judge was not in error when he held that the only document relied upon by plaintiff in proof of his case was an assignment, not executed, not registered and not before him ?

(5) Whether the plaintiff had proved his case on a preponderance of evidence?"

The respondent also filed a brief of argument and identified three issues for determination as follows:

"(1) Did the plaintiff establish his title to and over the property at plot 2, 250 Orije Layout Port Harcourt otherwise known as No. 4 Warri Street, Port Harcourt as to warrant the grant by the trial court of any of the reliefs claimed?

(2) Was the trial court right in rejecting as inadmissible the building agreement made in 1958 between the plaintiff’s late father and the defendant?

(3) Whether in the circumstances of this case the learned trial Judge was right to have acted on the evidence of the defendant and Alhaji Ibrahim Abdullahi ?"

The learned senior counsel for the appellant submitted under issue 1 that the building agreement was pleaded by both sides and therefore the trial court was wrong to have rejected it in evidence because according to him there were alterations in the document.

In reply to this under the respondent’s issue 2, the learned counsel for the respondent submitted that the trial court was right in rejecting the building agreement because the respondent was an illiterate.

It is trite law that issues in any civil case are defined and circumscribed by the pleadings of the parties. The parties and the court are bound by the pleadings. See Olusanya v. Osineye (2001) 27 WRN 86; (2001) 13 NWLR (Pt. 730) 298. From the pleadings of the parties which I have scrutinized it is clear that both sides agreed that there was a building agreement made between the late James Ezeigwe and the respondent and that the agreement was signed by both parties. The only point of disagreement was the issue of the price of building the 29-room complex on the disputed property. I am clearly of the view that the trial court was wrong in rejecting this document which was not really disputed between the parties. It was clearly pleaded by both sides. The respondent did not deny authenticating the document. She obviously obtained some benefits under that document and could not hide under the Illiterate Protection Law to renounce the document. I therefore admit that document as exhibit CA 1.

I have taken a look at exhibit CA1 and it does not assist the appellant in proving the case. There was clear evidence before the trial court that the appellant’s late father did not complete building the 29 rooms as stipulated in the contract. Exhibit CA1 cannot therefore assist in proving title to the disputed property. It is merely the building agreement. In any event, since there is clear evidence that one of the parties to the agreement has died, the agreement can no longer be enforced against the respondent.

On issue 2 the learned Senior Advocate for the appellant submitted that the respondent started giving evidence before leave was granted to her to allow Alhaji Abdullahi Ibrahim to defend the suit on her behalf as her attorney. Thereafter she dropped out of the case and Alhaji Abdullahi Ibrahim continued the evidence on her behalf as DW1. He said that the respondent was not cross-examined after her testimony, that the court did not distinguish between her testimony and that of her attorney but treated the entire testimony as her own. The learned senior counsel argued that since the respondent was not cross-examined her evidence should have been expunged from the record, and the trial court was wrong in treating the evidence of Alhaji Abdullahi Ibrahim as the evidence of the respondent.

The respondent replied that the trial Judge was right to have acted on the evidence of the respondent and Alhaji Abdullahi Ibrahim. The respondent brought in an attorney because of old age and illness and the appellant did not oppose the application. Alhaji Abdullahi Ibrahim was seriously cross-examined. Learned counsel submits that the appellant waived his right to cross-examine the respondent and cannot complain in this court. He relied on the case of Elebute and Ors. v. Faleke & Anor (1995) 2 NWLR (Pt. 375) 82.

I have read the record of appeal thoroughly, especially the written address of the appellant’s counsel In the Court below which starts from pages 99 – 103. The issue of the treatment of the evidence of DW1 by the court below by allowing the attorney to substitute the respondent was never raised as irregular. The appellant could have asked the court to allow him to cross-examine the respondent before her attorney substituted her. He did not do that. He did not ask the court to expunge the evidence of the respondent because she was not cross-examined. It is my view that such issue that was not canvassed before the lower court cannot be raised in this court for the first time without leave of court and no such leave has been sought and obtained. In any event, even if the evidence of the respondent and her attorney are totally ignored it does not automatically mean that the appellant’s case has been proved and that he is entitled to judgment as it is his duty to prove his case on the strength of his own case and not on the weakness of the respondent’s case. See Oyewole v. Oyekola (1999) 7 NWLR (Pt. 612) 560.

On the 3rd issue the learned Senior Advocate for the appellant submitted that exhibit A, the power of attorney was duly executed and was not tainted by fraud and the trial court was wrong to hold otherwise. According to the learned counsel exhibit A showed that it was thumb-printed by the respondent. It had an illiterate jurat and it was duly signed before a Magistrate.

The learned counsel for the respondent submitted that exhibit A does not satisfy the Illiterate Protection Law of the state particularly section 3 thereof. He relied on the case of Salami v. Savannah Bank of Nigeria Ltd. (1990) 2 NWLR (Pt. 130) 106. Section 3 of the Illiterate Protection Law of Rivers State reads:

"Any person who shall write any letter or document at the request, on behalf, or in the name of any illiterate person shall also write on such letter or other document his own name as the writer thereof and his address and his so doing shall be equivalent to a statement:

(a) that he was instructed to write such letter or document by the person for whom it purports to have been written and that the letter or document fully and correctly represents his instruction, and

(b) if the letter or document purports to be signed with the signature or mark of the illiterate person, that prior to its being so signed it was read over and explained to the illiterate person and that the signature or mark was made by such person."

It is not disputed that the respondent was and is still an illiterate and if a document like exhibit A is to be used against her it must satisfy strictly the conditions laid down in the Illiterate Protection Law quoted above.

In the case of S.C.O.A. Zaria v. Okon (1959) SCNLR 562; (1959) 4 FSC 220 at 223 the Supreme Court in interpreting this provision above, quoted with approval the judgment of Smith J. in the case of U.A.C of Nigeria Ltd. v. Edems & Ajayi (1958) NRNLR 33 as follows:

"The document on the face of it does not comply with the section. The object of the ordinance is to protect an illiterate person from possible fraud. Strict compliance therewith is obligatory as regards the writer of the document. If the document creates legal rights and the writer benefits thereunder, those benefits are only enforceable by the writer of the document if he complies strictly with the provisions of the ordinance. If a document which does not comply with the provisions of the ordinance creates legal right between the illiterate and a third party then evidence may be called to prove what happened at the time the document was prepared by the writer before the parties signed it. But the writer himself cannot adduce evidence in his own form to remedy the omission."

I have taken a look at exhibit A and it has an illiterate jurat to the effect that the contents were interpreted to the respondent but there is nothing to show who the writer is, and his address as required by section 3 of the Illiterate Protection Law. Exhibit A therefore cannot be used against the interest of the respondent. Although it was attested before a Magistrate, it is strange that the Magistrate did not insist on compliance with the Illiterate Protection Law before endorsing the document. Having said that I must agree with the learned counsel for the appellant that fraud with regard to exhibit A as alleged by the respondent and held to be proved by the court was not actually proved. The evidence of Alhaji Abdullahi Ibrahim concerning exhibit A is entirely hearsay. All that the respondent herself said in her evidence at page 68 of the record concerning exhibit A is as follows:

"At that time Northerners were being killed in Port Harcourt and I had to run to the plaintiff for refuge and from there ran away to the North. I ran away in the night. Exhibits J and K were in my bag which I left in the custody of the plaintiff. Before I ran away, I told the plaintiff to help in collecting rents from the tenants. He told me that unless I signed a document for him the tenants would not agree to pay rents. He then brought a document for me to sign. I cannot read and write and therefore I do not know what he wrote. No other person was present and the document was not interpreted to me."

Fraud is a criminal allegation which must be proved beyond reasonable doubt even in civil proceedings and the evidence given by the respondent is far below that standard see Koiki v. Magnusson (1999) 8 NWLR (Pt. 615) 492.

On the 4th issue, the learned counsel for the appellant has conceded that legal title in the property still remains in the respondent but argued that exhibit C and the various documents contained therein showed that the respondent agreed to assign the property to the appellant’s late father before he died and the appellant stepped into his shoes. He also conceded that no proper conveyance was executed.

The difficulty I have with this submission is the fact that the learned counsel has not drawn my attention to anywhere in the file of the Ministry of Lands: exhibit C, where the respondent applied to the Ministry for assignment of the disputed property to the appellant’s deceased father. All he has shown us from the files are reports and minutes by land officers which cannot be said to be binding on the respondent, especially as the respondent said she never went to the lands office to discuss assignment of the disputed property to the appellant’s father with anybody.

The last issue is whether the appellant proved his claim in the lower court. From all I have said so far, it is clear that the appellant did not prove his claim for possession and ownership of the disputed land. He did not tender any document of title. He did not show that he was in possession of the property as at the time of the action. The evidence showed that the respondent came and took over the property after the Nigerian civil war and has been in possession ever since. There was therefore no basis upon which the trial court could have granted the appellant possession and ownership of the disputed land. See the case of Idaayor & Anor v. Chief Tigidam & Anor (1995) 2 NWLR (Pt. 377) 359.

In the result I see no merit in this appeal and I hereby dismiss it and affirm the decision of the trial court. The appellant shall pay costs of N5,000.00 to the respondent.

**SYLVANUS ADIEWERE NSOFOR, JCA:**

I agree.

**MICHAEL EYARUOMA AKPIROROH, JCA**:

I have read in advance the lead judgment just delivered by my learned brother, Ogebe, JCA. I agree entirely with his reasoning and conclusion. I also dismiss the appeal and affirm the decision of the trial court.

I abide by the order on costs.

CASES REFERRED TO IN THE JUDGMENT

Elebute v. Faleke (1995) 2 NWLR (Pt. 375) 82.

Idaayor v. Tigidam (1995) 2 NWLR (Pt. 377) 359.

Koiki v. Magnusson (1999) 8 NWLR (Pt. 615) 492.

Olusanya v. Osineye (2001) 27 WRN 86; (2001) 13 NWLR (Pt. 730) 298.

Oyewole v. Oyekola (1999) 7 NWLR (Pt. 612) 560.

S.C.O.A. Zaria v. Okon (1959) SCNLR 562; (1959) 4 FSC 200.

Salami v. Savannah Bank Nig. Ltd. (1990) 2 NWLR (Pt. 130) 106.

U.A.C Nig. Ltd. v. Edems (1958) NRNLR 33.

STATUTE REFERRED TO IN THE JUDGMENT

Illiterate Protection Law of Rivers State s.3.