**MAKANJU AKINYELE AND OTHERS**

**V.**

**REV. JOHNSON ADEBAYO**

IN THE COURT OF APPEAL OF NIGERIA

THE 4TH DAY OF FEBRUARY, 2015

CA/AK/114/2012

**LEX (2015) - CA/AK/114/2012**

OTHER CITATIONS

2PLR/2015/86 (CA)

(2015) LPELR-24304(CA)

**BEFORE THEIR LORDSHIPS**

SOTONYE DENTON WEST, JCA

MOHAMMAD AMBI-USI DANJUMA, JCA

JAMES SHEHU ABIRIYI, JCA

**BETWEEN**

1. MAKANJU AKINYELE

2. JULIUS AKINROSOLA AKINYELE

3. DR. CLETUS OWUZE - Appellant(s)

AND

REV. JOHNSON ADEBAYO - Respondent(s)

**ORIGINATING COURT**

ONDO STATE HIGH COURT (A. O. Odusola, J., Presiding)

**REPRESENTATION**

SANNI OWOEYE with EGENI KARI KARA - For Appellant

AND

L. K. DARE - For Respondent

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

CUSTOMARY LAW:– Transfer of Land via absolute gifts under customary law – Requirement for proof of title under customary law – The role of witnesses in the transaction

CUSTOMARY LAW:- Distinction between customary law title over a family land and a personal holding – Validity of a gift absolute relating to a family without the consent of relevant members of that family

REAL ESTATE AND PROPERTY LAW - LAND - ALIENATION OR TRANSFER OF INTEREST OVER A FAMILY LAND:- Requirement for effecting a valid transfer of a family land

REAL ESTATE AND PROPERTY LAW - LAND - PROOF OF TITLE TO LAND – TITLE DERIVING FROM GIFT OR GRANT:- When proof by unbroken traditional history will be required – when witnesses will be enough

REAL ESTATE AND PROPERTY LAW - LAND - SALE, TRANSFER, GRANT OR GIFT OF LAND UNDER CUSTOMARY LAW:- Critical role of witnesses in giving a transaction over land held under customary law solemnity and validity

**MAIN JUDGMENT**

SOTONYE DENTON WEST, J.C.A. (DELIVERING THE LEADING JUDGMENT):

This is an appeal against the judgment of Hon. Justice A. O. Odusola of Ondo State High Court of Justice delivered on the 16th day of July, 2012 wherein the court granted all the reliefs sought by the plaintiff now Respondent. At the trial court, the Respondent had commenced an action against the Appellants claiming the reliefs below:

a. A declaration that the plaintiff is entitled to the customary right of occupancy over a piece or parcel of land situate, lying and being at Balorunduro, Ijoka Farm, Off Abusoro Road, Akure Ondo State which is bounded as follows: 1st side by High Chief Moses Adewole Adebayo's land, 2nd side by the existing road, 3rd side by late Samuel Adebayo's land and 4th side by Sunday Agbomo's Land.

b. The sum of N500,000 being the general damages for various acts of trespass committed by the defendants on the said land.

c. Perpetual injunction restraining the defendants, their agents, privies and anybody claiming through them from committing further acts of trespass on the said land.

The parties joined issues. Consequently, they filed and exchanged their pleadings. The matter was settled for full trial, at the end of which the trial court held in favour of the Respondent, hence this appeal by the Appellants.

The Appellants in their notice of Appeal dated 19/7/2012 and filed at the trial court's registry, raised five (5) Grounds of Appeal - (Pages 95 - 98 of the records of appeal.)

The parties filed and adopted their various briefs of argument. In their brief of argument dated 19th day of September, 2012 but filed on 4th day of October, 2012, the Appellants submitted two issues for determination as follows:

1. "Whether having regard to the fact that the respondent (Plaintiff in the trial court) did not plead and prove the nature, essential requirements and incidents of the alleged gift absolute of the land in dispute and how the said gift absolute was established, the learned trial judge was right to have acted on unpleaded, speculated as to the nature of the evidence, alleged gift absolute and entered judgment in favour of the respondent (Ground 1).

2. Whether having regard to the fact that the defendants in the trial court did not have a counter-claim and the respondent who sought a declaratory relief did not meet the requirement for proof of a gift absolute of land upon which he based his claim, the learned trail judge was right to have embarked upon a consideration of the weakness of the defence and enter judgment in favour of the respondent in the trial court (Ground 3)"

The respondent in his own brief of argument dated and filed on 28/11/2014 formulated only one issue for determination to wit.

"Whether the respondent successfully established that the land in dispute was given to him by his late father as gift absolute."

I have carefully perused through the issues adumbrated by both parties for determination of this appeal and I have not seen the difference between the Appellant's issue one and issue two. The issues centre on one point of argument on the proof or otherwise of the Respondent's title to the disputed land by gift absolute made to him by his deceased father. This issue by the Respondent captures the points in contention by both parties. This court will therefore adopt same for the determination of this appeal. Thus, the issue for determination is:

"whether the respondent successfully established that the land in dispute was given to him by his late father as gift absolute."

The basis of the argument of the Appellants is that the respondent did not establish by pleadings and evidence that the disputed land was a gift absolute made to him by his late father.

The learned trial judge, it was contended on behalf of the Appellants to have erred in law by relying on the mere assertion in the respondent's pleadings and evidence of his witnesses that the plaintiff's father gave him the land in dispute as gift absolute and nothing more to make a declaration of title in favour of the respondent.

Furthermore, that the onus was on the Respondent to prove the existence of the gift absolute which was the very basis of his claim for declaration of title.

It was argued that the Respondent did not show whether the alleged gift absolute was made under English Law/General law or under native law and custom and same was therefore fatal to his case as the learned trial Judge had no power to speculate as to the nature of the alleged gift. Referred to were the cases of *Osawaru v. Ezeiruka (1978) 6 - 7 SC (2005) 12 SCNJ 236; John I. Ogbu v. Best Wokoma (2005) 7 SCNJ 299; Dr. Augustine N. Mozie & Ors v. Chike Mbamalu & Ors (2006) 7 SCNJ 411 and Osagie v. Osagie & Anor (2009) LPELR - CA/B/4/06.*

It was further the contention of the Appellants that the acclaimed gift absolute was not done in the presence of witnesses as the Plaintiff failed woefully to plead and prove that the alleged transfer of the land in dispute to him as gift absolute was one under native law and custom. Referred to were the cases of *Folarin v. Durojaiye (1988) 1 NSCQ 255@ P.925, Okonkwo v. Okolo (1988) 1 NSCC 909 @ 925*

It was submitted that the Respondent could not establish his claim at the trial court by not clearly specifying his pleadings and not being able to lead evidence for the trial court to have granted the claims of the Respondent.

This court was urged to allow the appeal and set aside the judgment of the Lower Court.

The Respondent in his own argument debunked the contention of the Appellants and stated that the identity of the disputed land, the owner of the land, and the circumstance warranting the giving absolutely of the disputed land were all established at the trial court.

It was submitted that the finding of facts of the trial court was never perverse but in line with the pleading and evidence given in support.

This court was urged to dismiss the appeal.

**RESOLUTION OF THE SOLE ISSUE**

It is an elementary principle of law and has been held in a plethora of authorities that sale, transfer, grant or gift of land under native customary law is constituted by the handing over of the land so transferred in the presence of witnesses. The presence of witnesses is not only merely of evidential value, it is also a necessary part of the transaction. This is so because writing is foreign to native customary law and custom. The presence of witnesses gives the transaction not only solemnity but also validity, See *Kamalu V. Ojoh (2000) 11 NWLR (Pt.679) P.505 @ 517 Paras D-E, Cole V. Folami (1956) 1. F.S.C 66 @ 68, Ajayi v. Olanrewaju (1969) 1 All NLR 382 @ 387, Orun-nengimo V. Egebe (2008) 9 S.C.L.R (ph.7) pg. 82 @ 102.*

Furthermore, where a plaintiff in proof of title to land relies on grant or gift, proof of such grant or gift by traditional history only arises where the fact of the grant or gift was so ancient as to be beyond the memory of living witnesses to the event and not the evidence of tradition permitted by evidence Act. See *Okonkwo v. Okonkwo (2004) 5 NWLR (pt.863) pg.87 @ 121 paras A - D, Adisa v. Oyinwola (2000) 10 NWLR (PT.674) PG.116 @ paras G to H and pg.184 paras F to G.*

The major contention of the complaint of the Appellant was that the Respondent did not establish by credible evidence that the land in dispute was given to him by his late father as gift absolute. Meanwhile the Respondent proved the name of the person who gave the disputed land to him, the circumstances leading to the gift and the persons who witnessed the gift.

Firstly, the Respondent pleaded and proved that the land was given to him as gift absolute by his late father, Samuel Adebayo Atanlusi - *See paragraphs 5 and 9 of the amended statement of claim in and the evidence led by pw1, pw2, pw3 and the Respondent. See page 28 to 42*of the records of appeal.

Secondly, the Respondent established the circumstance leading to the gift. In paragraph 9 of the amended statement of claim, the Respondent, avers that the land in dispute was given to him as gift absolute by his late father in 1964 because his late father had no money to train him beyond modern 3 education. This fact was equally proved vide the evidence of PW1, PW2, PW3 and PW4. See pages 28 to 42 of the records of appeal.

In the circumstances of this appeal, what the Respondent was expected to prove, which he did through the evidence of PW1, PW2 and PW3, was that the gift was made in the presence of at least two witnesses. See *Temile v. Tawani (2001) 5 MJSC 32 @ 36.*

On the argument that the Respondent did not establish that the land or the gift is under English law or customary law, it is my humble view that whether, 'any land is under customary or English law can be arrived at by the court by perusing the pleadings therein. In this appeal, the Respondent pleaded customary right of occupancy. See paragraph *21(i)*of the amended statement of claim. Also in paragraphs 6 and 8 of the amended statement of claim, the Respondent pleaded that the disputed land was acquired by his late father by traditional history. This presupposes that the alleged gift was customary and governed by customary law. See *Uka V. Irolo (2002) 7 SCNJ 137 @ 163 Alli v. Alesinloye (2000) 4 SCNJ 264 at 283.*

This is no doubt that under native law and custom, an owner of land can validly transfer his absolute interest in the land and grant exclusive possession.

Sometimes, a person may decide to make a gift of his property to another either in consideration of acts performed or in order to perform certain and natural obligations.

It is, usually one of the primary responsibilities of parents to take adequate care of their children which include: medical educational and social welfare. This can either be by direct payment of the required expenses or empowerment by gift of property in lieu.

I cannot see anything wrong in that practice. However, it is the duty of the beneficiary of the gift to prove the existence of such a gift, especially where the owner, who made such gift is deceased and is survived by heirs who must inherit the property. Proof in those circumstances must be by documentary evidence. It suffices if the person who made the gift is the actual owner, there is a circumstance warranting the giving of gift.

Further, there must be witnesses who witnessed the transaction as applicable in gifts on land under customary law. These elements were placed before the trial court which found for the Respondent in this appeal. Consequently, since the finding of facts by the trial court was in line with the evidence before the court and same is not perverse, this court is obliged to consider same.

Nevertheless, alienation or transfer of interest absolute over a family land where the founder is deceased cannot be valid unless done by the head of the family with the consent of the principal members of the family. See *Agu v. Odofin (1992) 3 SCNJ 161; Ajibade v. Pedro (1992) 5 NWLR (pt.241) 257; Amakor v. Obiquna (1997) All NLR 119; Dabup v. Kolo (1993) 8 NWLR (Pt.317) 255 @ 277; Gabriel Adewole Tewogbade v. Mrs. V. A. Obadina (1994) 4 NWLR (Pt.297) 55 @ 73. Olohunde v. Adeyolu (2000) 10 NWLR (Pt.676) 562, Osho v. Foreign Finance Corporation (1991) 4 NWLR (Pt.184) 5 NWLR (Pt.123) 539 @ 550 - 551; Teniola v. Oluhunkun (1999) 5 NWLR (Pt.602) 280.*

In the facts culminating in this appeal, the title of the Respondent's father as the sole owner of the disputed land was never in issue.

An appellate court like this court will not ordinarily interfere with the findings of the lower court unless such findings are perverse and negate the principles of justice and consequently led to miscarriage of justice.

The reason is not farfetched, the court as a court of first instance, had the opportunity of hearing the evidence of the witnesses and viewing their demeanors.

The findings of the trial court in this appeal was not perverse looking at the pleadings and evidence therein.

It is in view of the above that this sole issue is resolved in favour of the Respondent against the Appellants.

On the whole, this appeal is dismissed for lacking in merit. The judgment of the lower court delivered on 16th July, 2012 is hereby affirmed, with no order as to costs.

**MOHAMMED AMBI-USI DANJUMA, J.C.A.:**

I agree with the reasoning and conclusion arrived at that the Respondent's father could make an absolute grant or gift of his property to a child of his or any person and to the Respondent as done in this case.

The evidence on record justified the findings and the conclusion arrived at by the trial court that a gift had been made.

This court cannot interfere with the solemn findings and conclusions, based on evidence led and belief of a Judge who had the benefit of watching, assessing and observing. I abide by the leading Judgment of my Lord, Denton West, P. J. in dismissing the Appeal and affirming the trial court's Judgment and without costs.

**JAMES SHEHU ABIRIYI, J.C.A.:**

I agree.