

08-1803-cv

Wiwa v. Shell Petroleum Development Company of Nigeria Limited

SDNY/NNY  
04-cv-2665  
PITMAN  
WOOD

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

**SUMMARY ORDER**

**RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.**

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 3<sup>rd</sup> day of June, two thousand and nine.

Present:

HON. JOHN M. WALKER,  
HON. RICHARD C. WESLEY,  
*Circuit Judges.\**

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KEN WIWA, INDIVIDUALLY AND ON BEHALF OF HIS DECEASED FATHER, KEN SARO-WIWA; OWENS WIWA; BLESSING KPUINEN, INDIVIDUALLY AND ON BEHALF OF HER LATE HUSBAND JOHN KPUINEN; KARALOLO KOGBARA; MICHAEL TEMA VIZOR; LUCKY DOOBEE, INDIVIDUALLY AND ON BEHALF OF HIS LATE BROTHER SATURDAY DOOBEE; FRIDAY NUATE, INDIVIDUALLY AND ON BEHALF OF HER LATE HUSBAND FELIX NUATE; MONDAY GBOKOO, BROTHER OF THE LATE DANIEL GBOKOO; DAVID KIOBEL, INDIVIDUALLY AND ON BEHALF OF HIS SIBLINGS STELLA KIOBEL, LEESI KIOBEL AND BARIDI KIOBEL, AND ON BEHALF OF HIS MINOR SIBLINGS ANGELA KIOBEL AND GODWILL KIOBEL FOR HARM SUFFERED FOR THE WRONGFUL DEATH OF THEIR FATHER DR. BARINEM KIOBEL; JAMES B. N-NAH, INDIVIDUALLY AND ON BEHALF OF HIS LATE BROTHER UEBARI N-NAH,

*Plaintiffs-Appellants,*

- v -

No. 08-1803-cv

UNITED STATES COURT OF APPEALS  
FILED  
JUN - 3 2009  
Catherine O'Hagan Wolfe, Clerk  
SECOND CIRCUIT

\* The Honorable Sonia Sotomayor was removed from the panel subsequent to oral argument. Because the remaining members of the panel are in agreement, we decide this case in accordance with Second Circuit Interim Local Rule § 0.14(b).

Issued as Mandate:

JUN 26 2009

SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LIMITED,

*Defendant-Appellee.*

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For Plaintiff-Appellant: JUDITH BROWN CHOMSKY (Jennifer Green, Beth Stephens, *of counsel*), Center for Constitutional Rights, New York, NY; Marco Simons and Rick Herz, *on the brief*, Earthrights International, Washington, DC.

For Appellee: ROWAN D. WILSON (Rory O. Millson, Thomas G. Rafferty, Michael T. Reynolds, *of counsel*), Cravath, Swaine & Moore LLP, New York, NY.

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1 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND  
2 DECREED that the judgment be **VACATED** and the action **REMANDED** to the district court  
3 for further proceedings in accordance with this summary order.

4 This is one of four actions brought against various Shell corporate entities in relation to  
5 alleged human rights violations and environmental degradation perpetrated by a Nigerian Shell  
6 subsidiary, the sole defendant in this case and the appellee in this appeal, Shell Petroleum  
7 Development Company of Nigeria, Ltd. ("SPDC"). We assume the parties' familiarity with the  
8 underlying facts and procedural history of the case, as well as with the issues on appeal.

9 The plaintiffs-appellants ("appellants") invoke the Alien Tort Claims Act, 28 U.S.C. §  
10 1350, alleging that ten of their Nigerian relatives were detained, tortured, and executed by SPDC  
11 directly and in concert with the Nigerian government, and with the knowledge of SPDC's  
12 corporate parents, formerly known as Royal Dutch Petroleum Company and Shell Transport and  
13 Trading Company (collectively "Royal Dutch/Shell"). In a final opinion and order dated March  
14 4, 2008, the District Court for the Southern District of New York (Wood, *C.J.*) dismissed the  
15 case on a motion for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure

1 12(b)(2) due to appellants' failure to allege the requisite minimum contacts with the United  
2 States on the part of SPDC. *Kiobel v. Royal Dutch Petroleum Co.*, 02 Civ. 7618, 04 Civ. 2665,  
3 2008 WL 591869, at \*1 (S.D.N.Y. Mar. 4, 2008). The district court also denied jurisdictional  
4 discovery on the basis that the appellants had access to the discovery previously conducted in  
5 related cases, which the court found to have been sufficient in scope to justify the dismissal. *Id.*  
6 Judgment was entered for SPDC on March 18, 2004. The appellants appeal, asserting that the  
7 district court has personal jurisdiction over SPDC under Federal Rule of Civil Procedure  
8 4(k)(2),<sup>1</sup> and that the district court did not provide them sufficient opportunity to conduct the  
9 jurisdictional discovery necessary to demonstrate this. The appellants also move to supplement  
10 the record with documents that they contend aid their case for jurisdiction and that were recently  
11 obtained in response to discovery requests in the related actions that remained pending after this  
12 action was dismissed. We now vacate the judgment and remand for the district court to  
13 reconsider its denial of jurisdictional discovery and dismissal of the action in light of the  
14 subsequent and continuing discovery in the related actions.

15 The relevant related actions are *Wiwa v. Royal Dutch Petroleum Co. (Wiwa I)*, *Wiwa v.*  
16 *Anderson (Wiwa II)*, and *Kiobel v. Royal Dutch Petroleum Co.*, all of which were consolidated  
17 for discovery and assigned to Chief Judge Wood prior to the filing of the action at issue in this  
18 appeal. SPDC was not a named defendant in any of these other cases.<sup>2</sup> The appellants predicate  
19 general personal jurisdiction over SPDC, which is organized under the laws of Nigeria with

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<sup>1</sup> "For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:

(A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and  
(B) exercising jurisdiction is consistent with the United States Constitution and laws."

<sup>2</sup> This action, dubbed *Wiwa III*, was filed on April 6, 2004. The complaint in the *Kiobel* class action was amended to include SPDC as a defendant around the same time that *Wiwa III* was filed. The district court dismissed the *Kiobel* claims against SPDC in the same opinion and order in which it dismissed *Wiwa III*. See *Kiobel*, 2008 WL 591869, at \*1 (S.D.N.Y. Mar. 4, 2008).

1 corporate headquarters in Nigeria, on the following factual allegations: (1) approximately 3.5  
2 million barrels of SPDC-produced crude oil was imported to the United States monthly between  
3 January 1990 and June 1996, constituting approximately 50% of SPDC's oil production, and  
4 SITCO, the importing entity, acted as SPDC's agent in so doing; (2) SPDC targeted the US with  
5 a public relations campaign relating to SPDC's operations in Nigeria; (3) SPDC recruited  
6 employees in the US through another Shell entity, Shell People Services ("SPS"); (4) SPDC  
7 employees came to the US for training and professional seminars and conferences; (5) SPDC  
8 entered into contracts for services in the US, including the construction of a barge in New  
9 Orleans for use in Nigeria; and (6) SPDC received financial assistance from and partnered in  
10 projects with the United States Agency for International Development ("USAID").

11 Although discovery was coordinated with the related cases, the appellants note that the  
12 cut-off for new discovery requests in those cases was May 31, 2004, shortly after *Wiwa III* was  
13 filed and prior to SPDC filing its answer asserting lack of personal jurisdiction, and this cut-off  
14 date was extended only to July 19, 2004 for limited matters. According to the appellants,  
15 discovery in the related cases was focused, as it properly should have been, on SPDC's conduct  
16 in Nigeria and its relationship to Royal Dutch/Shell, not on personal jurisdiction in the United  
17 States over SPDC. In August 2004, not long after the discovery cut-off for the related actions,  
18 the district court stayed all discovery in *Wiwa III*.

19 A plaintiff can defeat a Rule 12(b)(2) motion to dismiss "by pleading good faith, legally  
20 sufficient allegations of jurisdiction, i.e., by making a *prima facie* showing of jurisdiction."  
21 *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 184 (2d Cir. 1998) (internal quotation marks and  
22 citations omitted). Because it believed that the appellants had "access to the extensive discovery  
23 taken in connection with the prior related actions, including discovery from SPDC," the district  
24 court required the appellants to make specific factual averments to support their jurisdictional

1 allegations. *Kiobel*, 2008 WL 591869, at \*2. Although the dismissal for lack of jurisdiction is  
2 subject to de novo review, we review the district court's decision regarding the scope of  
3 jurisdictional discovery for abuse of discretion. *In re Terrorist Attacks on Sept. 11, 2001*, 538  
4 F.3d 71, 79 (2d Cir. 2008). A district court abuses its discretion in dismissing an action "when  
5 its decision rests on an error of law (such as application of the wrong legal principle) or a clearly  
6 erroneous factual finding," or when its ruling "cannot be located within the range of permissible  
7 decisions." *Wynder v. McMahon*, 360 F.3d 73, 76 (2d Cir. 2004). We conclude that it was clear  
8 error for the district court to find that the discovery conducted in the related actions encompassed  
9 the issue of personal jurisdiction over SPDC.

10 Although the appellants had access to the discovery in the related actions, requests  
11 pertinent to personal jurisdiction over SPDC were denied by the district court for lack of  
12 relevance to the related actions. The plaintiffs in the related actions requested, for example,  
13 documents relating to oil produced by SPDC in Nigeria and imported to the United States, as  
14 well as to goods and services purchased in the United States by or for SPDC. The plaintiffs'  
15 attorney explained that these requests were related to the plaintiffs' RICO claims and the district  
16 court's jurisdiction over the defendants. The district court ordered defense counsel to "[t]ry to  
17 find out whether you can come up with anything that would assist in determining how much oil  
18 produced in Nigeria by SPDC ended up in the United States." That information was later  
19 provided to the plaintiffs in the form of a chart. However, when defense counsel objected to the  
20 request for documents relating to goods and services purchased by or on behalf of SPDC in the  
21 United States as irrelevant to the RICO claims, the court responded, "[a]s we know, this court  
22 has jurisdiction over this case, so . . . this seems pretty attenuated from what [the plaintiffs] need.  
23 Is this something [the plaintiffs] can put off and maybe never demand?" Counsel for the  
24 plaintiffs in the related actions then agreed to hold off on the request for these documents. This

1 exchange is sufficient to convince us that the discovery in the related actions, while  
2 encompassing RICO subject-matter jurisdictional discovery, did not include discovery relevant to  
3 the question of personal jurisdiction over SPDC.

4 In their motion to supplement the record, the appellants provide several documents  
5 obtained from discovery in the related cases after *Wiwa III*'s dismissal that they contend support  
6 the proposition that SPDC merely lent its oil to SITCO "on consignment" to be sold by SPDC in  
7 the United States. The district court is in the best position to examine, evaluate, and determine  
8 the relevance of the documents at issue and to decide whether continuing discovery in the related  
9 cases has now been sufficient for the appellants to adequately allege personal jurisdiction over  
10 SPDC, to show that the appellants are sufficiently unlikely to be able to establish jurisdiction, so  
11 as to justify dismissal once more or to allow further jurisdictional discovery in *Wiwa III*.

12 The vacatur of the district court's order of dismissal renders appellants' motion to  
13 supplement the record and take judicial notice or remand for post-judgment proceedings moot.

14 Accordingly, the judgment of dismissal is **VACATED** and the action **REMANDED** to  
15 the district court to allow further proceedings on the question of personal jurisdiction over the  
16 defendant-appellee.

17 FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

18 By: Richard Alcantara  
19 Richard Alcantara, Deputy Clerk

20  
A TRUE COPY  
Catherine O'Hagan Wolfe, Clerk  
by Margaret Lane  
DEPUTY CLERK