

**SUPREME COURT OF NIGERIA**  
22ND JANUARY, 1993. SC. 217/1989  
**CORAM:- A. G. KARIBI-WHYTE, S. M. A. BELGORE,**  
**P. NNAEMKAAGU, O. OLATAWURA, E. O. OGWUEGBU, JJSC**

ALHAJA MORIYAMO ADESANYA ..... APPELLANT

AND

ADETAYO OLAITAN OTUEWU & Ors ..... RESPONDENTS

(For themselves and on behalf of all  
members of and accredited representatives  
of CHIEF TAIWO OTUEWU section of OTUEWU  
branch of MEDUSOPE FAMILY)

CIVIL PROCEDURE                      - pleadings - whether departure therefrom  
can be allowed - abandonment of pleadings  
implications thereof

EVIDENCE                                - failure to prove partition of family land  
implications thereof - burden of proof - on  
whom it rests

LAND LAW                                - claim for damages, trespass and injunction-  
when title is put in issue - family land-where  
claimed by a family section - things that must  
be proved

LAND LAW                                -land agreement that is inadmissible for non  
registration - whether admissible in proof of  
payment and gifts - towards establishment  
of valid customary grant

LAND LAW                                -proof of title - whether superseded by  
possession - plaintiff must rely on the  
strength of his case

**FACTS**

The Plaintiffs/Respondents filed an action against the Defendant/  
Appellant before the Ogun State High Court claiming damages for trespass  
and perpetual injunction. The plaintiffs are members of a section of the

Medusope family which is made up of other five branches. They averred that each section of the family has its own separate portion on which its members farm and plant various crops without any hindrance from any other section of the family. Plaintiffs argued that the Appellant was not a member of the Medusope family and that since their branch did not sell the land in dispute to the Appellant, she was in trespass.

Appellant in her Counter-claim/defence claimed to be a member of the Medusope family and that the land in dispute was sold to her by members of the family. That she was put in possession by members of the family and a document, Exhibit C, was thereafter prepared evidencing the fact that she paid some money and gave the usual customary gifts to the family.

The trial court found that partition of the entire family land not having been proved, the plaintiffs have failed to prove exclusive ownership. It also found that the Appellant did not prove her alleged membership of the Medusope family. The trial court went ahead to grant the Respondents' claim on the ground that they being in possession at the time of the sale had a better title than the Appellant.

The Appellant appealed to the Court of Appeal which upheld some of the trial court's findings and dismissed the appeal. On further appeal to the Supreme Court, the Appellant via her Counsel conceded the fact that Exhibit C not being registered is inadmissible under the Land registration Law but submitted that it is admissible as an acknowledgment of receipt towards proving a customary grant of the disputed land to the Appellant.

**HELD** (Unanimously allowing the appeal)

1. Where a party claims for damages, trespass and injunction, such a party has put the title of the land in issue. From the claim and pleadings the Appellant and Respondent have put title in issue.

(p. 156 L. 22)

2. Whereas it is not in dispute that the land in question belongs to Medusope family, but since the Plaintiffs'/Respondents' claim is based mainly on exclusive title and possession as against the entire Medusope family, they must

**144** ADESANYA V. OTUEWU (1993) 1 KLR 142; (1993) 1 NWLR  
prove that there has been a partition of the Medusope family land. (p 156 L. 25)

3. The trial court having found that the respondents have failed to prove partition of the Medusope family land should have dismissed the Respondents' claim which is based on title to the land in dispute. (p 157 L. 3)

4. The Respondent cannot now be allowed to rely on the title of Medusope family so as to defeat the claim of the Appellant who claimed to have derived her title from Medusope family. This will be a departure from Respondents' pleading. (p.157 L. 6)

5. Exhibit C (land agreement) which would have been inadmissible for non-registration is only admissible as an acknowledgment of receipt of money and gifts given to Medusope family by the Appellant. (Ogunbambi v. Abowaba) applied to the effect that payment of purchase money and delivery of possession created a valid title by native law and custom) (p.158 L. 2)

6. By virtue of the fact that the Appellant had a valid title, the mere possession of the Respondents relied upon by the lower Court cannot defeat the claim of the Appellant, since proof of good title supersedes possession. (p. 158L.7)

7. A plaintiff must succeed on the strength of his own case and not on the weakness of the Defendant's case. (p.160 L.1)

8. Once a party abandons his pleadings, it is not the business of the Court to look for evidence from the other party so as to base a case on facts which the plaintiff does not plead and cannot rely upon. (p. 160 L. 26)

9. Judgment is given in respect of material facts pleaded and proved at the trial. The parties as well as the court cannot go outside the pleadings. (p 160 L. 29)

10. Since facts are pleaded and evidence led in support of the pleadings, the Court is bound to adjudicate on the issues arising from the pleadings. Where, therefore, evidence led is not based on facts pleaded, such evidence goes to no issue. (p.160 L. 32)

11. Where according to the trial Court there was no head of the family, it is wrong to conclude that the Agreement (Exh.C) was made without a non-existent head of the family. (p.161 L. 4)

12. The Appellant having succeeded in proving title through Medusope family, it will be inequitable to grant injunction not only against her but against the family through which she derived title.  
(p. 161 L. 11)

**PER NNAEMEKA-AGU JSC** *“Having found that the plaintiffs failed to prove either ownership or exclusive possession which they pleaded the court below ought to have held that they did not prove their case and should have dismissed it. The onus of proof was on the plaintiffs. Moreover, it must be borne in mind that it has been established by a long line of decided cases that one of the incidents of our traditional communal ownership of land is that once it is admitted that a particular piece of land belongs to a family, the law places a rather heavy burden of proof on any person or group which asserts exclusivity of ownership or possession against the family or a person who claims through the family”.* (p.180 L. 33)

### **REPRESENTATION**

Chief G.O.K. Ajayi. S.A.N., A. Adebayo Oriola, For the Appellants  
Chief A.O. Adefala, For the Respondents

### **CASES REFERRED TO**

1. Oredoyin v. Arowolo (1989) 5 N.W.L.R. (part 114) 172
2. Adide v. Kelani (1985) 2 N.S.C.C. 1298
3. Airoe Con. & Civil Engr. Co. Uniben (1985) 1 N.S.C.C. 312
4. Anyaduba & Anor. v. Nigerian Renownned Trading Co. Ltd (1992) 5 N.W.L.R (part 243) 535
5. Ajagbe v. Akanni (1973) 11 S.C. 47
6. Ogunbambi v. Abowaba 13 W.A.C.A. 222

7. J.E. Ehimare & Anor. v. Okaka Emhonyon (1985) 1 N.S.C.C. 163; (1985) 1 N.W.L.R. (part 2) 177
8. Kaiyaoja v. Egnla (1974) 12 S.C. 55
9. Emogokwue v. Okadigbo N.S.C.C. 220
10. Adesioye v. Shieoniku, 14 W.A.C.A. 86
- 5 11. Kodilinye v. Odu (1935) 2 W.A.C.A.
12. NBTC Ltd v. Narumal Ltd. (1986) 4 N.W.L.R. (part 33) 117.
13. Abaye v. Ofili (1986) 1 N.W.L.R. (part 15) 134
14. Aba v. Akaajime (1989) 4 N.W.L.R. (part 11) 95
15. Osawe v. Osawe (1991) 5 N.W.L.R. (part 194) 710
- 10 16. Aromire & Ors v. Awoyemi (1972) 2 S.C.I.
17. Godwin Egwu v. Duro Ogunkehim unreported SC 529/1966.
18. Kuma v. Kuma (1936) 5 W.A.C.A. 4
19. Amodu Tijani v. the Secretary, Southern Nigeria (1921) 2 A.C. 399
- 15 20. Undeakpu Eze v. Samuel Igiliege & Ors. (1952) 14 W.A.C.A. 61
21. Balogun v. Balogun (1943) 9 W.A.C.A. 78
22. Ashimowu Shelle v. Chief Asajoh Olaja of Ereko (1957) 2 F. E. C. 65
- 20 23. Johnson v. Macaulary (1961) 1 ALL N.L.R. 743
24. Akerele v. Uye-Laberlu (1956) L.L.R. 743
25. Knowles v. Roberts (1888) 38 CH. D. 263
26. Willis v. Lovick (1901) 2 K.B. 195
27. Windhill Local Board v. Vint (1890) 45 Ch. D. 357
- 25 28. Gedge v. Royal Exchange Assurance (1900) 2 Q.B. 1914
29. North-Western Salt Co. v. Electrotyic Alkakico. (1914) A.C. 461
30. Rawlings v. General Trading Co. (1921) K.B. 635.
31. Ekpendu v. Erika (1959) 4 FSC 79
- 30 32. Talabi v. Griffin 12 W.A.C.A. 371
33. Messrs Lewis & Peat (N.R.I.) Ltd. v. Akhimien 7 S.C. 157
34. Harris v. Gamble (1878) 7 Ch. D. 877
35. Rutter v. Tregent (1879) 12 Ch. D. 758
36. Warner v. Sampson (1959) 1 QB 287
- 35 37. Talabi v. Griffin 12 W.A.C.A. 371
38. Wallersteins v. Moir (1974) 1 W.L.R. 991
39. Commercial plastics Ltd v. Vincent (1964) 3 ALL E.R 546
40. Belvoir Finance Co. Ltd v. Stapleton (1970) 3 ALL E.R. 664 C.A.
41. Sogunle & Ors v. Akerele & Ors (1967) N.M.L.R. 58

42. Adebambo v. Olowosajo (1985) N.W.L.R. 207  
43. Atunrase v. Sunmola (1985) N.W.L.R. 207  
44. Sogbesan v. Adebisi 16 N.L.R. 26  
45. Lewis v. Bankole (1908) 1. N.L.R. 82  
  
46. Taiwo v. Sarumi (1913) 2 N.L.R. 106 5  
47. Ewa Ekeng Inyang v. Efana Ekeng Ita & Ors (1929) 9 N.L.R. 84  
48. Metalimpex v. A.G Leventis (Nig)Ltd. (1976) 2 S.C. 91  
49. The Registered Trustees of Apostolic Faith Mission v. James (1987) 3 N.W.L.R. (part 61) 556  
50. Obijuru v. Ozims (1985) 2 N.W.L.R. (part 6) 167 10

### **STATUTES & RULES**

1. Land Instruments Registration Law Cap 53 Laws of Ogun State, S. 16  
  
2. Constitution of the Federal Republic of Nigeria, 1979, S.33 15  
3. Supreme Court Rules 1985 Order 5 rule (5)

### **BOOKS**

1. Bullen & Leake & Jacobs. Precedent of Pleadings 12 Edn. 83  
2. Hals Law of England 4th Edn. Vol. 9 297  

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### **LEAD JUDGMENT BY OLATAWURA JSC**

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This appeal brings once again into sharp focus the importance of pleadings and the principle that a party should not be allowed to depart from his pleadings without amendment to the pleadings. It is a case fought by a section or a branch of Medusope family claiming absolute title and possession to a land in dispute as against the present appellant who claimed to have bought the land from the entire family of Medusope and of which she is a member. She also filed a counter-claim. The question of the identity of the land in dispute was not an issue in the court of trial. The case was fought principally on whether the land in dispute belongs absolutely to a section of the family. I will in the course of this judgment reproduce some paragraphs of the pleadings on both sides so as to show that from the case put across on either side no one should be misled about the issues before this court. 30 35

The case of respondents who were plaintiffs at the court of trial was that their family Medusope consists of six branches. They traced their root of

title to their ancestor, one Ogunnesi. Ogunnesi begat Okunuga who was survived by six children. They averred also that it was over 100 years ago that Medusope family started to farm on the land now known as Medusope farmland and that each section of the family has its own separate portion over which members of  
5 each section farm and plant various crops without any hindrance from any other section or the family. It was also argued that the present appellant who was the defendant at the court of trial was not a member of Medusope family and that since the plaintiffs' branch, that is Otuewu section of Otuewu family, did not sell the  
10 land in dispute to the appellant she was therefore in trespass. They claimed also perpetual injunction restraining her and her agents from committing any other form of trespass.

15 The appellant, on the other hand, claimed to be a member of Medusope family and that the land in dispute was sold to her by members of Medusope family. A document was prepared. This document admitted in evidence as Exh. C featured prominently both in the lower court and in this court. She also claimed to have been put in possession by members of the family and  
20 therefore denied the claim of the present respondents. The case went to trial, witnesses were called on both sides and after a review of the evidence and the authorities cited, the learned trial Judge, Odunsi, J. gave judgment in favour of the plaintiffs. He also dismissed the counter-claim filed by the defendant. Before going to the merits of this case, I will point out that the respondent that  
25 is the plaintiffs at the court of trial filed a reply and defence to the Amended Statement of Defence and counter-claim.

The present appellant was not satisfied with the judgment of the court of trial. She appealed to the Court of Appeal, Ibadan Division and her appeal was dismissed hence the appeal to this Court.

30 In their Amended Statement of Claim, the plaintiffs averred in paragraphs 5, 6, 7, 9, 10, 11, 12, 13, 16, 17, 18, 20, 21 and 22 as follows:

"5. Ogunnesi begat one Okunuga who died intestate and was survived by 6 children namely:-

35 (a) Otuewu (female) who was Okunuga's eldest child, she begat Adebamowo, Bowokale, Koya, Taiwo, Adelaja and Adebanjo. Koya was senior to Taiwo, the youngest child.

(b) Ogunlase (male) who begat James, Oduntan (Moses), Joseph, Barikisu, Adejoke and Bankole.

(c) Efunde (female) - Begat Owosanya. Abraham (the father of Olugbani).

(d) Ogunyoye (male) - Begat Samson, Jacob, Simeon, Amos, Nowo and Sanya.

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(e) Otubekun (male) - Begat Joel, Ibidun.

(f) Ayanse (female) - Begat Ladipo, Odubanjo.

6. The plaintiffs aver that Koya Otuewu begat Olaitan Otuewu. The father of the 1st, 2nd and 4th plaintiffs. Chief Olaitan was brought up by his uncle 10 Taiwo who was so popular that people referred to their branch of Otuewu family as Chief Taiwo Otuewu section and in fact called Chief Olaitan the name of Chief Taiwo Otuewu.

7. The plaintiffs aver that when over 100 years ago, Medusope family started 15 to farm over the land now known as Medusope farmland each section or branch of Medusope family occupied various portions of the family land over which they remained in possession, control and occupation and were carrying thereon numerous and various acts of ownership and dominion such as farming. Planting maize, cassava, etc without any interruption from 20 any other section or branch of Medusope family or anybody.

9. The land in dispute forms portion of the Medusope farmland for well over 100 years over which the plaintiffs' grandfather, and later the plaintiffs' father Chief Taiwo Otuewu have been cultivating farm by planting maize, 25 cassava, yams without hinderance from any other member of Medusope family or any other family at all.

10. Sometime in February, 1981, the plaintiffs and their father Chief Taiwo Otuewu (now deceased) noticed that 2 survey beacons were being planted/ 30 buried on portion of the land covered by the Survey Plan attached to this amended Statement of Claim as Annexure 'A' and made enquiries from the persons planting the beacons as to who instructed them but they could not give particulars.

11. The plaintiffs' father, Chief Taiwo Otuewu and the plaintiffs then warned 35 the persons and told them that the land is part of Medusope family land in their occupation and control and possession and has not been sold to anybody.

12. *When after some weeks the plaintiffs and their father did not see anyone to show up they then uprooted the survey beacons.*

13. *About a month later the plaintiffs' father Chief Taiwo Otuewu and one Joseph Ogunlase an important member of Medusope family were arrested by the police at the instance of the defendant Alhaja Moriyamo Adesanya who resides at No. 35, Okunuga Street, Ijebu Ode on a complaint that her survey beacons which she planted on the land in dispute in February, 1981 were removed.*

16. *As the plaintiffs' father Chief Taiwo Otuewu, was getting old and feeble and did not want anybody to disturb his family's peace and possession and control of the land in dispute after his death, he decided and instituted this action in his lifetime to see the matter settled.*

17. *The plaintiffs' father died about 6 months ago and his descendants, his children and family including the plaintiffs continued with possession and control over the land in dispute planting cassava, yams, maize on the land and exercising numerous acts of ownership and possession thereon.*

18. *On or about 10th day of November, 1981 after the death of the plaintiffs' father Chief Taiwo Otuewu, the defendant and her servants came again unto a portion of the land in dispute and uprooted some cassava already planted on the land by the plaintiffs and their late father.*

20. *The plaintiffs institute this action for themselves and as representatives for and on behalf of the members of Chief Taiwo Otuewu Section of Otuewu branch of Medusope family.*

21. *The defendant is not a member of Chief Taiwo Otuewu family nor even a descendant of Okunuga (Medusope) either by blood or marriage.*

22. *Chief Taiwo Otuewu family did not sell or lease any portion of land in dispute to the defendant."*

The present appellant who was the defendant at the trial Court denied all material averments in the amended Statement of Claim and averred in the amended Statement of Defence and counter-claim in paragraphs 4-9, 12-18, 20-25, 27 and 28 as follows:

*"4. The Head of Medusope Family is Pa Amos Ogunyoye who succeeded the late Moses Ogunlase as Family Head.*

*5. The plaintiff who died on 23/8/81 had no family authority to institute this action against the defendant who is an outstanding member of Medusope family from Ogunne (Also called Agoro) branch.*

*6. The defendant avers that the land in dispute is a small fragment of the land granted to her by Medusope family as per the agreement dated 23/3/77 acting through its six accredited representatives by name:* 10

*(1) Laja Onakoy*

*(2) Joseph Ogunlase*

*(3) Chief Olurin Olumoko Joshua and three others.*

*7. The representatives come from each of the six branches.* 15

*8. The defendant paid the followings to The family as consideration in addition to her blood relationship to the family - N440,200 kolanuts and a sheep. The defendant will tender the said agreement at the trial and found on it.* 20

*9. The defendant was led into exclusive possession of the land granted to her and later surveyed the land in 1978 vide Survey Plan No. BPO 863 Block XII Plot No. 1 to 4. That area is edged green on the Plan No. BPO 1324.*

*12. Medusope was a wealthy man who migrated from Omu to settle in the area now known as Medusope some two hundred years ago. He came with his 'Oro', Oluweri and other fetish.* 25

*13. He became the owner of a large area of land over which he settled which land included the area in dispute.*

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*14. His settlement grew into Medusope (sometimes called Isope) village near Mobalufon, Ijebu Ode.*

*15. The whole land over which he settled at Isope still remain Medusope family land till today except the few grants made by the family.*

*16. The few grants of land ever made by the Medusope family to its members were witnessed by well written documents.*

18. *The 1st plaintiff and his late father were banned from family meetings because they once sold family land without the family's knowledge.*

20. *The defendant averts that the Medusope family made no grant of land in  
5 dispute to the plaintiffs nor their said father.*

21. *The defendant avers that the rest of the land in the area edged red on Survey Plan No. BPO. 1324 still belongs to the Medusope family.*

10 22. *The land in dispute forms part of the large tract of land surveyed and carved out into blocks and plots in the Medusope layout, Ijebu Ode many years ago.*

23. *The dispute giving rise to this action arose because plaintiffs removed  
15 Survey Pillars No. GE 1944 and ZX 5477 planted in 1978 when the defendant surveyed the land granted to her by the Medusope family.*

24. *With reference to paragraphs 7 and 9 of the amended Statement of Claim the defendant avers that members of the family farm on any available and  
20 suitable and convenient portions of the family land.*

25. *None of them had exclusive areas; for example Moses Ogunlase, Yisa Ogunlase, James Ogunlase, Jacob Ogunyoye and Simeon Ogunyoye who are now all dead farmed at one time or the other on the area in dispute.  
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27. *Pa Amos Ogunyoye is the present Head of Medusope Family.*

28. *There was no one called Ogunnumesi in the Medusope Family at all."*

In reply to the amended Statement of Defence, the plaintiffs (that is the present  
30 respondents) after denying their averments in the amended Statement of Defence and counter-claim, averred in paragraphs 5, 6, 7, 9, 10, 11, 12 of the reply as follows:-

"5. *With reference to paragraph 4 of the Amended Statement of Defence the  
35 plaintiffs say that Moses Ogunlase was the Head of Medusope Family until his death on or about the 19th day of March, 1977.*

6. *After the death of the said Moses Ogunlase, the surviving eldest male descendant of Medusope Family resident in Isope Village, Mobalufon, was*

*Chief Olaitan Oluwo alias Chief Taiwo Otuewu who became the Head of Medusope Family until his death in August, 1981. Pa Amos Ogunyoye thereafter became Head of Medusope Family and was so ceremoniously installed on 21st of February, 1982.*

7. With reference to paragraph 5 of the Amended Statement of Defence and Counter-Claim the plaintiffs say that they have their family authority to institute this action and that Ogunne is not a Branch of Medusope Family and the defendant is not a descendant of Medusope Family. Medusope Family meeting record book kept as from the year 1972 will be produced in evidence to support among other things, the names of the Branches of Medusope Family.

9. With reference to paragraph 6 of the Amended Statement of Defence and Counter-Claim, the plaintiffs will contend at the trial of this action that the Agreement dated 23rd March, 1977 referred to therein is not genuine but tainted with fraud and gross irregularity in that, amongst other things:-

(a) Laja Onakoya did not sign any agreement to sell land to the defendant and/or was deceived to sign such agreement and had no right to sign any document for Medusope family when his senior brother Chief Olaitan Otuewu was still alive;

(b) Joseph Ogunlase did not sign the agreement at all and his purported signature or thumb print thereon is a clear forgery, moreso as he was in Lagos on the 23rd of March, 1977 which was a day or two after the burial of his late senior brother Moses Ogunlase.

10. With reference to paragraphs 15, 20, 24 and 25 of the Amended Statement of Defence and Counter-Claim the plaintiffs say that although the whole area settled upon by all the Branches of Medusope Family is still known collectively and called Medusope Family Land but specific Branch Families from time immemorial occupy definite specific areas exclusively as their own and have been in occupation, possession and control of such specific areas carrying on farming and doing various and numerous maximum acts of possession and ownership thereon to the exclusion of others and without interruption from any other persons.

11. The plaintiffs' family say that they have from time immemorial settled and exclusively occupy the portion of land (including the land in dispute) de-

*scribed and delineated on Survey Plan No. AK. 1477/OG copy of which was referred to in paragraph 8 of the Amended Statement of Claim and attached thereto as Annexure 'A' as owners thereof and have since been in occupation, possession and control of the said portion of land carrying on farming and doing various and numerous maximum acts of possession and owner-  
5 ship thereon without any interruption from any person or other Branch Family of Medusope.*

*12. With further reference to paragraphs 24 and 25 of the Amended Statement of Defence and Counter-Claim the plaintiffs say that no Branch family  
10 ever worked on the land already occupied by another Branch family. None of the persons mentioned in the paragraphs has ever worked on the land covered by Survey Plan No. AK. 1477/OG."*

As said earlier the plaintiffs' claims were granted and the defendant's counter-  
15 claim was dismissed. The findings made by the learned trial Judge which are crucial to this appeal are as follows:

1. That the entire land belonged to the original settler and consequently the land belongs to the Medusope family.
2. That the family land has never been partitioned or
- 20 3. If it was partitioned as claimed by the plaintiffs he did not find partition proved.
4. That Otuewu section of Otuewu branch of Medusope family, since the land has not been partitioned, could not lawfully make a grant of any portion of the land to the defendant or indeed to anyone.
- 25 5. That if the sale to the defendant is valid and she immediately went into possession the plaintiffs cannot therefore succeed on an action of trespass against her.

30 6. That 5th defence witness, Mr. Amos Ogunyoye, was not the Head of Medusope Family at the time the family land was sold to the appellant.

7. That the plaintiffs were in possession at the time of sale to the defendant.

8. That the defendant has not proved that she is a member of Medusope family.

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At the Court of Appeal, some of these findings were confirmed and some issues not related to the case were raised. The lower court specifically said "*there was no need to plead specifically or prove partition or allotment in order to succeed against a trespasser who is not a member of the family*". I

will return to this when dealing specifically with paragraphs 10 and 11 of the reply to the counter-claim. Notice and grounds of appeal were filed against the judgment of the lower court. I will only concentrate on the issues raised in this Court as they were adequately covered by the grounds of appeal. Both parties filed their briefs of argument.

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The appellant formulated the following issues:

1. Whether or not the Court of Appeal misdirected itself by failing to properly identify the totality of the issues raised by the defendant for determination in the court below,.

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2. Whether the Court of Appeal was right in holding that the plaintiffs had in their pleadings raised the issue of the validity of the sale of the land in dispute to the defendant. Under this second issue, the appellant raised three sub-issues a, b and c which I do not want to set out but which I will deal with in the course of this judgment.

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3. Was a plea of invalidity of sale to the defendant raised?

4. Did the finding that Exh, C was tainted affect the defendant' case?

5. Whether the sale was void for want of consent of the family.

6. Was the order for perpetual injunction rightly made?

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The respondents' counsel adopted these issues although he erroneously numbered them as 1 to 5.

Chief G.O.K. Ajayi, S.A.N., the learned counsel for the appellant referred to the claims before the court of trial and pointed out that plaintiffs are no doubt members of Medusope Family, the original owners of the land in dispute but that they did not claim against the defendant as such. Their claims were based on the ground that the land in dispute is the property of Chief Taiwo Otuewu section of Otuewu branch of Medusope family. Learned counsel pointed out that the land was partitioned and that this finding was not disturbed by the Court of Appeal. Counsel pointed out further that the trial Judge found that since the plaintiffs were members of Medusope family and were physically in possession they could therefore maintain an action for trespass against the defendant who had claimed through Medusope family. Learned counsel submitted that the learned trial Judge was wrong to have given judgment in favour of the plaintiffs who had denied the title of Medusope family to the land in that their claim to the land in dispute is exclusive to their own branch and that the Judge was wrong to have given judgment to the plaintiffs who had made a case based on the fact that Medusope Family did

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not own the land. References were made to passages in the record of appeal where the present respondents claim exclusive ownership as against the entire family. He referred to the evidence on P.W. on p.36 of the record where he specifically said:

5 *'We are (sic) in a representative capacity on behalf of ourselves and the family of Chief Taiwo Otuewu.'*

10 Learned counsel submitted that the respondents made a totally different case from the case pleaded. He cited the case of *Oredoyin v. Arowolo* (1989) 5 NWLR (Pt.114) P.172.

Chief Adefala pointed out that the action was instituted by the plaintiff as  
15 Head of Medusope Family. His attention was drawn to paragraph 11 of their reply to the counter-claim but the learned counsel referred to paragraph 10 of the same counter-claim. Learned counsel then agreed that the respondents have not established their claim as to title but that having succeeded in proving possession he pointed out that the defendant was never put in possession by the entire members of Medusope Family. He finally urged that the  
20 appeal be dismissed.

Where a party claims for damages, trespass and injunction, such a party has put the title of the land in issue. There is no doubt that from the claim and pleadings the appellant and the respondents have put title in issue. As  
25 stated earlier, it is not in dispute that the land belongs to Medusope family, but since the respondents' claim is based mainly on exclusive title and possession of the land in dispute as against the entire Medusope family, the plaintiffs must prove that there has been a partition of the Medusope family. This is an issue which the Court of Appeal failed to appreciate and consequently misdi-  
30 rected itself on this very important fundamental issue in this case. This becomes glaring when in reply to the counterclaim the respondent's in paragraph 10 of the reply which I will have to quote again averred thus:

35 *"10. With reference to paragraphs 15, 20, 24 and 25 of the Amended Statement of Defence and Counter-Claim the plaintiffs say that although the whole area settled upon by all the Branches of Medusope Family is still known collectively and called Medusope Family Land but specific Branch Families*

*from time immemorial occupy definite specific areas EXCLUSIVELY AS THEIR OWN and have been in occupation....." (Capitals supplied).*

The learned trial Judge having found that the respondents have failed to prove that the Medusope family land has been partitioned should have dismissed the plaintiffs' claim which postulates title to the land in dispute. The respondents cannot now be allowed to rely on the title of Medusope family so as to defeat the claim of the appellant who claimed to have derived her title from Medusope family. It will be a departure from their pleadings: Ajide v. Kelani (1985) 3 NWLR (Pt.12) 248; (1985) 2 NSCC 1298; Airoe Con. & Civil Engr. Co. Ltd v. Uniben (1985) 1 NWLR (Pt.2) 287; (1985) 1 NSCC 312. The result would have been different if the plaintiffs who are members of one of the branches of Medusope family had taken the action to protect Medusope family property: Anyaduba & Anor v. Nigerian Renowned Trading Company Ltd. (1992) 5 NWLR (Pt.243) 535/571. The claim, the pleading and evidence led by the respondents are to the contrary. Their claim is exclusive ownership of the entire family property of Medusope and the burden is on them to prove this: Ajagbe v. Akanni (1973) 11 S.C. 47. Furthermore to allow the respondents to take refuge under the umbrella of Medusope Family at this late stage will only allow them to approbate and reprobate.

20

It appears to me that the lower court did not identify properly the issues raised by the defendant in that her defence and counter-claim were predicated not only on the sale of the land in dispute but that she was put in possession by members of Medusope Family. The Court of Appeal per Omololu Thomas, J.C.A. said:

*"Since the issue of partition and exclusive possession were resolved against the respondents (i.e. the respondents in this Court) I do not see the error in law here when judgment was given in favour of the respondents, not on the basis that the respondents had exclusive possession or that there was a partition of the family land, but only on the basis they were in possession, and that the appellant had no better title (Adesioye v. Shiwoniku) (1951) 14 WACA 86)."*

35

If the appellant can show a better title, then the respondents cannot rely on mere possession. It is necessary at this stage to consider the case of the appellant. Chief Ajayi, S.A.N. has pointed out repeatedly in his brief and I agree with him that if Exhibit C was the basis of the defendant's title, since it

was not registered under the Land Instrument Registration Law Cap 65, it was inadmissible. But Exhibit C is only admissible as an acknowledgment of the receipt of money and gifts given to Medusope Family. In *Ogunbambi v .Abowaba* (1951) 13 WACA 222, it was held that the payment of purchase money and the delivery of possession to the plaintiff created a valid title by native law and custom. It is my view that by virtue of the fact that the appellant had a valid title, the mere possession of the respondents relied upon by the lower court cannot defeat the claim of the appellant, Proof of good title supercedes possession.

10            In considering the issue of title and exclusive possession, the lower court said:

*"As far as title is concerned both sides cannot be said to be on even keel in that both sides must prove their respective titles. They failed to prove exclusive possession. There remained, however, the radical title of members of Medusope Family."*

If the lower court had not misdirected itself by failing to identify the case of the respondents who claimed exclusive possession as against the entire Medusope Family, it was at that stage that the case of the appellant on the claim of grant by that family ought to have been fully considered. To strengthen my view I will refer to paragraphs 8 and 9 of the Amended Statement of Defence and Counter-Claim. These paragraphs read as follows:

25            "8. The defendant paid the followings to the family as consideration in addition to her blood relationship to the family -N440,200 Kolanuts and a sheep. The defendant will tender the said agreement at the trial and found on it.

30            9. The defendant was led into exclusive possession of the land granted to her and later surveyed the land in 1978 vide Survey Plan No.BPO 863 Block XII Plot No.1 to 4. That area is edged green on the Plan No. BPO 1324."

In her evidence, the appellant said:

35            "It was at a meeting of the family that I requested for land: it was at the meeting I was told what to bring as consideration for the grant. They asked for a sheep, bitter kolanuts. kolanuts, schnapps, a sum of N400.00. I presented these at a subsequent family meeting. Members of the family then went with me to the land.....When all of them were there, the por

*tion granted to me was measured. They prayed for me. The family LATER gave me a document as evidence of grant. I can recognise the document. Exh. 'C' is the document."*

5

She was not cross-examined on this important aspect of payment of N400.00, presentation of sheep, bitter kola nuts etc. Neither was her evidence that she was put in possession by the family challenged. It was worth repeating if only to re-emphasise the nature of her grant that it was after the customary presentation of the gifts that Exhibit C came into existence. This I had earlier said was evidence of receipt. It is not correct as contended in the respondents' brief that the appellant said she bought the land "on two different occasions". See paragraphs 3-6 on page 4 of the Respondents' brief. It is therefore a misconception of the appellant's case by the lower court to think that the appellant relied on Exhibit C as evidence of sale. Exhibit C merely recorded the transaction of the payment of money and the gifts made to the family by the appellant. The case of J.E. Ehimare & Anor v. Okaka Emhonyon (1985) 1 NSCC 163 or (1985) 1 NWLR (Pt.2) 177 relied upon by Chief Adefala in his brief that the appellant "put forward a different story that the purported sale was made on two different occasions" as a case contrary to the appellant's pleading overlooked paragraphs 8 and 9 of the Amended Statement of Defence and Counter-Claim already reproduced above. The authority of this case strengthens the case of the appellant. I agree with Chief Ajayi, S.A.N. that there was no specific and in fact effective challenge to the sale transaction.

25

A heavy weather was made of Exhibit C on the ground that it was tainted with fraud. If the appellant's claim to the land had been through Chief Taiwo Otuewu section of Otuewu branch and for her to rely on Exhibit C as emanating from the said Chief Taiwo Otuewu section then the issue of fraud against the Otuewu family would have been a valid ground. Medusope family who granted the land to the appellant (and be it noted that the respondents have denied Medusope family title) did not complain of fraud, it doesn't lie in the mouth of Taiwo Otuewu section to say that a fraud has been committed on Medusope family. Medusope family gave evidence that they put the appellant in possession. One may legitimately ask: where lies the fraud? The question of fraud does not arise since the court of trial held that the land did not belong to the plaintiffs. The respondents are trying to exploit the situation

that if the appellant relied on Exhibit C which is inadmissible, consequently they must succeed. It is trite law that a plaintiff must succeed on the strength of his own case and not on the weakness of the defendant's case: Kaiyaoja v. Egunla (1974) 12 S.C. 55.

5            I now come to the sub-issues to which I had earlier made a brief reference. These are: validity of the sale of land to the defendant as per paragraph 22 of the Amended Statement of Claim, validity of the sale to the defendant by Medusope family and the issue of fraud and irregularity of the sale of land to the defendant. These issues of validity, irregularity and fraud ignored  
10 the basic claim of the respondents based on exclusive ownership and possession by Chief Taiwo Otuewu section of Otuewu branch as against the title of the land which is in Medusope family and that it was the same family that put the appellant in possession. It will amount to unnecessary repetition to set out paragraphs 8 and 9 of the Amended Statement of Defence and the Counter-  
15 Claim, but suffice it to say that the averment in paragraph 22 of the Amended Statement of Claim to wit:

*"Chief Taiwo Otuewu family did not sell or lease any portion of land in dispute to the defendant."*

20            When the court has found that the land in dispute did not belong to Chief Taiwo Otuewu section of the family cannot be regarded as a challenge to appellant's title. The challenge cannot be effective when the court found that the title is in Medusope family. This paragraph cannot and in fact did not raise  
25 any issue to the validity of the sale of the land to the appellant.

             Once a party abandons his pleadings it is not the business of the court to look for evidence from the other party so as to base a case on facts which the plaintiff does not plead and cannot rely upon. Judgment is given in respect of material facts pleaded and proved at the trial. The parties as well as  
30 the court cannot go outside the pleadings.

             Facts are pleaded; evidence is led in support of the pleadings. The court is therefore bound to adjudicate on the issues arising from the pleadings. Where therefore evidence led is not based on the facts pleaded such  
35 evidence goes to no issue: Emegokwue v. Okadigbo (1973) N.S.C.C. p.220.

             The issue of consent by the Head of the family becomes academic in view of the evidence and findings by the trial court. The trial court held that as

at the time Exhibit C was executed, i.e. 23rd March the Head of the family had died. In fact the court accepted the evidence that the Head of the family, P. Moses Ogunlase, died on 19th March, 1977, i.e. four days before Exhibit C was executed. Since, according to the court there was no Head of the family, it is wrong to conclude that the agreement was made without a non-existent head of the family. The plaintiffs were carried away by Exhibit C which was inadmissible for non-registration forgetting the other aspect of the appellant's case where she paid money etc. and was put in possession. 5

The appellant has succeeded in proving title through Modusope family, it will therefore be inequitable to grant injunction not only against her but against the family through whom she derived title. 10

In sum, I will allow the appeal; set aside the judgment of the lower court dated 3rd day of June, 1987 and I will make the following orders: 15

1. The claims of the plaintiffs who are the respondents in this Court are hereby dismissed.

2. The costs awarded in favour of the plaintiffs against the defendant are hereby set aside. 20

3. There will be judgment in favour of the defendant/appellant in her counter-claim in respect of the four plots of land delineated in survey Plan No. BPO 863 Block XII as Plots Nos. 1, 2, 3 and 4 admitted and marked Exhibit J in the said proceedings; Costs in the High Court in favour of the defendant are assessed at N500.00. 25

Costs in the Court of Appeal are assessed at N300.00 in favour of the defendant/respondent. Costs in this Court are assessed at N 1,000.00 in favour of the defendant/appellant. 30

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### **KARIBI-WHYTE JSC**

I have read the judgment of my learned brother Olatawura J.S.C. in this appeal. I agree with his reasoning and the conclusion allowing the appeal. I only wish to comment on an aspect of the 'case which' deserves emphasis, that is, that a plaintiff claiming for trespass and injunction to a piece of land must prove possession and title in himself. 35

It is of crucial importance and for a better understanding of the issues to state the facts of the case with sufficient clarity. By an Agreement dated 23rd March, 1977, the Medu-Isope family acting through its six accredited representatives one from each branch, sold a piece of land to the appellant. The piece of land now in dispute is part of the area so sold. As consideration for the sale, 5 appellant paid to the family N400 in cash and made gifts of 200 kola nuts and a sheep. The agreement of sale was tendered in the proceedings as Exhibit C. The six branches of the Medu-Isope family involved in the transaction are

- (i) Otuewu
- 10      (ii) Ogunlase
- (iii) Efunde
- (iv) Ogunyoye
- (v) Otubekun
- 15      (vi) Ayanse.

It would appear that Chief Taiwo Otuewu, head of the Otuewu branch of the Medu-Isope family was not aware of this transaction. Appellant was led into possession and later surveyed the land in 1978 Survey plan No. BPO 863 BLK 20 xii. The smaller area Survey Plan No. BPO 1324 dated 18/9/81.

Sometime in February, 1981, Chief Taiwo Otuewu noticed two Survey beacons buried in the portion of land cultivated by his section, the Otuewu branch of 25 the Medu-Isope family. When enquiries about the persons who were responsible for burying the beacons yielded no results, he decided to uproot them. After the beacons had been uprooted the appellant reacted by reporting the matter to the Police. This resulted in the arrest of Chief Taiwo Otuewu and one Joseph Ogunlase. On the 7th May, 1981, Chief Taiwo Otuewu issued a writ of 30 summons (suing for himself and as head of Medu-Isope family) against the appellant, claiming as follows-

"1. A sum of N1,000 (one thousand naira) damages for acts of trespass committed by the defendant, her servants and/or agents during the month of February, 1981 on the plaintiff's land situate being and lying on Medu-Isope Family land, off Ejirin Road, Ijebu-Ode in Ogun State. The Survey Plan of the said plaintiff's land will be filed later in this suit.

2. *A perpetual injunction restraining the defendant, her agents and/or servants from committing any further acts of trespass on the land in dispute and/or any portion of Medu-Isope Family Land lying off Ejinrin Road, Ijebu-Ode.*

5

Annual rental value of the land is N200.00. This action would seem to have been brought by the plaintiff as head of Medu-Isope Family, and in respect of the entire Medu-Isope Family Land. Chief Taiwo Otuewu died on the 23rd August, 1981 intestate. His children Adetayo, Olugbenga. Folorunso, Olaide, applied for substitution (For and on behalf of themselves and all members of and as accredited Representatives of Chief Taiwo Otuewu section of Otuewu Branch of Medusope family).

In paragraph 4 of the affidavit in support of the motion for substitution, it was deposed as follows-

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*"That we have been appointed by our other members of Chief Taiwo Otuewu family and we have agreed to substitute our names for that of our father and prosecute this action in a representative capacity for ourselves and other members of Chief Taiwo Otuewu, Branch of Medusope family."*

I have underlined the important words for emphasis and to demonstrate that there was a significant shift in the capacity in which the action was brought originally by Chief Taiwo Otuewu. Chief Taiwo Otuewu brought the action for himself and as Head of Medu-Isope Family of Mobalufon. The difference lies in suing as Head of Medu-Isope Family in who the land is vested, and as members of Chief Taiwo Otuewu, Branch of Medu-Isope Family which is only part of Medusope Family. Thus the action against the defendant was brought by the Otuewu Branch of the Medu-Isope family for themselves. It was never in dispute that the plaintiffs/respondents are part of the parent Medu-Isope family who made the grant to the defendant.

The claim of the plaintiff; whilst not disputing the root of title of the land, that it is Medusope family land, is founded on exclusive possession of the portion which they have farmed for more than 100 years. This is pleaded in paragraphs 4 and 7 respectively of the statement of claim and the amended statement of claim. Paragraph 7 of the amended statement or claim states as follows.

"7. The plaintiffs aver that when over 100 years ago, Medusope Family started to farm over the land known as Medusope farmland, each section or branch of Medusope family occupied various portions and remained up till today over such specific portions of the family land over which they remained in possession, control and occupation and were carrying thereon numerous and various acts of ownership and dominion such as farming, planting maize, cassava, etc. without any interruption from any other section or branch of Medusope Family or anybody."

10 On her part defendant founding her claim on sale from Medusope family, has also pleaded in paragraphs 6,7 ,8,9 of the statement of defence as follows-

15 "6. The Defendant avers that the land in dispute is a small fragment of the land granted to her by Medusope family as per the agreement dated 23/3/77 acting through its six accredited representatives by name

- 20 (1) Laja Onakoya  
 (2) Joseph Ogunlase  
 (3) Chief Olurin Oluwoko Joshua and three others.

25 The Joseph Ogunlade Ogunlanse mentioned herein seems to be the same referred to in paragraph II of the statement of claim as having been arrested along with Chief Taiwo Otuewu for removing the beacons buried by the defendant. He is therefore a member of the Chief Taiwo Otuewu branch of the Medusope family.

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"7. The representatives come from each of the six branches.

"8. The defendant paid the following to the family as consideration in addition to her blood relationship to the family - N400,200 Kolanuts and a sheep. The defendant will tender the said agreement at the trial and found 35 on it.

"9. The defendant was led into exclusive possession of the land granted to her and later surveyed the land in 1968 vide survey plan No.BPO 865 Block xii Plot No. 1 to 4. That area is edged green on the Plan No.BFO 1324.

It is common ground from the pleadings that both parties trace their title to the Medusope family. See paragraph 7 of the amended statement of claim, and paragraphs 6-9, 12-15 of the Statement of Defence. In addition the defendant has pleaded as follows in paragraph 24 and 25,

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*"24 With reference to paragraphs 7 and 9 of the amended statement of claim the defendant avers that members of the family farm on any available and suitable and convenient portions of the family land.*

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*"25 None of them had exclusive areas; for example Moses Ogunlase, Yisa Ogunlase, James Ogunlase, Jacob Ogunyoye, and Simeon Ogunyoye, who are now all dead farmed at one time or the other on the area in dispute."*

The defendant/appellant is in these averments claiming that at no time did plaintiff/respondent have exclusive possession to any part of Medusope family land. Hence it was averred in paragraph 15 of the amended statement of defence as follows-

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*"15. The whole land over which he settled at Isope still remains Medusope family land till today except few grants made by the Family."*

The issue before the learned trial Judge was the claim by the plaintiff to exclusive possession of a portion of Medusope Family by the Taiwo Otuewu branch of the family and of the defendant/appellant of the grant of the land in dispute by the Medusope family. Defendant/appellant claimed to have been put in possession by the Medusope family. A vast portion including portion of the land in dispute was sold to her by representative members of the Medusope Family. Exhibit C, which featured prominently, is documentary evidence of the transaction.

After trial on pleadings and viva voce evidence, the learned trial Judge gave judgment to the plaintiffs. He dismissed the counter-claim of the defendant. It is pertinent to observe that the learned trial Judge made certain findings of fact. These are that

1. The land in dispute belonged to the Medusope Family.
2. The Medusope Family land has never been partitioned.

3. The plaintiffs did not establish their claim that the Family land had been partitioned.

4. The Taiwo Otuewu section of Otuewu branch of the Medusope Family, could not lawfully make a grant of any portion of the Medusope family  
5 to defendant or anyone else since the land had not been partitioned.

5. That if the sale to defendant is valid and she immediately went into possession, the plaintiffs cannot therefore succeed in an action of trespass against her.  
10

6. That 5th defendant witness, Amos Ogunyoye was not the Head of Medusope Family at the time the Family land was sold to the appellant.

7. That the plaintiffs were in possession at the time of sale to the defendant.  
15

8. That the defendant has not proved that she is a member of Medusope Family. She was therefore liable in trespass.

9. That as the Family head did not concur in the sale, it was void.

10. The fact that payment was made to representatives of the family  
20 was not considered.

Defendant's appeal to the Court of Appeal was dismissed. In its judgment the Court below besides affirming all the findings of the trial Judge, raised some other issues not related to the case.

25      The Court below held that Exhibit C relied upon by the defendant/appellant was tainted with gross irregularity having not been executed by each of the 6 branches or 8 as claimed by DW5, of the Medusope Family. It was also held that Exh. C shows that some of those who executed it were not the named grantors in the document.

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The Court of Appeal held that partition of the land having not been pleaded, the finding by the trial Judge went to no issue.

35      It was also held that plaintiffs were in possession of the land in dispute, and defendant not being a member of the family could not show a better title. The Court below also held that appellant did not prove who the head of the family was at the date of execution of Exhibit C as against what the respondents established. Appellant also did not establish that the accredited representatives of the family agreed to the sale. The Court below agreed that

the trial Judge found that respondents were not in exclusive possession. It also went on to hold that possession of the land was sufficient since appellant had no better title, and not being a member of the Medusope family. It was also held in the Court below that there was no need to plead specifically or prove partition or allotment in order to succeed as against a trespasser who is not a member of the family.

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It is pertinent to observe that the appellant did not only plead and rely on Exhibit C as evidence of the transaction of the sale of the land in dispute. There was also a distinct and separate plea in paragraphs 8 and 9 of the amended statement of defence already reproduced in this judgment. Paragraphs 8 and 9 of the amended statement of defence clearly show that appellant paid the purchase price, made customary gifts and was put in possession.

It is well settled law that the payment of purchase price coupled with being put in possession confers an-equitable title enabling a purchaser in possession to call for a document of title. The title so acquired is capable of defeating subsequent purchasers - See *Ogunbambi v. Abowaba* 13 WACA 222.

The Court of Appeal did not appear to have taken paragraphs 8 and 9 of the amended statement of claim into consideration. If they had done so their conclusion would certainly have been different.

Appellant, dissatisfied with the decision, further appealed against the judgment to this Court. Both parties filed their briefs of argument. Learned Counsel formulated six issues for determination in the appeal. Respondents' Counsel adopted these same issues. The issues so formulated are as follows

-

1. Whether or not the Court of Appeal misdirected itself by failing to properly identify the totality of the issues raised by the defendant for determination in the Court below.

2. Whether the Court of Appeal was right in holding that the plaintiffs had in their pleadings raised the issues of the validity of the sale of the land in dispute 10 the defendant.

3. Was a plea of the invalidity of the sale to the Defendant raised?

4. Did the finding that Exh. C was tainted affect the defendant's case?

5. Whether the sale was void for want of consent of the family?
6. Was the order for perpetual injunction rightly made?

The crux of all the issues depended entirely on the understanding of the Court of Appeal of the case made and presented to the Court by the parties. This will depend upon the understanding of the claim in the writ of summons and the issues raised in the pleadings. It is therefore important to consider the status in which the action was brought and the pleadings in support of the claim.

In his brief of argument and oral expatiation before us, learned Counsel to the appellants, Chief G.O.K. Ajayi, SAN submitted that respondents are members of the Medusope Family, the original owners of the land in dispute, but brought the action and are claiming as a section of the Chief Taiwo Otuewu section of Otuewu branch of the Medusope Family. Thus their claim was based on the ground that the land in dispute is the property of Chief Taiwo Otuewu section of the Otuewu branch of the Medusope Family. Learned counsel pointed out that the findings of the learned trial Judge that plaintiff failed to prove that the land was partitioned has not been disturbed by the Court below. It was further pointed out that since respondents are members of the Medusope Family and where physically in possession they could maintain an action in trespass against the defendant who had claimed through Medusope Family. It was submitted that the learned trial Judge was wrong to have given judgment to the plaintiffs who had denied the title of the Medusope Family to the land on the ground that their claim to the land in dispute is exclusive to their own branch and that the Judge was wrong to have given judgment to the plaintiffs who had made a case based on the fact that Medusope Family did not own the land.

Learned Counsel referred to specific passages in the proceedings and submitted that respondents made a case totally different from their pleading. He relied for this submission on *Oredoyin v. Arowolo* (1989) 5 NWLR 35 (Pt.114) 172.

Chief Adefala for the respondents pointed out that the action was instituted by the plaintiffs as head of the Medusope Family. On being referred

to paragraph 11 of the reply to the counter claim, learned Counsel conceded that respondents have not established their claim as to title of the land in dispute. He however argued that having succeeded in proving possession, they were entitled to succeed. It was submitted that defendant was never put in possession by the entire members of Medusope family.

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It is of critical importance to the determination of this appeal to understand the fundamental and well settled proposition of law that in a claim for damages, trespass and injunction, title to the land in dispute is necessarily in issue. There is very little doubt in the instant case that title is in issue.

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It is common ground that the land in dispute belongs to the Medusope Family, but respondent has claimed exclusive possession of the land in dispute as against the other branches of the Medusope Family. They must accordingly prove the partition of the portion of the land in dispute to them. The Court of Appeal appears to have ignored this crucial defect in the case of the respondents.

The law is that since respondents failed to show title of the land in themselves, but concede that it is still in Medusope family, they cannot be allowed to rely on the title of the Medusope family to defeat the claim of the appellant who claimed to have derived her title from the Medusope Family. - See *Ajide v. Kelani* (1985) 3 NWLR (Pt.12) 248; (1985) 2 NSCC. 1298 *Airoe Con. & Civil Engr. Co. Ltd v. Uniben* (1985) 1 NWLR (Pt.2) 287; (1985) 1 NSCC. 312.

25

It is also of importance to observe that respondents did not bring the instant action to protect the property of Medusope Family. There would have been a different consideration if it was the case - See *Anyaduba & Anor v. Nigerian Renowned Trading Co. Ltd* (1992) 5 NWLR (Pt.243) 535. Having claimed exclusive ownership, the onus is on them to establish it - See *Ajagbe v. Akanni* (1973) 11 S.C. 47.

I have observed in this judgment that the Court below did not appear to have understood the case of the appellant. The case made by the appellant was based on the ground that the land in dispute was sold to her and that she was put in possession by the Medusope family. Appellant did not only claim to have title to the land under a sale agreement, reliance was also placed on the payment of the sum of N400, made gifts of 200 Kolanuts and a sheep to

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170     Adesanya v. Otuewu (1993) 1 KLR Karibi-Whyte JSC  
representative members of the family.

          The Court below did not rely on the fact that the respondents had exclusive possession or that there was a partition of the family land, but only  
5     on the basis that they were in possession, and that the appellant had no other title. (Adesioye v. Shiwoniku 14 WACA.86). There is no doubt and it is well settled law that where parties to the land in dispute rely on a common root of title, the party who shows a better title succeeds.

10           On the findings of "the Courts below, respondents have only claimed possession, not even exclusive possession. Chief Ajayi, S.A.N. has submitted that if Exhibit C was the basis of defendants' title, and requires registration under the Land Instrument Registration Law Cap, 65 to constitutes evidence in this case, and is not registered to be admissible, not being registered it was  
15     inadmissible. The Court below ought not to have relied on Exhibit C for rejecting the grant of the land in dispute. Exhibit C is however admissible as an acknowledgment of the receipt of money and gifts to Medusope Family. Our Courts have held in several cases that payment of purchase money and delivery of possession to a grantee creates a valid title by native law and custom -  
20     See Ogunbambi v. Abowaba 13 WACA. 22. On this principle appellant on the facts which was neither denied nor challenged had a valid title. In the circumstances the mere possession relied upon by the Court below ought not to have been relied upon to defeat the claim to title of the appellant established on the facts.

25

          The Court below could not on the facts before it be stating the law correctly when it said,

30           *"As far as title is concerned both sides cannot be said to be on even keel in that both sides must prove their respective titles. They failed to prove exclusive possession. There remained, however, the radical title of members of Medusope family."*

35

          The Court below misdirected itself by its failure to identify the case of the respondents. Respondents had claimed exclusive possession as against the entire Medusope Family. They also claimed a title separate from the Medusope Family. It was therefore not open to them to rely on the title of

Medusope Family. Appellant has claimed grant from Medusope family. This has not been controverted. The Medusope family gave evidence that they put appellant in possession. Respondents having relied on the Medusope family for their title have failed to prove such title - cassus cadit. The respondents' claim should have failed from the weakness of their own case - See Kodilinye v. Odu (1935) 2 WACA 336; NBTC Ltd. v. Narumal Ltd (1986) 4 5 NWLR (Pt.33) 117; Abaye v. Ofili (1986) 1 NWLR (Pt.15) 134; Abe v. Akaajime (1989) 4 NWLR. (Pt.113)95; Osawe v. Osawe (1991) 5 NWLR (Pt. 194) 710. The appeal succeeds on the resolution of this issue alone. But in the interest of completeness, I shall consider the other issues together.

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Chief Ajayi SAN dealt in considerable detail with the second issue *"whether the Court of Appeal was right in holding that the plaintiffs had in their pleadings raised the issue of the validity of the sale of the land in dispute to the Defendant."*

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The Court of Appeal came to this conclusion relying on paragraphs 5 and 6 of respondents reply to the Amended statement of defence and counterclaim, and paragraph 9 of the same pleading where Exhibit C was challenged 20 as not genuine and as tainted with fraud and gross irregularity. All the three sub-issues formulated under the issue are elaborations of the same formulation of the principal issue. The transactions constituting the sale have already been stated, namely, Exhibit C, the Agreement, and the payment of the purchase money of N400 and the gift of a sheep. 25

Let us now set out the respondents' reply to the amended statement of defence and counter claim, which are as follows -

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"5. With reference to paragraph 4 of the Amended statement of defence the plaintiffs say that Moses Ogunlase was head of Medusope Family until his death on or about the 19th day of March, 1977.

"6. *After the death of the said Moses Ogunlase, the surviving eldest male descendant of Medusope family resident in Isope Village Mobalufon, 35 was Chief Olaitan Oluwo alias Chief Taiwo Otuewu who became Head of Medusope family until his death in August 1981. Pa Moses Ogunyoye thereafter became Head of Medusope family and was ceremoniously installed on 21st February, 1982"*

9. *With reference to paragraph 6 of the Amended Statement of defence and counter-claim, the plaintiffs will contend at the trial of this action that the Agreement dated 23rd March, 1977 referred to therein is not genuine but tainted with fraud and gross irregularity in that amongst other things:~*

(a) *Laja Onakoya did not sign any agreement to sell land to the defendant and/or was deceived to sign such agreement and had no right to sign any document for Medusope Family when his senior brother Chief Olaitan Otuewu was still alive.*

(b) *Joseph Ogunlase did not sign the agreement at all and his purported signature or thumb print thereon is a clear forgery, moreso as he was in Lagos on the 23rd March, 1977, which was a day or two after the burial of his late senior brother Moses Ogunlase."*

That the Court of Appeal is under a misconception of the facts is clear if the relevant pleading is examined. The averment relied upon by the Court of Appeal is in paragraph 22 of the amended statement of claim where it was averred that

*"22. Chief Taiwo Otuewu did not sell or lease any portion of land in dispute to the defendant"*

This is the only averment in the statement of claim which denied sale of the land in dispute to the defendant. In the averment, plaintiff is denying sale by the Chief Otuewu family. This, cannot be and is not claimed to be a denial of sale of the land in dispute by the Medusope family. Defendant relied on sale to her by Medusope Family, and not by the Chief Taiwo Otuewu section or Otuewu branch of the Medusope family. This must be the case, because respondents were claiming that the land in dispute belonged to them, and not to the Medusope Family. In the circumstance, the Court below was in error in holding that by paragraph 22 of the Amended statement of claim was a challenge to the validity of the sale to the defendant by the Medusope Family. The Court of Appeal was clearly in error in the conclusion that paragraph 5 and 6 of the reply to the Amended Statement of defence and counter-claim raised the issue of the validity of the sale or lease of the of the land in dispute. The clearest issue raised in those averments is one of the order of succession to the headship of Medusope family. This was not directly related

to the transaction. It may be conceded that the inference that the death of Moses Ogunlase the Head of the Medusope family on or about 19th march, 1977 before the Agreement Exhibit C dated 23/3/77, who also was not a party raised in an oblique manner the issue of the validity of the transaction. But this inference was taken care of by paragraph 4 of the amended statement of Defence which averred as follows-

*"The head of the Medusope family is Pa Moses Ogunyoye who succeeded the late Moses Ogunlase the family head."*

If the case of the respondent was that the Agreement Exhibit C was void because the Head of family did not consent, it was their duty to plead specifically and unambiguously to such a material fact. In the absence of such a specific Pleading, the Court below was clearly wrong to have accepted the contention that it was sufficient as a challenge to the sale.

Finally on this issue, paragraph 9 is confined to the validity of Exh. C. It is not related to the 'Second transaction of the payment of purchase money of N400 and the gift of 200 Kola nuts and a sheep, and being put in possession. This aspect of the transaction was nowhere challenged other than in the general traverse. Paragraph 9 is therefore not a challenge to the validity of the transaction. The Court of Appeal was wrong to so hold. Since Exhibit C is not being relied upon as constituting the transaction, the allegation of fraud, irregularity, forgery, seems to me of no moment. It is a document incapable of being pleaded or of being admitted in evidence by section 16 of the Land Instruments Registration Law, Cap, 53, Laws of Ogun State - See also Talabi v. Griffin (1950) 12 WACA. 371.

In view of what I have said in this judgment and for the fuller reasons stated in the judgment of my learned brother Olatawura J.S.C. I will allow the appeal of the appellant and set aside the judgment of the Court below dated the 3rd day of June, 1987. I also abide by the costs awarded and the orders made.

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**BELGORE JSC**

I read in advance the judgment of my learned brother, Olatawura J.S.C. with which I am in entire agreement. I have nothing to add to his sound

reasoning and conclusions thereupon. I also allow this appeal by adopting the said judgment as mine. I make the same consequential orders as to costs.

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## NNAEMEKA-AGU JSC

This is a further appeal by Alhaja Moriamo Adesanya who was the defendant in suit No. HCJ./29/81 instituted in an Ogun State High Court, 10 holden at Ijebu - Ode. In that suit Chief Adetayo Olaitan Otuewu and three others for themselves and for and on behalf of all the members of and as accredited representatives of Chief Taiwo Otuewu section of Otuewu Branch of Medusope Family brought an action against the defendant claiming:

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*"(i) N1,000.00 being damages for trespass allegedly committed during the months of February and November, 1981 'on plaintiffs' land situate being and lying on Medusope family land, off Ejirin Road, Ijebu-Ode ...." and*

20

(ii) A perpetual injunction restraining the defendant, her agents and/or servants from committing any further acts of trespass on the land.

25

It was common ground that the land was originally settled upon by a man called Ogunumesi by the plaintiffs and Medusope by the defendant. It is however, plaintiffs' case that several branches of the family were in exclusive possession of and exercised rights of ownership over different portions of Medusope family land. It is clear that the plaintiffs based their claim to the 30 land in dispute upon ownership and exclusive possession.

The defendant's case was that she herself was from a branch of Medusope family and that the land granted to her by Medusope family through 35 their accredited representatives representing each of the six branches of the family and that the transaction was evidenced by a written agreement, dated 23/3/77, Exh. C, after she had paid the agreed purchase price. She was also let into exclusive possession in 1978 and she prepared a survey plan, Exh. J wherein her parcel of land was verged green. The defendant averred that each

member of the family fanned on available spaces in the land.

At the trial, each party called evidence in support of its case. In his judgment, the learned trial Judge Odunsi, J, made a number of findings on issues canvassed before him

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(i) After reiterating that the land was the communal property of Medusope family, he found that the plaintiffs did not prove partition. As partition is division of ownership over lands communally owned (for which see Balogun v. Balogun (1943) 9 WACA 78) this implies that the claim of the plaintiffs to exclusive ownership was not proved.

10

(ii) He said that he was not satisfied that 5 D.W., Pa Amos Ogunyoye, who was clearly the head of Medusope family at the time of the proceedings, was the head of the family on the date of the transaction that is on 23rd March, 1977. From this finding, he came to the conclusion that as the head of the family had not consented to the transaction evidenced by Exh. "C", it was accordingly void: Ekpendu v. Erika (1959) SCNLR 186; (1959) 4 F.S.C. 79.

15

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(iii) He found that although the plaintiffs had not proved partition or exclusive possession, they had been in possession of the portion of the land in dispute for a long time.

(iv) In his view, the defendant's membership of Medusope family was not proved.

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(v) As the defendant's counter-claim was filed without leave as required by the rules, he dismissed it.

On appeal, the Court of Appeal held inter alia as follows:

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*"Precisely, because the appellant did not prove who the head of the family was at the date of execution of exhibit C as against what the respondents established, nor did he prove that the accredited representatives of the family agreed to the sale, the learned trial Judge need not go into the question of execution of the agreement Exh. C, having found that the respondents were in possession (meaning that the appellant was not), and that the appellant was not even a member of the family and could not show any better title. She established nothing in fact by way of title and the trial Judge in my opinion therefore came to the right conclusion."*

35

Finally their Lordships held that as the plaintiffs were members of a sub-branch of Medusope family and succeeded in proving possession, they were entitled to succeed against the defendant who was a stranger to the family and had failed to prove a better title. There was no need to plead or prove partition in order to succeed against a trespasser who was not a member of the family, they held. Then the court dismissed the appeal.

The defendant has appealed further to this court. The issues for determination in this appeal as put forward by learned Senior Advocate for the defendant (appellant) Chief G.O.K. Ajayi and conceded by the learned counsel for the plaintiffs (respondents) Chief A.O. Adefala were as follows:-

(i) *"Whether or not the Court of Appeal misdirected itself by failing to properly identify the totality of the issues raised by the defendant for determination in the court below.*

(ii) *Whether the Court of Appeal was right in holding that the plaintiffs had in their pleadings raised the issue of the validity of the sale of the land in dispute to the defendant.*

(iii) *Was a plea of invalidity of sale to the defendant raised? Whether the finding of the Court of Appeal that Exhibit 'C' was 'tainted with fraud and gross irregularity' affects the defendant's case adversely.*

(iv) *Whether the sale was void for want of consent of the head of the family."*

I shall now consider the first issue to wit: Whether or not the Court of Appeal misdirected itself by failing to properly identify the totality of the issues raised by the defendant for determination in the court below. In arguing this issue, Chief Ajayi submitted first that the courts below decided the case entirely on the invalidity of the written document, Exh. C. and did not consider the case of the defendant that she paid the purchase price and had been taken by Medusope family to the land in dispute and put in possession thereof. While conceding that if Exh. "C" was tendered as an instrument conveying title, it could not be pleaded or given in evidence because it was not registered he submitted that payment of purchase price and being put into possession

was per se a sufficient proof of purchase and acquisition of title under customary law. Chief Adefala, on the other hand submitted that there was only one transaction: so, it was not possible to sever it and hold that although Exh. "C" was void the purchase itself was valid and conferred title on the appellant.

It is clear from the evidence before the court that the transaction between the defendant/appellant and Medusope family was one under native law and custom, and must be construed as such. The learned trial Judge himself summed up the evidence thus:

*"The defendant asked for a grant of family land at one of the meetings of the family and the family demanded payment by her of the sum N440, a sheep, bitter kola, kolanuts and a bottle of schnapps as consideration, which she paid. Members of the family then went with her to the land, showed her the four plots granted, and prayed for her. They later executed a document dated 23rd March, 1977 (Exh. C) in her favour as evidence of the grant: this was the time when the 1st P.W.'s father was no longer allowed to attend meetings of the family. The 5th D.W. Amos Ogunyoye was at that time the acting head of Medusope family".*

(Italics mine for emphasis).

It is clear from this state of the facts that the transaction had been completed according to custom before Exh. C and was later executed. If Exh. C turned out to be inadmissible, it could not affect the validity or efficacy of the transaction. Part of the complaint of Chief Ajayi is that the courts below failed to consider any other aspect of the appellant's case apart from pronouncing on the invalidity of Exh. 'C'. In my opinion he is right. I believe that the true position in law is that where a document such as Exh. C is itself one which limits, extinguishes or transfers title, then if it turns out to be invalid or inadmissible for being an unregistered instrument the whole transaction is invalid. But where as in this case the document is a mere evidence of a transaction already completed, it can be good evidence of receipt of money but its invalidity or inadmissibility will not affect the validity of the transaction. It appears to me that the part of the transaction between the defendant and the Medusope family which took place before the execution of Exh. C. that is payment of purchase money and being let into possession, which was further evidenced by the defendant's survey of the land and preparation of plan No. BPO 863 BUGXII on 28/3/78 were sufficient to transfer the title to her under customary law. See on this Isaac Talabi Ogunbambi v. Adeniji Soyombo Abowaba (1951) 13 WACA 222: also Griffin v. Talabi (1948) 12 WACA 371. I am satisfied that if

178 Adesanya v. Otuewu (1993) 1 KLR Nnaemeka-Agu JSC  
the courts below had directed themselves correctly as to the nature and im-  
port of the transaction between the defendant and Medusope family, they  
could not have come to the conclusion that the defendant who had acquired  
a good title was a trespasser.

5

The second complaint of Chief Ajayi on the 1st issue is that the learned  
Justices of the Court of Appeal did not give adequate consideration to the  
issues which the appellant had raised in that court, that is that the plaintiffs  
10 did not (prove their case as pleaded, Learned Senior Advocate on their behalf  
referred specifically to the pleading in paragraphs 7 and 9 of the amended  
statement of claim and paragraphs 10 and 11 of the Reply. He submitted that as  
their pleaded case was clearly based on ownership and exclusive possession  
it was wrong for the court below to have confirmed a finding of trespass based  
15 on bare possession. Chief Adefala, on the other hand submitted that any act  
of possession was sufficient to support a finding of trespass.

20 Now in paragraphs 7 and 10 of the plaintiffs' statement of claim, they  
pleaded as follows:-

"7. The plaintiffs aver that when over 100 years ago. Medusope family  
started to farm over the land now known as Medusope farmland each sec-  
tion or branch of Medusope family occupied various portions and remained  
25 up till today over such specific portions of the family land over which they  
remained in possession, control and occupation and were carrying thereon  
numerous and, various acts of ownership and dominion such as farming,  
planting maize, cassava, etc without any interruption from any other section  
or branch of Medusope family or anybody.

30

9. The land in dispute forms portion of the Medusope farmland for well over  
100 years over which the plaintiffs' grandfather and later the plaintiffs'  
father Chief Taiwo Otuewu have been cultivating farm by planting maize,  
35 cassava. yams without hindrance from any other member of Medusope fam-  
ily or any other family at all."

More emphatically, in paragraphs 10 and 11 of the Reply to the Amended Statement of Claim and Defence to the counter-claim, they pleaded as follows:-

*"10 With reference to paragraphs 15, 20,24 and 25 of the Amended Statement of Defence and Counter-Claim the plaintiffs say that although the whole area settled upon by all the Branches of Medusope family is still known collectively and called Medusope family land but specific Branch families from time immemorial occupy definite specific areas exclusively as their own and have been in occupation, possession and control of such specific areas carrying on farming and doing various and numerous maximum acts of possession and ownership thereon to the exclusion of others and without interruption from any other persons.*

*11. The plaintiffs' family say that they have from time immemorial settled and exclusively occupy the portion of land (including the land in dispute) described and delineated on Survey Plan No. AK.1477/OG copy of which was referred to in paragraph 8 of the Amended Statement of Claim and attached thereto as Annexure 'A' as owners thereof and have since been in occupation, possession and control of the said portion of land carrying on farming and doing various and numerous maximum acts of possession and ownership thereon without any interruption from any person or other Branch family of Medusope"*

It is clear from these pleadings that the plaintiffs' case was based on exclusive possession and ownership. The learned trial Judge clearly understood their case as such but found that, as partition of Medusope family land was not proved, the ownership or exclusive possession of the land in dispute by the plaintiffs, the Taiwo Otuewu sub-branch of Medusope family, was not proved. He, however, found that they had proved their possession of the land before and during the act of trespass complained of and so interference with that possession was trespass. The Court of Appeal confirmed this. The simple question is whether they were correct to have so held.

It is true that as a matter of legal theory, every unlawful or unauthorized entry on land in the possession of another is trespass for which an action in damages lies, even if no actual damage is done to the land or any

fixture in it. So where a person alleges bare possession and proves interference with it there is an actionable trespass. But also our law imputes possession to title. A person who has title can maintain an action in trespass against only one save one who can prove a better title. So, in a case such as this in which title was put in issue, the decisive question is who proves a better title:

5 see *Aromire & ors v. Awoyemi* (1972) 2 S.C. 1. at pp.10-11: *Godwin Egwu v.. Duro Ogunkehin* S.C. 529/1966 of the 28th of February, 1969. In a plaintiff's pleadings, he is required to show clearly and prove the nature of the possession which he is relying upon to sustain his action in trespass, that is whether he is relying on bare possession or on his possession or right to possession

10 based on his title to the land. The rule of *audi alteram partem* which is incorporated in our rules of pleadings postulates that a man must know the nature of the case which he is to meet in court. This is also a clear implication of the constitutional provision affording hearing guaranteed by section 33 of our Constitution of 1979. As such is the case, a plaintiff cannot in his pleadings aver

15 exclusive possession or right to possession based on title but, having failed to prove it, be allowed to succeed on bare possession. In the circumstances, the Court of Appeal was in grave error when their Lordships held as follows:-

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*"The case was prosecuted by the respondents (in a representative capacity) as representatives of the descendants of a sub-branch. The learned trial Judge found them to be in possession of the land in dispute even though the whole land of which the portion forms a part belongs to Medusope*

25 *family. Although he did not find exclusive possession in their favour, the possession of the land by the respondents as found is sufficient, as the appellant has no better title, and she is not a member of the Medusope family. There was no need to plead specifically or prove partition or allotment in order to succeed as against a trespasser who is not a member of the family"*

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Having found that the plaintiffs failed to prove either ownership or exclusive possession which they pleaded the court below ought to have held

35 that they did not prove their case and should have dismissed it. The onus of proof was on the plaintiffs. Moreover, it must be borne in mind that it has been established by a long line of decided cases that one of the incidents of our traditional communal ownership of land is that once it is admitted that a particular piece of land belongs to a family, the law places a rather heavy burden

of proof on any person or group which asserts exclusivity of ownership or possession against the family or any person claiming through them. Mere evidence of occupation and user by a member of the family is not conclusive as against the family or a person who claims through the family. See on this: Kuma v. Kuma (1936) 5 WACA 4, at p.9 (P.C.); Amodu Tijani v. The Secretary Southern Nigeria (1921) 2 A.C. 399, at p.404; Udeakpu Eze v. Samuel Igilieghie & 5 Ors. (1952) 14 WACA 61, Rayner, C.J., in his famous Report made in 1898 in dealing with the effect of occupation and user of communal or family lands by a member of the family or community put it succinctly thus, at page 404:

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*"He (meaning the Head of the family or community) is to some extent in the position of a trustee, and as such holds the land for the use of the community or family. He has control of it and any member who wants a piece of it to cultivate or build a house upon, goes to him for it. But the land so given remains the property of the community or family."*

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(Italics mine).

See also Balogun v. Balogun (1943) 9 WACA 78.p.83. A family land does not therefore cease to be so simply because a member of the family is in occupation of it or has even developed it: see Ashimowu Shelle v. Chief Asajon Oloja of Ereko (1957) 2 F.S.C. 65, 67; (1957) SCNLR 286. He may be no better than a usufructuary. Conceded that in recent times the impact of commercialisation has taken its toll on communal ownership of land, it is my view that where the case of the parties still shows that they are basing their cases on native law and custom, it still holds its full sway. In the instant case the admitted current head of the family Pa Amos Ogunyoye (D.W.5) testified as follows:-

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*"I know the land in dispute The Medusope owned the land from time immemorial. The family made a grant of four plots of our land to the defendant in 1977. We gave her a written document. I am one of the signatories to the document. I see Exh. 'C'; this is my signature on it as the 4th grantor."*

35

This devastating piece of evidence is not only as against the Medusope family, an admission against interest. It is also an admission by the very trustee of the land himself that the family had parted with ownership of the land in dispute to the defendant. It is of material significance that on defendant's case it was in 1978 that she surveyed the land whereas the pur-

chase was in 1977. The courts below did not advert to this. If the plaintiffs who claimed as a sub-branch of one of the constituent units of Medusope family had succeeded in proving partition that would have been tantamount to a division of ownership. See on this: Johnson v. Macaulay (1961) 1 All N.L.R. 743; Akerele v. Liye-Laberu (1956) L.L.R. 35. But they did not. Nor did they  
 5 otherwise establish exclusive possession. In the circumstances, I feel bound to agree with Chief Ajayi that the defendant who claims through Medusope, the owners, cannot rightly be adjudged a trespasser or be restricted by an order of injunction from enjoying the land granted to her by Medusope. I may add that when the plaintiffs failed to discharge the onus on them of proving  
 10 ownership or exclusive possession the learned trial Judge, on the case brought to court by the plaintiffs, should have proceeded to dismiss their case without further ado. The onus had not shifted to the defendant.

15

Chief Ajayi in the appellant's second and third issues, also raised some serious issues as to respondent's pleading. He contended that the plaintiff did not either in his statement of claim or the reply aver that the sale to the defendant was invalid. In his submission, what was pleaded in paragraph 9 of the  
 20 Reply was that the sale was tainted with fraud and irregularity. This is not the same with saying that the sale was invalid, he submitted. In his own submission, Chief Adefala, learned counsel to the respondent, contended that the respondent pleaded that the land in dispute had not been sold to anybody, that this carries with it the implication that there was no valid sale.

25

How now should the respondent have pleaded the invalidity of the transaction? In considering whether the invalidity of the transaction was  
 30 pleaded, I must bear in mind the fact that pleadings are no longer required to be technical in formulation. Subject to the requirement that parties must not offend against any of the known rules of pleadings as laid down by law, such as that they should not plead evidence or omit to plead facts which, when proved, may result in surprise to the other side or facts which are frivolous or  
 35 vexatious, or which may tend to prejudice, embarrass or delay the trial of the action, all that a pleader is now required to do in such a case is, where necessary to allege illegality or invalidity and plead facts from which inferences of law thereof could be drawn: see on this Knowles v. Roberts (1888) 38 Ch.D.

263, at p.270 to 271; Willis v. Lovick (1901) 2 K.B. 195. That is the proper rule. But the court will itself take notice of the illegality or invalidity of a contract on which a party is relying if it appears on the face of the contract or from the facts pleaded, although the party has not expressly averred that it is illegal or invalid: see Windhill Local Board v. Vint (1890) 45 Ch.D 357; Gedge v. Royal Exchange Assurance (1900) 2 Q.B. 214. In Northern Salt Co. v. Electroytic Alkaki Co. (1914) A.C. 461, Viscount Haldane, L.C., stated this rule at page 469, thus:-

*"My lords, it is no doubt true that where on the plaintiff's case it appears to the court that the claim is illegal, and that it would be contrary to public policy to entertain it, the court may and ought to refuse to do so. But this must only be when either the agreement relied on is on the face of it illegal, or where, if facts relating to such an agreement are relied on, the plaintiff's case has been completely presented. If the point has not been raised on the pleadings so as to warn the plaintiff to produce evidence which he may be able to bring forward rebutting all presumption of illegality which might be based on some isolated fact, then the court ought not to take a course which may easily lead to a miscarriage of justice. On the other hand, if the action really rests on a contract which all the face of it ought not to be enforced, then, as I have already said, the court ought to dismiss the claim, irrespective of whether the pleading of the defendant raise the question of illegality"*

25

I agree with this statement of the law. So, the true position is that if the contract is not ex-facie illegal but, as in this case, depends on the surrounding circumstances all the facts sufficient to sustain the plea must be pleaded. See also Rawlings v. General Trading Co. (1921) 1 K.B. 635. In the instant case, it was pleaded in paragraphs 4, 6, 7, 8, 9 and 10 of the amended statement of defence that the defendant purchased the land in dispute from Medusope family represented by the head of the family. D.W.5 who succeeded late Moses Ogunlase, supported by representatives of each of the six branches of the family. But in paragraphs 6, 7 and 8 of the reply to the amended statement of defence the plaintiffs pleaded that the head of the family at the time material to the agreement was their own father, Chief Taiwo Otuewu, that some of the signatories to exhibit C, were not the proper representatives of the constituent branches of the family and that exhibit C was a forgery because some of the purported signatories did not in fact sign the agreement. Now,

there can be no doubt that if the plaintiffs were able to uphold the above averments in the reply, it would have meant that the person who signed as the head of the family was not the head of the family infact.

5 If Exhibit C were an instrument of grant, if not so would have rendered the document void: see Ekpendu v. Erika (1959) SCNLR 186, but the learned trial Judge did not find that Chief Taiwo Otuewu was the head of Medusope family. So, this point falls to the ground. Above all, all the above allegation on the pleadings go to attack the validity or regularity of the document Exhibit "C" 10 which, as I have stated was a mere evidence of the transaction and not an instrument of grant. On the rules of pleading which I referred to above the plaintiffs ought to have gone further to plead and show that the sale transaction itself was void: but they did not do so by merely attacking Exhibit C.

15 But Chief Ajayi before us has not sought to rely on the validity to Exhibit C, as an instrument transferring title. He in fact told us that he was relying on Exhibit C merely as a receipt. This has not been contested. The decisive question is whether, if we treat Exhibit C merely as a receipt, the 20 defendant was entitled to judgment.

The appellant's third issue is whether the invalidity of the sale of the land in dispute to the defendant was raised. Learned Senior Advocate on her behalf pointed out that the pleading in paragraph 22 of the amended statement of claim, to wit: 25

*"Chief Taiwo Otuewu family did not sell or lease any portion of the land in dispute to the defendant."*

30 does not amount to a denial of a sale by Medusope family, the owners of the land. He therefore contended that the Court of Appeal was in error to have held that any issue was raised as to the sale by Medusope family which the appellant pleaded and is relying upon. Chief Adefala's reply was that the pleading in paragraph II of the amended statement of claim was sufficient to raise an issue on the Medusope sale.

35 Now in paragraph II of the amended statement of claim, the respondent pleaded as follows:

(ii) The plaintiffs father Chief Taiwo Otuewu and the plaintiffs then warned the persons and told them that the land is part of Medusope family

land in their occupation and control and possession and has not been sold to anybody.

In view of the detailed pleading of the sale transaction between the defendant and her Medusope family vendors as contained in paragraph 4 -11 of the amended statement of defence which averred a sale by the head of the family and principal representatives of the constituent branches of Medusope family, payment of purchase money and her being later let into possession, in exercise of which right she prepared a survey plan of the land and planted property beacons I consider the above pleading in paragraph 22 of the amended statement of claim completely evasive and insufficient to raise an issue on Medusope sale. I have by myself sought in vain for any other pleading of the plaintiffs which joined issues with the defendant on her averment that the admitted owners, the Medusope family, sold the land in dispute to her and let her into possession, but could find none.

In saying so, I am not unaware that the plaintiffs filed a reply and, as usual, in the first paragraph made a general denial of

*"each and every allegation of fact contained in the defendant's Amended Statement of Defence and counter-claim as if the same were set out and each specifically traversed."*

But I must ask myself: what is the value of such a general denial of important and material allegations of fact? The answer is, of course, nil. In saying so, I shall reiterate what this court had to say, per Idigbe, J.S.C., about such general denial, in the case of Messrs Lewis & Peat (N.R.I.) Ltd. v Akhimien (1976) 7 S.C. 157 at page 163-4 where he stated:

*"We must observe, however, that in order to raise an issue of fact in these circumstances there must be a proper traverse: and a traverse must be made either by a denial or non-admission either expressly or by necessary implication. So that if a defendant refuses to admit a particular allegation in the statement of claim. He must state so specifically: and he does not do this satisfactorily by pleading thus: 'defendant is not in a position to admit or deny (the particular allegation on the statement of claim) and will at the trial put plaintiff to proof.'*

As was held in Harris v. Gamble (1878) 7 Ch. D. 877 a plea that 'defendant puts plaintiff to proof amounts to insufficient denial: equally a plea that the defendant does not admit correctness' (of a particular allegation in the

statement of claim) is also an insufficient denial- see *Rutter v. Tregent* (1879) 12 Ch. D.758. We are, of course, not unmindful of the first paragraph of the statement of defence. Nowadays almost every statement of defence contains such general denial. (See *Warner v. Sampson* (1959) 1 Q.B. 287 at 310-311. However, in respect of essential and material allegations such a general denial  
5 ought not be adopted; essential allegations should be specifically traversed. (See *Wallersteins v. Moir* (1974) 1 W.L.R. 991 at 1002 per Lord Denning M.R.: also *Bullen & Leake & Jacobs, Precedents of Pleadings* 12th Edition 83).

In view of this state of the law, I must hold that no issue was raised on the defendant's leading that the land in dispute was sold to her by the  
10 Medusope family, the admitted owners. For, clearly, a denial of a sale by Chief Taiwo Otuewu family a sub-branch of one of the six constituent branches of Medusope family cannot amount to a denial of a sale by Medusope family.

15 It is trite that where a family owns a piece or parcel of land communally, the title of ownership remains with the family until and unless there is a partition. Such a partition, when proved, will result in a division of ownership. Where, as in this case, no partition is proved, it is unavailing for any of the constituent units to hoist its case an ownership unless it is suing on behalf of  
20 the entire undivided family, which is not the case here.

The next issue is whether the finding by the Court of Appeal that exhibit C was tainted with fraud and gross irregularity affects the defendant's  
25 case adversely. Learned Senior Advocate for the appellant conceded that in view of section 16 of the Land Instruments Registration Law, the document, exhibit C cannot be pleaded or given in evidence as it was not registered. He, however, pointed out that having been signed by the representatives of the majority of the six branches of the family and some others from the remaining  
30 two, it shows an endeavour by the family to provide a written evidence of their transaction with the defendant. Fraud, He submitted, would be too strong a word for the allegations in paragraph 9 of the Reply. He, therefore, submitted that the finding that Exhibit C "was tainted with fraud and gross irregularity" would have no effect on the rights acquired by the defendant as a purchaser  
35 for value who had been let into possession.

Surprisingly learned counsel for the respondents who decided to lump all their argument on all the issues together made no submissions on this issue. He may do well to remember that his omission to reply to the submissions by learned Senior Advocate for the appellant on the issue may well be deemed to imply that the respondents concede the point. For, it is expressly provided in Order 5 rule 5 of the Supreme Court Rules 1985, as amended, that: 5

*"(5) Save with leave of the court no oral argument will be heard in support of any argument not raised in the brief or on behalf of any party for whom no brief has been filed."*

As it is so, and no leave was sought and no oral argument was advanced by the respondents on the point. I may well assume that they had 10 no answer on the point.

Be that as it may. I wish to express my opinion on the point, albeit briefly. All I wish to say of Exhibit C is that it is evidence of the fact that the appellant paid some money for the land to some people who put themselves forward as representatives of the constituent units of Medusope family signed Exhibit "C" as evidence of that. Even if I hold as learned Senior Advocate for the appellant has conceded that it would not be pleaded or given in evidence as proof of title because of want of registration: or even if I agree that it was tainted with fraud and irregularity. I would still agree that that would have no effect on the rights acquired by the appellant as a purchaser for value who had been let into possession. This is because it is a recognised principle of law that a contract will rarely be totally illegal or void: certain parts may be entirely lawful in themselves, while others are valid. Where the illegal or void parts can be "severed" from the rest of the contract on the well-known principles of severance such will be done and the rest of the contract enforced without the void part. It is permissible for courts to adopt this course where the objectionable part of the contract involves merely a void step or promise and is not fundamental, and it is possible to simply strike down the offending part without re-writing or remaking the contract for the parties and without altering the scope and intention of the agreement; and lastly, the contract, shorn of the offending parts, retains the characteristics of a valid contract. See on these Vol. 9 Hals. Laws of England (4th Edn.) p.297 in paragraph 430. See also Commercial Plastics Ltd. v. Vincent (1964) 3 All E.R. 546, C.A. In the instant of purchase money by the defendant/appellant and her being let into possession by persons who put themselves forward as the representatives of the constituent units of Medusope family. There is no evidence on record to show that she knew that two of them were not in fact the true representatives 25 30 35

of their branches of the family and therefore no basis for holding that if there was fraud thereby, she was in fact in pari delicto with her ostensible vendors, moreso as the vital element to knowledge and intention in such cases was not made an issue on the pleadings. At common law equitable title to property has usually passed in such circumstances: see *Belvoir Finance Co. Ltd. v. Stapleton* 5 (1970) 3 All E.R. 664, C.A. In our own law, the remnant of the transaction after striking down Exhibit C, i.e. payment of purchase money and delivery of possession are the usual requirements of a valid sale of land according to customary law. They confer good title: See *Griffin v. Talabi* (1948) 12 WACA 371; *Ogunbambi v. Abowaba* (1951) 13 WACA 222. This title remains undiminished and unaffected by the findings on Exhibit C. So, learned Senior Advocate for 10 the appellant was right in his submissions.

15 Although the 5th issue and the main question which it raised were raised by Chief Ajayi in the alternative, I find it necessary to give my full consideration to it in this appeal. This is because such a deep miasma of cloud has been thrown into the true merits of this case by the issue of headship of "Medusope family. The indisputed original owners of the land in dispute. Stated simply, 20 the reasoning of the learned trial Judge was this: the then head of the family, Moses Ogunlase, died on the 19th of March, 1977. It is not true, as claimed by the plaintiffs, that Olaitan Otuewu was appointed the head of the Medusope family as his successor He also rejected the claim of the defendant that Pa Amos Ogunyoye (D.W.5) became the head of the family in succession to Pa 25 Moses Ogunlase. From these premises, he concluded that it had not been proved who the head of the family was at the material time of the transaction. From this he inferred that as the consent or the head of the family to the transaction had not been shown to have been obtained, the transaction as well as Exh. C which evidences it is void. He relied on the case of *Ekipendu v. Erika* (1959) SCNLR 186; 4 F.S.C. 79. 30

From the above state of the facts, Chief Ajayi submitted that it was 35 erroneous to have applied the principle when there was no one who could be said to be the head of the family. In such a case, he submitted, it would be

sufficient that some important members of the family conducted the sale for themselves and on behalf of the other members of the family.

Chief Adefala, for the plaintiffs/respondents, submitted that the fact remained that the consent of the head of the family had not been obtained. On the authority of decided cases, lack of his consent rendered the transaction void. He cited the cases of *Sogunle & Ors. v. Akerele & Ors.* (1967) N.M.L.R. 58, 60; *Adebambo v. Olowosago* (1985) 3 N.W.L.R. (Pt.11) 207, p.208; *Atunrase v. Sunmola* (1985) 1 N.W.L.R. (Pt. 1) 105, and so many other cases. He therefore submitted that as the consent of the head of the family is a *sine qua non* to the validity of a sale of family land, in the absence of such consent in this case, the sale was void. This was the position taken by the lower courts.

This issue calls for a careful examination of the so-called principle in *Ekpendu's* case (*supra*). It is necessary to bear in mind (that the principle derives from the fact (that in our traditional concept of communal ownership of land, Land belongs to every member of the community - past, present and yet- to-be-born. The land is under the management of the head of the family or community who is in the position of a trustee: see *Amodu Tijani v. Secretary, Southern Nigeria* (121) A.C. 399. p. 404. He is however, required to consult other principal members of the family or community before making important alienations of the family or community property, it is from these positions of the head of the family vis-a-vis the other members thereof (that the principle in *Ekpendu v. Erika* (*supra*) was adumbrated, to wit: that any sale or lease of family land without the consent of the head of the family is void, whereas such a transaction without the concurrence of the principal members is voidable.

The problem raised by the peculiar fact of this case is, however, this: what is the position where no family head existed at the time. It is true that under English Law, equity does not lack a trustee: where there is none equity will constitute one. As the head of the family under Nigerian law is a trustee of a type will equity allow a vacancy in his position in such a way as to defeat the right of a third party? I think not. For to do so could have disastrous consequences both to family interest and those of third parties. Now traditionally, under Yoruba customary law where no head of the family was nominated by a deceased father of the family (see *Sogbesan v. Adebisi* 16 N.L.R. 26) or appointed by the members of the family, the eldest surviving male (*Dawodu*) is the head of the family: see *Lewis v. Bankole* (1908) 1 N.L.R. 82, although it was

recognised that a woman could also be the head of the family (Taiwo v. Sarumi (1913) 2 N.L.R.106). But the members of a family have the right to appoint one of them, not necessarily the oldest male or female, to be the family head particularly where they are dissatisfied with the eldest child: this was in fact upheld in the case of Ewa Ekeng Inyang v. Efana Ekeng Ita & Ors. (1929) 9  
5 N.L.R. 84. As observed by Olawoye in his: "Title To Land in Nigeria" (1974) at p.30 this method is adopted particularly in chieftaincy families in Lagos and Western States. But it appears to me to be a correct view of the law - and this accords with common sense - that where the members of a family fail to exercise their discretion to appoint the head of their family, the eldest male member  
10 (or female if she is influential) can step in to act as the head of the family. It is from this background that I should now consider the evidence of D.W.5, Pa Amos Ogunyoye, where he stated

15 *"The plaintiffs and defendants are members of my family: the name is Medusope family. I am the present head of the family. My immediate predecessor as family head was Moses Ogunlase who died in 1977. I was asked by the family to act as head. I was finally installed as the head of the family last year. I know the land in dispute. The Medusope owned the land from time*  
20 *immemorial. The family made a grant of four plots of our land to the defendant in 1977. We gave her a written document. I am one of the signatories to the document. I see Exh. 'C': this is my signature on it as the 4th grantor. I see the 1st plaintiff. I know his father. He was never head of Medusope family,"*

25 This evidence that D.W.5. became acting head of the family when Pa Moses Ogunlase died was confirmed by the defendant who added that D.W.5 was older than Olaitan Oluwo. But the learned trial Judge decided to disbelieve that he became the acting head of Medusope family when Moses  
30 Ogunlase died on the ground that he had given contrary evidence in a proceeding in the Magistrates Court. Upon a careful reading of the relevant pieces of evidence in both cases, I am of the clear view that is not the case. Under cross-examination in this case he stated:-

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*"I agree I also said that as at the day i.e. at that moment there was no appointed head of my family. (Italics mine).*

*In this examination in Chief, he stated as I have set out above it is true that he used the words "asked to act as head of the family" and "finally installed as head of the family." In view of the choices of words "appointed head", "asked to act.. ..." and "finally installed", I do not see any conflict in the testimonies. As I understand it, a person acts in an office when he has not been appointed to the office. In this sense an acting Solicitor-General is not yet appointed the Solicitor-General but he performs the functions of the office. This was so when in the Magistrate Court D.W.5 stated that there was yet no appointed head of the family: he was stating a situation which was not inconsistent with the position of an acting head of the family. The evidence was, therefore, not in conflict. There was no proper ground for rejecting it. With respects, it is my view that if the learned trial Judge had approached the evidence of D.W.5 from this perspective having rejected the claims on behalf of Olaitan Otuewu for good reasons and having due regard to the need for continuity in the office of head of the family when asked to do so shortly after the death of Moses Ogunlase, the late head of the family, he would have found that D.W.5 was the acting head of Medusope family at this material time.*

But even if I agree with the courts below that there was no head of the family at all times material to the agreement. I would still have held that they were wrong to have held that the transaction was void on the principle in Ekpendu v. Erika (supra). It is noteworthy that in that case, the head of family was in fact Erika. Not only was he known and very much alive, but also it was he who challenged the transaction. Indeed, one common feature in all the cases cited in the judgment or relied upon in arguments is that in each case the head of the family was alive and known but the transaction nonetheless went ahead without his consent. In the instant case, if there was no head or the family, there was nobody whose consent could have been obtained and so no ground for declaring the transaction void. I therefore, agree with Chief Ajayi that were, as found by the learned trial Judge in this case, there was no head of the family, a sale of the family land by the principal members of the family acting for themselves and on behalf of the other members of the family is valid - at least until it is set aside. I would, therefore, for either of the above reasons

192 Adesanya v. Otuewu (1993) 1 KLR Nnaemeka-Agu JSC  
resolve this issue in favour of the appellant.

From my conclusions, on issues numbered (i), and (ii), (iv) and (v) above it is clear that the finding of trespass and order of injunction against the  
5 defendant cannot stand. The plaintiff, who had based their case on title in view of their trespass and injunction, having failed to prove it, cannot be granted those reliefs over Medusope family land against the defendant who claimed through Medusope and was supported by the family.

10 For the above reasons and other reasons contained in the judgment of my learned brother, Olatawura, J.S.C., the appeal is, therefore, allowed. The judgment of the courts below including the orders as to costs are set aside. In their place, I hereby dismiss the plaintiffs' case and grant the counter-claim,  
15 with costs against the plaintiffs assessed as follows:-  
N500.00 in the High Court;  
N300.00 in the Court of Appeal; and  
N1,000.00 in this court.

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### OGWUEGBUJSC

25 I have had a preview of the reasons for the judgment of my learned brother, Olatawura, J.S.C. I am in full agreement with them.

The plaintiffs/respondents in paragraphs 10 and 11 of their reply to the amended statement of defence and counter-claim averred as follows: -

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*"10. With reference to paragraphs 15, 20, 24 and 25 of the amended statement of defence and counter-claim, the plaintiffs say that although the whale area settled upon by all branches of Medusope family is still known collectively and called Medusope family land but specific branch families from time immemorial occupy definite specific areas exclusively as their own and have been in occupation possession and control of such specific areas carrying on farming and doing various and numerous maximum acts of possession and ownership thereon to the exclusion of others and without inter-*

"11.The plaintiffs' family say that they have from time immemorial settled and exclusively occupy (sic) the portion of land (including the land in dispute )as owners thereon and have since been in occupation, possession and control of the said portion of land (Italics mine for emphasis only). 5

The learned trial Judge made the following findings of fact among others:-

1. *The plaintiffs did not prove partition of the land of which the land in dispute forms a part of the plaintiffs' section of the Otuewu branch as claimed by them.* 10

2. *The land still belonged to Medusope family who could validly grant the land to the defendant.* 15

3. *The head of Medusope family did not concur to the sale to the defendant/appellant and that the sale was void.*

4.*The defendant was not a member of Medusope family and since Medusope family had been in physical possession, the defendant/appellant was liable in trespass.* 20

5. *D.W.5 - Amos Ogunyoye was not head of Medusope family at the time of the sale.* 25

The Court of Appeal ought not to have dismissed the appeal of the appellant.

Having pleaded as they did in paragraphs 10 and 11 of their reply to the amended statement of defence and defence to the counter-claim, led evidence on, those lines and failed to establish their averment that the land in dispute is owned exclusively by Chief Taiwo Otuewu section of Otuewu Branch of Medusope family. The courts below should have dismissed their claim, See *Ehimare & Ors v. Emhonyon* (1985) 1 NWLR (Pt.2) 177; (1985) 1 N.S.C.C. Vol. 16 163 and *Metalimpex v. A.G. Leventis (Nig) Ltd* (1976) 2 SC 91. 30

Parties are bound by their pleadings and must stand or fall on those pleadings. They are not allowed to depart from the case they have put forward in their pleadings. For that reason, the courts below ought not to have found for the plaintiffs/respondents.

5 The counter-claim of the appellant should have succeeded. D.W.5 and other members of Medusope family who were parties to the sale to the appellant testified that they sold the land to her and put her into possession. This evidence was not controverted by the respondents.

10 Coming to the non-execution of Exhibit "C" by the persons whose names appear on it as representing the six branches of Medusope family, it is clear from the pleadings that the appellant did not rely entirely on it. Her grant under the customary law is valid. She paid money, gave customary gifts and  
15 was put into possession by Medusope family. On the basis of this alone the counter-claim should have succeeded.

Exhibit "C" was admissible in evidence as an acknowledgment of the purchase price. See *The Registered Trustees of Apostolic Faith Mission v. James* (1987) 3 NWLR (Pt.61) 556 and *Obijuru v. Ozims* (1985) 2 NWLR (Pt.6) 167. This court in these cases held that where a purchaser of land or a lessee is in possession and has paid the purchase price to the vendor or has paid the rent to the lessor as the case may be, then in either case the purchaser or the lessee has acquired an equitable interest in the land which is as good as a legal  
25 estate. See also *Ogunbambi v. Abowaba* 13 WACA 222. The appellant in this appeal is even in stronger position than the appellants in the above two cases.

For the above reasons and the more detailed reasons contained in the lead judgment of my learned brother, Olatawura, J.S.C. I too allowed the  
30 appeal and set aside the judgment of the Court of Appeal dated 3rd June, 1987. I also abide by the consequential orders made by my brother, Olatawura, J.S.C. in the lead judgment including that as to costs. Appeal allowed.