

SUPREME COURT OF NIGERIA
12TH FEBRUARY, 1993. 30/1989
CORAM:- S. KAWU, A. B. WALI, I.L. KUTIGI
E. O. OGWUEGBU, S. U. MOHAMMED, JJSC.

CHIEF ASQUO OKO & OTHERSAPPELLANTS

AND

CHIEF JAMES NTUKIDEM& OTHERSRESPONDENTS

APPEALS *Appellate court's failure to comment on an issue raised before it - whether of any effect - when decision is not affected thereby*

APPEALS *-Trial court's failure to consider some aspects of evidence - whether order for retrial or dismissal shall be entered*

EVIDENCE *-Land matter - improper reliance on exhibit - on relationship between exhibit and the land in dispute - when surveyor's evidence will be necessary*

EVIDENCE *-Judicial notice - list of items under s. 73 of the Evidence Act - whether exhaustive - custom -when judicial notice thereof can be taken*

EVIDENCE *-Documentary evidence - where document has no probative value - implications of reliance thereon.*

EVIDENCE *-Duty of the Plaintiff to prove his case - and not to rely on weakness of the defence*

COURTS *-Powers of the Court of Appeal - to evaluate evidence given at the trial court - to dismiss a case - when properly exercised*

LANDLAW *-Claim for title to land - reliance on a document with no probative value - failure to prove the claim - proper order to be made.*

FACTS

The Plaintiffs in a representative capacity sued the Defendants as representatives of their village claiming declaration of title to two pieces of land, damages for trespass and perpetual injunction. After the hearing the trial Judge made some findings and granted all the reliefs sought by the Plaintiffs. The trial court found that it seemed plaintiffs' case had been evenly balanced by the Defendants' case with no side being stronger which should lead to Plaintiffs' being non-suited. But relying on Exhibit B, a very scanty 1955 Customary Court default judgment, it held that the balance was tilted in the Plaintiffs' favour.

Defendants appealed to the Court of Appeal, which found that the trial court made an ill use of Exhibit B, allowed the Defendants' appeal and dismissed the Plaintiffs' claim. The Plaintiffs being dissatisfied then appealed to the Supreme Court.

Appellants contended that the Court of Appeal should have remitted their case back to the High Court for a retrial instead of dismissing it. They also challenged the propriety of Court of Appeal's failure to consider trial Court's findings that rivers are traditionally used as natural boundaries between two people.

HELD (unanimously dismissing the appeal)

1. The trial Judge made improper use of Exhibit B, a default judgment that did not give the details and locations of the parcels of land claimed therein as was rightly found by the Court of Appeal.
(p. 125 L. 16)
2. Since there was nothing to relate Exhibit B, a very scanty document to the land in dispute, evidence of a surveyor is not only, essential but necessary towards establishing such a relationship.
(p. 125 L. 25)
3. Calling a surveyor to give evidence is not only necessary when a plea of *res judicata* is raised, but it is also essential in every case where

the parcel of land in the previous matter is undefined when it is required to prove acts of possession relating to the land in dispute. (p. 126 L. 6)

4. Although the learned Justice of the Court of Appeal did not comment on the issue that rivers are natural boundaries which the court can take judicial notice of as a notorious fact, it did not affect his decision. (p. 126 L. 13)

5. List of items provided under s. 73 of the Evidence Act which the court can take judicial notice of is not exhaustive. A solitary instance of the application of a custom to the facts of a particular case is not sufficient to make such a custom notorious. (p. 126 L. 18)

6. The trial Judge was in error to have held that Exhibit B was an act of possession by the Appellants when the said exhibit added nothing to the Appellants' case as it has no probative value. The Court of Appeal was therefore, right to have re-evaluated the evidence on the record before it towards arriving at a fair and just decision. (p. 126 L.30)

7. The Court of Appeal should not make an order for retrial in all cases where the trial court failed to consider some aspect of the evidence that was adduced before it. In the present case the trial Judge misconstrued the evidence presented before it as to the parties acts of possession in respect of the land in dispute. (p.128 L. 15)

8. By the provisions of the relevant law, the court of Appeal has the power to dismiss the Plaintiffs' case if on the evidence, that would have been the correct verdict the trial court ought to have entered. It also has the power to evaluate the evidence which the trial court failed to consider, and make correct findings. (p. 129 L. 35)

9. It is the duty of the Plaintiff to prove his case but not to rely on the weakness of the defence. Exhibit B having no probative value to the Appellants' case, the only logical conclusion any tribunal could reach

on the remaining (evidence is that Appellants have failed to prove their case and then have it dismissed it accordingly (p. 130 L. 7)

PER WALI JSC *“Before dealing with the arguments, let me once again state the procedural law where briefs have been filed and issues formulated. Issues are formulated on the grounds of appeal filed and once that is done, all arguments are presented on the issues and not on the grounds of appeal.”* (p. 121 L. 18)

REPRESENTATION:

A. Ekong Bassey, for the Appellants.

Seyi Sowemimo, for the Respondents.

CASES REFERRED TO

1. Ababio v. Priest-in-charge Catholic Mission 11 WACA 380
2. Momodu v. Momoh (1991) 1 NWLR (pt 169) 608
3. Ojibah v. Ojibah (1991) 5 NWLR (pt 191) 608
4. Aja v. Okoro (1991) 7 NWLR (pt 203) 260
5. A.R. Mogaji v. Rabiatu Odojin (1978) 4 S.C. 91
6. O. Akpauna & ors v. Obi Nzeka II & ors (1983) 7 S.C. 1
7. Kojo v. Bonsie (1957) 1 WLR 1723
8. Yoye v. Olubode (1974) 10 S.C. 209
9. Ezeadu v. Obiagwu (1986) 2 NWLR (pt 2) 208
10. Oyelowo v. Oyelowo (1987) 2 NWLR (pt 56) 239
11. Omorogie v. Idughiemwage (1985) 2 NWLR (pt 5) 41
12. Giwa v. Erinmilkun (1961) 1 All NLR 294
13. Fashanu v. Adekoya (1974) 6 S.C. 83
14. Okonji v. The State (1987) 3 S.C. 175
15. Ajide v. Asaulu (1980) 5 - 7 S.C. 78
16. Wulochem v. Gudi (1981) 1 S.C. 326
17. Frank Abba v. Ogodo (1984) S.C. 37
18. Governor v. Afolabi (1974) 10. S.C. 277
19. Dumije v. Stephen Iduozo (1978) 2 S.C. 1
20. Dumgboe v. Idugboe (1983) 1 SCNLR 29
21. Southerland v. Slopes (1925) A.C. 47
22. Mora & ors v. Nwalusi & ors (1962) 1 All NLR 681
23. Oronsaye v. Jibowu 13 WACA 41

24. Ogbewe v. I.G.P. (1958) WRNLR 17
25. Ayoola v. Adebajo (1969) All NLR 159
26. Egwuh v. Ogunkehin SC 259/60 28/2/69 (unreported)
27. Enekebe v. Enekebe (1964) 1 All N.L.R. 102
28. Hamidi Ojo v. Primate Adejobi & ors (1978) 3 S.C. 65
- 5 29. Shell B.P. Petroleum Development Co. of Nig. V. Pere Cole & Ors (1978)3S.C. 138
30. Kodilinye v. Odu. 2 WACA 336

10 **STATUTES & RULES**

1. Evidence Act s. 73
2. Court of Appeal Act. 1976 s. 16
3. High Court Rules of Cross - River State Order 33. Rule 10
- 15 4. Court of Appeal Rules - Order 26

BOOK

Law & Practice Relating to Evidence in Nigeria - By AGUDA.

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LEAD JUDGMENT BY WALI JSC

25 The plaintiffs sued (for themselves and on behalf of Ikot Udo Village), the defendants as representatives of Ikot Ayan Village] for-

- 30 *(a) a declaration of title to all the two pieces of land known as and called "Ndia Udot Ikot Udo" and "Ndon Ubok Ikot Udo", lying and situate in Ikot Udo within the Uyo Judicial Division of Cross River*
- (b) N1000.00 damages for trespass; and*
- (c) Perpetual injunction against the defendants, their servants, privies and agents from further entry into the aforesaid pieces or parcels of land or in any way interfering with the plaintiffs' rights and possession of the said land.*
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After pleadings were settled, the case proceeded to trial with each side adducing evidence in support of their averments at the end of which the learned trial Judge, Akpabio J. (as he then was) made

the following findings:-

"I find from the survey plans tendered by both sides that the land in dispute is just one vast area of undeveloped farmland sandwiched between the villages of the plaintiffs and defendants and with no building whatsoever on it. Both sides claim to have their juju shrines on it. That being the case, the crux⁵ of the matter would boil down to one question, namely-who was the first to farm on the land? Both sides claim that their ancestors deforested the land. It looks therefore as if the case for the plaintiffs has been evenly balanced by the case for¹⁰ the defendants, with no side stronger than the other, in which case the plaintiffs should be non-suited. There is however one piece of evidence which in my view has had the effect of conclusively tilting the balance in favour of the plaintiffs, and that is the record of proceedings tendered by the plaintiffs as¹⁵ Exh. B. Exh. B is a one page record of proceedings showing quite briefly that as far back as 1955 one Asuquo Udo Eno of Ikot Udo (i.e. the plaintiffs' village) (sic) to court claiming 350 pounds damages for trespass to his 20 parcels of Ndo²⁰ Ubot land. In other words, the 20 parcels of land in Exh. B was part of the land claimed by the plaintiffs in this case..... That being the case, it would mean that as far back as 1955 when the judgment in Exh. B was given, a member of the plaintiffs' village had continued to be legally in possession at²⁵ least of 20 parcels of land in the area now being claimed by the plaintiff. It is a fact the parties in Exh. B did not sue nor were they sued as representatives of their respective villages. But the fact remains that the plaintiff in this case was from³⁰ the plaintiffs' village, while the defendant was from the village of the present defendants and the land in question was also part of the Ndon Ubok land now being claimed. While this cannot operate as an estoppel per res judicata against the defendants, I nevertheless uphold the submission of³⁵ learned plaintiffs' counsel, on the authority of Ababio v. Priest in Charge Catholic Mission, 11 WACA 380, that it can certainly operate as evidence of possession." Once I believe this, I am bound to believe also that the plaintiffs were also in

possession of the land on the opposite side of the road known as Ndia Udot. The important point is that traditionally rivers are always used as natural boundaries between the two people. But it is not so in the defendants' plan.

5 *In effect therefore, I believe that the features shown on the plaintiffs' plan approximate more to the truth than those shown on defendants' plan, in view of the decision in Exh. B. I also hold that plaintiffs were fully in possession of the two*
10 *pieces of land known as Ndon Ubok Ikot Udo and Ndia Ikot Udo at the time of the alleged trespass."*

The learned trial Judge after making the findings (supra), granted all the reliefs claimed by the plaintiffs.

The defendants appealed to the Court of Appeal, Enugu
15 Division, against the decision. The Court of Appeal, after considering the arguments presented by both sides, concluded thus -

"This appeal quite rightly turns around the very narrow pivot of the ill use that the trial Judge made of Exh. 'B' and as it was on the basis of this fact more than anything else that he
20 *found the plaintiffs' case established, this appeal is bound to succeed as it has been shown that this Exh. 'B' cannot properly be the foundation for the plaintiffs' case. I have dealt with this question previously, and it, with other reasons I have*
25 *shown in this judgment, has led to my conclusion that this appeal succeeds and is allowed."*

The plaintiffs have now appealed to this Court. Henceforth the plaintiffs would be referred to as the appellants, while the defendants would likewise be referred to as the respondents.

30 With the Notice of Appeal, the appellants filed three grounds of appeal. Briefs were filed and exchanged. In the brief filed by the appellants, the following issues were raised for determination :-

"1. As the learned trial Judge had held that the case for both sides on traditional history was evenly balanced before he
35 *resorted to Exh. B (a customary court judgment between a person from the plaintiffs' village and a person from the defendants' village in relation to a part of the land in dispute) to hold that the balance tilted in favour of the plaintiffs, was the Court of Appeal right in holding that improper use had been*

made of Exh. B?

2. *Whether it was proper for the Court of Appeal to completely ignore the arguments addressed to it by the plaintiffs/appellants on the assumption (in favour of the plaintiffs) made by the learned trial Judge that rivers are traditionally used as natural boundaries between two people.* 5

3. *Having held that the learned trial Judge had made no findings on certain points of disagreement (and this was stated by the Court of Appeal to be noteworthy) was it legally proper for the Court of Appeal to dismiss the plaintiffs' case instead of remitting the case back to the trial court for retrial?"* 10

Learned counsel for the respondents did not formulate any issue in his brief but impliedly adopted those formulated by the appellants and also followed the pattern, in the presentation of his arguments, adopted by the appellants. 15

Before dealing with the arguments, let me once again State the procedural law where briefs have been filed and issues formulated. Issues are formulated on the grounds of appeal filed and once that is done, all arguments are presented on the issues and not on the grounds of appeal. It is misleading for the learned counsel for the appellants to say "Grounds 1 and 2 taken together" while in fact he was arguing issues 1 and 2 together which were based on the said grounds. See Momodu v. Momoh (1991) 1 NWLR (Pt.169) 608 Ojibah v. Ojibah (1991) 5 NWLR (Pt.191) 608 and Aja v. Okoro (1991) 7 NWLR (Pt.203) 260. On Issues 1 and 2, was the submission of learned counsel that the learned trial Judge, after his finding that "*the case for the plaintiffs has been evenly balanced by the case of the defendants*", it was proper for him to look for any other facts and circumstances in the case of either parties in order to tilt the balance in favour of one of them. It was in that process that he (the learned trial Judge) resorted to Exhibit B which was tendered and admitted without objection, and tilted the balance in favour of the appellants and that he was perfectly right to do so. In support of this 20 25 30 35

submission, he relied on the following decisions -A.R. Mogaji v. Rabiātu Odofin (1978) 4 SC 91; O. Akpapuna & Ors v. Obi Nzeka 11 & Ors. (1983) 2 SCNLR 1, (1983)7 S.C. 1 and Kojo v. Bonsie (1957) 1 WLR 1223. He therefore submitted that the Court of Appeal was wrong to opine that Exhibit B was inadmissible and to expunge it.

5 Learned counsel further submitted that the Court of Appeal was wrong in relying on the case of Yoye v. Olubode (1974) 10 SC 209 at 214-215 to upset the judgment of the trial court as the present case is not on all fours with Yoye's case. He contended that what was
10 claimed in Yoye's case was not the same or encompassed the area claimed in the previous case. It was for that reason that it became necessary to establish the identity between the land claimed in the previous case and the area claimed in the subsequent case (Yoye's
15 case); hence the evidence of the surveyor was stated to be essential to relate the plan in yoye's case to the descriptions of the land in dispute in the previous case. He said that what the appellants asserted and proved was that the same pieces of land within the land in dispute were litigated upon in trespass in 1954 and that Exh. B was
20 put in evidence to show some acts of possession. He submitted that in the given circumstance the evidence of a surveyor to relate the pieces of land in dispute in Exh. B to the land in dispute in the present case was not necessary. He cited and relied on Ezeadu v. Obiagwu
25 (1986) 2 NWLR (Pt.21) 208 and Omorogie v. Idugiemwage (1985) 2 NWLR (Pt.5) 41.

On the issue relating to the finding by the learned trial Judge that he was entitled to take judicial notice of the fact that a river is a
30 natural boundary between communities, learned counsel submitted that he was right to do so, as it was a notorious fact. In support, he cited the case of Oyelowo v. Oyelowo (1987) 2 NWLR (Pt.56) 239 CA.

35 In reply to the submissions above, it was the submission of learned counsel for the respondents that the learned trial Judge was in error in placing so much reliance on Exhibit B without calling the surveyor who prepared Exhibit A to relate that the pieces of land in

Exh. B fall within the land in dispute in Exh. A, He contended that Exh. B cannot be evidence of acts of possession since it was not shown that it falls within the land in dispute - Exhibit A. It was also the contention of learned counsel for the respondents that it is not only when a plea of res Judicata is raised that it becomes necessary for a surveyor to be called to relate the land in a previous litigation to the land in dispute. He also cited and relied on Yoye v. Olubode (supra). 5

On the issue of taking judicial notice by the learned trial Judge of rivers as natural boundaries between communities, he submitted that as none of the witnesses gave evidence that rivers are always used as natural boundaries, the learned trial Judge was wrong to have held so. He therefore urged this court to dismiss the appeal. 10

In this appeal both the appellants and the respondent are claiming a declaration to parcels of land to which they ascribed different names, relying on traditional evidence in proof of that. At the end of the trial, the learned trial Judge, Akpabio J, (as he then was) made a finding on such evidence that *"the case for the plaintiffs has been evenly balanced by the case of the defendants, with no side being stronger than the other in which case the plaintiffs should be non-suited"*. After making this finding he however proceeded to consider Exh. B, resulting in tilting the balance in favour of the plaintiffs/ appellants and entered judgment for them on their claims. 15 20 25

The crucial contention between the parties is the reliance put on Exh. B to tilt the balance in the appellants' favour. Exhibit B is a short judgment and I consider it pertinent to reproduce it here- 30

"CIVIL J.B 1/55 p.97

Case No. 42/54-55 Asuquo Udoh Eno of Ikot Udoh

V

Mbre Obong Akpan Onyung of Ikot Ayan.

Particulars of Claim - 97 350 pounds damages for trespass on plaintiffs 20 parcels of Ndoh Ubok land. Clearing same and planting crops on which land is situated at Ikot Udoh, encroached on by the 35

defendant as known to the plaintiff on 21/2/55. Case called, defendant absent, Vide attached memo, service was duly effected on defendant on 15/5/55.

Findings: Judgment in default.

5 Judgment for plaintiff or 50 in 7 days plus 16/6d costs in 3 days.

 Sgd: Eyo Akpan (President)
 Akpan Udo (Member)
 Etim Ibanga
10 Patrick Nsibang”

On this issue, the Court of Appeal, in its unanimous judgment found as follows -

15 *“In this appeal it was never established by evidence what is the connection or relationship between the 20 parcels of land in Exhibit ‘B’ and the two parcels of land in dispute which the plaintiffs/respondent showed in the Exhibit ‘A’ as the land in dispute. There is no doubt that the Exhibit ‘B’ speaks of 20*
20 *parcels of Ndon Ubok land’ and that the claim in the present case speaks of ‘two pieces or parcels of land known and called ‘Nya Udot Ikot Udo’ and ‘Ndon Ubok Ikot Udo’ all the two*
 pieces or parcels of land lying and situate at Ikot Udo, along Nkot Ayan - Ikot Udo Road, Uyo.’ But mention of these names
25 *ends all the similarity perhaps, and this is not enough for identifying these lands and treating them as being the same as the trial Judge seems to have done. There is emphatic need for establishing by clear evidence that the 20 parcels of*
30 *land of Exhibit ‘B’ lie within ‘Ndo Ubok Ikot Udo’ of the present case, but this proof was not offered.’*

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35 *“Nobody established that the land in the Exhibit ‘B’ is the same or part of the land in dispute in this present case. Besides the parties are not the same; for even if the plaintiff in Exhibit B is from the village of the respondents, his proprietary rights and interests do*

not coincide with those of the respondents in this case.”

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*“The trial Judge made improper use of Exhibit ‘B’ and de
 nied himself the opportunity of properly evaluating the evi 5
 dence before him. Here was not a case of defendants ‘con
 ceding’ that plaintiffs built on the land, but rather the strong
 claim by defendants that they evicted the plaintiffs from de
 fendants’ land and effectively stopped their attempts to build 10
 on the land. These are acts of possession in favour of the
 defendants which the trial Judge had failed to evaluate and
 appreciate. Or he drew wrong conclusion from established
 facts, and either situation would warrant this court interfering
 with his findings of facts and conclusions from such facts which 15
 were erroneous.”*

I cannot but agree more with these findings by the Court of
 Appeal. Exhibit B was not only a default judgment but also did not
 give the details and locations of the parcels of land claimed therein.
 The facts stated in it were so scanty to infer that the parties were 20
 litigating in representative capacities. This was in fact the finding by
 the trial Judge. No plan was tendered. Even if a surveyor was called,
 I cannot see how, with the scanty or no description of the parcels of
 the land in “Exh. B”, he could relate the same to the present case. 25

I have read the cases cited by the learned counsel for the
 appellants to show acts of possession by the appellants and have
 found them to be irrelevant, since there was nothing to relate Exhibit
 B to the land in dispute. To do this, as pointed out by learned counsel 30
 for the respondents, the evidence of a surveyor is not only essential
 but necessary. See *Salawu Yoye v. Olubode & Ors* (1974) 10 SC 209
 in which Ibekwe, J.S.C (as he then was), deciding a point not dissimi-
 lar to the one now in issue, said on pages 215 to 216 -

*“In the particular case which we are considering, we believe
 that the Surveyor was the most competent witness to relate*

the plan in the present case to the descriptions of the land in dispute in the previous case. As that was not done, we take the view that the vital issue as to whether the land in dispute
5 *in the two cases is identical, or not, still remains inconclusive.”*

I agree with the learned counsel for the respondents that it is not only when a plea of *res judicata* is raised that it becomes necessary to call a surveyor to give evidence in order to relate the parcel of land in dispute to another in a previous litigation, but it is also essential
10 in every case where the parcel of land in the previous matter is undefined when it is required to prove acts of possession relating to the land in dispute.

On the related issue that rivers are natural boundaries for which the court can take judicial notice of as a notorious fact, it is true
15 that the learned Justice of the Court of Appeal did not comment on it. But suffice to say that this does not affect the decision of the learned Justice.

Section 73 of the Evidence Act provides a list of items that a
20 court can take judicial notice of, but such a list is not exhaustive. It was neither shown by evidence nor judicial pronouncements over a period of time that rivers are natural boundaries between lands belonging to different communities. No authority was cited by the learned trial Judge to support his finding. The court may take judicial notice
25 of a custom of the people when such has been established on other occasions before the courts. A solitary instance of the application of the custom to the facts of a particular case is not sufficient to make such a custom notorious. *Giwa v. Erinmilokun* (1961) 1 SCNLR 377; (1961) All N.L.R 294. See *Aguda on Law & Practice Relating to*
30 *Evidence in Nigeria* pp. 140 - 144.

In my view the learned trial Judge was in error when he held that Exhibit B was an act of possession by the appellants, and therefore the Court of Appeal was right when it reappraised and reevaluated the evidence on the printed record before it in order to arrive at
35 a fair and just decision. See *Fashanu v. Adekoya* (1974) 6 SC. 83 particularly at 91.

On the admissibility of Exhibit B in evidence, I do not share the view expressed by the learned Justice of the Court of Appeal that it is inadmissible. Although it was admitted, it added nothing to the appellants' case as it has no probative value.

Learned counsel referred to Order 33 rule 10 of the High Court Rules of the then Cross-River State and submitted that the respondents "*did not specifically or sufficiently*" deny the appellants' averments in their pleadings as regards Exhibit B. I do not intend to go into this argument as it is not one of the issues raised in this appeal. Even if it is (which is not conceded), Exhibit B added nothing to the strength of the appellants' case for want of probative value.

The last issue (i.e. No.3) argued by the learned counsel for the appellants is on the appropriate order which he said the Court of Appeal ought to have made after its finding that-

"It is noteworthy that the trial Judge made no findings on these points as he did not consider them having relied only on Exhibit B".

He submitted that since the Court of Appeal had expressed opinion that the learned trial Judge had failed to make findings on some aspects of the evidence adduced, the proper order that court could have made was one for a retrial and not an outright dismissal of the appellants' case. He cited and relied on the following cases to support his submission - Ajide Arabe v. Asanlu (1980) 5 - 7 SC 78; Okonji v. The State (1987) 1 NWLR (pt.52) 659 (1987) 3 SC 175 at 203; Woluchem v. Gudi (1981) 1 SC 291 at 295; Frank Ebha v. Ogoto (1984) 1 SCNLR 372 (1984) 4 S.C.84; Governor v. Afolabi (1974) 10 SC 227; and Dumije v. Stephen Iduozo (1978) 2 SC 1 at 6 - 7 - 8.

In reply to the above submission, learned counsel contended that it is not in all cases where a trial court has failed to consider and make findings on some aspects of the evidence that was adduced before it that the Court of Appeal should make an order for a retrial, but only where such non-consideration resulted in miscarriage of justice. He submitted that in this appeal the evidence which the learned trial Judge had failed to consider or misconstrued is evidence which

would have resulted, if considered, in favour of the respondents and therefore the Court of Appeal was quite entitled as it did, to make findings of fact on matter not considered by the trial Judge where the evidence on record justifies such exercise. He relied on *Dumbo v. Idu*gboe (1983) 1 SCNLR 29; *Sutherland v. Stopes* (1925) AC 47; *Mora & Ors. v. Nwalusi & Ors.* (1962) 2 SCNLR 73 (1962) 1 All NLR 681;

He further submitted that the Court of Appeal did the right thing when it dismissed the appellants' case after evaluating the evidence not considered by the trial Judge. He relied on *Ayoola v. Adebayo* (1969) 1 All NLR 159; *Egwuh v. Ogunkehin* SC 529/66 of 28th February 1969 (unreported) and *Enekebe v. Enekebe* (1964) 1 All NLR 102. He urged this Court to dismiss the appeal.

As pointed out by the learned counsel for the respondents, it is not in all cases where the trial court omitted to consider some aspects of the evidence that was adduced before it, the Court of Appeal should make an order for a retrial. All the cases cited by the appellants involved non consideration of an important and material evidence which the Court of Appeal, having regard to the particulars of those cases was not in a position to consider and evaluate. As a result, an order for a retrial was made in respect of each of those cases. But in the present case, the learned trial Judge misconstrued the evidence adduced before him vis-a-vis the acts of possession by the parties in respect of the land in dispute. The Court of Appeal exercising the powers vested in it by Section 16 of the Court of Appeal Act, 1976 and Order 26 of the Court of Appeal Rules, 1981, reevaluated that piece of evidence where it said -

"I have already shown that no evidence connects the land in Exhibit B with the land in dispute in the present case, and the interest of the plaintiff in Exhibit B has no connection legally with the claims of the plaintiffs in the present case; so that acts of possession of the plaintiff in Exhibit 'B' cannot be credited to the respondents in this appeal. And it is to be noted, too, that it is only the appellants who pleaded that the land was deforested by their ancestors, for the plaintiffs pleaded

only as to their ancestors having been in possession from time immemorial. But the respondents also pleaded that in the long ago beyond human memory their ancestors had settled the plaintiffs' ancestors on the land called 'Ikot Udo' when the plaintiffs' ancestors were dislodged by the Efiks in a war.

It is noteworthy that the trial Judge made no findings on these points as he did not consider them having relied only on Exhibit 'B'. The defendants pleaded acts of ownership and possession. The defendants' case includes the claims that when plaintiffs had in the past tried to build a school and a church on the land in dispute which they called 'Nya Ndot Ikot Ayan' they repulsed the efforts and evicted the plaintiffs. There was evidence about these claims as given by D.W.1 and D.W.3. The learned Judge turned the situation around and used it against the appellants."

XX

"Thinking about the school and the church which the plaintiffs had sought to build. The learned trial Judge made no proper use of this evidence which would have weighed against the plaintiffs. Here was not a case of defendants 'conceding' that the plaintiffs built on the land" but rather the strong claim by defendants that they evicted the plaintiffs from defendants' land and effectively stopped their attempts to build on the land. These are acts of possession in favour of the defendants which the trial Judge had failed to evaluate and appreciate. Or he drew wrong conclusion from established facts, and 'either situation would warrant this court interfering with his findings of fact and conclusions from such facts which were erroneous."

Having myself read the evidence in this case, I can reach no other conclusion than to agree with the above findings by the Court of Appeal. An order of retrial would be of no help to the appellants since Exhibit B could not improve their case.

Under Section 16 of the Court of Appeal Act, 1976 and Order 26 of the Court of Appeal Rules, 1981, that court is vested with power to enter a verdict of dismissal of the plaintiffs' case if on the

evidence, that would have been the correct verdict the trial court ought to have entered. See *Hamid Ojo v. Primate Adejobi & Ors.* (1978) 3 SC 65. It is also within the power of the Court of Appeal to evaluate the evidence which the trial court had failed to consider, and make correct findings: See *Shell - BP Petroleum Development Co. of Nigeria Ltd v. Pere Cole & Ors* (1978) 3 SC 183. At any rate, the duty of the plaintiff is to prove his case, but not to rely on the weakness of the case of the defendants. See *Kodilinye v. Odu* (1935) 2 WACA 336 and since Exhibit B has no probative value to the appellants' case, the only logical conclusion any tribunal could reach on the remaining evidence is that the appellants have failed to prove their case and accordingly to dismiss it

In conclusion, there is no substance in the issues raised and urged in favour of the appellants. The appeal fails and it is accordingly dismissed with N1000.00 cost to the respondents.

The judgment of the Court of Appeal is hereby affirmed.

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KAWU JSC

I have read, in draft, the lead judgment of my learned brother, Wali JSC. I agree with his reasoning and also with his conclusion that the appeal lacks merit and should be dismissed. The learned trial Judge based his judgment essentially on Exh. "B" which was of little probative value. I think he was in error to have done so. He should have held that the plaintiff was unable to prove his case which should have been dismissed. The appeal fails and it is accordingly dismissed with N1000.00 costs awarded to the respondents.

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KUTIGI JSC

I have had the advantage of reading in draft the judgment read by my learned brother Wali JSC. I entirely agree with his reasoning and conclusions. The appeal which lacks merit is dismissed with costs of N1,000 against the appellants.

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OGWUEGBU JSC

I have had the advantage to reading in draft the judgment of my learned brother Wali, JSC. I entirely agree with his reasons and conclusion that the appeal should be dismissed.

I too dismiss the appeal and abide by the consequential orders made in the lead judgment. 5

MOHAMMED JSC also agreed with the lead judgment.

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