

SUPREME COURT OF NIGERIA
10TH DECEMBER, 1993 SC.36/1987.
CORAM:- M. L. UWAI, A. B. WALL, I. L.
KUTIGI, Y. O. ADIO, A. I. IGUH, JJSC.

1. OLADEJO ADEWUYIAJUWON APPELLANT
2. FABASI AMOO FAWOLE
3. YESUFU AKANMU AKANNI DEFENDANTS
4. LARINDE AMOO AJANI
5. ISHOLA FADELE

AND

FADELE AKANNI & 10 OTHERS
(For themselves and on behalf of the RESPONDENT
Ibolo Arikoto Family)

***APPEALS** - Error in law by Court of Appeal - No miscarriage of justice occasioned thereby - Whether judgment will be reversed*

***APPEALS** - Land dispute - Trial court's finding - Not supported by evidence - Whether Court of Appeal's reversal of the finding was justified*

***COURTS** - Doctrine of lis pendens - Not made an issue by the parties - Whether the court can raise it suo motu*

***EVIDENCE** - Failure to adduce evidence in support of a vital issue - Whether trial court's finding without evidence was erroneous*

***LAND LAW** - Sale of land made pendente lite - Whether the issue of lis pendens can be raised*

***PLEADINGS** - Averment in pleadings - Whether tantamount to evidence - Where averment is denied or disputed - Onus of proof by evidence*

***PRACTICE & PROCEDURE** - Admission by a set of defendants - Whether submission that the - Court used it against a non admitting party is correct*

FACTS

The Appellant bought the land in dispute situate at Ibadan from the 2nd - 5th Defendants who sold to him as the accredited representatives of the Arikotokowosi family during the pendency of a suit in respect of that land before the customary court. After the said Defendants, got judgment in their favour on behalf of the Ibala Arikoto family, they executed a conveyance for the Appellant. It is an established fact that the land belongs to the Ibala Arikoto family, save that the Appellant merely averred that the Defendants told him that Arikoto is an abbreviation of Arikotokowosi at time of the conveyance.

The Respondents filed an action against the Defendants for declaration, or in the alternative the setting aside of the deed of conveyance made between the Appellant and 2nd - 5th Defendants without the authority and consent of the Ibala Arikoto family. The trial court dismissed Respondents' claim. Their appeal to the Court of Appeal was successful. 1st Defendant/Appellant being dissatisfied has now appealed to the Supreme Court to determine inter alia, whether the Court of Appeal could suo motu raise the doctrine of *lis pendens* and whether the lower court could disturb the trial court's findings of fact.

HELD (unanimously dismissing the appeal)

1. That sale of the land in dispute was made to the Appellant by the 2nd - 5th Defendants *pendente lite* was a fact accepted by the Appellant in his evidence before the trial court. Therefore the said sale could be questioned as to whether or not it was caught by the doctrine of *lis pendens*. (P. 137 L 34).
2. In the light of the applicable principles of law, the Court of Appeal could not in law raise the doctrine of *lis pendens* suo motu (as it did), when no issue was joined by the parties either in their pleadings nor was it made an issue in their briefs of argument or in their oral submissions before that court (P. 139 L 20).
3. The erroneous application of the doctrine of *lis pendens* by the Court of Appeal suo motu did not occasion any miscarriage of justice. An Appellant, to secure the reversal of a judgment on basis of error of law committed by a lower court must further establish that the error of law complained of did in fact occasion a miscarriage of justice and/or substantially affected the result of the decision. (P.146 L17)
4. An averment in pleadings is not to evidence and must be established by

satisfactory evidence unless it is expressly admitted. As such, where a pleaded material fact is either denied or disputed by the other side, the onus of proof clearly rests on he who asserts such a fact to establish the same by evidence. (P.140L37)

5. The Appellant in the land from 2nd - 5th owners adduced no evidence upon which the trial court could find that the Appellant dealt with the 2nd - 5th Defendant as accredited representatives of the Ibala Arikoto family at the time he bought the land. (p. 141 L5)

6. The learned trial Judge was in error when he held that the 2nd - 5th Defendants were the accredited representatives of the Ibala Arikoto family when they sold their family land to the Appellant as this finding is not supported by any evidence before the trial court. (p. 142 L 22)

7. There is hardly any evidence before the trial court in support of its conclusion on the validity of Exhibit 3 (the Conveyance) and the Court of Appeal was fully justified to reverse the learned trial Judge's finding that the land in dispute was validly sold to the Appellant by the 2nd - 5th Defendants. (P. L03).

8. It cannot be correct, from a close study of the relevant passage that the admission of the 2nd-5th Defendants in their statement of defence was used against the Appellant by the Court of Appeal. (p. 145 L. 28)

REPRESENTATION:

E. O. Lalude Esq. with J. A. Morapeyo Esq. for the Appellant.
Chief O.A. Ogundeji for the Respondents.

CASES REFERRED TO

1. Alao v. Ashiru (1973) 11 S. C. 23 at 39 - 40
2. Atanda v. Lakanmi (1974) 3 S. C. 109,
- 3 Kuti v. Balogun (1978) 1 S. C. 53
- 4 Adegoke v. Adibi (1992) 5 NWLR (pt. 242) 410 at 420
- 5 Ejowhomu v. Edok-Eter Mandilas Ltd. (1986) 5 N. W. L. R. (pt. 39) 1
6. Kuti v. Jibowu (1972) 1 All N. L. R. (pt. 11) 180 at 192.
7. Saude v. Abdullahi (1989) 7 S. C. N. J. 216 at 229.

132	Ajuwon	v.	Akanni	(1994)	1	KLR
	8. Chief Ebba v. Chief Ogodo and Anor. (1984) 4 S. C.					
	9. Florence Olusanya v. Olufemi Olusanya (1983) 3 S.C. 41.					
	10. Akinfosile v. Ijose (1960) S.CJSLL.R. 447					
	11. Muraina Akanmu v. Adiogun (1993) 7 NWLR. (pt. 304) 218 at 231.					
	12. Obmiami Brick and Stone Ltd. v. A.C.B. Ltd. (1992) 3 NWLR (pt. 220) 260 at					
5	293					
	13. Anyah v. A.N.N Ltd. (1992) 6 NWLR (pt. 247) 319 at 331.					
	14. Balogun v. Agboola (1974) 10 S.C. 111					
	15. Ike v. Ugboaja (1993) 6 N.W.L.R (pt. 301) 539 at 555.					
	16. Kwansa Efi v. Enyinful 14 W.A.C.A 424					
10	17. Enang v. Adu (1981) 11-12 S.C. 25					
	18. Ibodo v. Enarofia (1980) 5 - 7 S.C. 42					
	19. Chinwendu v. Mbamali (1980) 3 - 4 S.C 31.					
	20. Njoku v. Erne (1973) 5 S.C. 293,					
	21. Ige v. Olunloyo (1984) 1 S.C.KL.R. 158					
15	22. Secretary Lagos Town Council v. Badaru Soule & Anor. (1939) 15 N.L.R 72					
	23. Agbloee v. Sapper 12 W.A.C.A. 187					
	24. Manke Bonso 3 W.A.C.A. 62					
	25. Ekpendu v. Erika (1959) 4 F.S.C. 79 at 81.					
	26. National Investment and Property Co. Ltd v. Thompson V. Organisation					
20	Ltd. (1989) 1 All N.L.R. 138 at 142					
	27. Oredoyin v. Arowolo (1989) 4 N.W.L.R. (part 7) 172					
	28. Chief Okparaekwe v. Obidike Egbuonu (1941) 7 W.A.C.A. 53 at 55.					
	29. Olabode vs. Salami (1985) 2 N.W.L.R. (Part 7) 282					
	30. Ukelianya v. Uchendu 13 W.A.C.A. 45 at 46.					
25	31. Chief Ole and Others v. Chief Babalola and others (1991) 4 N.W.L.R. (part					
	185) 267					
	32. Onajobi v. Otanipekun (1985) 4 S.C. (part 2) 156 at 163.					
	33. Gwanto v. State (1983) 1 SCNLR 142 at 152					
	34. Adeniji v. Adeniji (1972) 1 All N.L.R.					
30	35. Road Transport Employers Association of Nigeria v. National Union of					
	Road Transport Workers (1992) 2 NWLR. (Pt. 224) 381.					
	36. Eze v. Igiliege & Ors (1952) 14 W.A.C.A. 61					
	37. Adenle v. Oyegbade (1967) NMLR. 136 at p. 138.					
	38. Macaulay v. NAL Merchant Bank Ltd. (1990) 4 N.W.L.R. (pt. 44) 283					
35	39. Lemgbe v. Imale (1959) W.R.N.L.R. 325					
	40. Fatunde v. Onwaomanam (1990) 2 NWLR 2. (Pt. 132) 322.					

LEAD JUDGMENT BY IGUH JSC

By a writ of summons filed on the 19th August, 1977 in the Ibadan Judicial Division of the High Court of Justice, Oyo State, the plaintiffs, who are now respondents, for themselves and on behalf of the Ibala Arikoto Family, sued the first defendant now appellant, claiming as follows:-

(1) *Declaration of title in accordance with native law and custom to all that piece or parcel of land situate at Aponrin in Ibadan - Ajia Road, Ibadan, in Oyo State of Nigeria.*

(2) *Five thousand Naira being special and general damages for trespass committed by the first defendant, his servants or/and agents on the said land in 1976.*

(3) *Injunction to restrain the defendant, his servant, privies or land agents from entering or committing further trespass on the said land."*

There was a fourth claim by the said plaintiffs against the 1st, 2nd, 3rd, 4th and 5th defendants as follows:-

"(4) In the alternative to claim (1) above. The plaintiffs' claim against the defendants is for setting aside of the deed of conveyance made between the first defendant on the one hand and the 2nd, 3rd, 4th and 5th defendants on the 20th September, 1974 without the authority, consent, knowledge or accreditation of the plaintiffs of Ibala Arikoto family."

Pleading were ordered in the suit and were duly filed and exchanged.

At the trial, evidence was led in support of the plaintiffs' case and that of the first defendant. The 2nd - 5th defendants were absent throughout the hearing although they were duly represented by counsel who, on their behalf, cross-examined all the witnesses who testified before the court.

The case for the plaintiffs who prosecuted the action for themselves and on behalf of members of the Ibala Arikoto family was that they were the owners in possession of the land in dispute. The said land was situate at Ogbere, Aponrin on the Ibadan-Ajia Road, Ibadan. In suit No. CV/80/72 at the Grade "A" Customary Court Mapa, Ibadan, the Ibala Arikoto family members who were represented in that action by the 2nd - 5th defendants as plaintiffs claimed against one Lasupo Anisere, a declaration of title to a customary right of occupancy to the piece or parcel of land described and more particularly delineated on Survey Plan No. AD/97/73, damages for trespass and injunction and obtained judgment. The said Survey Plan No. AD/97/73 covered and included the land allegedly trespassed upon by the defendants in the present

action. The plaintiffs' case was that the 2nd - 5th defendants without the knowledge, consent, authorisation and/or approval of the Ibala Arikoto family unlawfully sold a piece or portion of their said land to the 1st defendant. Following the purported sale, the 1st defendant went into this land. It was as a result of this entry that the plaintiffs, for themselves and on behalf of members of the Ibala Arikoto family, instituted this action against the defendants.

The 1st defendant, for his own part, claimed that he bought the land in dispute shown in his plan No. EBS 973 from the 2nd - 5th defendants in June, 1972. The four defendants sold the land to him for N2,200.00. When he asked for a conveyance in respect of the land, the 2nd - 5th defendants informed him that the land was then the subject matter of litigation at the Grade "A" Customary Court, Ibadan. They advised him to wait until the determination of that action. The Arikoto family eventually obtained judgment against the said Lasupo Anisere, the defendant in the Customary Court suit, for title to the land in accordance with customary law on the 28th June, 1974. He stressed that the 2nd - 5th defendants represented the Ibala Arikoto family in that case. It was after the determination of suit No. CV/80/72 that the 2nd - 5th defendants executed a deed of conveyance in respect of the land in his favour. This was on the 20th September, 1974. The 2nd - 5th defendants conveyed the land to him as the accredited representatives of Arikotokowosi family. He paid no further consideration for this conveyance apart from the N2,200.00 he paid to the vendors when he first bought the land in 1972. He was told by his vendors that Arikoto was an abbreviation of Arikotokowosi and he believed them.

The 2nd - 5th defendants in their Statement of Defence admitted that members of the Ibala Arikoto family are the owners in possession of the land in dispute. They also admitted that they did not obtain the consent, authorisation or approval of the Ibala Arikoto family to sell their land to the 1st defendant. They admitted that the plaintiffs' family was known as and called Ibala Arikoto and not Arikotowosi family.

At the conclusion of hearing, the learned trial Judge in a reserved Judgment, found for the 1st defendant and dismissed the plaintiffs claims. Being dissatisfied with this judgment, the plaintiffs lodged an appeal to the Court of Appeal which in a unanimous decision allowed the same and set aside the judgment and orders of the Ibadan High Court delivered on the 17th January, 1980 in the suit. In line with the provisions of the Land Use Act, 1978, the Court of Appeal, Ibadan Division, granted to the plaintiffs a declaration that they were entitled to a customary right of occupancy in respect of the

land described and more particularly delineated in Plan No. AD/97/73 which included the land covered by the conveyance. Exhibit 3. On the claim for damages for trespass, the Court of Appeal was of the opinion that the purported sale was void and consequently awarded N500.00 general damages to the plaintiffs against the 1st defendant. An injunction was also granted restraining the 1st defendant, his servants, agents and privies from entering or committing any further acts of trespass on the land in dispute. This appeal is against the said judgment of the Court of Appeal. 5

Altogether seven grounds of appeal were filed by the 1st defendant who hereinafter will be referred to as the appellant. These grounds of appeal, without their particulars, are as follows- 10

1. The learned Justices of Appeal misdirected themselves in law and on facts when they held that in so far as the 1972 transaction is void, then the conveyance, Exhibit 3, made in furtherance thereof is void also and did not operate to transfer any title to the appellant. 15

2. The learned Justices misdirected themselves in law and on facts when they held; as they did, that Arikotowosi is not the same as Ibala Arikoto.

3. The learned Justices erred on facts and in law when they held that the sale by the 2nd - 5th defendants to the appellant could not be regarded as sale by the accredited representatives of Ibala Arikoto family. 20

4. The learned Justices of the Court of Appeal erred in law when they held in their judgment at page I49 lines 32 to 36 and page 150 lines 1 & 2 as follows:-

"Applying the doctrine of lis pendens to the facts of the case on hand, it is my view and I so hold that the present case falls within the doctrine and in the circumstances, the 1972 transaction is void and as the conveyance, Exhibit 3, was made in furtherance of the void transaction, it, too, is void and did not operate to transfer any title to the respondents" 25

in that the said doctrine was raised suo motu by the Court of Appeal without giving the parties an opportunity to be heard particularly as the issue was neither raised by the pleadings of the parties nor at the trial. 30

5. The learned Justices of the Court of Appeal erred in law by holding in their judgment at page 151 line 36 and page 152 lines 1 - 5 that it may be true that the Arikoto family held out the 2nd - 5th defendants as their accredited representatives as regards representing the family in the Customary Court action but not as regards the sale of the family land. 35

6. The learned Justices of the Court of Appeal misdirected them-

selves in law when they held in their judgment at page 150 lines 31 - 35 that in the absence of any finding that Ibala Arikoto and Arikotowosi are one and the same, it cannot be concluded that Exhibit 3 conveyed to the appellant title the land of Ibala Arikoto family.

7. The Court of Appeal erred in law by relying on the admission of paragraph 20 of the Statement of Claim by the 2nd - 5th defendants to the effect that the family of the plaintiff was known, called and styled as Ibala Arikoto family and not Arikotokowosi family, as admission against appellant who did not adopt the said averment in his own Statement of Defence.

Learned counsel for the parties filed and exchanged their respective written briefs of argument. Both Mr. E.O. Lahide for the appellant and Chief O.A. Ogundeji for the respondents, appeared to be in agreement on the issues for determination in this appeal. Each formulated four questions as calling for determination. I have carefully examined these questions set out by learned counsel in their briefs of argument. I am satisfied that the questions raised in the brief of argument of learned counsel for the appellant are more consistent with the issues raised in the grounds of appeal. I will therefore adopt the four issues as formulated in the appellant's brief. These are as follows -

"1. Whether the Court of Appeal could in law raise suo motu the doctrine of lis pendens on which no issue was joined by the parties either by their pleadings or evidence at the trial without calling on the parties to address on the issue.

2. Whether the learned Justices of the Court of Appeal could disturb the findings of fact made by the learned trial Judge that the 2nd to 5th defendants were the accredited representatives of Ibala Arikoto family when they executed the conveyance, Exhibit 3, when the conclusion of the trial court was supported by undisputed evidence.

3. Whether the Court of Appeal was right in holding that a specific finding of fact by the trial court on the issue of whether Arikoto and Arikotokowosi refer to one and the same family was necessary in deciding whether or not Exhibit 3, the conveyance, conveyed Arikoto family land in view of overwhelming evidence in support of the conclusion of the trial court.

4. Whether the Court of Appeal could in law use the admissions in the Statement of Defence of the 2nd to 5th defendants who filed a separate defence from that of the 1st defendant against the said 1st defendant when he did not adopt the admissions so used against him."

The first issue relates to grounds 1 and 4 of the appellants' grounds of appeal. The main argument of learned counsel for the appellant on this

issue is that the doctrine of *lis pendens* upon which the court below declared the 1972 sale and the conveyance, Exhibit 3, as null and void was raised *suo motu* by that court and that no opportunity was given to the appellant or the respondents to address the court on the issue. He argued that the said doctrine was neither raised by the parties in their pleadings nor was it mentioned in their briefs of argument. Learned counsel also stressed that the parties were not invited to address the Court of Appeal on the issue and that, under these circumstances, it was unfair on the appellant for the court to have based its decision on the issue. 5

In the alternative, learned counsel pointed out that the conveyance, Exhibit 3, was executed on the 20th September, 1974. This was after the determination of the Customary Court suit on the 28th June, 1974. He submitted that if the parties were given the opportunity to address the court below on the issue of *lis pendens* the appellant would have established that the transfer of title of the land by the 2nd - 5th defendants to the appellant per the conveyance, Exhibit 3, did not take place *pendente lite* but after the litigation had been concluded. Learned counsel, therefore, contended that the conveyance, Exhibit 3, was not caught by the doctrine of *lis pendens*. 10 15

It is indisputable that the doctrine of *lis pendens* affects a purchaser who buys property, the subject matter of litigation, during the pendency of such litigation, not because the purported purchaser is caught by the equitable doctrine of notice, but because the law does not allow parties to a suit, and give to them, pending the litigation, rights in the property in dispute, so as to prejudice the opposite party. But the doctrine of *lis pendens* only applies to a suit in which the object is to recover or assert title to a specific property which, however, must be real property as the doctrine has no application to personal property. Accordingly, where there is a sale of, or, conveyance in respect of a land in dispute by either side to a litigation, even though the alienation be for ever so good a consideration, yet if it was made ***pendente lite***, the purported purchase would be ineffective and must be set aside as void. See *Barclays Bank of Nigeria Ltd. v. Alhaji Adam Ashiru and others* (1978) 6 and 7 S.C.99 at 123 - 125 and 128 - 129 per Idigbe, J.S.C. See too *Bellamy v. Sabine* (1857) 26 L.J. (N.S.) *Equity Reports* 797 at 803 and *Wigram v. Buckley* (1894) 3 Ch.483 at 486, 492 - 493. 20 25 30

In the case under consideration, it is patently clear that the land in dispute was purportedly sold to the appellant by the 2nd - 5th defendants, as plaintiffs, in the Ibadan Customary Court Suit No. CV/80/72. This sale was made *pendente lite* in 1972 and this fact was accepted by the appellant in his evidence before the trial court when he testified as follows:- 35

*"The four defendants sold the land to me for N2,200.00
I bought the land in 1972. They told me a case was going on on the land I
asked for a conveyance but I was told to wait till the case was completed
In 1974, I was told that they had won the case. On 20th September, 1974,
they followed me to the court to execute a deed of conveyance in respect of
5 the land. This is the deed of conveyances - Exhibit 3"*

It is therefore clear that the said 1972 sale of the land in dispute
pendente lite to the appellant by the 2nd - 5th defendants could be questioned
as to whether or not it was caught by the doctrine of lis pendens. And as the
10 conveyance, Exhibit 3, was made pursuant to and in furtherance of the 1972
sale, it, too could be void and might not operate to transfer any title to the
appellant depending on whether or not the original 1972 transaction was caught
by the doctrine of lis pendens and therefore void.

15 Learned counsel for the appellant has however argued that the doc-
trine was neither raised by the parties in their pleadings nor was it made an
issue in their written briefs of argument or in their oral submissions before the
Court of Appeal. He submitted that it was wrong in law for the Court of Appeal
to have raised suo motu the doctrine of lis pendens without calling on the
20 parties to address it on the issue.

It seems to me that there is definite substance in this submission of
Mr. Lalude. It is crystal clear from the record of appeal that the said doctrine of
lis pendens was neither raised by the parties in their pleadings nor was it made
an issue in their written briefs or argument or even in their oral submissions
25 before the Court of Appeal. It emerged for the first time in the reserved judg-
ment of the Court of Appeal and was therein raised suo motu without an
opportunity having been given to learned counsel to address the court on the
issue. I must, with great respect, observe that this is an area the Court of
Appeal would appear to have slipped in its otherwise well considered judg-
30 ment.

In the first place, it cannot be over-emphasized, and this court has
repeatedly laid it down, that when a court raises a point suo motu, as the court
below did in the instant case, the parties must be given an opportunity to be
heard on such a point particularly the party that may suffer some disadvan-
35 tage or disability as a result of such a point raised suo motu. See *Ajao v.*
Ashiru (1973) 11 S.C.23 at 39 - 40; *Atanda v. Lakanmi* (1974) 3 S.C.109; *Kuti v.*
Balogun (1978) 1 S.C.53; *Adegoke v. Adibi* (1992) 5 NWLR (Pt.242) 410 at 420;
Ejowhomu v. Edok-Eter Mandilas Ltd. (1986) 5 NWLR (Pt.39) 1 and *Kuti v.*
Jibowu (1972) 1 All NLR (Pt. 11) 180 at 192. This approach will ensure not only

that the parties are given a fair hearing but that justice is seen to have been done in accordance with the principle of the audi alteram partem rule.

In the second place, the law is well settled that decisions of courts must only be founded on grounds raised by or for the parties or either of them and in respect of which it has received arguments from or on behalf of the litigants before them. In *Shitta Bey v. Federal Public Service Commission* (1981) 1 S.C.40, 5 Idigbe, J.S.C, succinctly put this proposition as follows -

"This court has on a number of occasions warned against decisions of court being founded on any ground in respect of which it has neither received argument from or on behalf of the litigants before them, nor even raised by or for the parties or neither of them."

See too *Saude v. Abdullahi* (1989) 7 S.C.N.J. 216 at 229 (1989) 4 NWLR (Pt. 86) 58. Similarly, in *Chief Ebba v. Chief Ogoto and Another* (1984) 4 S.C.84 at 112, (1984) 1 SCNLR 372, Eso, J.S.C. dealing with the same principle of law put the matter as follows -

"With utmost respect, it should be plain to the Court of Appeal that when an issue is not placed before it, it has no business whatsoever to deal with it. A Court of Appeal is not a knight errand looking for skirmishes all about the place."

See also *Florence Olusanya v. Olufemi Olusanya* (1983) 1 SCNLR 134 (1983) S.C.41 at 56 - 57 and *Kuti v. Jibowu* (1972) 1 All NLR (Pt. 11) 180 at 190.

In the light of the above, I am satisfied that the Court of Appeal could not in law raise suo motu the doctrine of lis pendens on which no issue was joined by the parties either in their pleadings nor was it made an issue in their briefs of argument or in their oral submissions before the court below. I must therefore resolve the first issue in favour of the appellant.

The matter does not however end there as there is the more important question of whether, or not, a miscarriage of justice was occasioned in this appeal as a result of this erroneous application of the law by the Court of Appeal. I will return to this question later on in this judgment.

The second issue relates to ground three and five of the ground of appeal. It calls for a determination of whether the Court of Appeal was right in setting aside the finding of the learned trial Judge to the effect that the appellant, at the time he bought the land in dispute dealt with the 2nd - 5th defendants as the accredited representatives of the Ibala Arikoto family.

In this regard, it must be pointed out that both the respondents and the appellant joined issue in their pleadings on whether or not the 2nd - 5th defendants sold the land in issue with the knowledge, consent and/or approval of the Ibala Arikoto family. The respondents averred in paragraphs 16, 19 & 20 of their Statement of Claim as follows:-

"16. The second, third, fourth and fifth defendants without the knowledge, consent, authority or approval of the plaintiffs and Ibala Arikoto family purported to convey to the first defendant on 20/9/74 7,160 acres of land demarcated by pillars or beacon numbers AC372, AC373, AC374, AC375, AC392, AD393, AC 394. AC 395, AC 396, AC 397, AC398, AC 399, AC400 and AC401 and thereon edged red in plan No. EBS 973 drawn by Licensed
5 Surveyor Mr. SA Agboola.

19. The said second, third, fourth and fifth defendants have not at any time been accredited or authorised by the said family to sell, mortgage
10 or lease their said land or any aforesaid portion of same to the 1st defendant or any other person or persons.

20. The plaintiffs' family is known, called and styled as Ibala Arikoto family and not Arikotokowosi's family."

The appellant in paragraphs 12 & 19 of his Statement of Defence
15 replied to the above averments as follows, namely:-

"12. With regard to paragraphs 16, 17, 18 and 19 of the Statement of Claim, the 1st defendant avers that he bought the 7.160 acre land referred to from the 2nd, 3rd, 4th and 5th defendants, who professed to him that they
20 had legal right to sell as accredited representatives of Arikotokowosi family of Adeyelu compound, Ojaigbo Ibadan, who actually sold and conveyed to him in that capacity.

19. As regards paragraph 20 of the Statement of Claim, the 1st defendant avers that the 2nd, 3rd, 4th and 5th defendants, the Signatories to the Sale Agreement and Deed of Conveyance referred to in paragraphs 8
25 and 11 above respectively told him that the word "Arikoto" is just an abbreviation of the word "Arikotokowosi", and he readily believed them."

A close study of the entire evidence before the trial court discloses
30 that the respondents testified in very clear terms that their Ibala Arikoto family at no time authorised the 2nd - 5th defendants to sell or dispose of their land in issue. But there was a total lack of evidence from the appellant to the effect that the 2nd - 5th defendants sold the land to him with the knowledge, consent and approval of the Ibala Arikoto family who were the undisputed owners thereof. It is one thing to aver a material fact in issue in one's pleadings and
35 quite a different thing to establish such a fact by evidence. Where a material fact is pleaded and is either denied or disputed by the other side, the onus of proof clearly rests on he who asserts such a fact to establish the same by evidence. An averment in pleadings is not and does not tantamount to evidence and must therefore be established by satisfactory evidence unless the

same is expressly admitted. See *Akinfosile v. Ijose* (1960) S.C.N.L.R. 447; *Muraina Akanmu v. Adigun* (1993) 7 NWLR (Pt.304) 218 at 231; *Obmiami Brick and Stone Ltd. v. A.C.B. Ltd.* (1992) 3 NWLR (Pt.229) 260 at 293 and *Anyah v. ANN Ltd.* (1992) 6 NWLR (Pt.247) 319 at 331.

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In the instant case, the appellant in spite of his assertion that he purchased the land from the 2nd - 5th defendants as the accredited representation of the owners adduced no evidence whatever in support of this vital issue. There was therefore no evidence upon which the trial court could find that the appellant, at the time he bought the land dealt with the 2nd - 5th defendants as the accredited representatives of the Ibala Arikoto family.

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It is true that an appellate court will not, as a general rule, interfere with the findings of fact of a trial court but this rule is subject inter alia to the availability of acceptable evidence before such trial court in support of such findings. See *Balogun v. Agboola* (1974) 10 S.C.111 and *Ike v. Ugboaja* (1993) 6 NWLR (Pt.301) 539 at 555. The appellate court will also not hesitate to interfere with the findings of fact of a trial court where the same is established to be substantially erroneous on the face of the record of proceedings or where such a finding is shown to be perverse. See *Kwansa Efi v. Enyinful* 14 WACA 424; *Enang v. Adu* (1981) 11 - 12 S.C. 25; *Ibodo v. Enarofia* (1980) 5 - 7 S.C. 42; *Chinwendu v. Mbamali* (1980) 3 - 4 S.C.31; *Njoku v. Eme* (1973) 5 S.C.293; *Ige v. Olunloyo* (1984) 1 S.C.N.L.R. 158 and *Ike v. Ugboaja* (1993) 6 NWLR (Pt.301) 539 at 569.

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In considering the second issue, *Ogundare, J.C.A.*, as he then was, who delivered the lead judgment in the appeal and concurred in by *Uche Omo, J.C.A.*, as he then was, and *Sulu-Gambari, J.C.A.*, dealt with the matter as follows:"

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With respect, however, I do not share the trial Judge's view that the family had held out 2nd - 5th defendants as their accredited representatives. This finding may be true as regards representing the family in the action in the Customary Court but not "as regards sale of family land....."

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The learned Justice *Ogundare, J.C.A.* as he then was, a little later in his judgment continued:-

"In my view trial Judge is clearly in error to apply the doctrine of holding out so as to deprive the other principal members of the family of their right in respect of the family property. To hold as the trial Judge did would mean that where a member of a family represents his family in a court action, how-be-it with the knowledge and consent of the family, this without

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more clothes such member with authority to alienate family property without reference to the family. I can find no authority to support such a contention. The maxim is: Caveat Emptor. It is for the respondent to have made enquiries as to who the members of the Ibala Arikoto family are before dealing with the 2nd - 5th defendants alone especially as he knew that the land
5 *he sought to buy was family land of Ibala Arikoto family."*

I have given the above views of the learned Justice Ogundare, J.C.A, as he then was, a most careful consideration and I am, with respect, in complete agreement with him.

10 Learned counsel for the appellant in his brief referred to the decision in Secretary, Lagos Town Council v. Badaru Soule & Another (1939) 15 NLR. 72. He urged the court to hold on that authority that in as much as the 2nd - 5th defendants represented the family in their land case, they were held out as having authority to deal with their family land.

15 It has to be observed that the facts of the Lagos Town Council case are easily distinguishable from the facts of the instant case. In the former case, it was established that one Yesufu Aromire with the knowledge and consent of his family prosecuted and defended court actions and made sales of family land so on, all on behalf of his family. There is no such evidence in the present
20 case to the effect that the 2nd - 5th defendants with the knowledge and consent of their family ever made sales of any family land on behalf of the family.

On the whole, I am satisfied that the learned trial Judge was in error when he held that the 2nd - 5th defendants were the accredited representatives of the Ibala Arikoto family when they sold their family land to the appel-
25 lant. This finding is not supported by any evidence before the trial court. I find myself in total agreement with the observation of the Court of Appeal to the effect that it was not established that the 2nd - 5th defendants had any mandate from their family to sell their Ibala Arikoto family land. Under such circumstance, the Court of Appeal was duty bound to reserve the said finding.
30 Accordingly, I must answer the second question in the affirmative.

The principle of law that arises from the third issue is basic but fundamental. This is expressed in the Latin maxim, *nemo dat quod non habet* which literally means that no one can give what he does not own. See *Akerele v. Atunrase* (1969) 1 All NLR 201 at 208 ... The question for determination here
35 is whether Arikoto and Arikotokowosi referred to one and the same family and whether a finding on the issue was necessary in deciding whether or not Exhibit 3, the conveyance, successfully conveyed the land in dispute to the appellant.

There is no dispute that the land in dispute is owned by the Ibala

Arikoto family. The pleadings and evidence of the parties before the trial court together with the Customary Court judgment in Suit No. CV/80/72 bear this out. By Exhibit 3, however, the vendors of the said land are described as representatives of the Arikotowosi family as against the Ibala Arikoto family who are the established true owners of the land. Unless, therefore, Ibala Arikoto and Arikotokowosi are one and same family, Exhibit 3 may not be worth the paper on which the alleged conveyance. 5

On this issue, the respondents averred in their statement of claim that Ibala Arikoto, their family, and the Arikotokowosi did not refer to one and the same family. The 2nd - 5th defendants, in their Statement of Defence, admitted the respondents' averment in this regard, but the appellant in his own statement of Defence, pleaded that the land was sold to him by the 2nd - 5th defendants who told him - 10

"that the word 'Arikoto' is just an abbreviation of the word Arikotokowosi and he readily believed them." 15

It seems to me strange that the appellant "readily believed" the above representation of the 2nd - 5th defendants without any investigations to establish its credibility and in utter disregard of the maxim, caveat emptor. It is even more strange that the learned trial Judge made no finding on this very material issue as the validity and effectiveness of Exhibit 3 depended on whether the vendors therein, that is to say, the Arikotokowosi family were one and the same family as the Ibala Arikoto family who are the undisputed owners of the land. If they were not, then the Arikotokowosi family would be unable to dispose of what did not belong to them. If, however, both referred to the same family, then various other issues surrounding Exhibit 3 would necessarily arise. These included whether or not the alleged sale was with the consent and approval of the family. Again, whether or not the sale was void or voidable might also arise as the head of a family must join in a conveyance of family land and the principal members must concur therein otherwise it would be void ab initio. See Agbloee v. Sappor 12 WACA 187. But where the head of a family sold family land without the consent of the principal members, such a sale would not be void but voidable at the instance of those members who did not consent thereto although in appropriate cases laches and estoppel could come into play. See Manko v. Bonso 3 WACA 62 and Ekpendu v. Erika (1959) SCNLR 186; (1959) 4 F.S.C. 79 at 81. However the latter category of sale can only be valid where the head of the family executed such a conveyance for and on behalf of the rightful family which owned the land and not if he purported to sell the property as the beneficial owner thereof or as representing some other vendors or family who had no title to such land. In that case, the 20 25 30 35

principle, *nemo dat quod non habet* will apply to invalidate such a spurious sale. See *Akerele v. Atunrase* (supra) at page 208. But as I have observed earlier on, the learned trial Judge was in error when he held that the 2nd - 5th defendants sold the land to the appellant as the accredited representatives of the Ibala Arikoto family. The court below was therefore right to reverse this finding.

It seems to me that from whatever angle one examines the validity or otherwise of the sale in issue, a finding on whether Arikoto and Arikotokowosi referred to one and the same family must be regarded as imperative. Regrettably, the learned trial Judge made no finding on the point. The Court of Appeal, in dealing with this material omission on the part of the judgment of the learned trial Judge stated as follows:-

"One other aspect of the submissions made in this appeal relating to the conveyance (Exhibit 3) concerns effectiveness in that the vendors therein acted as accredited representatives of Arikotokowosi family..... Appellants contend that they are Ibala Arikoto family. Unless Arikotokowosi and Ibala Arikoto are one and the same family. Exhibit 3 would be ineffective to pass Ibala Arikoto's title in the land in dispute to the respondent....."

Significantly, the learned trial Judge made no finding on this rather important issue. Exhibit 2, the judgment in CV/80/72 referred to the family as Ibala Arikoto. Even Exhibit 3, the conveyance, does not speak of Ibala Arikotokowosi but of Arikotokowosi simpliciter. In the absence of any finding that Ibala Arikoto and Arikotokosi are one and the same, I cannot conclude that Exhibit 3 conveyed to the respondent (now appellant) title in the land of Ibala Arikoto family....."

(Words in brackets supplied)

I agree with the above observations of the Court of Appeal which, in my view, are totally justified having regard to the issues and the evidence before the trial court.

It must however be observed, contrary to the contention of learned counsel for the appellant, that there is, with respect, hardly any evidence before the trial court in support of its conclusion on the validity of Exhibit 3. The Court of Appeal was fully justified to reverse the finding of the learned trial Judge to the effect that the land in issue was validly sold to the appellant by the 2nd - 5th defendants. I must, for all the reasons that I have given above, hold that the third question for determination must be answered in the affirmative.

Issue number four for decision arises from ground 7 of the grounds of appeal. This is whether the Court of Appeal could in law use the admission in the Statement of Defence of the 2nd - 5th defendants against the 1st defendant when the said 1st defendant did not adopt the said admission.

The first point that must be made is that parties are bound by their pleadings. See *National Investment and Properties Co. Ltd v. Thompson Organisation Ltd.* (1969) 1 All NLR 138 at 142 and *Oredoyin v. Arowolo* (1989) 4 NWLR (Pt.114) 172. Secondly, a fact which is admitted by the defendant in his pleadings need not be proved by the plaintiff, but should be regarded as established at the trial. See *Chief Okparaeké v. Obidike Egbuonu* (1941) 7 WACA 53 at 55. 10

The 2nd - 5th defendants by paragraph 1 of their Statement of Defence admitted the respondents' averment in paragraph 20 of their Statement of Claim to the effect that the said respondents' family was known as and called Ibala Arikoto family and not Arikotokowosi family. The appellant referred to that portion of the judgment of the Court of Appeal at page 153 lines 15 5 to 11 of the record of proceedings which states as follows:-

"In their Statement of Defence, the 2nd to 5th defendants admitted paragraph 20 of the statement of Claim wherein the appellants averred that their family is known as Ibala Arikoto and not Arikotokowosi. Not having sold as accredited representatives of the Ibala Arikoto family, the 1972 transaction cannot validly pass title in Ibala Arikoto family land to the respondent." 20

The appellant's main complaint with regard to the fourth issue is that the Court of Appeal, from the above passage of its judgment, erred in law by using the said admission of the 2nd - 5th defendants against the appellant who did not adopt the same. 25

It cannot be correct from a close study of the above passage that the admission of the 2nd - 5th defendants in their Statement of Defence was used against the appellant by the Court of Appeal. It has already been stated that an averment in the pleadings is not and does not tantamount to evidence and must therefore be proved. See *Akinfosile v. Ijose and Muraina Akanmu v. Adigun & Anor.* (supra). But where in a civil case, some facts are pleaded by the plaintiff and admitted by a defendant, such admitted facts would require no further proof on the part of the plaintiff in so far as his claims against the defendant who made the admission are concerned. The court, in such a situation, is entitled as a matter of law to accept such facts as established by the plaintiff against the admitting defendant. 30 35

In the present case, the 2nd - 5th defendants in their Statement of Defence admitted the respondents, averment in their Statement of Claim that their family is the Ibala Arikoto and not the Arikotokowosi family. From the state of the pleadings of the respondents, and the 2nd - 5th defendants, it cannot be disputed that the Court of Appeal was perfectly entitled as a matter of law to accept the admission in issue as fully established by the respondents against the 2nd - 5th defendants. The court below was also entitled to use this admission against the 2nd - 5th defendants. This seems to me to be all that the Court of Appeal did in the above passage of its judgment. That court went further to add and quite rightly in my view, that the said 2nd - 5th defendants not having sold the land as the representatives of the rightful owners, to wit, the Ibala Arikoto family, could not validly pass title in the land to the appellant. I am satisfied that these observations of the Court of Appeal are all issues of law and that that court was fully justified to make them having regard to the state of the pleadings before the court. I must accordingly resolve the fourth issue against the appellant.

It is now necessary to return to the first issue and to determine whether the erroneous application of the doctrine of *lis pendens suo motu* by the Court of Appeal under circumstances I have mentioned occasioned any miscarriage of justice in the appeal. In this regard, it must be emphasized that it is not every error of law that is committed by a trial or appellate court that justifies the reversal of a judgment. An appellant to secure the reversal of a judgment, must further establish that the error of law complained of did in fact occasioned a miscarriage of justice and/or substantially affected the result of the decision. See *Olubode v. Salami* (1985) 2 NWLR (Pt.7) 282. An error in law which has occasioned no miscarriage of justice is immaterial and may not affect the final decision of a court. This is because what an Appeal Court has to decide is whether the decision of the trial Judge was right and not whether his reasons were, and a misdirection that does not occasion injustice is immaterial. See *Ukejianya v. Uchendu* 13 WACA 45 at 46; *Chief Oje and others v. Chief Babalola and Others* (1991) 4 NWLR (Pt.185) 267 and *Azuetonma Ike v. Ugboaja* (1993) 6 NWLR (Pt.301) 539 at 556. See too *Onajobi v. Olanipekun* (1985) 4 S.C. (Pt.2) 156 at 163 and *Gwanto v. State* (1983) 1 SCNLR 142 at 152.

I have given this matter a most careful consideration and have come to the conclusion that the said error in law complained of did not occasion any miscarriage of justice. In the first place, the 2nd - 5th defendants who purportedly sold the land in issue to the appellant had no right whatsoever and were not entitled or authorised to dispose of their family land. In the second place, the said 2nd - 5th defendants purported to sell the property to the appellant not as the accredited representatives of the true owners, the Ibala Arikoto

family, but as representing the Arikotokowosi family which had no interest whatever over the land in issue. In these circumstances, it seems to me clear that the erroneous application of the doctrine of *lis pendens* notwithstanding, there was no other course that was open to the court below in the appeal than to invalidate the sale in issue and to dismiss the appeal before it.

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In the final result, I find no substance in any of the points urged on behalf of the appellant in this court to justify a reversal of the decision of the court below. Consequently, this appeal fails and it is accordingly dismissed with N1,000.00 costs against the appellant in favour of the respondents.

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UWAIS JSC

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I have had the privilege of reading in draft the judgment read by my learned brother Iguh, J.S.C. I entirely agree with him and I have nothing to add. Accordingly, I too dismiss the appeal and affirm the decision of the Court of Appeal with N1,000.00 costs against the defendant/appellant in favour of the plaintiffs/respondents.

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WALI JSC

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I have had the privilege of reading in advance a copy of the lead judgment of my learned brother, Iguh, J.S.C. I entirely agree with his reasoning and conclusion therein. I too will dismiss the appeal and affirm the judgment and orders of the Court of Appeal with N1,000.00 costs to the respondents.

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KUTIGI JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother Iguh, J.S.C. I agree with his reasoning and conclusion. For the reasons therein stated I would also dismiss the appeal and hereby dismiss it with N1,000.00 costs to the plaintiffs/respondents.

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ADIO JSC

I have read the judgment of my learned brother, Iguh, J.S.C., just delivered. I agree with his conclusion dismissing the appeal and it is accordingly dismissed by me. I, however, wish to make some comments, by way of emphasis. The facts of this case have been fully summarised by my learned brother, Iguh, J.S.C. With reference to the first issue, even if the Court of Appeal erred in law in raising suo motu the question of the application of the doctrine of *lis pendens* to the transaction between the parties, that alone was not sufficient to warrant the reversal of the judgment of the Court of Appeal.

10 No doubt a court should confine itself to issues raised by the parties. Where, however, the court raises an issue suo motu and the issue goes to the root of the case, the parties must be given an opportunity to address the court on the point. See *Adeniji v. Adeniji* (1972) 1 All NLR 298; and *Road Transport Employers Association of Nigeria v. National Union of Road Transport Workers*.

15 (1992) 2 NWLR (Pt.224) 381. It is only where the issue raised suo motu goes to the root of the case that it can be said that the error of law occasioned a substantial miscarriage of justice so as to warrant a reversal of the judgment. It is not every slip committed by a Judge in his judgment that will amount to a misdirection which will result in the appeal being allowed. The misdirection, to

20 be fatal, must have occasioned a substantial miscarriage of justice. See *Onwuka v. Omogui* (1992) 3 NWLR (Pt.230) 393. The mistake must have affected or influenced the decision appealed against before it can result in the reversal of the decision. In the present case, there was another fundamental ground, quite independent of the application of the doctrine of *lis pendens* to the

25 aforesaid transaction, upon which the appellant's claim could be properly dismissed. The aforesaid ground, which was very fundamental, was that the alleged title of the appellant derived from the purported sale of the land in dispute to him by the 2nd to the 5th defendants, was incurably defective in that the alleged or purported sale was not by or on behalf of the Iba Arikoto

30 family that both parties agreed was the owner of the land in dispute. That was what knocked the bottom out of the appellant's case. It was common ground that the land in dispute was, to the knowledge of the appellant part of the land that Iba Arikoto family recovered in a previous suit but when the 2nd to 5th defendants purported to sell it to the appellant, they did so as members or

35 accredited representatives of Arikotokowosi family. Where the land in dispute is accepted by the parties or found by the court to be originally a family land, the person who claims exclusive ownership thereto must fail unless he asserts by his pleading and proves by evidence how that exclusive ownership properly devolves on him. See *Eze v. Igiliegebe & ors.*(1952) 14 WACA 61; and

Adenle v. Oyegbade. (1967) NMLR 136 at p.138. In the instant case, the error of the Court of Appeal, if any, in applying the doctrine of *lis pendens* to the transaction (purported sale of the land in dispute to the appellant) has occasioned no miscarriage of justice in the circumstances because without the application of the said doctrine to the purported transaction, the appellant's claim could still be properly dismissed.

The second and the third issues raised in the appellant's brief may be considered together. With reference to the second issue, which was whether the Court of Appeal was right in disturbing the alleged finding of fact that the 2nd to the 5th defendants were the accredited representatives of Iba Arikoto family when they executed the deed of conveyance, Exhibit "3", in the first place, there was no legally admissible evidence that the 2nd to 5th defendants executed the deed of conveyance as the accredited representatives of Iba Arikoto family. On the contrary, the deed of conveyance, Exhibit "3", speaks for itself. It shows clearly that it was executed by the 2nd to the 5th defendants as representatives of Arikotokowosi family. Generally, when the terms of an agreement or contract have been reduced into writing, evidence cannot be given of its terms except the document itself is produced. Secondary evidence of its contents maybe produced in cases where such secondary evidence is admissible under the provisions of the Evidence Act. See *Macaulay v. NAL Merchant Bank Ltd.* (1990) 4 NWLR (Pt.144) 283; and section 131(1) of the Evidence Act. The 2nd to the 5th defendants were described as representatives of Arikotokowosi family, the said defendants could not be regarded as representatives of Iba Arikoto family when they executed the deed of conveyance in the absence of any admissible evidence that Iba Arikoto family was the same or was otherwise known as Arikotokowosi family. An appeal court has power to reverse findings of fact of a lower court if in its opinion the findings are not supported by evidence. See *Lengbe v. Imale* (1959) WNLR 325; and *Fatude v. Owoamanam*, (1990) 2 NWLR (Pt.132) 322. The Court of Appeal was, therefore, right in reversing the finding of fact made by the learned trial Judge which was not supported by evidence. As the deed of conveyance, Exhibit "3", speaks for itself, the 2nd to 5th defendants purported to sell the land in dispute for and on behalf of Arikotokowosi family. Both the appellant and the respondents agreed that the land in dispute was part of the parcel of land owned by Arikoto family. In the circumstances there must be evidence on the basis of which there could be a specific finding that Iba Arikoto family was the same or was otherwise known as Arikotokowosi family before the appellant could succeed in his claim for declaration of title. The 2nd to 5th defendants could not sell what, as representative of Arikotokowosi family, did not belong to them or to Arikotokowosi family that they purported to represent in

the execution of the deed of conveyance, Exhibit "3" Nemo dat quod non habet. The purported sale of the land in dispute by the 2nd to 5th defendants to the appellant and the deed of conveyance executed by them pursuant to the purported sale were void ab initio. See Akerele v. Akerele v. Atunrase (1969) 1 All NLR 201.

5 It is for the foregoing reasons and the fuller reasons given in the lead judgment of my learned brother, Iguh, J.S.C., that I agree that the appeal be dismissed. I hereby dismiss the appeal and abide by the order for costs.

Appeal dismissed.

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