

SUPREME COURT OF NIGERIA
10TH DECEMBER, 1993 SC. 206/1990.
CORAM:- M. L. UWAIS, A. B. WALL, I. L. KUTIGI,
Y. O. ADIO, A. I. IGUH, JJSC.

CHIEF JOHNSON IMAH & ANOTHER APPELLANTS
(For themselves and on behalf of
members of Akuku Community)

AND

CHIEF AJOWELE OKOGBE RESPONDENTS
& ANOTHER (For themselves and on behalf of
members of Ojirami Community)

APPEALS - Damages for trespass - Excessive award by trial court - Attitude of appeal court thereto

COURT - Suo motu raising of issue not raised by the parties - Without giving the parties opportunity to address on the issue - Whether substantial miscarriage of justice is always occasioned thereby - What a party must show to secure reversal of the judgment

DAMAGES - Award of high sum of N50,000.00 general damages for trespass without any specific findings or reasons - Whether maintainable - Where trespass is of a technical nature - Sufficient nominal damage to be awarded

EVIDENCE - Land dispute - No evidence establishing the boundary in question - Whether appellants' claim was rightly dismissed

LAND LAW - Appellants in possession of certain places within the land in dispute at the time of trespass - Whether their claim was rightly dismissed - Whether appellants' right to succeed in trespass can be deprived

LAND LAW - Claim for damages for trespass - Where ownership and possession are vested in a third party - Whether the plaintiffs can sue for trespass

LAND LAW - Claim for declaration of title to land - Where it fails - Whether claim for damages for trespass on the same land must fail

PLEADINGS - Land dispute - Where appellants' averment show that ownership and possession are vested in government - Whether appellants are bound by that averment

FACTS

The Appellants sued the Respondents before the Auchil High Court in former Bendel State for a declaration that they were entitled to the Customary Right of Occupancy in respect of the land in dispute, N250,000.00 general damages for trespass and perpetual injunction. Appellants gave part of the land in dispute allegedly trespassed upon by the Respondents to the Bendel State Government to build houses for members of the Appellants' Community that were victims of a flood. It was while this building was going on that the Respondents struck, destroyed things and packed away cement blocks claiming that the land in dispute belongs to them. Appellants' claims were granted by the trial Court which awarded N50,000.00 as general damages, granted the declaration sought but refused the order for perpetual injunction. The trial court held that it was not necessary to call boundary-men to establish the boundaries of the land in dispute.

Defendants' appeal to the Court of Appeal was upheld by that Court Appellants have now appealed to the Supreme Court which had to determine amongst other issues whether there is sufficient evidence on which the teamed trial judge could find that the Plaintiffs/Appellants were the owners and in possession of the land in dispute.

HELD (*unanimously allowing the appeal in part*)

1. As there was ample evidence that the Appellants were in possession of certain places within the land in dispute at the time the Respondents committed the trespass, the Court of Appeal erred in dismissing the Appellant's claim for damages. (P.159U6)
2. The Appellants could not be deprived of their right to succeed in their claim for damages for trespass in relation to a place within the land in dispute edged pink which was outside the area edged yellow held by the Court of Appeal to be in Bendel State Government's possession. (P.159 L3)
3. Since parties are bound by their pleadings, the word "gave" in respect of

the two pieces of land used in the Appellant's pleadings cannot mean "*show*" or "*made available*". The Court of Appeal was therefore, right in holding that the ownership of the aforesaid parcels of land was vested in the Bendel State Government which also has possession. Thus the Appellants not being in possession at the relevant time cannot sue the Respondents for trespass (P. 160L38).

4. As there was no evidence before the learned trial Judge, the Court of Appeal was in order in holding that the boundary in question was not established. And where as in this case there is dispute as to boundary and or identity of land, such must be proved with certainty (P. 163 L19)

5. The Appellants having failed to establish one of the boundaries of the land in dispute, the Court of Appeal was justified in dismissing the Appellant's claim and in setting aside the judgment of the learned trial Judge that granted the Appellants the declaration that they were entitled to the customary right of occupancy of the land in dispute (P.164 L6).

6. If a plaintiff's claim for a declaration of title to a piece of land fails, it does not necessarily mean that his claim for trespass on the same land must fail. Appellant's failure to establish their claim for a declaration that they were entitled to customary right of occupancy of the land in dispute is not therefore, inconsistent with their success in their claim for damages for trespass (P.164 L14).

7. The Court of Appeal's criticism that no reason was given by the trial Judge for the award of the high sum of 145,000.00 as general damages for trespass was justified. The learned trial Judge merely summarised the evidence without making any specific findings or giving any reasons for the award and a summary or restating of evidence does not constitute an evaluation of the evidence (P.166 L3).

8. The evidence of trespass in this case being the isolated erection of shed on a portion of the land in dispute, the Court of Appeal's interference with the awarded damages (of N50,000.00 reducing it to N3,000.00) was not even far reaching or adequate. The sum of N500.00 being reasonably sufficient as general damages is hereby awarded since a trespass which is only of a technical nature can at best attract only nominal or minimal damages (P. 66 L16).

9. It is wrong for the court to raise and determine an issue not raised by the parties because it is material for the determination of the case before it, without giving the parties an opportunity of being heard on it. However, Appellants' contention, that failure of the court to give such opportunity to the
- 5 parties always occasions a substantial miscarriage of justice is not correct for each case depends on its own merit. Merely showing that an error of law was committed by court without showing that miscarriage of justice was occasioned is not sufficient for the purpose of reviewing a judgment (P. 167 L10).

10 **REPRESENTATION:**

T. A. Molajo Esq, with F. N. Udom Esq. for the Appellants.
J. Imohi Esq. for the Respondents.

15 **CASES REFERRED TO**

1. Olugbeniro v. Ajagunbade (1990) 3 N.W.L.R. (R 136)
2. Adegbanjo v. Brown (1990) 3 N.W.L.R. (Pt. 141) 661
3. National Investment & Property Co. Ltd v. Thompson Organisation Ltd. (1969) 1 All N.L.R. 138 at p. 142
- 20 4. Bello v. Attorney General, Oyo State (1980) 5 N.W.L.R. (Pt. 190) 130
5. Ogilevie v. Alien (1899) 15 T.L.R 294
6. Udeze v. Chidebe (1990) 1 N.W.L.R. (Pt. 125) 141
7. Udofia v. Afia (1940) 6 W.A.C.A. 216
8. Baruwa v. Ogunsola (1938) 4 W.A.C.A. 159
- 25 9. Makanjuola v. Balogun (1989) 3 N.W.L.R. (Pt. 108) 122
10. Sogunle v. Akerele (1967) N.M.L.R. 58
11. Araba v. Asanlu (1980) 6-7 S.C. 74 at pp. 85-87
12. Adebite v. Ogunfaolu (1990) 4 N.W.L.R. (Pt. 146) 578
13. Ojibah v. Ojibah (1991) 5 N.W.L.R. (Pt. 191) 296
- 30 14. Amakor v. Obiefuna (1974) 3 S.C. 67
15. Adelaja v. Fanoiki (1990) 2 N.W.L.R. (R 131) 157
16. Onaga & Ors. v. Micho & Co. (1961) 1 All N.L.R. 338
17. Ijebu-Ode Local Government v. Balogun & Co. Ltd (1991) 1 N.W.L.R. (Pt. 166) 136
- 35 18. Uwegba v. Attorney-General, Bendel State (1986) 1 NWLR (Pt 16) 303
19. Umunna & Ors. v. Okwuraiwe (1978) 6-7 S.C. 1, 12
20. Elowhomu v. Edok-Eter Mandilas Ltd. (1986) 5 NWLR (Pt. 39) 1
21. Olubode v. Salami (1985) 2 N.W.L.R. (Pt. 7) 732
22. Baruwa v. Ogunsola (1938) 4 W.A.C.A. 151

23. Agbonifo v. Aiweneoba (1988) 1 N.W.L.R. (Pt. 70) 325
24. Onwuka v. Ediala (1989) 1 N.W.L.R. (pt. 95) 182
25. Olusanmi v. Oshasona (1992) 6 N.W.L.R. (Pt.245) 22 at 36
26. Awote v. Owodonni (No.2) (1987) 2 N.W.L.R. (Pt.57) 366 at 371
27. Ezeokeke v. Uga and others (1962) 1 All N.L.R. (Pt.3) 482 5

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LEAD JUDGMENT BY ADIO JSC

The appellants, for themselves and on behalf of members of Akuku Community, in the High Court of the defunct Bendel State, Auchi Judicial Division, sued the respondents, for themselves and on behalf of Ojirami Community claiming:

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"(i) A declaration that the plainiffs are entitled to the customary right of occupancy of all that piece or parcel of land shown and verged pink in survey plan No. LSF 2757 filed in this suit.

(ii) N250,000 being general damages for the defendants' trespass on the said land.

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(iii) Perpetual injunction restraining the defendants whether by themselves, their agents or servants or otherwise howsoever from committing further acts of trespass on the said land."

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Pleadings were duly filed and exchanged. With the leave of the Court, the Statement of Claim filed by the appellants and the Statement of Defence filed by the respondents were amended. The evidence led by the appellants was that two ancestors of members of Akuku Community, Ogboro and Uyorogun, led them from Benin to the present site of Akuku land many years ago. When they got to the site they went on top of the hill called Oyan-Kuo and settled there because there was war going on at the material time. Members of the community, though living on the hill, used to farm on the land at the foot of the hill which was not occupied by anybody. In the year, 1918, they left the top of the hill and had since then been living and farming on the land at the foot of the hill. Sometime, the Government built a dam in the area and the dam is called Ojirami dam. The place where the respondents subsequently settled was on one side of the dam and the appellants' settlement was on the other side.

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Members of the appellants' community had farms and houses on the land at the foot of the hill where they settled. They built a school there and two shrines of the community were on the land which is now the land in dispute. It is verged pink on the survey plan tendered by the appellants that was admitted and marked Exhibit "A".

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In 1980, the dam was flooded and it swept away the appellants' buildings and some other things they had on the land in dispute. At the request of the Bendel State Government, the appellants' community gave two parcels of land, edged yellow on the survey plan (Exhibit "A"), to the Government to enable the Government build houses there to re-settle the members of the appellants' community. While the building operation was going on, members of the respondents' community started to claim that the land in dispute belonged to them. They entered the land in dispute, destroyed certain things there, and packed away others such as cement blocks and sand. Further, they used to come to the appellants' village, brandishing cutlasses, singing and saying that they were ready to fight the appellants. Some sheds were erected on the land in dispute by some female members of the respondents' community.

In the view of the respondents, the survey plan Exhibit "A" tendered by the appellants was not correct. They, respondents, tendered a survey plan drawn by their own surveyor. The survey plan was Exhibit "H" in which the land in dispute was also verged pink. The respondents too alleged that they were living on the hills but subsequently they too came down and were living at Ojirami at the foot of the hill. According to the respondents, their community gave the Government the land on which the dam was built and they also gave permission to the appellants' community to build a primary school on the land in dispute. The respondents had on the land in dispute a market, two juju shrines, farms and the foundation of a town hall. Okejami was the boundary between the land of the appellants and the land of the respondents.

The learned trial Judge, after consideration of the evidence before him and the submissions of the learned counsel for the parties, held that the land in dispute was not in doubt, as to its identity, to both parties and that the question of calling boundary-men to establish the boundaries of the land in dispute, in relation to which the appellants were claiming customary right of occupancy, did not arise. He concluded that the land in dispute was at Akuku village and stated that he was satisfied that the evidence led by the appellants was more probable and he accepted it. In his view, the appellants were in possession of the land in dispute when the respondents trespassed on it. He, therefore, granted the appellants the declaration that they were entitled to the customary right of occupancy of the land in dispute edged pink in Exhibit "A" and awarded N50,000 damages to the appellants for trespass committed by the respondents. The appellants' claim for injunction failed.

Dissatisfied with the judgment, the respondents appealed to the Court of Appeal. The Court of Appeal held that the award of damages in relation to the alleged trespass was wrong as the quantum of the damages given was not a

correct and judicious exercise of the discretion of the learned trial Judge. The damages given were exemplary without any reason given for such nature of grant which was contrary to known principles. The court was, in any case, of the opinion that the finding of trespass itself was in error because possession of the land in dispute was then in the State Government, and not in the Akuku community. The court held further that the sum of N3,000 damages would have been sufficient if the appellants' claim for damages had been proved. In the case of the claim for declarations that the appellants were entitled to the customary right of occupancy of the land in dispute, the Court of Appeal held that the declaration could not be granted to cover the two pieces of land (edged yellow in Exhibit "A") within the land in dispute edged pink. The Court of Appeal also held that, in the circumstances in this case, the learned trial Judge was wrong in holding that the respondents proved the boundaries of the land in dispute to entitle them to a grant of declaration of customary right of occupancy in respect of it. The court, therefore, allowed the appeal, set aside the judgment of the learned trial Judge, and dismissed the appellants' claim for declaration of customary right of occupancy and the claim for damages for trespass on the land in dispute.

The appellants, dissatisfied with the judgment of the Court of Appeal, have appealed to this court. The six issues for determination formulated in the appellants' brief are, in my view, sufficient for the determination of this appeal. The aforesaid issues, which were based on the grounds of appeal, were as follow:-

"(1) What is the land in dispute in this case?

(2) Is there sufficient evidence on record on which the learned trial Judge could find that the plaintiffs were the owners and in possession of the land in dispute?

(3) Assuming that the Court of Appeal was right in saying that because the portion edged yellow in Exhibit 'A' was in the Bendel State Government's possession (which is not conceded) does that deprive the plaintiffs of the right to succeed in their claim for damages for trespass to the land in dispute?

(4). Is failure to call boundary men fatal to a party's case where there is no genuine issue as to the plan of the land in dispute being correct and both parties produce in evidence plans of the land in dispute made by licensed surveyors?

(5) In the award of substantial damages is a Judge bound to restate the evidence on the record which justify such award?

(6) Is the Court of Appeal or any court for that matter entitled to take up points of fact and/or law not argued or raised by any of the parties and come

to a decision of the case upon such point either alone or in conjunction with other points without having first heard the parties thereon?"

When the appeal came up for hearing before us, the learned counsel for the parties made oral submissions to us in amplification of the arguments in the briefs. The first issue relating to the identity of the land in dispute and the second issue on the question of ownership and possession of the land in dispute were argued together in the appellant's brief. The main complaint of the appellants in the brief and in the oral argument of their learned counsel, on the points, was that the Court of Appeal dealt with that aspect of the case as if the land in dispute consisted only of the two pieces of land edged yellow in the survey plan tendered by the appellants, Exhibit "A", whereas it was the land edged pink in Exhibit "A" that was in dispute. The respondents' position was that the land in dispute was the land edged pink in the survey plan tendered by the respondents, Exhibit "H", but that the alleged trespass by them, if any, was confined to the two pieces of land edged yellow in Exhibit "A". The Court of Appeal, in its judgment, referred to the evidence that after the Ojirami darn disaster, the appellants gave the Government of Bendel State two parcels of land, edged yellow in Exhibit "A", so that houses might be built on them for the re-settlement of the members of the appellants' community. The court stated further, *inter alia*, as follows:-

"In the light of the evidence led in support of the respondents' pleadings, can it really be maintained that these two pieces of land were still in the physical possession of Akuku Community? I think not. The learned trial Judge did not consider this issue carefully and come to a clear finding of fact thereon before finding possession in the Akuku community. Had he done so he would have been hard pressed to explain how land granted to the Government, surveyed and built thereon can be said, at the time of the building, to be in the physical possession of the Akuku community.....Since possession is therefore in the Bendel State Government the appellants cannot be found liable in law for trespass on the land at the suit of the respondents."

The appellants who tendered the survey plan marked Exhibit "A", stated clearly in paragraph 5 of their Amended Statement of Claim, what in their view was the land in dispute between them and the respondents; it was the portion edged pink within which were the two pieces of land given to the Bendel State Government which were verged yellow. The respondents too tendered a sur-

vey plan, marked Exhibit "H" in which what, in their view, was the land in dispute was edged pink. There was, therefore, no doubt that from the point of view of the appellants the land in dispute was the land, edged pink in Exhibit "A" and from the point of view of the respondents it was the land edged pink in Exhibit "H". The question whether the appellants could claim damages for trespass committed within the two parcels of land edged yellow in Exhibit "A" will be considered later. What is important, at this stage, is that the learned trial Judge found, rightly in my view, that the alleged trespass was committed in places outside the two areas edged yellow but which were still within the area edged pink in Exhibit "A". The contention of the appellants was that since they were in possession of land outside the portions verged yellow hut which was within the land in dispute they were entitled to damages for trespass committed on it. Only a person in possession of the land in dispute at the material time can sue for damages for trespass See *Olagbemiro v. Ajagunbade III*, (1990) 3 NWLR (Pt. 136) 37; and *Adebanjo v. Brown* (1990) 3 NWLR (Pt. 141) 661. As there was ample evidence, before the learned trial Judge, that the appellants were in possession of certain places within the land in dispute, which were outside the two pieces of land edged yellow within it, at the time that the respondents committed the trespass, the Court of Appeal erred in dealing with this aspect of the matter as if the land in dispute consisted of only the areas edged yellow in Exhibit "A" and in dismissing the appellant's claim for damages on that basis. The question whether there was sufficient evidence that could enable one to come to the conclusion that the appellants were the owners of the land in dispute will be considered when dealing with the question raised under the fourth issue.

The question raised under the third issue was whether if the Court of Appeal was right in holding that because the portions edged yellow in Exhibit "A" were in the Bendel State Government's possession (which the appellants did not concede) that deprived the appellants of the right to succeed in their claim for damages for trespass to the land in dispute outside the portions verged yellow. The first part of the question raised under the issue has been dealt with while considering the question raised under the second issue. The conclusion to which came was that as there was ample evidence before the learned trial Judge that the appellants were in possession of certain places within the land in dispute which were outside the two pieces of land edged yellow in Exhibit "A", at the time that the respondents committed the alleged trespass, the Court of Appeal erred in treating this aspect of the matter as if the land in dispute consisted of only the two pieces of land edged yellow in

Exhibit" A", and in dismissing the appellants' claim for damages for trespass on that basis. The answer to the first part of the question raised under the third issue is in the negative. If the Court of Appeal was right in holding that possession of the two pieces of land edged yellow in Exhibit "A" was in the Bendel State Government that could not deprive the appellants of the right to
 5 succeed in their claim for damages for trespass in relation to a place within the land in dispute edged pink in Exhibit "A" which was outside the two pieces of land edged yellow within it.

It is necessary at this stage to deal with the situation in the case of the two
 10 pieces of land edged yellow within the land in dispute edged pink in exhibit "A". I have already quoted above the portion of the judgment of the Court of Appeal which dealt with the point. After making reference to the fact that the appellants gave the two pieces of land edged yellow in Exhibit "A" to the then Government of Bendel State to enable it to build houses to re-settle the appel-
 15 lants, the Court of Appeal came to the conclusion that possession of the two pieces of land was vested in the Bendel State Government and that, for that reason, the appellants could not recover damages for trespass allegedly committed by the respondents on the aforesaid pieces of land. The learned counsel for the appellants argued that the Court of Appeal erred in holding that the
 20 possession of the aforesaid pieces of land was in the Government of Bendel State and not in the appellants because what, in fact, happened was that the Government was shown or the appellants made the two parcels of land edged yellow in Exhibit "A" available to the Government. It was the submission of the learned counsel for the appellants that possession of the said parcels of
 25 land was still in the appellants. The stand of the respondents was that by giving [he parcels of land to the Government, the appellants had parted with the possession thereof. The appellants after stating the circumstances warranting the request of the Government to the appellants for land, in paragraphs 20 and 21 of the Amended Statement of Claim, averred in paragraph 22
 30 thereof as follows:-

*"22. For the purpose of the building of the said low cost houses, the plaintiffs' community in 1981 gave to the Bendel State Government two parcels of land in Akuku..... and verged yellow in the survey plan No. LSF 2757
 35 filed in this suit. The said parcels of land are marked 'A' and 'B' respectively in the said plan and form part of the land in dispute."*

The law is that parties are bound by their pleadings. See National investment & Property Co. Ltd v. Thompson Organization Ltd (1969) 1 All NLR 138

at p. 142; and Oredoyin v. Arowolo (1989) 4 NWLR (Pt. 114) 172. The averment in the Amended Statement of Claim was, inter alia, that the appellants' community gave the aforesaid two parcels of land edged yellow in Exhibit "A" to the then Bendel State Government. I can't see how the Court of Appeal could properly be expected to construe what happened to be that the appellants' community showed the parcels of land to the Government or that the appellants' community made the parcels of land available to the Government. The word "gave" was plain enough. Plain words must be given their plain meanings. See Abioye v. Yakubu (1991) 5 NWLR (Pt. 190) 130. A court has no power to import into the meaning of a word something not in it. See Bello v. Attorney-General, Oyo State (1986) 5 NWLR (Pt. 45) 828. The word "give" according to the Concise Oxford Dictionary, p. 578 means: bestow gratuitously, hand over as present, confer ownership of with or without actual delivery, and could not properly be interpreted to mean "made available" or "show" as was contended by the learned counsel for the appellants. The two parcels of land, aforesaid, were unconditional gifts made by the appellants' community to the Bendel State Government. Unless a donor reserves the right to revoke, once a gift has been validly executed it cannot be revoked in the absence of fraud, mistake, misrepresentation or other invalidating cause. See Ogilvie v. Allen (1899) 15 T.L.R. 294. The Court of Appeal was, therefore, right in that the ownership of the aforesaid two parcels of land was vested in the Bendel State Government and since there was evidence that the Government had taken possession of the parcels of land and was building houses on them, their possession was in the said Government. For that reason, the appellants could not sue the respondents for damages for trespass allegedly committed by the respondents on the aforesaid parcels of land as the appellants were not in possession of them at the relevant time. The Court of Appeal was, therefore, not wrong in coming to that conclusion.

The question raised under the fourth issue is whether in order to succeed in their claim for a declaration that they were entitled to the customary right of occupancy of the land in dispute, the appellants must call boundary men as witnesses to establish the boundaries of the land in dispute. The Court of Appeal, after pointing out that the conclusion of the learned trial Judge, on this aspect of the matter, that it was not necessary for the appellants to call boundarymen as witnesses was erroneous, stated, inter alia, as follows:

"Should the area verged pink (averred to be in dispute) in both plans have the same configuration and/or cover the same area of land, then not only will the identity of the land in dispute not be in doubt, but the need to

call boundary witnesses can be safely dispensed with. In the instant case, even though the parties have indicated the area edged pink as in dispute in both plans (Exhibits A and H) both areas:

- (a) do not cover the same area of land*
- (b) do not have the same shape*

5 *(c) some of the boundaries are very different..... In these circumstances, proof of the boundaries of the land is certainly indispensable, and where boundaries are indicated with other communities the evidence of such communities are essential in proof of such boundaries..... It is therefore difficult to see how the respondents can be held to have proved the*
 10 *boundaries of the area edged pink on Exhibit' A' as to entitled them to a grant of declaration thereof."*

With further reference to the claim for a declaration that the appellants were entitled to the customary right of occupancy of the land in dispute, the Court
 15 of Appeal set out certain questions, relating to the pieces of land edged yellow in Exhibit "A", which the learned trial Judge should have considered and made findings of fact upon and on which he did not make any findings before he granted the aforesaid declaration. The court then stated further as follows:- '

20 *"Without specific findings on these matters raised, it must be difficult for a trial court, at least, to grant a declaration of title which would cover such pieces of land situate as they are within the totality of the land in respect of which the declaration is sought.....my inclination at the moment on the basis of the evidence on record is to hold that this is not a proper case for*
 25 *grant of entitlement to a customary right of occupancy to be made to cover the areas edged yellow situate within the land in dispute. Issue 3 therefore succeeds."*

The appellants claimed, inter alia, a declaration that they were entitled to the
 30 customary right of occupancy of the land in dispute edged pink in the plan tendered by them, Exhibit "A". The appellants contended that even in the case of this aspect of the matter, a declaration should be granted them if they were able to establish their claim only to an ascertainable portion of the land in dispute though the declaration would be confined to the portion in relation to
 35 which they established their claim. The onus is on the plaintiff who claims a declaration of title to a land in dispute to satisfy the court that he is entitled on the evidence brought by him to the declaration claimed. He must rely on the strength of his own case and not on the weakness of the defendant's case. If the onus is not discharged, the weakness of the defendant's case will not help

the plaintiff, and the proper judgment is for the defendant. See *Kodilinye v. Odu* (1935) 2 WACA 336. The boundaries of the land in dispute must be proved with certainty such that a surveyor, taking the record, could produce a survey plan, showing with accuracy, the land in dispute. See *Udeze v. Chidebe* (1990) 1 NWLR (Pt. 125) 141. Ascertainable boundaries of the land in dispute must be established. See *Udofia v. Afia* (1940) 6 WACA 216. A plaintiff's first duty is to prove the area, with certainty, over which he claims. See *Baruwa v. Ogunsola* (1938) 4 WACA 159. Therefore, the claim of a plaintiff who is claiming a declaration of title will be dismissed if he fails to prove the boundaries or the identity of the land in dispute. See *Makanjuola v. Balogun* (1989) 3 NWLR (Pt. 108) 192. A closer look at the survey plan, Exhibit "A", tendered by the appellants, showed that all the parcels of land having boundaries with the land in dispute verged pink therein, except one, were stated to be appellants' parcels of land. If that was so, the need to call boundary witnesses would be only in relation to that one parcel of land which did not belong to the appellants' community. The aforesaid observation or statement of the Court of Appeal would, therefore, be right only in so far as that parcel of land, not belonging to the appellants, which had a boundary with the land in dispute was concerned. As there was no evidence before the learned trial Judge in relation to that aspect of the matter, the Court of Appeal was perfectly in order in holding that the boundary in question was not established. There was dispute about the boundary of the land in dispute. The respondents averred in their Amended Statement of Defence that the survey plan produced by the appellants, Exhibit "A", was not correct. The respondents produced their own survey plan, Exhibit "H", whereas in the present case, there is a dispute as to the boundary or identity of land or both, such must be proved with certainty. See *Udeze's case*, supra.

It is necessary, before coming to a conclusion on the appellants' claim for a declaration that they were entitled to customary right of occupancy of the land in dispute, to point out that it was an error on the part of the Court of Appeal to hold that the claim of the appellants should be dismissed by reason only that the two pieces of land verged yellow in Exhibit "A" had been given by the appellants to the defunct Bendel State Government or because the aforesaid parcels of land were within the land in dispute verged pink in Exhibit "A". In the first place, the land in dispute did not consist of only the aforesaid two parcels of land. Therefore, failure of the appellants to establish their claim to them alone should not result in the dismissal of their claim to other parts of the land in dispute outside the two parcels of land. Secondly, if a plaintiff who is claiming a declaration of title to land claimed a larger parcel of land but

succeeds in proving the boundaries and title to a smaller parcel of land, he is entitled to a declaration of title in respect of the smaller part of the land originally in dispute, the title and boundaries of which he has proved with certainty. See *Sogunle v. Akerele* (1967) NMLR 58; and *Araba v. Asanlu*, (1980) 6 S.C. 74 at pp. 85 - 87. Indeed, that was what happened in *Udeze's case*, supra. However, as the appellants in this case had failed to establish one of the boundaries of the land in dispute the learned trial Judge was wrong in holding that the need to call boundary witnesses did not arise as the boundaries of the land in dispute had been established, the Court of Appeal was, therefore, justified in setting aside the judgment of the learned trial Judge granting the appellants the declaration that they were entitled to the customary right of occupancy of the land in dispute verged pink in Exhibit "A" and was also justified in dismissing the appellants' claim.

The conclusion that the appellants failed to establish their claim for a declaration that they were entitled to customary right of occupancy of the land in dispute is not inconsistent with their success in their claim for damages for the trespass committed by the respondents on the same land. This is because if a plaintiff's claim for a declaration of title to a piece of land fails, it does not necessarily mean that the claim of the same plaintiff for damages for trespass on the same land must fail. See *Adegbite v. Ogunfaolu* (1990) 4 NWLR (Pt. 146) 578; and *Ojibah v. Ojibah* (1991) 5 NWLR (Pt. 191) 296. Further, a person in possession of a parcel of land can bring an action for damages for trespass committed on the parcel of land against any person, other than the true owner or a person with a better title. The person in possession may even be a trespasser and a defendant who may be able to successfully resist an action for damages for trespass brought by such plaintiff is the true owner or is a person with better title or a person who was on the land in dispute with the authority of the true owner. See *Amakor v. Obiefuna* (1974) 3 S.C 67; and *Adelaja v. Fanoiki* (1990) 2 NWLR (Pt. 131) 137.

The fifth issue relates to the award of N50,000.00 damages made by the learned trial Judge which the Court of Appeal reduced to N3,000.00. The Court of Appeal, in any case, held that the alleged trespass was not established because the appellants did not prove that they were in possession of the land in dispute which the Court of Appeal erroneously thought consisted only of the two parcels of land verged yellow in the plan Exhibit "A". The conclusion of this court on that aspect of the matter was that trespass was committed on the land in dispute outside the two parcels of land marked yellow in Exhibit "A", for example, the sheds constructed by the female members of the respon-

dents' community and the appellants were entitled to damages for the trespass. The question is how much should be awarded as damage? The learned trial Judge awarded N50,000.00. The Court of Appeal held that the amount of damages was too high. It was set aside and substituted with N3,000.00. In dealing with this question, the Court of Appeal stated, inter alia as follows:

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"In the instant case, the learned trial Judge did not give any reasons for awarding the rather large sum of N50,000. Such an amount can only be justified when granted for serious and wanton acts of trespass. If there is evidence on record to support such acts it would not be against the award that the learned trial Judge did not make any finding on specific acts of trespass. To award N50,000 for such trespass without stating why such an award is given, must invite the description/conclusion that the award is arbitrary. It is in my view obviously too high and it is therefore an award of damages which this court can interfere with. Accordingly, should trespass in the final conclusion be deemed to have been established, this award is hereby reduced to N3,000.00."

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The submission made for the appellants, on this point, was that it was the evidence on record that was material and not a restatement of the evidence by the learned trial Judge that could justify an award. The evidence which was referred to in the appellants' brief was that the respondents used to go to the land in dispute with dangerous weapons and used to challenge the appellants to come and fight. That was only what the appellants could refer to as evidence in support of the award of N50,000.00. The respondents' contention was that the Court of Appeal was right to interfere with the award. A court does not interfere with the award of damages unless the trial Judge or the lower court acted upon some wrong principle of law or the amount awarded was so extravagant or so small as to make it an entirely erroneous estimate of the damages. See *Onaga & Ors v. Micho & Co.* (1961) 2SCNLR 101; (1961) 1 All NLR 324; and *Ijebu-Ode Local Government v. Adedeji Balogun & Co. Ltd.* (1991) 1 NWLR (Pt. 166) 136. The evidence before the learned trial Judge which was set out in his judgment, was that it was when the Bendel State Government began to erect houses on the two parcels of land verged yellow in Exhibit "A" that the respondents started to lay claim to the land in dispute. The respondents went to the land, packed away the blocks and the sand being used for the construction of the houses, and destroyed things on the land. He concluded that the respondents trespassed on the land in dispute when it was in possession of the appellants and awarded N50,000.00 to the appellants as damages. The Court of Appeal interfered with the award be-

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- cause according to it, no reason was given by the learned trial Judge for the award of the sum of N50,000.00 as general damages, which the Court of Appeal felt was too high in the circumstances. I think that there is substance in the reason given by the Court of Appeal for its interference with the award. I
- 5 have read the judgment of the learned trial Judge and I think that the criticism of it by the Court of Appeal that no reasons were given for the award of the rather large sum of N50,000.00 and that the award, in the circumstance, was too high, was justified. The learned trial Judge merely summarised the evidence and did not make any specific finding or give any reasons for the award.
- 10 A summary of evidence or restating of it does not constitute an evaluation of the evidence. See *Uwegba v. Attorney-General Bendel State* (1986) 1 NWLR (Pt. 16) 303. Further, it was only within the two parcels of land, verged yellow in Exhibit "A", that building operation was going on. So, all the cement blocks and sand being used for building construction allegedly packed away by the
- 15 respondents could not be said to belong to the appellants as it was the Government of Bendel State that was carrying on the building operation. The evidence of trespass that was within the land in dispute but outside the two parcels of land edged yellow in Exhibit "A" was the isolated instance of the erection of sheds in one portion of the land in dispute by the female members
- 20 of the respondent's community. This is a proper case warranting the interference of the Court of Appeal with the award of damages. The interference with the award by the Court of Appeal was not even far reaching or adequate enough. A trespass which is only of a technical nature can at best, attract only nominal or minimal damages. See *Umunna & Ors v. Okwuraiwe*, (1978) 6-7 S.C.
- 25 1 at 12. If, as rightly stated by the Court of Appeal, what happened was a trespass then the sum of N500.00 is reasonably sufficient as general damages and that is the amount which this court will award to the appellants as damages for the trespass committed by the respondents.
- 30 The question raised under the sixth issue was whether the Court of Appeal could suo motu raise and consider issues not raised by the parties and decide the case on the basis of them without hearing the parties thereon. The appellants referred to the alleged issues, and it was argued that the type of thing which the Court of Appeal did, without doubt, used to lead to a miscarriage of
- 35 justice. The contention of the respondents was that as the learned trial Judge failed to appraise and evaluate the evidence before him on certain relevant issues and to make findings thereon, the Court of Appeal was justified in examining the evidence on record, in the interest of justice, to ensure that the inferences and conclusions that could reasonably be drawn from the evi-

dence justified the determination of those issues by the learned trial Judge. No doubt, the Court of Appeal raised and gave consideration to certain issues in the determination of the appeal before it. The fundamental question is whether the parties were given the opportunity of being heard on the issues before they were determined and, if not, whether the error resulted in a miscarriage of justice. If a trial court fails to consider and evaluate the evidence adduced by both parties on certain relevant issues, it is the duty of the appellate court, if it does not involve credibility of witnesses, to consider and evaluate such evidence and to make proper findings. See *Ogunleye v. Oni* (1990) 2 NWLR (pt. 135) 745. However, it is wrong for a court to raise and decide an issue because it is material for the determination of the case or appeal before it, which has not been raised by the parties to the case themselves, without giving the parties an opportunity of being heard on it. See *Ejowhomu v. Edok-Eter Mandilas Ltd* (1986) 5 NWLR (Pt. 39) 1. It is not, however, correct to state, as contended by the appellants, that failure of the court to give such an opportunity to the parties always occasions a substantial miscarriage of justice. Each case depends on its own merit. Therefore, it is not sufficient for the purpose of reversing a judgment merely to show that an error of law was committed by the trial or appellate court; the appellant must further demonstrate or show that the error of law in the case in question occasioned a miscarriage of justice. In other words, the error must have substantially affected the result of the decision. See *Olubode v. Salami* (1985) 2 NWLR (Pt.7)282. In this case, the appellants claimed three reliefs in the High Court. The court granted two of the reliefs, namely, declaration of title and damages for trespass. The third relief for injunction was dismissed and there was no appeal to the Court of Appeal in relation to that. The appeal against the judgment of the Court of Appeal setting aside the award of damages for trespass has partially succeeded. The complaint in the present circumstances, therefore, relates to the declaration of customary right of occupancy and it has not been shown that the alleged error on the part of the Court of Appeal occasioned a substantial miscarriage of justice. What crucially affected the decision of the Court of Appeal in relation to the appellants' claim that they were entitled to customary right of occupancy was their failure to establish the boundary of the land in dispute. It cannot, therefore, reasonably be said that the error in question in this case occasioned a substantial miscarriage of justice.

On the whole, the appeal partially succeeds. In so far as it concerns the dismissal, by the Court of Appeal, of the appellants' claim for a declaration of customary right of occupancy is concerned, the appeal is dismissed. The order of the Court of Appeal dismissing the appellants' claim for damages for

trespass is hereby set aside. In its place is substituted an order awarding N500.00 to the appellants as damages for the trespass committed by the respondents.

The appellants are awarded N1,000.00 costs.

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UWAIS J.S.C

I have had the opportunity of reading in draft the judgment read by my learned brother Adio, J.S.C. For the reasons which he has given therein I agree that the appeal has merit and that it should be allowed in part with N1,000 costs to the respondents.

WALI JSC

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I am privileged to have read before now a copy of the lead judgment of my learned brother, Adio J.S.C. I agree with the reasoning and conclusions arrived at by him and I adopt the same as mine.

For these same reasons, I hereby partially allow the appeal in that the order of dismissal by the Court of Appeal for a declaration for the grant of a Customary Right of Occupancy is affirmed while the amount of damages awarded for the simple trespass is further reduced to N500.00.

There will be no order as to costs.

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KUTIGJSC

I had a preview of the judgment of my learned brother Adio, J.S.C. just read. I agree with his reasoning and conclusions. I will also dismiss the appeal but allow the claim for general damages for trespass which is fixed at N500.00 only.

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IGUH JSC

I have had the privilege of reading in draft, the lead judgment just delivered by my learned brother, Adio, J.S.C. I am in complete agreement with

his reasoning and conclusions.

It is crystal clear from the pleadings that the boundaries of the land in dispute were in issue between the parties. The accuracy of the appellants' survey plan of the said land; Exhibit A, was expressly challenged by the respondents. In spite of these, the appellants adduced no evidence at the trial in proof of the north eastern boundary of the land they claimed. This is the alleged boundary of the land in dispute with the land of Somorika people. 5

The law is well settled by a long string of authorities that the onus of proof lies on the plaintiff who seeks a declaration of title to land to establish with certainty and precision the area of land to which his claim relates. See *Baruwa v. Ogunsola* (1938) 4 WACA 159; *Agbonifo v. Aiwereoba* (1988) 1 NWLR (Pt. 70) 325; *Onwuka v. Ediala* (1989) 1 NWLR (Pt. 96) 182; *Olusanmi v. Oshasona* (1992) 6 NWLR (Pt. 245) 22 at 36; *Awore v. Owodunni* (No.2) (1987) 2 NWLR (Pt. 57) 366 at 371; *Ezeokeke v. Uga and Ors* (1962) 2 SCNLR 199; (1962) 1 All NLR (Pt. 3) 482 and *Makanjuola v. Balogun* (1989) 3 NWLR (Pt. 108) 192. This onus, the appellants failed to discharge in respect of the north eastern boundary of the land in dispute. I entertain no doubt that this failure on the pan of the appellants to establish the north eastern boundary of the land in dispute is fatal to their claim for a declaration of title to a customary right of occupancy thereto. I therefore agree with the decision of the Court of Appeal that the learned trial Judge was in error when he held that the appellants established the boundaries of the land in dispute to entitle them to a grant of a declaration of title. It is also my view that the Court of Appeal was right when it allowed the respondents' appeal, set aside the judgment of the learned trial Judge and dismissed the appellants' claim for title to the land in dispute. 10 15 20

On the appellants' claim for damages for trespass, the Court of Appeal was of the opinion that trespass was not established because possession of the land in dispute was at all material times in the then Bendel State Government and not in the Akuku Community. It therefore dismissed this arm of the appellants' claim on the basic principle that trespass to land is only maintainable at the instance of one in possession of such land. See *England v. Palmer* 14 WACA 659 at 661; *Olagbemiro v. Ajagungbade III* (1990) 3 NWLR (Pt. 136) 37; *Adebanjo v. Brown* (1990) 3 NWLR (Pt. 141) 661 and *Alhaji Are v. Raji Ipaye* (1986) 3 NWLR (Pt. 29) 416. 25 30

With profound respect, I think that the Court of Appeal was in error when it dealt with the two pieces of land verged yellow in the appellants' plan, Exhibit "A" as if they were the only land in dispute in the suit. Those two pieces of land were admittedly in the actual possession of the then Bendel State Government at all times material to the trespass complained of. But the land in dispute verged pink in the appellants' plan is made up of three contiguous 35

portions of land. These consist of the two portions verged yellow which were in the possession of Government together with the rest of the land in dispute which were in the possession of the appellants. There was ample evidence before the trial court that the respondents erected sheds outside the area verged yellow but within the area of the land in dispute in the possession of the appellants. No doubt, the acts of trespass complained of commenced on the areas verged yellow but they extended beyond the said area verged yellow into the portion of the land in dispute. In this circumstance, I am in agreement with my learned brother, Adio, J.S.C., that the unauthorised erection of sheds by the respondents on the portion of the land in dispute in the possession of the appellants outside the areas verged yellow constituted an act of trespass for which the appellants are entitled to damages.

On the issue of damages, the principle is well established that in order to justify reversing a trial court on the question of the amount of damages awarded, the appellate court should be convinced either

- (i) that the trial court acted upon some wrong principle at law, or
- (ii) that the amount awarded was so extremely high and extravagant or so very small and paltry as to make it, in the judgment of the appellate court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. See *Flint v. Lovell* (1935) 1 KB 360; *Ziks Press Ltd. v. Ikoku* (1951) 13 WACA 188; *Idahosa v. Oronsaye* (1959) SCNLR 407; (1959) 4 F.S.C 166; *Bala v. Bankole* (1986) 3 NWLR (pt.27) 141; *Onaga v. Micho & Co.* (1961) 2 SCNLR 101; (1961) 1 All NLR 388 and *Ijebu Ode Local Government v. Balogun and Co. Ltd* (1991) 1 NWLR (Pt. 166) 136. The learned trial Judge having found trespass established proceeded to award N50,000.00 as general damages to the appellants. No reason was given for this extremely very high award of general damages in respect of what the Court of Appeal rightly described as a "bare trespass". In my view, this is one of the clearest cases in which the award of N50,000.00 as general damages by the trial court for a "bare trespass" without proof whatsoever of any special or aggravating circumstance, loss or injury must, by all standards, be regarded as wholly unjustifiable, totally high and extravagant and an entirely erroneous estimate of the damage to which the appellants are entitled. The Court of Appeal was therefore right in reducing this award. I also agree that the interference of the Court of Appeal by reducing this extraordinary award of damages to N3,000.00 was on the evidence, not as drastic as the justice of the case demands. Accordingly, I, too, will further reduce the amount to N500.00 being general damages for this act of bare trespass.

In the light of the above and for the more detailed reasons set out in the lead

judgment of my learned brother, Adio, J.S.C. this appeal partially succeeds. The orders of the Court of Appeal dismissing the appellants' claim for damages for trespass is hereby set aside and the appellants are awarded N500.00 damages for trespass against the respondents. The appeal against the dismissal by the Court of Appeal of the appellants' claim for a declaration of title to customary right of occupancy is hereby further dismissed. I endorse the consequential orders in the lead judgment in their entirety. 5

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