

SUPREME COURT OF NIGERIA
17TH JUNE, 1994, SC. 143/1992.
CORAM: S. M. A. BELGORE, A. B. WALI,
M. E. OGUNDARE, E. O. OGWUEGBU, A. I. IGUH, JJSC.

SUNDAY ADONRI DEFENDANT/RESPONDENT/
CROSS-APPELLANT

AND

MADAM FUMIKE OJO-OSAGIE PLAINTIFF/APPELLANT/
CROSS-RESPONDENT

APPEALS - Issue not before the court - Court of Appeal cannot set up a different case for the parties - If it must raise a new issue - Need to be addressed on the new issue.

APPEALS - Interfering with trial court's findings of fact - Not to be done ordinarily by appellate court - Save in certain justifiable circumstances.

APPEAL - Order of a retrial - By Court of Appeal in a land matter - Held to be as a result of misconception of the case.

EVIDENCE - Findings of trial court - Where supported by evidence - Whether Court of Appeal should disturb the findings.

EVIDENCE - Allegation of contradictions and conflicts - In Plaintiff's evidence - When not acceptable - Towards rendering trial court's findings perverse.

JUDGMENTS - Final conclusion of trial Court - Flowing from Findings of Fact made by it - Whether Court of Appeal was right in disturbing the final conclusion.

LAND LAW - Succession - Claim by both parties to property in dispute - By virtue of inheritance under Bini customary law - Trial Court's findings of fact - Whether to be disturbed.

PRACTICE & PROCEDURE - Findings of fact - Court of Appeal's failure to consider the trial court's weighty findings of fact - Though it directed its mind to the guiding principles on the issue - Whether those principles were applied.

FACTS

The Plaintiff and Defendant are first cousins. The property in dispute known as 12 Mission Road Benin-City was inherited by the Plaintiff from her late parents after she had performed their burial rites according to Bini custom. Part of the property was previously owned by one Late Madam Igbinake a relation of the parties who gave the property to Plaintiffs mother, Ayenu, as a gift inter vivos. The Plaintiff had been living within the property for over 40 years. In 1970, pursuant to a request made by a relation of the parties, Plaintiff gave accommodation to the Defendant within the property. In 1978, the Defendant asked the tenants to pay rents to him rather than the plaintiff, but they refused. Defendant later laid claim to the house by inheritance through his late father whom he claimed inherited from Madam Igbinake. He started molesting the plaintiff who moved out and started living at 11 Mission Road.

Plaintiff then instituted this action claiming inter alia, a declaration that she is in possession and therefore entitled to Statutory Right of Occupancy, and possession of that part of the premises now occupied by the Defendant without the Plaintiffs consent. The trial court found for the Plaintiff and granted all her reliefs save her claim for N2,000 damages for trespass. Defendant's appeal to the Court of Appeal was allowed in part by that court in raising an issue not before it and wrongfully interfering with the trial court's findings of fact. The Court below ordered a retrial. Plaintiff being dissatisfied has now appealed to the Supreme Court while the Defendant has also cross-appealed. The final court has to determine to whom as between Ayenu (Plaintiffs mother) and Adonri (Defendant's father) the property in dispute was given.

HELD (Unanimously allowing the plaintiffs appeal)

Setting up a different case for the parties

1. By ordering a retrial to determine which part of the house in dispute was bought by plaintiffs father the court below, with respect, went on a voyage of its own. That issue was not before it. The duty of the court below was to consider the case before it in the light of the defendant's complaints. It has no business setting up for the parties a case different to the one set up by the parties. And if it must raise any other issue suo motu, it must draw the attention of the parties to it and give them the opportunity of addressing it on such issues. (P.25 L.39)

Interfering with trial court's findings of fact

2. It is settled that an appellate court will not ordinarily interfere with the

findings of fact made by a trial court except in certain circumstances such as where the trial court has not made a proper use of the opportunity of seeing and hearing witnesses at the trial or where it has drawn wrong conclusions from accepted credible evidence or has taken an erroneous view of the evidence adduced before it or its findings of fact are perverse in the sense that they do not flow from the evidence accepted by it. (P.30 L.33)

When not to disturb findings of fact

3. The trial court's findings were adequately supported by the evidence before it. The court below would be expected ordinarily not to disturb the findings. (P.32L.15)

When retrial is ordered out of misconception

4. Their Lordships of the court below laboured under a complete misconception of the case. It was this misconception of the case that led them to order a retrial to determine which part of the property in dispute was bought by plaintiff's father from Suberu and his wife. By its order of retrial the Court must have accepted the story of purchase of a structure from Suberu. And yet, it talked of contradictions in evidence. (P.33 L.38)

Failure to consider weighty findings of fact

5. There was no attempt made to consider the weighty findings of fact made by the learned trial Judge. Although the court below directed its mind to the principle guiding an appellate court as regards its attitudes towards findings of fact made by trial court, it does not appear that those principles were applied by it. (P.34 L.5)

Allegation of contradictions in evidence

6. There is no justification for disturbing the final conclusion reached by the trial court, flowing, as it were, from the findings of fact made by it. For this reason, the submission of learned Senior Advocate appearing for the defendant that "the case of the Plaintiff was unsatisfactory as a result of lack of cogent evidence as well as the presence of contradictions and conflicts in its presentation is not acceptable. There is no such "contradictions and conflicts" in the evidence for the Plaintiff that would whittle down or render perverse the findings of the trial court." (P.34 L. 10)

NOTABLE POINTS OF INTEREST

OGUNDARE.JSC

5 ***1. When main issue on appeal is one of fact***

The main issue in this case is: to whom did Madam Igbinake Otote give her house in her life-time, plaintiffs mother Ayenu or defendant's father, Adonri. This is essentially a matter of fact. Indeed, this case resolves itself on the facts. And a long line of cases beginning with Loeb v. Nassar 3 WACA 227 has laid down what the attitude of an appellate court should be to findings of facts made by the trial court. (P.26 L. 15)

OGWUEGBU.JSC

15 ***2. Findings of fact of trial court - Not to be easily interfered with***

It has been settled by several decisions of this court that where a court of first instance which has the singular advantage of seeing and hearing the witnesses testify has made findings of fact, an appellate court will not readily interfere except where circumstances warrant such interference, for example, where the findings were unreasonable or perverse and not the result of the proper exercise of the judge's judicial discretion to believe or disbelieve, or where the facts found by the court of trial are wrongly applied to the circumstance of the case. (P. 39 L.4)

25 **IGUH.JSC**

3. Need for court to limit itself to issues raised by the parties

It cannot be over emphasized that courts of law must limit themselves only to issues raised by the parties in their pleadings as to act otherwise might well result in the denial to one or the other of the parties of his right to fair hearing. So too, when an issue is not placed before an appellate court, save, of course such fundamental matters as touch on the jurisdiction or competence of a court or the constitutionality of an act or thing directly in issue in a cause, the appellate court has no business whatsoever to deal with such an issue. (P.40 L.21)

4. Presumption that trial Judge's decisions on the facts are right

Where a case tried by a Judge without a jury, as in the instant case, comes before the Court of Appeal, that court will presume that the decisions of the

Judge on the facts are right and will not disturb them unless they are unsupported by evidence, or are perverse or the appellant satisfactorily makes out that they are wrong. (P.42 L.36)

CASES REFERRED TO

Oniah v. Onyia (1989) 1 NWLR (pt. 99) 514, 545C	5
Loeb v. Nassar 3 WACA 227	
Okopiri v. Jonah (1961) All NLR 102, 104-105	
Mogaji v. Odofoin (1978) 4 S.C. 91 - 100	
Ekwealor v. Obasi (199) 2 N.W.L.R. (Pt. 131) 231	10
Udofia v. The State (1984) 12 S.C. 139	
Nnajifor v. Ukonu No. 1 (1985) 2 N.W.L.R. (Pt.9) 686	
Nabham v. Nabham (1967) N.M.L.R. 192	
Nzekwu v. Nzekwu (1989) 2 N.W.L.R. (Pt. 104) 373	
Metalimpex v. A.G. Leventis & Co. Ltd (1976) 2 SC. 91	15
Kalio v. Kalio (1977) 2 SC. 15	
George v. Dominion Flour Mills Ltd (1963) 1 S.C.N.L.R. 242	
Shell B.P. Ltd. v. Abedi (1979) 1 All N.L.R. (Part 1) 13	
Ogunlowo v. Prince Ogundare (1993) 7 N.W.L.R. (Part 307) 610 at 624	
Shitta-Bey v. Federal Public Service Commission (1981) 1 SC. 40	20
Saude v. Abdullahi (1989) 7 S.C.N.J. 216 at 229	
Olusanya v. Olusanya (1983) 3 SC. 41 at 56 - 57	
Ochonma v. Unosi (1965) N.M.L.R. 321 at 323	
Ugo v. Obiekwe (1989) 1 N.W.L.R. (Pt. 119) 556 at 581	
Nwokoro v. Onuma (1990) 3 N.W.L.R. (pt. 136) 22 at 35	25
Anie v. Uzorka (1993) 8 N.W.L.R. (Pt.309) 1 at 16	
Adegoke v. Adibi (1992) 5 N.W.L.R. (Pt. 242) 410 at 420	
Sheldon v. Bromfield Justices (1964) 2 Q.B. 573 at 478	
Rex v. Hendon Justices, Ex Parte Gorchein (1973) 1 W.L.R. 1502	
Mbanta v. Anigbo (1972) 2 E.C.S.L.R. 306 at 311	30
Okpiri v. Jonah (1961) All N.L.R. 102 at 104	
Lawal v. Dawodu (1972) 8 - 9 S.C. 83 at 114	
Balogun v. Agboola (1974) 10 SC. 111 at 118	

LEAD JUDGMENT BY OGUNDARE JSC **35**

Both the plaintiff, Madam Fumike Ojo-Osagie and the defendant, Sunday Adonri are first cousins; the father of Sunday was a younger brother of Fumike's mother. Their parents are both dead. The two parents were both

related to one Madam Igbinake Otote who died childless some years ago at Benin City. Madam Igbinake owned a small house on the land now known as 12, Mission Road, Benin. Adjacent to Madam Igbinake's house and thatched together with it was another small house owned by one Suberu, a native of Ife.

5 Plaintiff's mother, Madam Ayenu Ojo-Osagie who was a niece to Madam Igbinake moved with her husband, Ojo-Osagie (plaintiff's father) from Akure to Benin and lived with her aunt, Madam Igbinake. Because of the care and attention Madam Ayenu gave to her aunt, the latter gave her thatched house to her niece as a gift inter vivos. Suberu decided to leave Benin for his home

10 town Ife with his family and sold his house to plaintiff's father, Ojo-Osagie. With the ownership in the two houses now in Ojo-Osagie and his wife, Ayenu. After the death of Madam Igbinake Ojo-Osagie, demolished the two thatched houses and built on the land a house with shops, now standing on the premises and now known as 12 Mission Road. Ayenu died in 1940 leaving behind

15 the plaintiff as her only child. Ojo-Osagie too died in 1958 without a male child, the plaintiff is his eldest daughter. And following her performing the burial rites of her parents according to Benin custom, she inherited the house, shops and premises known as 12, Mission Road.

Defendant's father, Adomi was apprenticed by Ayenu to one Akhator

20 Anyamu to learn driving. Adomi soon became a professional driver and when he moved from Akure to Benin, he lived with his elder sister, Ayenu and her husband, that is, plaintiff's parents, in the thatched house given by Madam Igbinake to Ayenu. About 1929, Adomi left the house and moved to Ibiwe Street, Benin where he rented a house. He remained in the rented accommodation

25 until 1945 when he died. After the death of Adomi, his son Sunday, that is defendant, lived with a relation called Afe. He too learned motor driving and became a professional motor driver. On his return to Benin from Ondo, the defendant approached the plaintiff in 1970 and begged for accommodation. On the intervention of Mr. Afe, plaintiff allowed Sunday to live in a vacant

30 room in the house at 12, Mission Road. Another room that later became vacant was also given to him to live in. In 1978, defendant called plaintiff's tenants in the house and told them to pay rents to him rather than to the plaintiff. The tenants refused. The defendant later laid claim to the house by inheritance and started molesting the plaintiff who, in fear for her life, moved

35 out of the premises and started living at No. 12 Mission Road. Plaintiff then instituted the action leading to this appeal claiming as per paragraph 28 of her further amended statement of claim as hereunder:

(a) A Declaration that plaintiff is in possession and therefore entitled to Statutory Right of Occupancy and/or is the proper person to apply

and obtain Certificate of Occupancy in respect of No. 12, Mission Road, Benin City.

(b) An order for possession of that part of the premises now occupied by the defendant without the consent and authority of the plaintiff.

(c) Perpetual Injunction restraining the defendant, his agents, servants or privies from further interfering with, dealing or treating with anybody in respect of the said piece of land, house, shops and premises known as No. 12, Mission Road, Benin City, in any manner inconsistent with the plaintiff's right, title and interests in the said piece of land.

(d) N2,000.00 general damages for trespass and for questioning the plaintiff's right, title and interests in respect of the said property.)

The defendant, in his 2nd further amended statement of defence claimed that it was his father who inherited the premises in dispute from his (father's) aunt, Madam Igbinake. He, defendant then inherited it from his father.

The action proceeded to trial at the conclusion of which the learned trial Judge, in a considered judgment found for the plaintiff and entered judgment in her favour in terms of her claims in paragraph 28 of her further amended statement of claim, except the claim for damages for trespass which he dismissed. Being dissatisfied with this judgment, the defendant appealed to the Court of Appeal and the latter court allowed the appeal. Concluding his lead judgment, with which the other Justices that sat on the appeal agreed, Ejioyumi J.C.A said:

"It is evident from the pleading that originally there were two separate holders of properties on the land before they were demolished and rebuilt into the present property which is the subject matter of the present dispute. It is also clear that either of the parent of the respondent bought the other property from its owners who were known as Suberu and Iroro. The appellant has not disputed that claim, and in my view it cannot be proper for him to be declared the owner of this part of the disputed property, when he has no claim or right to it. In such circumstances, it is my view that the respondent ought to be allowed to prove the extent of the area of land which she inherited as a result of the purchase of a portion of the disputed land by either of her parents. For that reason, the case would be sent back for retrial in order to determine that question alone.

The result then is that the appeal has succeeded to the extent that the respondent has not established her claim to that portion of the disputed property which she claimed that she inherited from Madam Igbinake through her own mother. The judgment and orders of the lower court including the order for costs are hereby set aside.

With regard to the other portion of the disputed property it is hereby ordered that the case be remitted to the court below in order that the court may properly determine the area of the disputed land that the respondent claimed was purchased and developed by her parents.”

5 The plaintiff has now appealed to this court, with leave of the court below, against the judgment upon three grounds of appeal. The defendant too, was dissatisfied with the part of the judgment of the court below relating to the order of retrial in respect of a part of the premises in dispute and the order for costs and has also cross-appealed, with leave of the court below,
10 upon five grounds of appeal. Pursuant to the rules of this court both parties filed and exchanged their respective Briefs of Argument in which they set out the questions they consider are necessary for determination in the two appeals. In the plaintiff’s Brief the following questions are formulated:-

15 1. *Whether the learned Justices of the Court of Appeal was (sic) justified in delivering judgment on preliminary facts of the property on the land in dispute which has merged into one integral parcel of land i.e. 12, Mission Road property canvassed by the parties on joined issue of inheritance and/or gift inter-vivos from Madam Igbinake.*

20 2. *Whether on settled pleadings and Briefs, the identity of the property put in dispute i.e. 12, Mission Road, Benin City as in doubt as put up by the parties and their witnesses?*

25 3. *Whether the Court of Appeal was justified in disturbing the detailed and meticulous findings of facts of the learned trial Judge at pages 92 to 94 and completely ignored these crucial findings decisive of the case?*

30 4. *Whether the learned Justices of the Court of Appeal were justified in their approach as to relevant and determinable issue of inheritance of 12, Mission Road, Benin City canvassed and put up by the parties or gift inter vivos put by defendant for his father from late Madam Igbinake.*

35 5. *Whether the Court of Appeal was justified in basing their decision on historic/antecedents or preliminary issues of the property other than instead of the ultimate paramount joined issues of inheritance and gift inter-vivos by the parties respectively and which the learned trial Judge of the high Court meticulously considered in compliance with the principle laid down in Mogaji v. Odofin (1978) 4 S.C. 91-100.”*

40 She adopts in her respondent’s Brief these issues and the arguments on them in respect of the defendant’s cross-appeal.

The defendant, for his part, sets out the following issues as arising for determination in the two appeals, to wit:-

i. Whether the court of Appeal was right in dismissing the claim

made by the plaintiff to the land in dispute by way of inheritance through her mother and her mother's aunt Madam Igbinake Otote.

(Plaintiff's issue 4 - pp. 9- 13 of her Brief)

ii. Whether the Court of Appeal was justified in ordering a retrial of part of this case for the purpose of determining the identity of the disputed land claimed by the plaintiff to have been purchased and developed by her parents.

(Plaintiff's Issues 1 and 2 - pp. 9-13 of her Brief).

iii Whether having regard to issues i and ii above, the Court of Appeal ought to have dismissed the plaintiff's claim in its entirety.

iv. Whether the Court of Appeal was right in not awarding costs in favour of the defendant on the success of his appeal."

Plaintiff's Questions 1 & 2:

I shall take first Questions 1 and 2 in plaintiff's Brief which are Covered by Issue ii in defendant's Brief. In her further amended statement of claim plaintiff pleaded, inter alia as follows:

"3 The plaintiff is the owner by inheritance of the land, house, shop and premises now known as No. 12, Mission Road, Benin City. The said land, house, shop and premises had at previous times been known as No.8, Mission Road, and as No 10, Yakubu Gowon Street/Road, Benin City.
5. That at the time of the death of Madam Ayenu Ojo-Osagie, about 1940, she had no other child and also at the time of the death of Mr. Ojo-Osagie in about 1958, he also had no male child and plaintiff is his first daughter.

8. That originally there were two small houses thatched together in the premises where the land and house in dispute now stands. One of the houses was owned by Madam Igbinake Otote and the other then belonged to one Suberu and his wife named Iroro.

12. That the said Suberu and Iroro (Iya-roro) his wife were natives of Ife. And at one time Subaru visited his home town Ife and his relations prevailed on him not to stay in Benin again and that he should go and bring back his wife from Benin.

14. That it was plaintiff's Father that demolished the two thatched houses and built the present house and shops now on the land and premises which is clearly marked out and verged pink as shown in Plan No. LSD 2029 filed along with the Statement of Claim.

22. The plaintiff avers that the land and house, shops and premises in dispute was owned by her father during his life time and that she inherited same from her father. The plaintiff will produce and rely on various receipts, rates and levy which her father paid before he died and also receipts of

payments made by her since she took over the property as evidence that her father and herself had always been the owners and in possession of the said premises. The plaintiff further says that she is referred to in some of the receipts as Madam F. Osifo Ojo, R. Oni, Mrs. Fumike Ojo, Fumike Ojo etc., and that the reason for this is that she cannot read and write and as a result different people write down her names the way they like and at times when she gives money to someone to pay on her behalf.”

The defendants, for his part, denied the above paragraphs and averred specifically in his 2nd further amended statement of defence as hereunder:-

4. The defendant denies paragraph 3 of the plaintiff’s statement of claim and avers that the plaintiff did not at any time or at all inherit any of the premises mentioned in the said paragraph; the defendant further adds that it was the defendant’s father who inherited the said premises from defendant’s father’s aunt, one Madam Igbinake, who had no issue and before the said Igbinake died she summoned a family meeting and there directed that defendant’s father should inherit the house after he had performed her burial ceremonies after her death. The defendant will rely on Bini Customary Law to the effect that on the death of a person who has no issue, the male relation who performs the burial ceremony inherits his property.

14. With regard to paragraph 14 of the plaintiff’s statement of claim, the defendant denies that the plaintiff’s father demolished the thatched house and built a new house and shops on the land. What is on the land today is the house built by Madam Igbinake Otote, the sister of the grandfather of both the plaintiff and defendant, called Osifo. The thatched roof which was originally on the house was removed by an Ibo tenant who then roofed the building with corrugated iron sheets in lieu of rent. The defendant further avers that the plaintiff’s father did nothing whatsoever to alter or modify the structure of the said house built by Madam Igbinake Otote. Throughout the plaintiff’s parents were merely tenants at will at the house in dispute.

22. In answer to paragraph 22 of the plaintiff’s Statement of claim the defendant denies all the averments made therein and avers that he, defendant, appointed the plaintiff as caretaker of the land in dispute while the defendant was working under African Timber & Plywood Limited at Agbagie in Ondo State and it was during her management of the said land in dispute on behalf of the defendant that she collected the receipts for rates and levies. The defendant will produce receipts for four years which the defendant obtained from the Local Council that the plaintiff failed to pay.”

The case was fought on the basis of there being one house on the land to which each party claimed entitlement by inheritance, plaintiff from her parents and defendant from his father. The main issue put before the trial court was to whom as between Ayenu (plaintiff's mother) and Adomi (defendant's father) the property in dispute was given. The learned trial Judge addressed himself to that main issue and made findings of fact leading to the resolution of the issue. It was this same issue that the defendant who lost at the trial, placed Before the Court of Appeal and on which both parties addressed it.

In the judgment of Ejiwunmi, J.C.A. (with which Kolawole, J.C.A. and Adio, J.C.A. (as he then was) agreed), the learned Justice of Appeal observed:-

It seems to me, however that from what I have said above, the findings of the learned trial Judge ought not to be allowed to stand. In the first place it is manifest that the learned trial Judge was wrong to have concluded that it was not important for the claim to succeed whether the respondent proved her ownership of the land to her father or mother. I believe that the learned trial Judge ought to have noted that the property in dispute arose from two sources or parts. The first part being that which the respondent claimed that she inherited from her mother who inherited it also from her aunt. The other part clearly arose from a purchase and it is that which the respondent has a right to succeed to as it was purchased by her parents.

It is trite law that in a claim for a declaration of possessory title as in this case, the burden lies on the party who is claiming to establish that claim upon the strength of his own case and not on the weakness of the case of the defendant whose duty is merely to defend. If the onus of proof is not discharged, the weakness of the defendant's case will not help him and the proper judgment is for the defendant. On the basis of the principle of law so enunciated it is my view that the respondent has not established her claim to that part of the disputed property which she claimed (sic) through her mother. But the claim with regard (sic) must be considered differently.

He concluded the judgment with the passage earlier quoted by me. By its judgment, the court below treated the case as if it were claim to two separate buildings.

Both parties complain in the appeals before us that the court below, went beyond the case put before it by them and without hearing them on the division of the property in dispute into two separate units.

I am in complete agreement with the submissions of learned Senior Advocate both in their Briefs and in oral arguments before us on this point. By ordering a retrial to determine which part of the house in dispute was bought

by plaintiff's father the court below, with respect, went on a voyage of its own. That issue was not before it. The trial court considered, on the evidence before it, who, as between the plaintiff and the defendant, had right to the property in dispute and decided it was the plaintiff who had such a right. The defendant appealed. The duty of the court below was to consider the case before it in the light of the defendant's complaints. It has no business setting up for the parties a case different to the one set up by the parties. See Oniah & Ors. v. Onyia (1988) 1 NWLR (Pt.99) 514, 545. And if it must raise any other issue suo motu, it must draw the attention of the parties to it and give them the opportunity of addressing it on such issues.

In the premise the order of retrial made by the court below was wrongly made and must be set aside.

Plaintiff's Questions 3-5:

These questions raise the same issues as formulated in the defendant's Brief as Issues i & iii. As stated earlier in this judgment, the main issue in this case is: to whom did Madam Igbinake Otote give her house in her life-time, plaintiff's mother Ayenu or defendant's father, Adomi. This is essentially a matter of fact. Indeed, this case resolves itself on the facts. And a long line of cases beginning with Loeb v. Nasser 3WACA 227, has laid down what the attitude of an appellate court should be to findings of facts made by the trial court. Sir Ademola, C.J.F. (as he then was) in Okpiri v. Jonah (1961) 1 SCNLR 174; (1961) All NLR 102 at 104-105 stated the principles thus:-

"Three guiding principles were laid down by Lord Thankerton:-

1. Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself by the Judge, an appellate Court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion;

2. The appellate Court may take the view that, without having seen or heard the witnesses, it is not in position to come to any satisfactory conclusion on the printed evidence.

3. The appellate Court, either because the reasons given by the trial Judge are not satisfactory or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and then the matter will then become at large for the appellate Court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question.

This statement by Lord Thankerton, has not been doubted, but it has been qualified in the case *Benmax v. Austin Motor Co. Ltd.* (1955) A.C. 370; also (1955) All E.R. 326. The headnote of the report reads:-

‘There is a distinction between the finding of a specific fact and a finding of fact which is really an inference drawn from facts specifically found, In the case of the latter the appellate tribunal will more readily form an independent opinion than in the case of the former which involves the evaluation of the evidence of witnesses, particularly where the finding could be founded on their credibility or bearing,’

And the learned Chief Justice in *Mojo v. Stocco* (1968) 1 All NLR 141 at 149 again stated:-

“We need to make it clear once again that this court will not interfere with findings of facts made in the court below, but when circumstances justify it, as we have pointed out in some cases, we shall not hesitate to disturb the findings of facts made by the judge in the court below. The circumstances need no reiteration.

*We have sufficiently reviewed the position of the law in other cases which came before this court and a few authorities need be referred to here all indicating that where the facts found by the court of trial are wrongly applied to the circumstances of the case or where the inference drawn from those facts are erroneous or where the findings of facts are not reasonably justified or supported by evidence given in the case, the Court of Appeal, is in as much a good position as the trial Court to deal with the facts and to make proper findings _ We refer to the case of *Akinola and others v. Fatoyinbo Oluwo and others* (1962) 1 SCNLR 352; (1962) 1 All NLR 244; *Lawal Braimoh Fatoyinbo and others v. Selistu Abike Williams* (1956) 1 F.S.C. 87; (1956) SCNLR 274; *Chief Oshoghon Fahumiyi and another v. Fatumo Temitoyin Ohaji and another* (Unreported) S.C. 54/1965 delivered 29th September 1967 and to mention two English cases - *Watt or Thomas V. Thomas* (1967) A.C. 484 *Benmax v. Austin Motor Co. Limited.* (1955) A.C. 370.)”*

In *Lawal v. Dawodu* (1972) 8-9 S.C. 83, 114-115, Coker J.S.C. restated the law in these words:

In the evaluation of evidence we think it firmly established in our jurisprudence that a Court of Appeal ought not, except in exceptional circumstances, to interfere with what must be considered the outcome of a dispassionate consideration of the evidence by a Judge who saw and heard the witnesses give Evidence. The ascription of probative values to evidence comes at a later stage of the whole process and it is also established that this is a matter for the Judge who saw and heard those witnesses given evidence.

Nevertheless, the area is one in which the Court of Appeal is at least equally qualified and competent and indeed is often required to exercise jurisdiction in certain, albeit exceptional, circumstances. A trial Judge however learned may draw mistaken conclusions from indisputable primary facts and may indeed wrongly arrange or present the facts on which the foundations of the case rest. In those circumstances, it would be completely invidious to suggest that a Court of Appeal should not intervene and do what justice requires but should abdicate its own responsibility and rubberstamp an error however glaring.”

And in Balogun v. Agboola (1974) 10 S.C. 111 at 118-119, the learned Justice in delivering the judgment of this Court once again said:

“The ascription of probative values to evidence is a matter primarily for the court of trial and it is not the business of a court of appeal to substitute its own views of undisputed facts for the views of the trial court. Interference by a court of appeal with respect to issues of fact is by law confined within very narrow and limited dimensions and we are clearly of the view in this case that the Western State Court of Appeal took a mistaken view of the law when it embarked, as it did, on a fresh appraisal of the evidence of witnesses to whom the learned trial Judge had himself listened and whom he had seen face to face when they (the court of appeal) were dealing only with the cold sullen print of the records before them. We have no hesitation in restoring the findings of fact of the learned trial judge.”

I only need to refer to two weighty dicta of Idigbe J.S.C. and Nnamani, J.S.C in Woluchem v. Gudi (1981) 5 S.C. 291 at 295-296 and 326-329. Idigbe, J.S.C. stated the law thus:-

There are very strict limitations on the power of the Court of Appeal to set aside or reverse the decision of the trial Judge on issues of fact. These have been well set out by Baggaly JA long ago in the Glannibanta (1876) 1 P.D. 283 at 287 and also by Lord Sumner in The Hontestroom (owners) (1927) A.C. 37. I need not repeat them here; but suffice it to say that when, as here, the decision of the trial Judge is based mainly and substantially on his assessment of the quality and credibility of witnesses who testified before him, a Court of Appeal ‘must in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong’ [See Lord Kingsdown in The Julia (1860) 14 MooP. CC 210 at 2351.

That certainly, was not the case in the appeal in hand; nor could the Federal Court of Appeal have rightly been convinced that the learned trial Judge was wrong in the view he took of the evidence of the principal witness for the plaintiff - Chief Jonathan Wokoagbara Eke (P.W.2) - whom he

was satisfied was credible; and the observations of that Court (The Federal Court of Appeal) that Chief Eke proved that -tributes were paid to the appellants' (respondents herein) - an aspect on which the Court found fault with the findings of the learned trial Judge - is, in fact, not borne out, or support by the recorded evidence of that witness."

Nnamani, J.S.C. in his own judgment said:-

The principles under which an Appeal Court would interfere with the findings of a lower court have been laid down by several Authorities of this Court and Courts in common law jurisdictions. It is now settled law that if there has been a proper appraisal of evidence by a trial court, a court of appeal ought not to embark on a fresh appraisal of the same evidence in order merely to arrive at a different conclusion from that reached by the trial court. Furthermore, if a court of trial unquestionably evaluates the evidence then it is not the business of a Court of Appeal to substitute its own views for the views of the trial court. See Folorunsho v. Adeyemi (1975) NMLR 128 CAW; A.M. Akinloye v. Bello Eyiola & Ors. (1968) NMLR 92 at page 85; Balogun v. Agboola (1974) 19 S.C. 111. That of course does not mean that an Appellate Court is completely shut out. Certainly not, for if it were so the appeal itself would be pointless. The interference must, however, be in accordance with the principles that have been laid down over the years. If the judgment of the trial court can be demonstrated to be affected or full or material of inconsistencies and inaccuracies or if the trial Judge has failed to appreciate the weight or bearing of circumstances admitted or proved or has gone completely wrong the Court of Appeal will interfere. Also if the trial court takes a decision which is clearly perverse it will be open to the Court of Appeal to set aside such a decision. See Lucky Onowan & Anor. v. J.J.I. Iserhien (1976) NMLR 263 at 265; (1976) 9-10 S.C. 95. See also Nabham v. Nabham (1967) NMLR 47. These principles are based on sound common sense. The learned trial Judge has the singular advantage of seeing and observing the witnesses. He watches their demeanour, candour or partisanship, their integrity, manners etc. He can therefore decide on their credibility and this affects a substantial part of his findings of fact. These advantages are not normally enjoyed by the Appellate Court. All it has is the printed evidence, it does not have the other evidence - evidence of the demeanour of the witnesses and other incidental elements that go to make up the atmosphere at a trial. It cannot fully appreciate the background against which the evidence was received. It therefore is in no position to contest the findings of fact which the learned trial Judge has made based on such evidence that is available before him. See *Edmund Davies. Lj in Breen v. Amalgated Engineering Union (now Amalgamated Engineering and Foundry Workers Union) and others* (1971) 1 All E.R. 1148 at page 1161 quoted with

approval a dictum of Lord Sumner in Steamship Hontestroom (owners) v. Steamship Sagaporack (Owners) 1927 A.C. 37 where the learned law Lord said:-

‘What then is the real effect on the hearing in a Court of Appeal of
5 the fact that the trial Judge saw and heard the witnesses? I think it has been
somewhat lost sight of. Of course, there is jurisdiction to retry the case on the
short hand note, including in such retrial the appreciation of the relative
values of the witnesses. It is not, however, a mere matter of discretion to
remember and take account of this fact; it is a matter of justice and of judicial
10 obligation. None the less not to have seen the witnesses put appellate judges
in a permanent position of disadvantage as against the trial Judge and
unless it can be shown that he has failed to use or has palpably misused his
advantage, the higher court ought not to take the responsibility of reversing
conclusions so arrived at merely on the result of their own view of the possi-
15 bilities of the case..... If this estimate of the man forms any substantial part of
his reasons for his judgment the trial Judge’s conclusions of fact should be
left alone’

The House of Lords in Watt (or Thomas v. Thomas) (1947) 1 All E.R.
582 formulated the principles under which an appellate Court intervenes in the
20 following words, which I respectfully adopt:

‘Where a question of fact has been tried by a Judge without a jury,
and there is no question of misdirection of himself by the Judge, an appellate
court which is disposed to come to a different conclusion on the evidence
should not do so unless it is satisfied that any advantage enjoyed by the trial
25 Judge by reason of having seen and heard the witnesses could not be suffi-
cient to explain or justify the Judge’s conclusions. The appellate court may
take the view that, without having seen or heard the witnesses it is not in a
position to come to any satisfactory conclusion on the printed evidence. The
appellate court either because the reasons given by the trial Judge are not
30 satisfactory or because it unmistakably so appears from the evidence may be
satisfied that he has not taken proper advantage of his having seen and
heard the witnesses, and the matter will then become at large for the appel-
late court.’

From these cases and many more, it is settled that an appellate court
35 will not ordinarily interfere with the findings of fact made by a trial court except
in certain circumstances such as where the trial court has not made a proper
use of the opportunity of seeing and hearing witnesses at the trial or where it
has drawn wrong conclusions from accepted credible evidence or has taken
an erroneous view of the evidence adduced before it or its findings of fact are

perverse in the sense that they do not flow from the evidence accepted by it.

Turning now to the case on hand. The learned trial Judge, after a review and appraisal of the evidence adduced before him found:

1. *The plaintiff was born in the property in dispute.*
2. *That she lived there with her mother Ayenu and her father Ojo Osagie.* 5
3. *That plaintiff had lived continuously in the property in dispute for upwards of 40 years.*
4. *That plaintiff was forced out of the property when she was assaulted by the defendant.*
5. *That the defendant moved into the property in dispute (12, Mission Road) with the plaintiff's consent and after the late Mr. O.I. Afe had spoken to her.* 10
6. *That the defendant lived with late Mr. O.I. Afe before he (defendant) moved to 12, Mission Road.*
7. *That it was the plaintiff who performed the burial ceremonies for her parents when they died.* 15
8. *That plaintiff's mother was the sister of defendant's father.*
9. *That defendant's father died outside Benin and his corpse was taken to* 20
12, Mission Road for burial ceremony because of the close family tie and because 12, Mission, Road was a more suitable place than the abode of the defendant's father.
10. *That until he died the defendant's father did not build a house for himself but lived in a rented apartment in Ibiwe Street.* 25
11. *That it is not true that there was a family meeting where the late Madam Igbinake directed that on her death Adomi (defendant's father) should perform her burial ceremony and thereafter take absolutely the property in dispute.*
12. *That Madam Igbinake was childless and her property situate at 12, Mission Road was inherited by the plaintiff's mother Ayenu who according to P.W.1 was a sister of late Madam Igbinake.* 30
13. *That it is the plaintiff and not the defendant who has been in possession of the property in dispute at all times material to this case.*
14. *That it was the plaintiff's mother (Ayenu) and not the defendant's father (Adomi) who performed Madam Igbinake's burial ceremonies.* 35
15. *That the plaintiff's mother (Ayenu) became the bona fide owner of the property in dispute by inheritance since her sister Igbinake the original owner of the property died childless.*
16. *That the story of how Madam Igbinake's property at 12, Mission*

Road passed to the defendant's father (Adomi) got no support from the evidence of late Mr. O. I. Afe (an important member of the defendant's family) as could be seen from Exhibit 'B'.

17. That it was the plaintiff and not the defendant who was paid
5 compensation when part of 12, Mission Road was destroyed during the expansion of the said Mission Road.

18. That if even the plaintiff's family at a meeting had decided that the property in dispute be shared between the plaintiff and the defendant that decision is not binding on them unless they consented to the division.

10 19. That either party to this suit was free to come to court for a declaration that he or she is the rightful person to apply for a certificate of occupancy in respect of the whole of 12, Mission Road.

20. I am very satisfied that the plaintiff by traditional evidence and acts of ownership has established her claim to the ownership of 12, Mission
15 Road.

These findings were adequately supported by the evidence before the trial court. I would ordinarily expect the Court below not to disturb them. But that Court, per Ejjiwunmi, J.C.A. observed:

"It is therefore manifest from the above pleading of the respondent
20 that the respondent is apparently claiming that her mother Ayenu became seised of a portion of the disputed land by inheritance from her mother's aunt, Madam Igbinake. And in order to justify her entitlement to all the disputed land, the respondent as I have previously observed pleaded by
paragraph 22 of her Further Amended Statement of Claim that she inherited
25 the land through her father who bought the other portion of the land adjacent to that which her mother inherited. And that it was her father who thereafter built what is now known as 12, Mission Road."

Having regard to the contention of learned Senior Counsel for the appellant, the question then is whether in the face of the pleadings and the
30 evidence before the trial court the learned trial Judge was right to have upheld the claim of the respondent when he held at page 90 of the record of proceedings thus:-

'Whether the plaintiff inherited 12, Mission Road from her father or mother is, strictly speaking, not important in determining the plaintiff's claim
35 to the property.'

I think that the learned trial Judge by so holding fell into error. It is my view and with the greatest respect to the learned trial Judge that the respondent having put forward two conflicting claims with regard to her root of title to the dispute land, it becomes the duty of the trial court to

examine the claim of the respondent upon the basis of her pleadings. In my humble view, the Court has a duty to resolve the conflicting claim and if the respondent did not establish her claim to the disputed land then the claim of the respondent must be dismissed. Now, in the case under consideration, the learned Senior counsel for the appellant has directed our attention to the conflicting evidence led by the respondent in support of her claim to the disputed land. One of such conflicts to which our attention was drawn is in connection with the purchase of the other house on the disputed land. It would be recalled that the respondent by her pleadings had averred in paragraph 13 of her further amended statement of claim that it was her father Ojo-Osagie who bought the house from its owners Suberu and Iroro. Significantly the respondent did not in her testimony give any evidence in support of that averment. But her witness, Yessuf Mustapha, P.W.4 who claim that he know the parents of the respondent said with regard to the purchase of the other house on the disputed land thus:-

"I know (sic) Suberu and Iroro. Suberu was the husband of Iroro. They too (sic) were living in Mission Road when I know them. Suberu and Iroro were living close to the house of the parents of the plaintiff. The two houses (i.e.) of the plaintiff's parents and Suberu and (Iroro) were quite close. Both house had (sic) common boundary. When Suberu was going to his home town, Modakeke in Ile Ife, he sold his house along Mission Road, Benin which was of mud walls and thatched roof to Mama Fumike for #330.00 to Suberu. The father of the plaintiff was around When Mama Fumike i.e. plaintiff's mother was buying the house from Suberu for #330.00."

It is thus clear from the evidence of P.W.4, that contrary to the pleadings of the respondent that it was her father who bought the other house on the property, it was her mother who bought the property and apparently in the lifetime of her father. Now, the witness P.W.4, further went on to say that respondent's father later rebuilt the property before he died, and he predeceased the respondent's mother. Again the testimony of this witness appears to contradict the respondent pleadings as to who of her parents died first. It would appear from paragraph 16 of the respondent's Further Amended Statement of Claim that she pleaded that her father died sometime in 1985, and thereafter she inherited the property. However, it must be noted that the respondent did not give any direct evidence on this point except to say that she performed the burial ceremonies of her parents when they died."

With profound respect to their Lordships of the court below, I think they laboured under a complete misconception of the case. It was this miscon-

ception of the case that led them to order a retrial to determine which part of the property in dispute was bought by plaintiff's father from Suberu and his wife. By its order of retrial the Court must have accepted the story of purchase of a structure from Suberu. And yet, it talked of contradictions in evidence.

5 There was no attempt made to consider the weighty findings of fact made by the learned trial Judge. Although the court below directed its mind to the principle guiding an appellate court as regards its attitudes towards findings of fact made by a trial court, it does not appear that those principles were applied by it.

10 I can find no justification for their disturbing the final conclusion reached by the trial court, flowing, as it were, from the findings of fact made by it. It is for this reason that I am unable to accept the submission of learned Senior Advocate appearing for the defendant that the case of the plaintiff was unsatisfactory as a result of lack of cogent evidence as well as the presence of
15 contradictions and conflicts in its presentation." I can find no such "contradictions and conflicts" in the evidence for the plaintiff that would whittle down or render perverse the findings of the trial court.

In conclusion, I allow the plaintiff's appeal, and set aside the judgment of the court below. I restore the judgment of the trial High Court in favour
20 of the plaintiff, together with the order for costs made by that court. In view of the conclusion I reach on the order of retrial made by the court below, the point taken by the defendant in his appeal is well taken but his success on this point is of little comfort to him since the judgment of the court below has been set aside. Similarly, it is now a matter of academic exercise to consider the
25 defendant's complaint on the order for costs made by the court below. Suffice to say that as the defendant fails in the relief he seeks from this Court, his appeal is dismissed.

I award N1,000.00 costs of this appeal to the plaintiff.

30

BELGORE JSC

I read in advance the judgment of my learned brother, Ogundare, J.S.C, and I am in agreement with him that this appeal has great merit. The identity of the land in dispute is clear by the pleadings and the evidence led
35 during hearing at the trial Court, I am firmly of the view that the Court of Appeal misconstrued the findings of fact of the trial Court on this matter. I adopt the reasons in the lead judgment aforementioned as mine. I also allow this appeal and restore the judgment of the trial Court. I make the same consequential orders as made by Ogundare, J.S.C.

WALI JSC

I have been privileged to read before now, the lead judgment of my learned brother, Ogundare J.S.C and I agree with his reasoning and conclusion. For those same reasons which I hereby adopt, I shall also allow this appeal.

The appeal succeeds and it is allowed. The judgment and order of the Court of Appeal is set aside while that of the trial court is hereby restored with N 1,000.00 costs to the plaintiff/appellant in this appeal.

OGWUEGBU JSC

The plaintiff in paragraph 28 of her further amended statement of claim averred as follows:-

(a) *A declaration that plaintiff is in possession and therefore entitled to a Statutory Right of Occupancy and/or is the proper person to apply and obtain Certificate of Occupancy in respect of No. 12, Mission Road, Benin City.*

(b) *An order for possession of that part of the premises now occupied by the defendant without the consent and authority of the plaintiff.*

(c) *Perpetual Injunction restraining the defendant, his agents, servants or privies from further interfering with, dealing or treating with anybody in respect of the said piece of land, house, shops and premises known as No. 12, Mission Road, Benin City, in any manner inconsistent with the plaintiff's right, title and interest in the said piece of land.*

(d) *N2,000.00 general damages for trespass etc."*

The facts of the case having been fully set out in the lead judgment of my learned brother Ogundare, J.S.C., I do not intend to repeat them.

After pleadings were filed and exchanged, the case proceeded to trial. At the close of the case, the learned trial Judge found for the plaintiff in the first three heads of her claim. He refused the claim for damages. The defendant who was not satisfied with the judgment, appealed to the Court of Appeal. His appeal was allowed by the court below. In allowing the appeal, the court below remitted the case to the high Court for retrial. The plaintiff appealed against the whole judgment while the defendant appealed against the order of retrial.

The plaintiff identified the following five issues in her brief of argument as arising for determination in the appeal:-

1. *Whether the learned Justices of the Court of Appeal was (sic) justified in delivering Judgment on preliminary facts of the property on the land in dispute which have merged into one Integral parcel of land i.e. 12,*

Mission Road property canvassed by the parties on joined issue of Inheritance and/or gift inter-vivos from Madam Igbinake.

2. *Whether on settled pleadings and briefs, the identity of the property put in dispute i.e. 12, Mission Road, Benin City was in doubt as put up*
5 *by the parties and their witnesses?*

3. *Whether the Court of Appeal was justified in disturbing the detailed and meticulous findings of facts of the learned trial Judge at pages 92 - 94 and completely ignored these crucial findings decisive of the case?*

4. *Whether the learned Justices of the Court of Appeal were justified*
10 *in their approach as to Relevant and determinable issue of inheritance of 12, Mission Road, Benin City canvassed and put up by the parties or gift inter-vivos put by the defendant for his father from late Madam Igbinake.*

5. *Whether the Court of Appeal was justified in basing their decision on historic/antecedents or preliminary issues of the property other than*
15 *or instead of the ultimate paramount joined issues of inheritance and gift inter-vivos by the parties respectively and which the learned trial Judge of the High Court meticulously considered in compliance with the principle laid down Mogaji v. Odofin (1978) 4 S.C.91 - 100."*

The defendant on his part formulated the following issues in his brief
20 of argument:-

"I. Whether the Court of Appeal was right in dismissing the claim made by the plaintiff to the land in dispute by way of inheritance through her mother her mother's aunt Madam Igbinake Otote.

II. Whether the Court of Appeal was justified in ordering a retrial of
25 *part of this case for the purpose of determining the identity of the disputed land claimed by the plaintiff to have been purchased and developed by her parents.*

III. Whether having regard to issues I and III above, the Court of Appeal ought to have dismissed the plaintiff's claim in its entirety.

30 *IV. Whether the Court of Appeal was right in not awarding costs in favour of the defendant on the success of his appeal."*

I must say that the learned trial Judge in his judgment exhibited a clear understanding of the issues canvassed by both parties in their pleadings and evidence. The plaintiff claimed declaration of title through inheritance from her parents according to Bini Native Law and Custom having performed the burial ceremonies of her father and mother and being the eldest surviving child of the parents.
35

The defendant on the other hand had averred that his father, Adomi inherited the said premises from Madam Igbinake who was his father's aunt and that the

said Igbinake had no issue. He in turn inherited same from his father.

The plaintiff also averred that one house is on the land in dispute and the defendant in paragraph 9 of his second further amended statement of defence stated that there is only one house of five rooms at the front and five rooms at the rear.

At page 88 from line 28 to page 29 lines 1 to 5 of the record of appeal, the learned trial Judge stated as follows:-

“From the evidence before me and from the pleadings it is crystal clear that the parties in this suit know the property in dispute as lying and situate at 12, Mission Road, Benin (now renumbered 6, Mission Road). Since there is no dispute about what is on the land and the extent of it, there is no need for a survey plan to be tendered. In my view failure to produce a survey plan which was pleaded in the further amended statement of claim does not in my view affect the merits of this case.”

After evaluating the evidence, the learned trial Judge made vital findings of facts among which are:-

1. That the plaintiff was born in the property in dispute.
2. That she lived there with her mother Ayenyun and her father Ojo Osagie.
3. That the plaintiff had lived in the property in dispute for upwards of 40 years.
4. That the plaintiff was forced out of the property when she was assaulted by the defendant.
5. That the defendant moved into the property in dispute (12, Mission Road) with the plaintiff's consent and after the Mr. O. I. Afe had spoken to her.
6. That it was the plaintiff who performed the burial ceremonies of her parents when they died.
7. That Madam Igbinake was childless and her property situate at 12, Mission Road was inherited by the plaintiff's mother.
8. That it was the plaintiff and not the defendant who had been in possession of the property in dispute at all times material to the case.
9. That it was the plaintiff's mother Ayenyun and not Adomi who performed Madam Igbinake's burial ceremonies.
10. That the plaintiff's mother (Ayenyun) became the bona fide owner of the property in dispute by inheritance since her sister, the original owner of the property died.
11. The story of how Madam Igbinake's property at 12, Mission Road passed to the defendant's father (Adomi) got no support from the evidence of late Mr. O.I. Afe (An important member of the defendant's family) as could be seen from Exhibit “B”.

12. That it was the plaintiff and not the defendant who was paid compensation when part of No. 12, Mission Road was used up during the expansion of Mission Road.

From the pleadings, the evidence adduced and the findings of the learned trial Judge, it was the court below and not the trial court which misconceived the issues on which the case was fought by the parties and it thereby fell into a serious error. This is clear from some of the conclusions of the court below:-

(a) At page 173 lines 20 to 30 the court held:-

It is therefore manifest from the above pleading of the respondent that the respondent is apparently claiming that her mother Ayenu became seised of a portion of the disputed land by inheritance from her mother's aunt, Madam Igbinake. And in order to justify her entitlement to all the disputed land, the respondent as I have previously observed pleaded by paragraph 22 of her further amended statement of claim that she inherited the land through her father who bought the other portion of the land adjacent to that which her mother inherited. And that it was her father who thereafter built what is now known as 12, Mission Road."

At page 177 from line 23 to page 178 lines I - 5 of the record of appeal, the court below held as follows:-

"It is evident from the pleading that originally there were two separate holders of properties on the land before they were demolished and built into the present property which is the subject matter of the present dispute. It is also clear that either of the parents of the respondent bought the other property from its owners who were known as Suberu and Iroro. The appellant has not disputed that claim, and in my view, it cannot be proper for him to be declared the owner of this part of the disputed property, when he has no claim or fight to it. In such circumstances, it is my view that the prosecution ought to be allowed to prove the extent of the area of land which she inherited as a result of the purchase of a portion of the disputed land by either of her parents. For that (sic) reasons, the case would be sent back for retrial in order to determine that question alone."

The court below read paragraph 22 of the further amended statement of claims in isolation when it arrived at the above conclusion. The court below should have considered paragraphs 10 to 22 of the further amended statement of claim.

The Court below was in error in considering No. 12, Mission Road, Benin City as two separate buildings on the land as against the original ownership of the resultant property. Having regard to the above errors, it will be undesirable to uphold its judgment which was not supported by the plead-

ings and the evidence and which overlooked the unassailable findings of fact made by the learned trial Judge which were crucial to the case. The identity of the subject matter i.e. No. 12, Mission Road, Benin City was very well known to the parties.

It has been settled by several decisions of this court that where a court of first instance which has the singular advantage of seeing and hearing the witnesses testify has made findings of fact and appellate court will not readily interfere except where circumstances warrant such interference, for example, where the findings were unreasonable or perverse and not the result of the proper exercise of the Judge's judicial discretion to believe or disbelieve, or where the facts found by the court of trial are wrongly applied to the circumstances of the case: See Ekwealor V. Ohasi (1990) 2 NWLR (Pt.131) 232; Udofia v. State (1984) 12 S.C. 139, Nnaji for & Ors. 1'. Ukonu & Ors. No.1 (1985) 2 NWLR (Pt.9) 686, Nabham v. Nabham (1967) 1 NMLR 1: and Nzekwu v. Nzekwu (1989) 2 NWLR (Pt. 104) 373.

For the above reasons and the fuller reasons contained in the lead judgment of my learned brother Ogundare, J.S.C. I too allow the appeal of the plaintiff and set aside the judgment of the Court of Appeal. The judgment of the trial court is hereby restored. The issues of costs raised in the defendant's cross-appeal have been overtaken by the outcome of the plaintiff's appeal. The plaintiff is entitled to the costs of this appeal which I assess at N1,000.00.

IGUHJSC

This appeal is sequel to the judgment of the Court of Appeal, Benin Division, delivered on the 17th January, 1992.

The court below had on the 11th May, 1989 set aside the decision of the Benin High Court given in favour of the plaintiff and remitted part of the case to the High Court for retrial on the issue of the identity of part of the land in dispute.

The history and facts of the case are fully set out in the lead judgment of my learned brother, Ogundare, J.S.C. and no useful purpose will be served in my repeating them all over again. It suffices to state that the plaintiff per paragraph 28 of her further amended statement of claim had claimed against the defendant as follows:-

1) Declaration of entitlement to a statutory right of occupancy in respect of No. 12 Mission Road, Benin City;

2) Possession of any part of the premises held by the defendant;

3) Perpetual injunction restraining the defendant, his servants, agents and privies from any further interference with the said property; and

4) N2,000.00 general damages for trespass.

The trial court found for the plaintiff in respect of the first three items of her claim but dismissed the relief as to damages for trespass. On appeal, the court below as aforesaid, set aside the decision of the trial court and ordered a retrial in respect of an aspect of the case relating to the identity of part of the land in dispute purchased and developed by the plaintiffs late parents.

Both parties have now appealed to this court with the leave of the Court of Appeal. While the defendant has appealed against that part of the judgment of the Court of Appeal relating to the order of retrial, the plaintiff has appealed against the entire judgment of the Court below.

It seems to me necessary to point out that the case for both parties hinges on inheritance. It is common ground both from the pleadings and the evidence of the parties that the subject matter in dispute in this case is one compact or integral piece or parcel of land known and described as No. 12, Mission Road, Benin City. It is also common ground that the original owner of this land was Madam Igbinake through whom the parties have asserted their rival claims to title thereto. The identity of the land in dispute or any part thereof was clearly not in issue between the parties. It is equally clear that the single issue that called for determination between the parties was which of them had a better title to the land in dispute after the death of the said Madam Igbinake whether by way of inheritance and/or gift inter-vivos as pleaded by them.

In this regard, it cannot be over emphasized that courts of law must limit themselves only to issues raised by the parties in their pleadings as to act otherwise might well result in the denial to one or the other of the parties of his right to fair hearing. See *Metalimpex v. A.G. Leventis & Co. Ltd.* (1976) 2 S.C. 91; *Braide v. Kalio* (1927) 7 NLR 34; *George v. Dominion Flour Mills Limited* (1963) 1 SCNLR 242, *Oniah v. Onyia* (19&9) 1 NWLR (Pt.99) 514, *Shell B.P. Ltd. v. Ahedi* (1974) 1 All NLR (Pt.1) 1: and *Alhaji Ogunlowo v. Prince Ogundare* (1993) 7 NWLR (Pt.307) 610 at 624. So, too, when an issue is not placed before an appellate court, save of course such fundamental matters as touch on the jurisdiction or competence of a court or the constitutionality of an act or thing directly in issue in a cause, the appellate court has no business whatsoever to deal with such an issue. See *Shitta-Bey v. Federal Public Service Commission* (1981) 1 S.C. 40; *Saude v. Ahdullahi* (1989) 7 SCNJ 216 at 229; (1989) 4 NWLR (Pt.116) 387; *Florence Olusanya v. Olufemi Olusanya* (1983) 3 S.C. 41 at 56 - 57; (1983) 1 SCNLR 135; and *Ochonona v. Unosi* (1965) NMLR 321 at 323.

In the present case, however, the Court of Appeal, if I may say with due respect, wandered into the historical antecedent of the property in dispute and raised a totally new issue which was neither argued by the parties nor relevant for a determination of the real issue in controversy between the

parties. The Court below, by so doing, was able to make a division of the land in dispute into two and dealt with the same as two separate parcels of land without hearing the parties thereupon whereas that was not the basis on which they conducted and fought their cases either in the trial court or before the court below. Both learned counsel are ad idem that the Court of Appeal in this exercise went beyond the case presented and argued before it without 5 affording the parties an opportunity to be heard. It is plain to me that the Court of Appeal fell into a serious error by treating the land in dispute as if it were two separate pieces or parcels of land as a result of which it was able to make an order of retrial in respect of one of the alleged two pieces of land. It has to be stressed in this connection that on no account shall an appellate court 10 formulate or raise an issue suo motu, no matter how clear it may appear to be, and proceed to resolve it and to decide the matter before it on that issue without hearing the parties on such issue so formulated. See Okafor v. Nnaife (1972) 3 ECSLR 261; Ugo v. Obiekwe (1989) 1 NWLR (Pt.99) 566 at 581; Nwokoro v. Onuma (1990) 3 NWLR (Pt.136) at 22; Anie v. Uzorka (1993) 8 NWLR (Pt.309) 15 I at 16; and Adegoke v. Adibi (1992) 5 NWLR (Pt.242) 410 at 420. If it does so, it will be breach of a party's right to fair hearing. See Sheldon v. Bromfield Justices (1964) 2 Q.B. 573 at 578; Rex v. Hendon Justices. Ex Parte Gorchein (1973) 1 WLR 1502.

There is yet another aspect of this case into which the court below 20 fell and thereby committed another serious error in law. The learned trial Judge after a thoroughly painstaking evaluation of the evidence before the court made the following legitimate findings of fact, namely -

- "1 That plaintiff was born in the property in dispute.*
- 2. That she lived there with her mother Ayenyun and her father Ojo 25 Osagie.*
- 3. That plaintiff had lived continuously in the property in dispute for upwards of 40 years.*
- 4. That plaintiff was forced out of the property when she was as- 30 sailed by the defendant.*
- 5. That the defendant moved into the property in dispute (12, Mission Road) with the plaintiff's consent and after the late Mr. O.I. Afe had spoken to her.*
- 6. That the defendant lived with late Mr. O.I. Afe before he (defen- 35 dant) moved to 12, Mission Road.*
- 7. That it was the plaintiff who performed the burial ceremonies for her parents when they died.*
- 8. That plaintiff's mother was the sister of defendant's father.*
- 9. That defendant's father died outside Benin and his corpse was*

taken to 12, Mission Road, for burial ceremony because of the close family tie and because 12, Mission Road was a more suitable place than the abode of the defendant's father.

10. That until he died the defendant's father did not build a house
5 for himself but lived in a rented apartment in Ibiwe Street.

11. That it is not true that there was a family meeting where the late Madam Igbinake directed that on her death Adomi (defendant's father) should perform her burial ceremony and thereafter take absolutely the property in dispute.

12. That Madam Igbinake was childless and her property situate at
10 12, Mission Road was inherited by the plaintiff's mother Ayenyun who according to P.W.1 was a sister of late Madam Igbinake.

13. That it is the plaintiff And Not the defendant who has been in possession of the property in dispute at all times material to this case.

14. That it was the plaintiff's mother (Ayenyun) And Not the
15 defendant's father (Adonri) who performed Madam Igbinake's burial ceremonies.

15. That plaintiff's mother (Ayenyun) became the bona fide owner
20 of the property in dispute by inheritance since her sister Igbinake the original owner of the property died childless.

16. That the story of how Madam Igbinake's property at 12, Mission Road passed to the defendant's father (Adomi) got no support from the evidence of late Mr. O.I. Afe. (an important member of the defendant's family) as could be seen from Exhibit "B".

17. That it was the plaintiff and not the defendant who was paid
25 compensation when part of 12, Mission Road was destroyed during the expansion of the said Mission Road.

18. That if even the plaintiff's family at a meeting had decided that
30 the property in dispute be shared between the plaintiff and the defendant that decision is not binding on them unless they consented to the division.

19. That either party to this suit was free to come to court for declaration that he or she is the rightful person to apply for a certificate of occupancy in respect of the Whole of 12, Mission Road."

35 These findings of fact are fully supported by evidence before the trial court and are in my view more than sufficient to dispose of the issue in controversy between the parties.

Where a case tried by a Judge without a jury, as in the instant case, comes before the Court, of Appeal, that court will presume that the decisions of the Judge on the facts are right and will not disturb them unless they are

unsupported by evidence, or are perverse or the appellant satisfactorily make out that they are wrong. See Mbanta and others v. Aligbo and Another (1972) 2 ECSLR 306 at 311; Okpiri v. Jonah (1961) 1 SCNLR 174;(1961) AII NLR 102 at 104; Lawal v. Dawodu (1972) 8-9 S.C. 83 at 114; and Balogun v. Agboola (1974) 1 S.C. III at 118. None of the above findings of the learned trial Judge appears to me to be perverse or to have been faulted on any justifiable ground and I 5 can find no reason upon which the Court of appeal would interfere with them. Strange enough, however, the court below seemed to have ignored these finds as a result of which it arrived at its erroneous decision which, with respect, I find myself unable to affirm.

It is for the above and the more elaborate reasons contained in the 10 lead judgment of my learned brother, Ogundare, J.S.C. with which I am in full agreement that I, too, would allow the plaintiff's appeal and set aside the judgment of the Court below. The judgment of the trial court in favour of the plaintiff is hereby restored together with the order as to costs therein made. 15 The defendant's appeal is hereby dismissed. I endorse all the consequential orders contained in the lead judgment in their entirety.

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