

SUPREME COURT OF NIGERIA
24TH JUNE, 1994. SC. 29/1991
CORAM:- A. B. WALI, I. L. KUTIGI, S. U. ONU,
Y. O. ADIO, A. L. IGUH, JJSC

SAMUEL OKEDARE APPELLANT
AND
1. OBAAHMADU ADEBARA RESPONDENTS
2. COMMISSIONER FOR WORKS & SURVEY
3. ATTORNEY-GENERAL, KWARA STATE

APPEALS - Retrial order - Trial court's failure to make findings on material issues that depend on credibility of witnesses - Where appeal is allowed thereby- Whether retrial is the proper order.

LAND LAW - Identity of land-Counter claim by defendant to ownership - Whether his description of the land by stating the boundary features - Makes the identity reasonably certain.

LAND LAW- Title - Plaintiff's failure to establish the identity of land in dispute - Whether the claim will be dismissed.

LAND LAW- Description of the land in dispute - Where the description given in oral evidence varies with that stated in the pleadings - Dismissal of claim or granting title to a lesser portion of the land - May be the legal consequence.

LAND LAW - Description - When description of land in dispute contained in the counter claim - Is deemed not to be exactly the same with that given in oral evidence.

PRACTICE & PROCEDURE - Findings that depend on credibility of witnesses - Trial court's failure to make the findings - When the failure is deemed to deny the Supreme Court the ability to determine the case.

FACTS

The 1st Respondent instituted an action against the Appellant, the 2nd and 3rd Respondents in the Kwara State High Court. He claimed amongst other things a declaration that he as the Oba of Jebba was by paternal inheritance the owner of all lands in Jebba. The Appellant in his Statement of Defence included a counter-claim in which he claimed inter alia, that he and his family were the customary owners of all lands in and around Jebba bounded as described in his said counter-claim. The immediate cause of the dispute between the parties was the disbursement of the compensation which the Nigerian Paper Mill Ltd. was to pay for the land it acquired in the area.

The learned trial Judge non-suited the Appellant and 1st Respondent in respect of their claims for compensation, dismissed the other aspects of 1st Respondent's claim, and granted the other reliefs claimed by the Appellant. Upon 1st Respondent's appeal, the Court of Appeal ordered a retrial of the case having found that the area claimed by 1st Respondent was not ascertainable to enable one determine the actual amount he was entitled to be compensated for. And also to enable others who have interest in the acquired land participate in the retrial proceedings. Being dissatisfied, the Appellant has now appealed to the Supreme Court to determine the certainty of identity of land claimed by the Appellant and the 1st Respondent. The ultimate court in deciding whether the Court of Appeal's general retrial order was proper, upheld only the retrial of Appellant's counter-claim whilst setting aside the retrial of the case generally.

HELD (Unanimously allowing the appeal in part)

Claim for title - Effect of failure to prove identity of land

1. With reference to the legal consequence of the 1st respondent's failure to establish the identity of the land being claimed by him, the consequence is that his claim should be dismissed as was done by the learned trial Judge. The court below, rightly, affirmed the judgment. A plaintiff in a claim for declaration of title or to statutory right of occupancy must prove ascertainable boundaries, since the plaintiff's first duty is to prove, with certainty, the area over which he claims. A plaintiff is required to establish with certainty and precision the area of land to which his claim relates. If he fails to prove the boundaries or the identity of the land in dispute, the claim will be dismissed (P.114L.17)

Whether description of boundaries is satisfactory

2. It is sufficient for the present purpose, to state that the description of the boundaries of the land in dispute in relation to the counter-claim satisfied the” test laid down by the West African Court of Appeal in Kwadzo’s case, that is, whether a surveyor can from the record produce an accurate plan of such land. (P.115L.29)

Ascription of land - Effect of variation in oral evidence and pleadings

3. If the description of the land given in evidence does not relate to the land in dispute or any part thereof, then the plaintiffs claim or, the defendant’s counter-claim, as the case may be, in relation to the land in dispute has to be dismissed. If the description, given in evidence, though not in accordance with the description in the pleading, is a description of only a part or portion of the land in dispute, that alone should not be a reason for dismissing the plaintiffs or the counter-claimant’s claim. A court may grant less but not more than the land in dispute. (P. 116 L.26)

Finding of variation in Description of land

4. There is no doubt that the description of the land in dispute in the counter-claim given by the D.W. 1 was not really or exactly the same as the description of the same land given in paragraph 73 (i) of the Statement of Defence of the Appellant. (P. 117 L. 12)

Findings that depend on credibility of witnesses

5. If the findings, which depend on credibility of witnesses, in relation to the foregoing matters had been made, that would have enabled this court to hold either that the appellant’s counter-claim should have been dismissed or that his claim to the whole of the land in dispute or any part or portion thereof should have been granted. (P. 117 L.27)

When retrial order will be made

6. Where an appeal is allowed because of the failure of the trial court to make findings on material issues and the determination of the material issues depends on credibility of witnesses, the proper order to make is an order for retrial (P.117 L.32).

NOTABLE POINTS OF INTEREST

ADIO JSC

1. Retrial order - Non parties cannot become parties during retrial

5 The court below made the order because it felt that the evidence available on record did not sufficiently establish the 1st respondent’s claim to compensation. The court also felt that it would give those who did not participate in the proceedings, though they might want to claim compensation, opportunity to do so, Those who were not parties to the case when retrial of it was
10 ordered cannot be parties to the retrial. (P. 116 L.2)

2. Difference between evidence and pleadings -Nature of court’s order varies

If there is a difference between the description of the land in dispute as averred in the pleading and the description of the land in dispute given in evidence, by
15 the plaintiff, the nature of the order which the court should make depends on whether the description given in evidence does not relate at all to the land in dispute or any part thereof or whether the description relates only to a smaller portion of the land in dispute. (P. 116 L.21)

20 *3. Variation in land description - Fundamental question trial court ommits to find upon*

The question then is whether despite the slight variation(s) in the aforesaid description, by the D. W. 1., it was still a description of the land in dispute or of any part or portion thereof or that it was not a description of the land in
25 dispute or of any part thereof. Unfortunately, the learned trial Judge did not make any finding in respect of the fundamental question. (P. 117 L.I 5)

KUTIGLJSC

Plaintiffs claim to land declared vague and uncertain

30 4. “I am therefore in complete agreement with the findings of the court below that the plaintiffs claim of “all land in Jebba” is vague and uncertain. It is not capable of ascertainment either. A declaration of title can only be granted in respect of a piece of land which has definite, precise and accurate boundary”
(P. 123 L.39)

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5. Declaration of title may be made without survey plan

It is settled that where there is no difficulty in identifying the land a declaration of title may be made without it being based on a plan (see ETIKO v. DIKIBO (1976) 6 SC. 97). The trial High Court was therefore in order to have

granted the declaration and injunction in respect of the land in favour of the 1st defendant being land with definite boundaries. (P. 125 L.6)

IGUHJSC

6. Description of land from which a surveyor can produce plan - Discharges onus of proof 5

The first point which must be made is that the onus of proof lies on the plaintiff who seeks a declaration of title to land and/or injunction to establish with certainty and precision and without inconsistency the area of land to which his claim relates. A plaintiff may discharge this onus by such description of the land that any surveyor acting on such a description could produce an accurate plan of the land in dispute. The test of such description was succinctly put by Kingdom, C.J. over half a century ago in Kwadzo v. Adjei (1944) 10 W.A.C.A. 274. (P. 131 L.4) 10

7. Filing of survey plan is not compulsory in all land cases 15

“The vast majority of litigants in land cases now file survey plans of the piece or parcel of land in respect of which they claim title and/or injunction and it is my view that this practice must be commended as clearly wise. It has to be recognised however that it is not sine qua non that a survey plan of land in dispute must be filed in all land cases. Where there is no difficulty in identifying a piece or parcel of land in dispute, a declaration of title may be decreed without its being tied to a survey plan”. (P. 131 L.29) 20

8. When retrial will be ordered

An appellate court will order a retrial where there has been such an error in law or an irregularity in procedure which neither renders the trial a nullity nor makes it possible for the appellate court to determine whether there has been no miscarriage of justice. (P. 134 L.12) 25

REPRESENTATION

Mr. J.O. Ijaodola for the Appellant.

Mr. A. Salman SAN, with Mr. O. Agom for the Respondents.

CASES REFERRED TO

Motunwase Sorungbe (1988) 4 N.W.L.R. (pt. 92) 90
 Olusanmi v. Oshasona (1992) N.W.L.R. (pt. 245) 22 at p.36
 Imah v. Okogbe (1993) 9 N.W.L.R. (pt. 316) 159
 Karibo v. Grend (1992) 3 N.W.L.R. (pt 230) 426

- Nwadike v. Ibekwe (1987) 12 SC 14
 Kodilinye v. Odu 2 WACA 336
 Bello v. Eweka (1981) 1 S.C 101 at 102
 Arabe v. Asanlu (1980) 5 - 7 SC. 78
 Udofia v. Afia 6 WACA 216
- 5 Kwadzo v. Adjei (1944) 10 WACA 274
 Baruwa v. Ogunshola (1938) 4 WACA 159
 Amata v. Modekwe (1954) 14 WACA 580
 Epi v. Aigbedion (1972) 10 S.C. 53
 Abioye v. Yakubu (1991) 5 NWLR (pt 190) 130
- 10 Ekwere v. Iyiegbu (1972) 6 SC. 116
 Oluwi v. Eniola (1967) NMLR 339
 Awote v. Owodunni (No.2) (1987) 2 NWLR 366 at 373 F - G
 Omoregie v. Idugiemwanye (1985) 2 NWLR 41 at 54
 Bakare v. Apena (1986) 4 NWLR (pt 33) 1
- 15 Olasehinde v. African Continental Bank Limited (1990) 7 NWLR (part 161) at page 183
 Duru v. Nwosu (1989) 4 NWLR (part 113) 24
 Okoduwa v. The State (1988) 2 NWLR (part 76) 333
 Ezzo. West Africa Inc. v. Oyegbola (1969) 1 NMLR 194 at 198
- 20 Baruwa v. Ogunsola (1938) 4 W.A.C.A 159
 Agbonifo v. Aiwereoba (1988) 1 N.W.L.R. (part 70) 325
 Qnwuka v. Ediala (1989) 1 N.W.L.R. (part 95) 182
 Olusanmi v. Oshasona (1992) 6 N.W.L.R. (part 245) 22 at 36
 Awote v. Owodunni (No. 2) (1987) 2 N.W.L.R. (part 57) 366 at 371
- 25 Ezeokeke v. Uga (1962) 1 All N.L.R. (part 3) 482
 Makanjuola v. Balogun (1989) 3 N.W.L.R. (part 108) 122
 Udeze v. Chidebe (1990) 1 N.W.L.R. (part 125) 141
 Amata v. Madekwe (1954) 14 W.A.C.A 580
 Okorie v. Udom (1960) S.C.N.L.R. 326
- 30 Sokpui v. Agbazo 13 W.A.C.A. 241
 Etiko v. Dikibo (1976) 6 SC. 97
 Wallenstein v. Moir (1974) 3 All E.R. 217
 Bello v. Eweka (1981) 1 SC. 101
 Motunwase v. Sorungbe (1988) 4 N.W.L.R. (part 92) 90
- 35 Arabe v. Asanlu (1980) 5-7 SC. 78 at 87 - 88
 Chikwendu v. Mbamali (1980) 3-4 SC. 31 at 75
 Lamai v. Orbih (1980) 5-7 SC. 28
 Woluchem v. Gudi (1981) 5 SC. 291 at 326
 Igwego v. Ezeugo (1992) 6 N.W.L.R. (part 249) 561 at 585

LEAD JUDGMENT BY ADIO JSC

The first respondent, a traditional ruler instituted an action in the Kwara State High Court against the appellant, the second and the third respondents in which he, inter alia, claimed a declaration that he, as the Oba of Jebba, was by paternal inheritance, the owner of all lands in Jebba. He claimed other reliefs, including declarations in relation to certain things and injunctions restraining the appellant alone or the 2nd and the 3rd respondents in relation to certain matters. The appellant filed a Statement of Defence to the Statement of Claim of the 1st respondent. In the Statement of Defence of the appellant was included a counter-claim in which he claimed, inter alia, a declaration that he and his family known and called Okedare family of Jebba were the customary owners and/or entitled to possession of all lands in and around Jebba, Kwara State, Nigeria, which land was bounded in the North by River Niger, in the West by Gata, in the East by River Oshin/Bacita and in the South by Alagbon, and which land also included the land on which the Nigerian Paper Mill constructed its logging Road Project and subject matter of the suit. He also claimed another declaration and also a decree in respect of certain things and four permanent injunctions restraining one or the other of the 1st, the 2nd and the 3rd respondents. The 2nd and the 3rd respondents filed a joint Statement of Defence.

The evidence led by the 1st respondent was that he was appointed the Oba of Jebba in 1943 by the Emir of Ilorin in succession to his father. The 1st respondent by custom and tradition owned all parcels of land in Jebba. According to him his family used to allocate land to deserving subjects in his domain and everyone living in Jebba was his tenant. His subjects who had been allocated parcels of land used to give yams and guinea corn as tributes to his family.

The appellant led evidence that he and members of his family were the owners of all parcels of land in and around Jebba. The averments, in his statement of Defence, showed what was the basis for his claim that all parcels of land in and around Jebba belonged to his family.

The immediate cause of the dispute between the appellant and the 1st respondent was the disbursement of the compensation which the Nigerian Paper Mill Limited was to pay for the land acquired by the Mill in the area. The list of claimants for compensation for crops which the 1st respondent submitted to the Mill did not include the appellant or any member of his family. On learning of what happened, the appellant protested to the Ministry of Works, Lands and Survey, Ilorin, and to the Management of the Nigerian Paper Mill Limited.

The learned trial Judge, after due consideration of the evidence led by the parties and of the submissions of their learned counsel, non-suited the appellant and the 1st respondent in respect of their claims for compensation, dismissed the other aspects of the 1st respondent's claim, and granted the
5 other reliefs claimed by the appellant. In particular, the learned trial Judge stated, inter alia, as follows:-

*"Principally, this suit is 1st plaintiff's baby. He only included the names of the other co-plaintiffs for the sake of making up number. They remained faceless throughout the proceedings as they never testified. Their
10 claim is dismissed. All the other declarations sought by the 1st plaintiff fail and are accordingly dismissed.*

*The 1st Defendant clearly proved his case in respect of all the declarations sought by him apart from the specific amount of compensation due on economic trees. The declarations sought by the 1st defendant apart from
15 those relating to compensation are upheld. They are ordered accordingly."*

Dissatisfied with the judgment of the learned trial Judge, the 1st respondent lodged an appeal to the Court of Appeal. A careful reading of the judgment of the Court of Appeal shows that the court was of the view that the claim of the 1st respondent that he was the owner of all lands in Jebba and the
20 claim of the appellant that he and his family were the customary owner and/or entitled to possession of all lands in and around Jebba were considered by the Court as claims to unascertained land which could not succeed. That accounts for that part of the order of the court which stated as follows:-

*"In the result, this appeal succeeds in part. The judgment of Fabiyi,
25 J., granting declaration and injunctions claimed by the 1st respondent, in his counter-claim is set aside. The appeal of the appellant against the dismissal of the appellant claim is dismissed."*

In the view of the court below, since the area claimed by the 1st respondent was not ascertainable to enable one to determine the actual amount
30 he was entitled to be compensated the proper order was an order of retrial. The evidence adduced was definitely inconclusive to establish the 1st respondent's individual claim against the payment made by the Paper Mill. In making the order for retrial, the court stated that other persons whose rights have been affected by the acquisition of land by the Paper Mill Limited, should be al-
35 lowed to participate in the retrial proceedings. The foregoing accounts for the second part of the order of the court below which is as follows:-

"I order the case to be retried by the High Court, but before another Judge. All parties and those interested in the compensation paid by the Nigerian Paper Mill, Jebba, should be notified of the retrial for them to file

their respective claims before the High Court.”

There was no inconsistency or conflict in the first and the second parts of the order made by the court below as previously thought when the appeal was being heard and as argued by the learned counsel for the parties. Whether the judgment of the court below and its orders were right is another matter.

Dissatisfied with the judgment of the Court of Appeal, the appellant 5 has lodged an appeal against it to this court. The parties duly filed and exchanged briefs of argument in accordance with the rules of this court. There were six issues formulated for determination in the appellant’s brief and the 1st respondent adopted the issues raised in the appellant’s brief. The other respondents did not file any brief. In my view, many of the issues framed in the 10 appellant’s brief were repetitive and the answers to some of them were incapable of assisting the court to resolve the main questions. The following issues for determination are sufficient for the determination of this appeal:-

(1) Was the identity of the land being claimed by the 1st Respondent reasonably certain and if the answer is in the negative what was the legal 15 consequence?

(2) Whether the identity of the land being claimed by the appellant was not reasonably certain?

(3) If the oral evidence led by the appellant on the description of the boundaries of the land being claimed by him was not in accordance with the 20 description of the boundaries of the land in dispute in the counter-claim, what order should the Court of Appeal have made?

(4) Whether the Court of Appeal was right in ordering a retrial in relation to the claim for compensation payable for the land acquired for Nige- 25 ria Paper Mill Ltd?

I deal with the first issue. The question raised under the issue was whether the identity of the land being claimed by the 1st respondent was reasonably certain. The court below in dealing with that aspect of the matter stated, inter alia, as follows:

“*Salman Referred to the case of Ate Kwadzo v. Robert Kasi Adjei 30 (1944) 10 WACA 274. I have gone through that case and I agree with Salman that the West African Court of Appeal held in that case that before a declaration of title is given, the land to which it relates must be ascertained with certainty, the test being whether a surveyor can from the record produce an accurate plan of such land..... With respect to the submis- 35 sion of the learned counsel for the 1st respondent the facts of this case can easily be distinguished with the facts in Sa’adu Yakubu’s case. In the case in hand both the appellant and the 1st respondent have claimed that their respective families owned all lands in Jebba Now what amounts*

to all land in and around Jebba. Can the court declare any of the families the owner of lands in and around Jebba when, as a matter of fact, there are various admissions by both parties that some other persons do own lands within Jebba and its environs."

5 The submission in the appellant's brief was that the Court of Appeal was wrong in holding that the description of the land in dispute was vague. It was argued that the appellant (respondent before the court below) admitted the description of the land in dispute given by the 1st respondent, (appellant in the court below). The submission of the learned counsel for the 1st respondent was that the Court of Appeal was right in holding that the description of
10 the land in dispute was vague. I will only add that that might be true in the case of the 1st respondent's claim but may not necessarily be so in the case of the counter-claim of the appellant. With reference to the alleged admissions, in this connection by the appellant, a declaration of title or to statutory right of
15 occupancy is not granted wholly or solely on admissions in pleadings. See *Motunwase v. Sorungbe* (1988) 5 NWLR (Pt.92) 90.

With reference to the legal consequence of the 1st respondent's failure to establish the identity of the land being claimed by him, the consequence is that his claim should be dismissed as was done by the learned trial
20 Judge. The court below, rightly, affirmed the judgment. A plaintiff in a claim for declaration of title or to statutory right of occupancy must prove ascertainable boundaries, since the plaintiff's first duty is to prove, with certainty, the area over which he claims. A plaintiff is required to establish with certainty and precision the area of land to which his claim relates. If he fails to prove the
25 boundaries or the identity of the land in dispute, the claim will be dismissed. See *Olusanmi v. Oshasona*, (1992) NWLR (Pt. 245) 22 at pp. 36; and *Imah v. Okogbe*, (1993) 9 NWLR (Pt.316) 159. In this case the expression "land in Jebba" without more was not a sufficient description that could reasonably enable one to determine with precision and certainty the identity of the land in
30 dispute. The court below was, therefore, right in dismissing the appeal of the 1st respondent against the judgment of the court of trial dismissing his claim.

The question raised under the second issue was whether the identity of the land being claimed by the appellant in the counter claim was not
35 reasonably certain. The view of the court below was that the identity of the land being claimed by the appellant in the counter-claim was not reasonably certain. The court, in this respect, stated inter alia, as follows:-

"If the 1st respondent admits that the appellant and some other persons do own separate farms and economic trees within the disputed area

is the court right to declare the Okedare's family of Jebba as the customary owner and/or entitled to possession of all land in and around Jebba, Kwara State, as the learned trial Judge did in his judgment? The learned trial Judge had made a vague declaration and the appellants are quite in order to raise the issue even at the appeal stage"

The position taken by the appellant was that the identity of the land being claimed by him in the counter-claim was reasonably certain. The submission in the 1st respondent's brief was that the description of the land in dispute was vague and that the court below was right in the view it took.

I have set out above the relevant part of the judgment of the learned trial Judge entering judgment for the appellant. Unfortunately the statement of the learned trial Judge that the declaration being sought by the appellant, apart from those relating to compensation, were upheld and they were ordered accordingly was not helpful. The averment in paragraph 73(i) of the Statement of Defence relating to the counter-claim did not merely state that the appellant and his family were the owners of all lands in and around Jebba, Kwara State, it went further to give particulars of the boundaries of the land being claimed. The averment is as follows:-

"(1) A declaration that the 1st Defendant and his family known and called 'the Okedare family of Jebba' is (sic) the customary owner and/or entitled to possession of all lands in and around Jebba Kwara State, Nigeria, which land is bounded in the North by River Niger, in the West by Gata, in the East by River Oshin/Bacita and in the South by Alagbon and which lands also include the land on which the Nigerian Paper Mill constructed its logging Road Project and subject matter of this suit."

There was similar averment in paragraphs 50 and 51 of the Statement of Defence of the appellant. Whether the appellant would be able to prove what he averred in paragraph 73(1) of the Statement of Defence set out above is another thing. It is sufficient for the present purpose, to state that the description of the boundaries of the land in dispute in relation to the counter-claim satisfied the test laid down by the West African Court of Appeal in Kwadzo's case *supra*, that is, whether a surveyor can from the record produce an accurate plan of such land. The answer to the question raised under issue (2) is in the affirmative.

The next question is the question raised under the fourth issue which was whether the Court of Appeal was right in ordering a retrial in relation to the claim for compensation payable for the land acquired by the Nigerian Paper Mill Limited. The argument, if any, in the brief of each party was devoted to the supposed inconsistency in the order made by the court below. The

question whether the court below was right in making the order for retrial was not treated. I have already shown that there was no inconsistency of any kind in the order made by the court below. The court below made the order because it felt that the evidence available on record did not sufficiently establish the 1st respondent's claim to compensation. The court also felt that it would give
5 those who did not participate in the proceedings, though they might want to claim compensation, to do so. What happened was that parties to this case allowed the issue of claim and counter-claim to the land in dispute to take precedence over the claim for compensation for crops which did not involve question of the ownership of the land in dispute. In the process, no evidence
10 or sufficient evidence was led on the claim for compensation for the crops on the land acquired by the Nigerian Paper Mill Limited. As a result, the learned trial Judge non-suited the appellant and the 1st respondent. Those who were not parties to the case when retrial of it was ordered cannot be parties to the retrial. *Annah v. Djan (1944) WACA 21.*

15 I now come to the question raised under the third issue. The question is: if the oral evidence led by the appellant on the description of the boundaries of the land being claimed by him was not in accordance with the description of the boundaries of the land in dispute in the counter-claim, what order should the Court of Appeal have made? The answer to the question
20 depends on the facts and the circumstances of each particular case. If there is any difference between the description of the land in dispute as averred in the pleading and the description of the land in dispute given in evidence, by the plaintiff, the nature of the order which the court should make depends on whether the description given in evidence does not relate at all to the land in
25 dispute or any part thereof or whether the description relates only to a smaller portion of the land in dispute. If the description of the land given in evidence does not relate to the land in dispute or any part thereof, then the plaintiff's claim or the defendant's counter-claim, as the case may be, in relation to the land in dispute has to be dismissed. If the description, given in evidence,
30 though not in accordance with the description in the pleading, is a description of only a part of portion of the land in dispute, that alone should not be a reason for dismissing the plaintiff's or the counter-claimant's claim. This court, in a situation like that, stated in *Imah's case supra*, inter alia at pp. 175, as follows:-

35 *"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 small 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 Arabe v. Asanlu (1980) 5 - 7 S.C. 78 at pp. 85-87."

A court may grant less but not more than the land in dispute. The appellant led evidence on the boundaries of the land in dispute in the counter-claim. The evidence was given by D.W.1. Under cross-examination by the learned Counsel for the 1st respondent, the D.W.1 stated, inter alia, as follows:-

"I know the boundaries of Okedare's land. Okedare's land is bounded by the Niger Bridge along Bida Road. Along the South i.e. Road leading to Ilorin. Okedare land is bounded by Bacita Road junction. In the East, Okedare's land is bounded by River Oshin and in the West by Awon River."

There is no doubt that the description of the land in dispute in the counterclaim given by the D.W.1 was not really or exactly the same as the description of the same land given in paragraph 73(i) of the Statement of Defence of the appellant. The question then is whether despite the slight variation(s) in the aforesaid description, by the D.W.1, it was still a description of the land in dispute or of any part or portion thereof or that it was not a description of the land in dispute or of any part thereof. Unfortunately, the learned trial Judge did not make any finding in respect of the fundamental question. Further, there was evidence before the learned trial Judge, and it can be inferred from the Statement of Defence and Counter-claim filed by the appellant, that there were other persons who had farms on the land in dispute which showed that the appellant could not have been able to prove his claim, if any to the whole of the land in dispute. The locations of the said farms within the land in dispute and their sizes are not known. This is another fundamental matter in respect of which there should have been findings by the learned trial Judge. If the findings, which depend on credibility of witnesses, in relation to the foregoing matters had been made, that would have enabled this court to hold either that the appellant's counter-claim should have been dismissed or that his claim to the whole of the land in dispute or any part or portion thereof should have been granted. For that reason, the appellant's appeal partially succeeds and it is hereby allowed to the extent indicated. Where an appeal is allowed because of the failure of the trial court to make findings on material issues and the determination of the material issues depends on credibility of witnesses, the proper order to make is an order for retrial. See *Karibo v. Grend* (1992) 3 NWLR (Pt. 230) 426.

The appeal partially succeeds and the following are my consequential orders:-

1. That the order made by the Court of Appeal for a retrial of the case generally

is hereby set aside, and in place thereof a retrial of the counter-claim, except claim for compensation in respect of which both parties have been non-suited, before another Judge of the Kwara State High Court is substituted.

2. That the appellant as counter-claimant shall file a survey plan in terms of the description of the parcel of land subject of the order for the retrial,
5 and the 1st respondent may also do so, if he desires.

3. The appellant is awarded costs of N1,000.00

WALI JSC

10 I have had a preview of the lead judgment of my learned brother Adio, J.S.C. and with which I entirely agree.

For the reasons contained in the lead judgment of my learned brother Adio, J.S.C., I shall partly allow and hereby allow this appeal and make the following consequential orders:-

15 1. That the order made by the Court of appeal for a retrial of the case generally is hereby set aside.

2. In place of a retrial of the whole case generally, an order limited to the retrial of the counter-claim before another judge of the Kwara State High Court is hereby substituted.

20 3. That the appellant as counter-claimant shall file a survey plan in terms of the description of the parcel of land subject of the order for a retrial.

4. That the 1st respondent may, if he so desires, also file a survey plan of the land in dispute in the counter-claim.

25 5. That the appellant is awarded N1,000.00 costs in this appeal against the 1st respondent.

KUTIGI JSC

30 The plaintiff's claims as contained in para. 36 of their statement of claim dated 27/3/86 read as follows:-

"36. Whereof the plaintiffs claim (sic) against the defendants jointly and severally.

1(a) A declaration that the 1st plaintiff, as the Oba of Jebba is by 35 paternal inheritance, the owner of all lands in Jebba.

(b) A declaration that the rightful claimants to N43,973.12 compensation are those people whose names appear on the list compiled at the site of the counting of the economic trees and crops the original of which list is now with the second Defendant.

(c) A declaration that the first Defendant having failed and or neglected to come out and show that he had interest in the land in issue at the time that everybody was asked to come out, is estopped from later coming out to say that he owns the land.

(d) A declaration that the plaintiffs are entitled to compensation as assessed by the Nigerian Paper Mills Limited, Jebba. 10

(e) Alternatively a court's order that the plaintiffs are entitled to the said compensation as assessed and paid by the Nigerian Paper Mills Limited, Jebba, the plaintiffs being the occupiers of and were in physical possession of the said land and for whose economic trees and crops the said compensation was paid by the said Nigerian Paper Mills Limited Jebba. 15

2. (a) An injunction restraining the first defendant or any member of his family from holding himself out or parading himself as the owner of all lands in Jebba.

(b) An injunction restraining the second and third Defendants from recognising the 1st defendant as the owner or co-owner of all the land in respect of which compensation is about to be paid. 20

(c) An injunction restraining the second and third defendants from paying the compensation in this case to anybody other than those whose names appear in the list with the second defendant" 25

The 1st defendant in his Statement of Defence, counter-claimed against the plaintiff's, 2nd & 3rd defendants vide para. 73 of the Statement of Defence and Counter-Claim thus - 25

"73(i) A declaration that the 1st defendant and his family known and called "the Okedare family of Jebba" is the customary owner or, entitled to possession of all lands in and around Jebba Kwara State, Nigeria which land is bounded in the North by River Niger, in the West by Gara, in the East by River Oshin/Bacita and in the South by Alagbon, and which lands also include the land on which the Nigerian Paper Mill constructed its Logging Road project and subject-matter of this suit. 30

(ii) A declaration that 1st defendant and his said family only are entitled to the N36,315.00 compensation payable and duly paid by the Nigerian Paper Mill, in respect of economic trees destroyed on the said part of 1st defendant's land at Jebba Kwara State, Nigeria, on which the said Nigerian Paper Mill constructed its Logging Road project, which said compen- 35

sation had been (sic) forwarded to 2nd Defendant by the said Nigerian Paper Mill and is now in the custody of the said 2nd Defendant.

(iii) A decree of the court ordering 2nd defendant to pay the said N36,315.00 compensation to 1st defendant.

(iv) A permanent injunction restraining plaintiff from further holding himself out as the customary owner of, or from ever trespassing into, or receiving or claiming compensation in respect of the economic trees on, the said all lands at Jebba subject-matter of plaintiff's claim in this suit and 1st defendant's counter-claim in this suit.

(v) A permanent injunction restraining 2nd and 3rd defendants from ever paying the said N36,315.00 compensation to plaintiff or any person other than 1st Defendant and his family.

(vi) A permanent injunction restraining 2nd defendant from ever and henceforth paying compensation in respect of economic trees or any other item or items of compensation due to a customary owner of land, to plaintiff, with regards to all lands at Jebba.

(vii) A perpetual injunction restraining 2nd defendant from recognizing plaintiff as the traditional owner of all or any lands whatsoever at Jebba"

Because of the order which I intend to make finally I do not wish to go into the facts of the case and what the witnesses called at the trial said or did not say. Suffice it to say however that at the end of the trial before Fabiyi, J. of the Ilorin High Court, the learned trial Judge in a reserved judgment dismissed plaintiffs' claims while 1st defendant's counter-claim succeeded except the claims of the parties relating to compensation where he entered an order of non-suit for both sides. He said on pages 280/281 of the record as follows:-

"Upon an exquisite consideration of the evidence adduced, I am unable to pin-point the sum payable on economic crops for which the 1st plaintiff or his bench-men are entitled to compensation. Similarly, the 1st defendant failed to prove his figure of N36,315.00 He merely said it is a liquidated claim.....I enter an order of non-suit in respect of both parties' claims relating to compensation. Principally, the suit is 1st Plaintiff's baby. He only included the names of the other five co-plaintiffs for the sake of making up number. They remained faceless throughout the proceedings as they never testified. Their claim is dismissed. All the other declarations sought by the 1st plaintiff fail and are accordingly dismissed. The 1st Defendant clearly proved his case in respect of all the declaration, sought by him apart from the specific amount of compensation due on economic trees. The declarations sought by the 1st defendant apart from those relating to compensation are upheld. They are ordered accordingly."

Dissatisfied with the judgment of the trial High Court, the plaintiffs appealed to the Court of Appeal, Kaduna. The appeal was against the whole decision. The following five issues were formulated for determination before the court.

“1. Whether on the totality of the evidence before the trial court the Plaintiff/Appellant have failed in toto in proving his case to warrant his case being dismissed.

2. Whether on the evidence before the trial court the Defendant/Respondent has proved his counter-claim.

3. Whether in the absence of a plan a declaration granting all lands in and around Jebba to the Defendant/Respondent is certain and ascertainable.

4. Whether, inspite of admission by the Defendant/Appellant that some other people own their own land in Jebba, the trial learned Judge was right in granting all lands in and around Jebba to the defendant/Appellant without giving them a hearing in the absence of any evidence that the Defendant/Appellant gave the land to such other land owners.

5. Whether the learned trial Judge was right in treating Exhibit 2, which was a proceeding before an Upper Area Court as an evidence testified to before him.”

The Court of Appeal carefully went into the issues and finally dismissed plaintiffs’ appeal in respect of their own claims but allowed the appeal in respect of the declarations and injunctions granted to the 1st defendant in respect of the counterclaim. Uthman Mohammed J.C.A. (as he then was) delivering the leading judgment concluded his judgment thus-

“In the result, this appeal succeeds in part. The judgment of Fabiyi J., granting declarations and injunctions claimed by the 1st respondent in his counter-claim is set aside. The appeal against the dismissal of the appellants’ claims is dismissed. I order the case to be retried by the High Court, but before another judge. All parties and those interested in the compensation paid by the Nigerian Paper Mill, Jebba should be notified of the retrial for them to file their respective claims before the High Court. Parties are to bear own costs of this appeal.”

It ought to be made clear at once that the plaintiffs/appellants’ appeal failed and was dismissed. So there is nothing to be retried there. The appeal against the counter-claim in favour of the 1st defendant was however allowed and the declarations and injunctions set aside. The order for a retrial before other judge of the High Court therefore can only be in connection with the counter-claim of the 1st defendant.

Now, further aggrieved by the decision of the Court of Appeal, the

plaintiffs have again appealed to this Court.

Briefs were filed and exchanged. Mr. Ijaodola learned counsel for the plaintiffs in his brief submitted the following issues for determination -

(i) Considering the state of the pleadings, could it be validly raised
5 “that the land in dispute was uncertain”?

(ii) Could the decision of Hon. Justice Fabiyi of the Ilorin High Court validly affect non-parties to the suit and was it right to set aside the trial court’s decision on that point?

(iii) Did the promulgation of the Land Use 1978 affect the parties’
10 interests under native law and custom?

(iv) What is the proper order for the lower court (Court of Appeal) to make when the plaintiff who was the appellant before it did not prove its case?

(v) Can the Court of Appeal order a retrial when it held: “the appeal against the dismissal of the appellants’ claim is dismissed.”?

(vi) Could the reasons given by Hon. Justice Akpabio be sustained?
15

In view of my explanation of the purport of the final orders of the judgment of the Court of Appeal above, it is quite obvious to me that issues (ii) & (iii) ceased to be relevant, the judgment of Fabiyi J, in respect of the counter-claim of the 1st defendant (the Okedare family) having been set aside and a re-trial
20 ordered. The remaining four issues simply boil down to two. And these are;

(1) Whether the plaintiffs’ claims were validly dismissed on the state of the pleadings; and

(2) Whether the order for re-trial was properly made.

These issues will be treated and answered together.

25 But before I go into these issues, Mr. Salman learned Senior Counsel for the 1st defendant raised a preliminary objection that plaintiffs’ Grounds of appeal 1, 2, 3, 4 & 6 are incompetent being grounds of mixed law and fact or facts alone for which neither leave of this Court nor of the Court below was obtained contrary to Section 213(3) of the 1979 Constitution. Mr. Ijaodola re-
30 sponding said all these grounds are grounds of law since they do not dispute any finding of fact but legal conclusions only arising from admitted facts. I have read the Grounds of Appeal myself and I am inclined to agree with Mr. Ijaodola that the grounds are grounds of law even though as stated by Mr. Salman, some of the particulars supplied under some of the grounds are mat-
35 ters of fact. But clearly the facts are not themselves in issue but only the legal conclusions drawn from them. The preliminary objection is accordingly overruled. (See Nwadike & Ors. v. Ibekwe & Ors. (1987) 12 S.C. 14 (1987) 4 NWLR (Pt. 67) 718.

It was contended by Mr. Ijaodola that it was palpably wrong for the lower courts to have held that the land adjudicated upon was vague when

there was nothing in the pleadings which suggest that the identity of the subject matter of the dispute between the parties was in issue. He said it is settled law that what is admitted needs no further proof as provided for under section 74 of the Evidence Act.

I have earlier on set out the claims of the plaintiffs above. Paragraph 36(a) relates to the piece of land over which they sought for a declaration of title. For the avoidance of doubt, it reads -

“36 (1)(a) A declaration that the 1st plaintiff as the Oba of Jebba is by paternal inheritance, the owner of all land in Jebba.”

In para. 1 of the 1st Defendant’s Statement of Defence it was pleaded thus - 10

1. The 1st defendant denies paras. 1, 2, 3, 5, 10, 11, 12, 25, 27, 28, 29, 30, 34, 35 and 36 of Plaintiff’s Statement of Claim and puts Plaintiff to the strictest proof thereof.”

I have tried in vain to discover from the 1st defendant’s pleadings where if at all he admitted knowing “all land in Jebba” claimed by the plaintiffs. 15 But be that as it may, even If there was such an admission (which is denied) I believe it is settled law that a party claiming to be entitled to a declaration must satisfy the court by evidence and not by an admission in the pleadings of the defendant, that he is entitled to such a declaration. Apart from the fact that the court has a discretion whether or not to grant the declaration, the success of 20 a claimant in such an action depends entirely on the strength of his own case and not the weakness of the defence (See Kodilinye v. Odu (1935) 2 WACA 336 and Bello v. Eweka (1981) 1 S.C. 101 at 102 per Obaseki, J.S.C.).

The trial High Court had this to say on page 274 of the judgment -

“This account is one for declaration of title. The plaintiff must suc- 25 ceed on the strength of his case and not on the weakness of the defence. He must therefore succeed by credible evidence. Refer to Kodilinye v. Odu (1935) 2 WACA 336. The first plaintiff’s case appears weak and the evidence ad- duced seemed most unreliable. Such evidence appeared concocted in the main. I cannot and do not believe some.” 30

There was no appeal against the finding therein.

In addition the Court of Appeal per Mohammed J.C.A (As he then was) who read the leading judgment said as follow

“I agree..... that before a declaration of title is given the 35 land to which it relates must be ascertained with certainty, the test being whether a Surveyor can from the record produce an accurate plan of such land.”

I am therefore in complete agreement with the findings of the court below that

the plaintiff's claim of "all land in Jebba" is vague and uncertain. It is not capable of ascertainment either. A declaration of title can only be granted in respect of a piece of land which has definite precise and accurate boundary (See Kwadzo v. Adjei (194) 10 WACA 274. Araba v. Asanlu (1980) 5-7 S.C. 78, 5 Bello v. Eweka (supra).

The 1st defendant's counter-claim however did not suffer the same or similar defects as that of the plaintiffs". I have already reproduced the counterclaims as per para. 73 of the 1st defendant's Statement of Defence (supra). For ease of reference I reproduced again para. 73(1) as follows -

10 "73(1) A declaration that the 1st defendant and his family known and called "the Okedare family of Jebba" is the customary owner and/or entitled to possession of all lands in and around Jebba Kwara State Nigeria, which land is bounded in the North by River Niger. In the West by Gata in the East By River Oshin/Bacita and in the South by Alagbon and which 15 land also include the land on which the Nigerian Paper Mill constructed its Logging Road Project and subject matter of this suit."

He had earlier pleaded in paras. 50 and 51 of the same Statement of Defence thus

20 "50 The said Okedare Family of Jebba which consists of many members today and of which 1st Defendant is a member and headed by Pa Abraham Okedare was and still is the customary owner of all lands in and around Jebba, Kwara State, Nigeria the land subject-matter of this suit inclusive.

51. The said Okedare's family land at Jebba is today bounded in the North by River Niger, in the West by Gata in the East by River Oshin and 25 Bacita and in the South by Alagbon.

52. 1st Defendant and his Okedare family of Jebba inherited their said land at Jebba from their forefathers originated by the said Okedare Lanloke or Lanloke and from time immemorial.

The plaintiff in his Reply to the 1st Defendant's Statement of Defence and Counter-Claim pleaded in paras. 11 & 12 that -

"11. The plaintiffs deny paras. 50, 51 & 52 and puts the 1st defendant to the strictest proof thereof.

12. With respect to para. 50 the plaintiff avers that never at any time did the 1st defendant nor his great grand father own all lands in Jebba or 35 own the land in this present suit."

It should thus be appreciated at once that in the suit there are two different pieces of land, at least by their descriptions, for which declarations were sought by the plaintiff and 1st defendant respectively. Plaintiffs' land is simply "all land around Jebba" while the 1st defendant's own is as described

in paras. 51 and 73(1) of the Statement of Defence and Counter-Claim set out above. I do not think it can be seriously contended that the land in dispute in the Counter-Claim for which the 1st defendant sought a declaration is not identifiable or ascertainable. I think it is quite identifiable following the description given by the 1st defendant himself in paras. 51 and 73(1) of the Statement of Defence and Counter-Claim. It is settled that where there is no difficulty in identifying the land a declaration of title may be made without it being based on plan (See *Etika v. Dikiba* (1976) 6 S.C. 97). The trial High Court was therefore in order to have granted the Declaration and injunction in respect of the land in favour of the 1st defendant being land with definite boundaries. 10

The Court of Appeal was therefore wrong when it said -

"It is plain that the land, the Okedare family (the defendants) is declared the customary owner and or entitled to possession "in and ground Jebba" is uncertain." 15

It was the plaintiffs who claimed to be owners of "all lands in Jebba". (See para. 36(1)(a) of the Statement of Claim above). That land was clearly uncertain. The 1st defendant's claim (the Okedare family) is as set out above in paras. 51 and 73(1) of the Statement of Defence. The description of the land in those paragraphs are to me referable to a certain and definite piece of land from which a Surveyor who understands the features referred to therein can produce a plan of the land (See *Kwadzo v. Adjei* (1944) 10 WACA 274 *Araba v. Asanlu* (supra). 20

The Court of Appeal however, found it necessary and for ample reasons too to set aside the declarations and injunction granted to the 1st defendant and in its stead ordered a retrial before another judge of the High Court. It must be emphasised again that the retrial can only be in connection with the Counter-Claim, the Court of Appeal having rightly in my view dismissed "the appeal against the dismissal of appellants (plaintiffs) claim." In ordering a retrial the court below observed in the lead judgment that "there are many people like the plaintiff/appellant and the 5 plaintiffs living in and around Jebba and owning properties and lands therein" who would be affected by any declaration one way or another. It also observed that the appellant himself adduced no evidence to show the area of his land which had been acquired by the Nigerian Paper Mill for the construction of their Logging Road to entitle him to any amount as compensation, and that the presence of other people and or tenants on the land in dispute and any rights acquired by any of them since the promulgation of the Land Use Act 1978 coupled with the absence of clear evidence on the value of economic trees lost by individual land holders 25 30 35

or owners, a retrial was desirable. The cases of Udofia v. Afia (1940) 6 WACA 216 and Araba v. Asanlu (1980) 5 - 7 S.C. 78 were cited and relied upon.

I think the Court of Appeal was right in principle. Apart from observations above there was evidence and which the High Court accepted, that the 1st defendant's family owned the lands on which the Federal Low Cost Housing and the General Hospital all in Jebba were constructed. When compensation was paid it was paid direct to the 1st defendant's family. Again When the Nigerian Paper Mill Acquired land in Jebba and failed to pay compensation, the 1st defendant's family instituted an action in an appropriate court which was still pending at the time of the present suit. This is therefore in my view a proper case to order a retrial and not a dismissal of the Counter-Claim as contended by the plaintiff/appellant's counsel since there is evidence, at least for now, that the defendant owns parts of the land in dispute. As observed above there was no appeal against the non-suit order of the High Court in respect of the claims for compensation by the parties either in the Court of Appeal or in this Court.

The main issues relating to the other claims by the plaintiffs and the 1st defendant's remaining Counter-Claims having been considered and resolved against the plaintiff (except the retrial of his own case which is allowed) the appeal fails I endorse the orders of the Court of Appeal dismissing plaintiffs claims subject as above and ordering a retrial of the 1st defendant's Counter-Claims also subject as above. The 1st defendant should file a Survey Plan of the area of land he claims as described in paras. 51 & 73(1) of his Statement of Defence before the commencement of the new trial.

I endorse the orders in the lead judgment of my learned brother Adio J.S.C. which I read before now.

ONU JSC

I was privileged before now to have a preview of the judgment of my learned brother Adio, J.S.C. I agree with his reasoning and conclusions. In making a brief comment on the case as contested, I am left in no doubt that the trial court rightly dismissed the claim of the plaintiffs (a conclusion the court below confirmed) when it arrived at the following inevitable conclusion, to wit:-

"Principally, the suit is 1st Plaintiff's baby. He only included the names of the other five co-plaintiffs for the sake of making up number. They remained faceless throughout the proceedings as they never testified. Their claim is dismissed. All these other declarations sought by the 1st Plaintiff

fail and are accordingly dismissed.”

As for the counter-claim, the cornerstone of the 1st defendant’s pleading in that regard, is to be found in paragraph 73(i) of his statement of Defence wherein among others, he pleaded:

“A declaration that the 1st Defendant and his family known and called “the Okedare family of Jebba” is the customary owner and/or entitled to possession of all lands in and around Jebba Kwara State, Nigeria, (sic) which land is bounded in the North by the River Niger, in the West by Gata, in the East by River Oshin/Bacita and in the South by Alagbon, and which lands also include the land on which the Nigerian Paper Mill constructed its logging Road Project and subject-matter of this Suit.” (Italics are mine for emphasis). 10

He further sought an injunction.

At the trial, the evidence led by the 1st defendant in support of the above pleading at inception and towards the middle of his testimony, was as follows:- 15

“I know a place called Jebba, I know all the lands in Jebba. I know the fellow who owns all the land in Jebba. My great grandfather - Okedare Lanloke owns all the land of Jebba..... .

All the villages around Jebba were established by permission of my family. My Okedare family is the Customary owner of the land of Jebba” 20

With the above piece of evidence revolving around the words italicized to wit: “all lands in and around Jebba” the trial Court’s findings in its judgment, though later vehemently attacked on appeal in the court below as amorphous and uncertain, found the following expression.

“The 1st defendant clearly proved his case in respect of all the declarations sought by him apart from the specific amount of compensation due on economic trees. The declarations sought by the 1st defendant apart from those relating to compensation are upheld. They are ordered accordingly.” 25

As epitomised in his contribution to the lead judgment which allowed the Plaintiff’s appeal on the issue of the uncertainty and impreciseness or unclear nature of 1st defendant’s claim in the counterclaim, Akpabio, J.C.A. said right when he observed among others that:- 30

“No survey plan accompanied Respondent’s counterclaim to make the area for which title was declared for the 1st Respondent to be certain or ascertainable. A survey plan is always a Sine qua non in most cases where a declaration of title or injunction is sought. Apart from Ate Kwadzo v. Rohert Kwasi Adjei (1944) 10 WACA 274, mentioned in the lead judgment as the locus classicus on the matter, numerous other cases may be cited such as Akinola 35

Baruwa v. Ogunshola (1938) 4 WACA 159, where it was held that:-

“Declaration of title to land should not be granted if there is any doubt as to the identity of the land in dispute.

“See also Amata v. Modekwe (1954) 14 WACA 580; Udofia V. Afia
5 (1940) 6 WAC 216 and Okosun Epi v. Johnn Aigbedion (1972) 10 S.C. 53.

*“There was also the fact that the declaration of title to “all lands in and around Jebba” in favour of 1st Respondent’s family, coming after the Land Use Act, 1978 was a contravention of section I of the said Act which had
10 already vested title to all lands within a State on the Military Governor of each state. Such a declaration was therefore, void and must be set aside.”*
See Abioye v. Yakubu (1991) 5 NWLR (Pt.190) 130.

Since the 1st defendant was unable to prove the extent to the land i.e. the boundaries and extent with accuracy and to which he purported to hang
15 his claim of right of occupancy (See Ekwere v. Iyiegbu (1972) 6 S.C. 116; Oluwi v. Eniola (1967) NMLR 339; while earlier on he had acknowledged the occupation by the plaintiff -and some others as holders or tenants of portions thereof, in the absence of clear evidence on the value of economic trees lost by such individual holders or owners, a retrial held by the court below is the most
20 appropriate order to make in the circumstances, and I so hold. Besides, it having been fully demonstrated in both the pleadings and evidence that when the Nigerian Paper Mill, Jebba acquired land in the area and failed to pay compensation, 1st defendant’s family instituted an action in an appropriate court which was still pending at the time of the present action, a retrial becomes inevitable and not a dismissal of the counter-claim as contended by
25 learned counsel for the plaintiffs/appellants. The filing of a Survey Plan in the instant case following guidelines laid down by this court in such cases as Awore v. Owodunni (No.2) (1987) 2 NWLR (Pt.57) 366 at 373 F-G; and Omoregie v. Idugiemwanye (1985) 2 NWLR (Pt.5) 41 at 54, becomes necessary bearing in
30 mind that a retrial implies that one of the parties, in the instant case, the 1st defendant/counter-claimant, is being afforded opportunity to relitigate the same matter all over again. In so ordering a retrial I am satisfied that the other party, here the Plaintiff, is not thereby being wronged to such an extent that there would be a miscarriage of justice. See Bakare v. Apena (1986) 4 NWLR
35 (Pt.33) 1; Olasehinde v. Ajikan Continental Bank Limited (1990) 7 NWLR (Pt.161) 180; Duru v. Nwosu (1989) 4 NWLR (Pt. I 13) 24; Okuduwa v. State (1988) 2 NWLR (Pt.76) 333; and Esso West Africa Inc. v. Oyegbola (1969) 1 NMLR 194 at 198.

The retrial is rendered all the more compelling in that it was established at the

trial that some people had acquired interest i.e. are living on the land as tenants and effort should be made to effectually settle all matters in controversy relating thereto once and for all times.

It is for the above reasons and the fuller ones contained in the lead judgment of my learned brother Adio, J.S.C. with which I had expressed my concurrence, that I order the case to be remitted to the High Court, Kwara State before another Judge for retrial in terms of the consequential orders inclusive of those for costs made.

IGUHJSC

The plaintiffs by a writ of summons claimed against the defendants as follows:-

“1(a) A declaration that the 1st plaintiff, as the Oba of Jebba is by paternal inheritance, the owner of all lands in Jebba.

(b) A declaration that the rightful claimants to N43,973.12K compensation are those people whose names appear on the list compiled at the site of the counting of the economic trees and crops the original of which list is now with the second defendant.

(c) A declaration that the first defendant having failed and or neglected to come out and show that he had interest in the land in issue, at the time that everybody was asked to come out, is estopped from later coming out to say that he owns the land.

(d) A declaration that the plaintiffs are entitled to compensation as assessed by the Nigerian Paper Mills Limited, Jebba.

2(a) An Injunction restraining the first Defendant or any member of his family from holding himself out or parading himself as the owner of all lands in Jebba.

(b) An injunction restraining the second and third defendants from recognising the first defendant as the owner or co-owner of the land in respect of which compensation is about to be paid.

(c) An injunction restraining the second and third defendants from paying the compensation in this case to anybody other than those whose names appear on the list with the second defendant.”

Pleadings were ordered in the suit and were duly settled, filed and exchanged. The 1st Defendant in his Statement of Defence counter-claimed against the plaintiffs, the 2nd and 3rd defendants jointly and severally as follows:-

“(i) A declaration that 1st Defendant and his family known and

called “the Okedare family of Jebba” is the customary owner and/or entitled to possession of all lands in and around Jebba Kwara State Nigeria, which land is bounded in the North by River Niger, in the West by Gata, in the East by River Oshin/Bacita and in the South by Alagbon, and which lands also include the land on which the Nigerian Paper Mill constructed its logging Road Project and subject-matter of this suit.

(ii) A declaration that 1st Defendant and his said family only are entitled to the N36,315.00 compensation payable and duly paid by the Nigerian Paper Mill, in respect of the economic trees destroyed on the said part of 1st Defendant’s land at Jebba, Kwara State, Nigeria on which the said Nigerian Paper Mill constructed its Logging Road Project, which said compensation had been forwarded to 2nd Defendant by the said Nigerian Paper Mill and is now in the custody of the said 2nd Defendant.

(iii) A decree of the Court ordering 2nd defendant to pay the said N36,315.00 compensation to 1st Defendant.

(iv) A permanent injunction restraining Plaintiff from further holding himself out as the customary owner of or from ever trespassing into, or receiving or claiming compensation in respect of the economic trees on the said all lands at Jebba subject-matter of Plaintiff’s claim in this suit and 1st Defendant’s counter-claim in this suit.

(v) A permanent injunction restraining 2nd and 3rd Defendants from ever paying the said N36,315.00 compensation to Plaintiff or any person other than 1st Defendant and his family.

(vi) A permanent injunction restraining 2nd Defendant from ever and henceforth paying compensation in respect of economic trees or any other item or items of compensation due to a customary owner of land, to Plaintiff, with regards to all lands at Jebba.

(vii) A permanent injunction restraining 2nd Defendant from recognizing Plaintiff as the traditional owner of all or any lands whatsoever at Jebba”

The case accordingly went to trial at the conclusion of which the learned trial Judge in a considered judgment non-suited the plaintiffs’ claim in respect of compensation but dismissed the rest of their claims. The reliefs claimed by the 1st defendant in his counter-claim were granted apart from those relating to payment of compensation which the Court also non-suited.

Being dissatisfied with this judgment, the plaintiffs lodged an appeal to the Court of Appeal, Kaduna Division, which in a unanimous decision dismissed the same in respect of the plaintiff’s claims. The Court of Appeal however allowed the appeal in respect of the declarations and injunctions granted to the 1st defendant by the trial court with regard to his counter-claim.

The said declarations and injunctions were set aside and an order for the general retrial of the case before another Judge of the High Court of Kwara State was made by the court below.

The 1st defendant, who is the appellant herein has now appealed to this court against the said judgment of the Court of Appeal.

The first point which must be made is that the onus of proof lies on the plaintiff who seeks a declaration of title to land and/or injunction to establish with certainty and precision and without inconsistency 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; *Awote v. Owodunni* (No. 2) (1987) 2 NWLR (Pt. 57) 366 at 371; and *Ezeokeke v. Uga and others* (1962) 1 All NLR (Pt.3) 482 (1962) 2 SCNLR 199. A plaintiff may discharge this onus by such description of the land that any surveyor acting on such a description could produce an accurate plan of the land in dispute. The test of such description was succinctly put by Kingdom, C.J. over half a century ago in *Kwadzo v. Adjei* (1944) 10 WACA 274 where the learned Chief Justice pronounced as follows:-

“The acid test is whether a Surveyor, taking the record could produce a plan showing accurately the land to which title has been given.” See too *Makajuola v. Balogun* (1989) 3 NWLR (Pt.108) 192; and *Udeze v. Chidebe* (1990) 1 NWLR (Pt.125) 141.

There can be no doubt that another, and perhaps a better and more reliable way of establishing the identity and precise extent of a piece or parcel of land in dispute is by filing an accurate survey plan thereof reflecting all the features on such a land and showing clearly the boundaries thereof. See *Udofta v. Afia* (1940) 6 WACA 216; *Amata v. Modekwe* (1954) 14 WACA 580; *Okorie v. Udom* (1960) SCNLR 326; and *Olusanmi v. Oshasona* (1992) 6 NWLR (Pt. 245) 22 at 29. The vast majority of litigants in land cases now file survey plans of the piece or parcel of land in respect of which they claim title and/or injunction and it is my view that this practice must be commended as clearly wise. It has to be recognised however that it is not a sine qua non that a survey plan of land in dispute must be filed in all land cases. Where there is no difficulty in identifying a piece or parcel of land in dispute, a declaration of title may be decreed without its being tied to a survey plan. See *Sokpuiii v. Agbozo* 111 (1951) 13 WACA 241 and *Ibuluya v. Dikibo* (1976) 6 S.C. 97. I will now consider to what extent the parties hereto succeeded in establishing the precise extent and identity of the land in dispute in the action.

As already mentioned, the plaintiffs’ claims against the defendants jointly and severally are inter alia for a declaration of title by paternal inherit-

ance to -“all lands in Jebba”

together with perpetual injunctions. No survey plan of the land in dispute was filed or tendered by the plaintiffs at the hearing. There was also no facts pleaded in the plaintiffs’ Statement of Claim or testified to by the said plaintiffs
 5 or by their witnesses on the question of the precise identity and extent of the land in dispute. It ought also to be mentioned that the 1st defendant nowhere in his pleadings made any admission on the issue of the certainty and boundaries of the land claimed by the plaintiffs even though the law is settled that the court does not make declarations of right either on mere admissions or in
 10 default of defence without hearing appropriate evidence and being satisfied with such evidence. See *Wallensteiner v. Moir* (1974) 3 All E.R. 217, *Vincent Bello v. Magnus Eweka* (1981) 1 S.C. 101; and *Motunwase v. Sorungbe* (1988) 5 NWLR (Pt.92) 90. It seems to me crystal clear that the plaintiffs’ claim for declaration of title to all lands in Jebba is patently vague, unquestionably
 15 uncertain and incapable of ascertainment in terms of its precise extent and boundaries. As I have already observed, the onus 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. This onus, the plaintiff failed to discharge in this case. And if this onus is not discharged, a plaintiff’s claim will
 20 stand dismissed. See *Ajide Araha v. Ogunbiyi Asanlu* (1980) 5-7 S.C. 78 at 87 - 88; *Olusanmi v. Oshasona* (1992) 6 NWLR (Pt. 245) 22; and 36 and *Imah v. Okoghe* (1993) 9 NWLR (Pt. 316) 159.

There are also the concurrent findings of fact by both the trial court and the court below to the effect that the evidence in support of the plaintiffs’
 25 claims appears in the main weak, unacceptable and unsatisfactory. These findings have not been shown to be perverse or patently erroneous nor was it established that a miscarriage of justice will result if they are allowed to remain and I can find no reason to interfere with them. See *Chiwendu v. Mbamali* (1980) 3-4 S.C. 31 at 75; *Lamai v. Orbih* (1980) 5-7 S.C. 28; *Woluchem v. Gudi*
 30 (1981) 5 S.C. 291 at 326; and *Igwego v. Ezeugo* (1992) 6 NWLR (Pt. 249) 561 at 585 etc etc. I therefore agree with the orders of the trial court and the court below dismissing the plaintiffs claims in their entirety.

On the other hand, the 1st defendant’s counter-claim was *inter alia*
 35 for a declaration of title to -

“all lands in and around Jebba, Kwara State, Nigeria which land is bounded in the North by River Niger, in the West by Gata, in the East by River Oshin/Bacita and in the South by Alagbon and which land also include the land on which the Nigerian Paper Mill constructed its Logging Road Project and subject matter of this suit.”

There particulars are clearly pleaded in paragraph 73(i) of the 1st defendant's Statement of Defence.

There can be no doubt that a claim in declaration of title and perpetual injunction in respect of "lands in and around Jebba" without more cannot, in my view, be said to relate to a certain, precise and identifiable piece or parcel of land. This is because, such land is incapable of ascertainment as no surveyor acting on such a vague and unclear description can produce an accurate plan of the land in dispute. The 1st defendant's present counter-claim however went further to give some precise and detailed particulars with the accurate boundaries of the land in dispute. With due respect, I am unable to agree with the court below that the land claimed by the 1st defendant is either uncertain, unascertainable or unidentifiable.

It must however be mentioned that the description of the land in dispute as testified to by D.W.1 before the trial court appears ex facie to be at variance with that pleaded in paragraph 73(i) of the 1st defendant's Statement of Defence. The practical issues that has thus emerged is whether or not the land described by the said D.W.1 is the same with, larger than or only forms part of the land in dispute as pleaded in paragraph 73(i) of the Statement of Defence.

Regrettably, the learned trial Judge made no finding on this material question as a result of which this court is incapacitated from justifying or otherwise reversing the finding of the trial court in favour of the 1st defendant on his counter-claim.

Additionally there is the evidence of the parties with their witnesses, reinforced by the admissions of the appellant to the effect that various other people including the plaintiffs own portions of land within the land in dispute. The trial court as well as the court below so found. Indeed, the court below in dealing with this aspect of the case observed as follows:-

"Can the court declare any of the families the owner of all lands in and around Jebba when, as a matter of fact, there are various admissions by both parties that some other persons do own lands within Jebba and its environs..... if the 1st respondent (meaning the present 1st defendant/appellant) admits that the appellant (meaning the 1st plaintiff) and some other persons do own separate farms and economic trees within the disputed area, is the court right to declare the Okedare's family of Jebba as the customary owner and/or entitled to possession of all lands in and around Jebba, Kwara State, as the learned trial Judge did in his judgment?"

(Words in brackets supplied).

The Court of Appeal per the lead judgment of Uthman Mohammed, J.C.A. (as he then was) answered the above question as follows:-

“I agree that there are many other people like the appellant and the five plaintiffs living in and around Jebba and owning properties and lands therein, who would be engulfed in this novel declaration. Now which lands belong to them and which is owned by Okedare family. This undoubtedly has established that the declaration is vague and in my opinion any order made consequent to it cannot be allowed to stand.”

I think, with respect, that the court below is right in the above observations. In my view, there is abundant evidence upon which this court is entitled to order the rehearing of the 1st defendant’s counter-claim de novo. An appellate court will order a retrial where there has been such an error in law or an irregularity in procedure which neither renders the trial a nullity nor makes it possible for the appellate court to determine whether there has been no miscarriage of Justice. See *Duru v. Nwosu* (1989) 7 SCNJ 154 at 159 (1989) 4 NWLR (Pt.113) 24 and *Okoduwa v. State* (1988) 2 NWLR (Pt.76) 333. Also where an appeal is allowed because of the failure of the trial court to make findings on material issues and the determination of such material issues, as in the present case, depends on the credibility of witnesses, the proper order to make is an order for retrial. See *Karibo v. Grend* (1992) 3 NWLR (Pt.230) 426.

In the instant case, the learned trial Judge failed to make any finding on the material question of whether or not the land testified to by D.W.1 is exactly the same with forms only a part of or is different from the land in dispute in this case as pleaded in paragraph 73(i) of the 1st defendant’s Statement of Defence. Secondly, the identities of the portions of land owned by various other persons within the land in dispute were not indicated by any evidence before the court. It therefore seems to me that this is an appropriate case where in the interest of justice, a retrial and not a dismissal of the counter-claim must be ordered.

In the final result this appeal partially succeeds and the order of the court below dismissing the plaintiffs’ claims other than those in respect of payment of compensation is hereby affirmed. The order of the court below remitting this case to the trial court for retrial generally is also hereby set aside. In substitution thereof, it is ordered that the 1st defendant’s counter-claim except his claim for compensation which was non-suited be remitted to the High Court of Kwara State for retrial before another Judge. I abide by the consequential orders including the order as to costs contained in the lead judgment.