

**SUPREME COURT OF NIGERIA**  
22ND JULY, 1994. SC. 174/1991  
**CORAM:- S. M. A. BELGORE, A. B. WALL, I. L. KUTIGI,**  
**Y. O. ADIO, A. I. IGUH, JJSC**

EDOKPOLO & CO. LTD. .... APPELLANT

AND

1. SAMSON OHENHEN

2. ALFRED EHIGIATOR OKENEDO ..... RESPONDENTS

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**CONVEYANCING-** *Instrument that contains all essential things - But not in their proper positions - Whether invalid on that ground alone.*

**DOCUMENTS-** *Validity of a deed - Whether appellant who is not a party to the deed - Can apply to set it aside as null and void.*

**EVIDENCE'** - *Illiterates - Where an illiterate died without testifying - It means there was no complaint by him - About his manner of execution of the document in question.*

**EVIDENCE** - *Instrument - Execution before justice of the peace - Under the Land Instrument Registration Law - When to be presumed - Inspite of improper arrangement of clauses.*

**ILLITERATES** - *Document prepared by a legal practitioner - For his illiterate client - Whether to be interpreted by him - Prior to the illiterate's signature*

**ILLITERATES** - *Illiterates Protection Law - Applicability to a document - Whether trial judge's error in not considering the entire oral evidence - Led him to a wrong conclusion.*

**ILLITERATES** - *Illiterates Protection Law - Only the illiterate and not a third party - Can complain that document was not explained - Before, the illiterate signed it.*

**LAND LAW-** *Registration of instruments - Where appellant's solicitor informed it of an encumbrance on the land in dispute - Whether appellant was a bonafide purchaser.*

**PRACTICE A PROCEDURE** - *Issues canvassed by the parties at trial - Considered by the lower court - Whether such consideration of issues was - erroneous.*

### **FACTS**

The late father of the 2nd Respondent/Defendant sold the land in dispute to the Plaintiff/Appellant. But prior to this sale he granted a 50 years lease to the 1st Respondent/Defendant in respect of the same parcel of land vide Exhibit 9. Appellant protested to the 2nd Respondent's father (the deceased) as soon as 1st Respondent commenced building operations on the land. The deceased denied the lease, alleged that his thumb-impression on Exh. 9 must have been forged but admitted that he granted a 3 years lease to 2nd Respondent by an oral agreement. Exhibit 9 was prepared by a legal practitioner upon the instruction of the deceased who was an illiterate. Though Exhibit 9 was shown to be executed before a justice of the peace, it was not elegantly drafted and some clauses were not placed in their proper positions.

Appellant filed an action before the High Court Benin-City claiming a declaration of title to the Land in dispute, general damages and perpetual injunction. The deceased died without testifying in the court. The trial court gave judgment for the Appellant on the ground that Exh. 9 was invalid because it was not interpreted to the deceased and was not executed before a justice of the peace. The Respondents' appeal to the Court of Appeal was upheld as that court accepted the 1st Respondent's contention supported by the 2nd Respondent that the deceased granted a 50 years lease to him before the sale to the Appellant. The Court of Appeal held that Appellant's title is subject to 1st Respondent's enjoyment of his 50 years lease. The Appellant has now appealed to the Supreme Court to determine inter alia, whether the Court of Appeal was right in giving legal effect to Exhibit 9.

**HELD** (Unanimously dismissing the appeal)

***Only the illiterate can complain that Document was not explained***

1. The Illiterates Protection Law, which the appellant alleged that Exhibit "9" contravened, was made for the protection of illiterate persons. It is the illiterate person at the request of whom any person writes a letter or document that requires protection and he is the one who may seek the protection given by the Law by complaining that the letter or document written at his request and which was signed with his signature or his mark was not, prior to its being so signed, read over and explained to him (P. 191 L.5)

***Documents prepared by a legal practitioner for the illiterate***

2. Where a letter of document is prepared by a legal practitioner at the request or on behalf of his client who is an illiterate, the legal practitioner need not interpret and explain the letter or document to the client prior to the client signing or making his mark on the letter or document. The evidence of D.W. 6 was that he was a legal practitioner. The deceased who was his client requested him to prepare Exhibit “9” and he did so. In the circumstance, section 5 of the Illiterates Protection Law exempted the D.W. 6 from complying with the provisions of the law. (P. 191 L.17)

***No complaint by the illiterate***

3. The deceased did not testify during the proceedings in this case. He died before 27th April, 1981, when the trial court started to take evidence. So, there was no evidence or complaint by him (the person who needed the protection provided by the Law) that Exhibit “9” was not read and explained to him before he thumb-printed it. (P.191 L.26)

***Judge’s error is not considering the entire oral evidence***

4. On the question of the application or non-application of the Illiterates Protection Law to Exhibit “9”, the Court of Appeal was right in holding that the learned trial Judge erred in not considering in addition to Exhibit “2” and “P”, the totality of the oral evidence before him before coming to the conclusion that the provisions of the Law were not complied with in the execution of Exhibit “9”. If he had considered, in addition to Exhibits “2” and “P”, the totality of the oral evidence, his decision on the point would have been that the provisions of the law were complied with. (P. 192 L.30)

***Issues canvassed by the parties at trial***

5. If a court raises an issue, which the parties themselves have not raised, because it is material for the determination of the case or appeal before it, the parties must be given an opportunity to argue the point before the issue is determined. In the present case, the issues were canvassed by the parties, particularly the appellant and considered by the learned trial Judge before they were considered by the court below. The court below, has, therefore, not done anything improper or erroneous. (P. 195 L.35)

***Validity of an instrument with improperly arranged clauses***

6. If, as it was the position in this case, all the essential things which an instrument like Exhibit “9” should contain are contained in it and what

appears to be wrong is that they are not in their proper or correct positions, the instrument may not on that ground alone be said to be invalid. The consequence of basing a judgment on such a technical point can be very grave and may result in a miscarriage of justice. The court should not allow itself through technicalities to be used for perpetrating injustice. (P. 196 L30)

***Instrument - Presumption of Due Execution***

7. As all the essential things, particularly the signature of the Justice of the Peace and the magic words: *in my presence* “and “*Justice of the Peace*” were in Exhibit “9”, the learned trial Judge should have presumed or inferred that the instrument was executed in the presence of the justice of the peace. This is because the court will presume the existence of one fact from the existence of proved fact where such a presumption or inference is irresistible or where there is no other reasonable presumption or inference which fits all the facts. (P.196L.39)

***Whether non-party can apply to set aside a deed***

8. Closely connected with the question dealt with above is the competence, if any, of the appellant to challenge the validity of Exhibit “9”, the deed executed by the deceased and the 1st respondent in relation to the aforesaid lease transaction to which the appellant was not a party. In so far as the said transaction was concerned, the appellant was a third person a complete stranger. Only parties to a deed can apply to set it aside on the ground that it is null and void. (P. 198 L.25)

***Prior notice of an encumbrance on land***

9. The legal implication of the discovery of exhibit “9 “ in the Land Registry by the solicitor acting for the appellant was that the appellant was not a bona fide purchaser for value of the land in dispute without notice as there was evidence that the solicitor reported his finding to the appellant. The court below was right in giving legal effect to Exhibit “9” in the circumstances of this case. (P.200L.9)

**NOTABLE POINTS OF INTEREST**

**ADIO JSC**

***1. Evidence that put appellant’s cast in disarray***

The evidence of the 2nd respondent and the evidence of another son of the deceased (D.W. 4) who told the court that he knew that the deceased leased

the land in dispute to the 1st respondent and did not sell it to the appellant, clearly showed that the appellant's case was in disarray.(P. 192 L.25)

***2. Instrument not executed before a designated authority***

- 5 The legal position is that where an instrument requiring registration under the Land Instrument Registration Law is not executed before a designated authority, it is not admissible. (P. 196 L.18)

***3. Written agreement cannot be altered the will of the deceased***

- 10 In the case of the alleged statement in the Will of the deceased that he did not grant a lease of the land in dispute to the 1st respondent for fifty years, the deceased and his legal advisers ought to know that the law does not 'permit what is stated in an agreement, that is in writing, to be changed, altered or contradicted in that way. (P. 198 L.I)

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***4. Pleading - Admitted averments need not be proved***

Averment in the pleading of a party which is admitted in the pleading of the other proper party needs not be proved. (P. 198 L.21)

20 **BELGOREJSC**

***5. Encumbrance on land***

The land in dispute was already encumbered by the time of purported sale to the appellant. The notice of this encumbrance could easily have been discovered if the appellant had been diligent enough to heed his counsel's advice

- 25 that Exhibit 9 was in existence.(P.200 L.21)

**IGUHJSC**

***6. Non-Compliance with Illiterates Protection Law - Effects***

- 30 The first point that must be made is that the Illiterates Protection Law as its title suggests is a law to protect, and safeguard illiterates from being exploited. It is certainly not a law to penalise them and the fact that the writer of a letter or document at the request, on behalf or in the name of an illiterate did not carry out the provisions of that law did not mean that such letter or document was for that reason alone void and of no effect. (P.203 L3)

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***7. Evidence of preparation of a Document for an illiterate***

In my view, evidence of the facts that any document is written by a person on the instruction of an illiterate, that the contents fully and correctly represent his instructions, that prior to its being signed, it was read over and explained

to the illiterate and that the signature or mark thereon was made by such illiterate may either be oral, and such oral evidence is clearly admissible in law, or it may be patent on the face of such a document where the name and address of the writer are indicated as required by law. (P. 204 L. 10)

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**REPRESENTATION**

Mr. A.O. Alegeh for the Appellant

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Mr. K.S. Okeaya - Inneh SAN, with Miss

J.O Okeaya - Inneh for the Respondents

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**CASES REFERRED TO**

Okoniji v. The State (1987)1 NWLR (Pt. 52)659

Obodo v. Ogba (1987)2 NWLR (Pt. 51)1

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Eze v. The State (1985)3 NWLR (Pt. 13)429

Niger Construction Ltd v. Okugbeni (1987)NWLR (Pt. 67)787

25

Okelola v. Boyle (1989)5 NWLR (Pt. 119)46

Ejowhomu v. Edok - Eter Mandilas Ltd (1986)5 NWLR (Pt. 39)1

Highgate Maritime Services Ltd v. First Bank Nig Ltd (1991)1 NWLR (Pt. 167)290

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Union Bank of Nigeria Ltd. v. Professor Ozigi (1994)3 NACR 1

Uwegba v. Attorney-General, Bendel State (1986)7 NWLR (Pt. 16)363

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Adejumo v. Ayantegbe (1989)3 NWLR (Pt. 110)417

Ordor v. Nwosu & Anor (1974)12 S.C. 103 at p. 112

Omorhirhi & Ors v. Enatevwere (1988)1 NWLR (Pt 73) 746

5 Folami v. Cole (1990)2 NWLR (Pt. 133) 445

Iro Ezera v. Inyima Ndukwe (1961) All NLR 564

P.Z c. Gusau (1962)1 All NLR 242

10

Djukpan v. Orovuyovbe (1967)1 All NLR 134 at 140 134

Isaac Omoregbee v. Daniel Lawani (1950)3 - 4 S.C. 180 at 117

15 Nigerian Maritime Services Ltd v. Alhaji Bello Afolabi (1978)2 SC. 79 at 81

Odulaja v. Haddad (1973)11 SC. 35

Alimi Lawal v. G.B. Ollivant (Nig) Ltd (1972)3 S.C. 124 at 137

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George Ikenye & Another v. Akpala Ofune and others (1985)2 NWLR 1

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**STATUTES REFERRED TO**

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Land Instrument Registration Law Cap. 80 S.8

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Illiterates Protection Law SS. 5, 3  
Evidence Act S. 137(1)

**LEAD JUDGMENT BY ADIO JSC**

The appellant, as plaintiff, in the High Court of Justice, Benin Judicial Division of the defunct Mid-Western State of Nigeria, instituted an action against the 1st respondent and the father of the 2nd respondent. The father of the 2nd respondent died before the commencement of the hearing of the case and, on the application of the appellant, the 2nd respondent was substituted as the 2nd respondent. The appellant's claim according to paragraph 23 of the Amended Statement of Claim, was as follows:-

“(i) *Declaration of title to the piece or parcel of land shown on Plan number CS2/77 attached to the deed of conveyance registered as No.6 at page 6 in volume 274 of the Lands Registry in Benin and parcel A on Plan No. 1074/75 attached to the deed of conveyance registered as No.33 at page 33 of Volume 316 of the Lands Registry.*

(ii) *In the alternative the plaintiff seeks a declaration that the 1st defendant's interest in the parcels of land described above extinguished on 1st day of May, 1977.*

(iii) *General damages of N2,000.00.*

(iv) *Perpetual injunction restraining the 1st defendant and his servants or agents from erecting permanent structure on the land.”*

Pleadings were duly filed and exchanged by the parties. The evidence led was that the 1st respondent, sometime in 1974, obtained a lease for the period of fifty years from the father of the 2nd respondent in respect of his vacant parcel of land bounded on one side by Akpakpava Street and on the other side by Eheakpen Street in Benin City. Exhibit “9” was the deed of conveyance executed by the father of the 2nd respondent and the 1st respondent in relation to the transaction. The allegation was that not long after the transaction between the 1st respondent and the father of the second respondent in relation to the aforesaid parcel of land, the appellant received an offer of a freehold interest in relation to another parcel of land on which there was a building for which the appellant paid the sum of N4,000.00 to the father of the 2nd respondent as purchase price as shown by a deed of conveyance. Exhibit “1”, executed by the parties in relation to the transaction. The cause of the present dispute was another parcel of land which the father of the 2nd respondent allegedly sold to the appellant which had earlier been leased to the 1st respondent by the father of the 2nd respondent for fifty years. The appellant



paid N2,400.00 for it and the deed of conveyance executed by the parties in relation to the transaction was Exhibit “2”. At all material times and up to the time of his death in 1977, the father of the 2nd respondent, aged 120 years, was bed ridden and was a cripple.

5 As soon as the 1st respondent commenced building operations on the parcel of land, there were protests by the appellant. The appellant alleged that it brought the matter to the notice of the father of the 2nd respondent (hereinafter referred to as “the deceased”) and the deceased alleged that his thumb-impression on Exhibit “9” must have been forged and that he did not grant to  
10 the 1st respondent lease for a period of fifty years in relation to the land in dispute; the agreement was oral and only a lease for three years was granted.

The learned trial judge, after consideration of some of the evidence led by the parties and of the submissions made by their counsel, entered judgment for the appellant. He held that fraud was not established in relation  
15 Exhibits “2” and “9” executed by the deceased in relation to the land in dispute, in favour of the appellant and the 1st respondent, respectively. In his view, the Land Instruments Registration Law (Cap.81) was the relevant Law for the purpose of this case and he did not agree with the submission of the learned counsel for the 1st respondent that by virtue of section 5 of the  
20 illiterates Protection-Law non-compliance with the provisions of the Law in relation to Exhibit “9” did not invalidate the document. In the circumstance, he held that Exhibit “9” was invalid because its contents were not read and interpreted to the deceased and by reason also of the fact that there was nothing therein to show that it was executed in the presence of a magistrate or  
25 it Justice of the peace as prescribed in section 8 of the Land Instruments Registration Law, Cap. 81. He also held that Exhibit “2” was valid. In his opinion, the evidence led during the proceedings before him did not matter much; the main and fundamental issue was the validity or otherwise of Exhibits “2” and “9”.

30 Dissatisfied with the judgment, the respondents lodged an appeal against it to the Court of Appeal. The court below allowed the appeal after holding that the contention of the respondents that the deceased granted a lease of fifty years to the 1st respondent in relation to the land in dispute before subsequently purporting to grant to the appellant a freehold interest in  
35 the same parcel of land was established. In its view, Exhibit “9”, the deed of lease executed in favour of the 1st respondent by the deceased, was valid as there was nothing in relation to it which contravened the illiterates Protection Law and the Instruments Registration Law. For those reasons, the court below affirmed the decision of the learned trial judge granting title to the parcels of

land conveyed by Exhibits “1” and “2” subject, however, to the 1st respondent’s enjoyment of his prior interest of 50 year lease conferred on him by Exhibit “9”. The orders of the learned trial Judge granting perpetual injunction, damages for trespass, and costs to the appellant were set aside.

The appellant was dissatisfied with the judgment of the court below and it lodged an appeal against it to this court. The parties, in accordance with the rules of this court, duly filed and exchanged briefs. The appellant identified, in its brief, three issues for determination while the 1st respondent, in his brief, identified two issues for determination. In my view, the three issues, identified for determination in the appellant’s brief which covered the two issues in the 1st respondent’s brief, are sufficient for the determination of this appeal. The three issues in the appellant’s brief are as follows:-

*“(1) Whether the court of Appeal was right in holding that Exhibit “9” complied with the provisions of the Land Instruments Registration Law, Cap.81 of the Laws of Bendel State, 1976.*

*(2) Whether the Court of Appeal was right in raising and basing its judgment on an issue not raised by either party.*

*(3) Whether the Court of Appeal was right in giving legal effects to Exhibit “9” in the circumstances of this case.”*

The question raised under the first issue was whether the court below was right in holding that Exhibit “9” complied with the provisions of the Land Instruments Registration Law Cap. 81. Uche Omo, J.C.A., (as he then was) who read the lead judgment of the court below, agree with the learned trial Judge that the issue for determination was a straightforward one. In dealing with the alleged deficiencies which the learned trial judge found to have made Exhibit “9” not to have complied with the provisions of the Illiterates Protection Law and the Land Instruments Registration Law, one by one, -he referred to the relevant provisions of the laws and to the views expressed by the learned trial Judge, on the points, and stated, inter alia, as follows:-

*“Factually, the finding is correct. But that is the legal position?*

*What Law is this deficiency said to offend- the Illiterates Protection Law or the Land Instruments Registration Law? I take it to be the former. In that case my first observation is that nowhere in that legislation is there a mandatory provision that the only evidence of interpretation that is acceptable and the court can consider is that on the face of the document. There was evidence before the learned trial Judge by the person who prepared the document, and who there fore should comply with the provisions of the Illiterates Protection Law, that he interpreted the contents of the document from English language to Bini language to the lessor Ehigiator Ozigba Okeneda..... The learned trial Judge clearly erred in not considering*

*this evidence which was given by a legal practitioner, whose client the lessor was (so he testified without any challenge); and who prepared Exhibit “9” and saw it through from consultation with and instruction from his client, to its execution by him.”*

5 The learned Justice of the court below then went an to consider the question of what was the effect of the failure of the learned trial Judge to consider the evidence and, in dealing with the question, expressed the following view:-

“With regard to the first alleged deficiency, it may be argued that the failure of the learned trial Judge to consider the evidence of D.W.6, still  
10 leaves the issue of what credibility he would have attached to that evidence if he had considered it unaddressed, and that therefore the proper order to make in the circumstance would be one of a retrial vide (1) *Okonji v. The State* (1987) 1 NWLR. (Pt. 52) 659 (2) *Obodo v. Ogba.* (1987) 2 NWLR. (Pt. 54) 1. A look at the testimony of D.W.6 and his crass examination reveals  
15 that his evidence was unchallenged .....Being unchallenged the trial Judge would have no choice but to believe the evidence vide (1) *Eze v. The State* (1985) 3 NWLR. (Pt.13) 429; (2) *Niger Construction Ltd., v. Okugbeni,* (1987) 4 NWLR. (Pt 67) 787.

*The issue of credibility, there fare does not arise. On the basis of my  
20 findings an the two deficiencies relied upon, in respect of which the learned trial Judge was in error, the order which must follow is that his decision being wrong must be set aside.”*

With reference to the alleged non-compliance with the provisions of the Land Instruments Registration Law, the court below was of the view that  
25 there was sufficient compliance with the provisions of the Law and that the learned trial Judge erred in his view which appeared to suggest that a document, in order to comply with the provisions of the Law must be in a certain stereotype farm. The court said further that the fact that Exhibit “9” was not in a particular elegant or stereotype farm did not affect its validity. It concluded  
30 by saying that Exhibit “9” was a document that spoke far itself and if the learned trial Judge looking at it still had any doubt about its proper execution, he should have considered the oral evidence before him which did not contradict Exhibit “9” but merely explained it.

The argument in the appellant’s brief was, inter alia, that the court below was  
35 wrong in holding that the provisions of the illiterates Protection Law were complied with because there was nothing an the face of Exhibit “9” showing the person who interpreted the document to the deceased and the evidence of the D.W.6, which the court below said the learned trial Judge should have considered to resolve any doubt in his mind, was not credible. The contention

in the 1st respondent's brief was that the failure of the learned trial judge to consider the evidence of the D.W.6, the legal practitioner who prepared Exhibit "9", which showed that the provisions of the Illiterates Protection Law were complied with justified the order of the court below allowing the appeal.

The Illiterates Protection Law, which the appellant alleged that exhibit "9" contravened was made for the protection of illiterate persons. It is the Illiterate person at the request of whom any person writes a letter or document that requires protection and he is the one who may seek the protection given by the Law by complaining that the letter or document written at his request and which was signed with his signature or his mark was not, prior to its being so signed, read over and explained to him. One is therefore, not surprised by the following provisions of section 5 of the Law:-

*"5. This Law shall not apply to the writing of any letter or other document written in the course of his business by or at the direction of any person admitted to practise and practising as a legal practitioner in a High Court or the Supreme Court."*

In short, where a letter or document is prepared by a legal practitioner at the request or on behalf of his client who is an Illiterate, the legal practitioner need not interpret and explain the letter or document to the client prior to the client signing or making his mark on the letter or document. See Okelola v. Boyle, (1989) 5 NWLR (Pt.119) 46, which is a decision of the court of Appeal with which I agree. The evidence of D. W.6 was that he was a legal practitioner. The deceased who was his client requested him to prepare Exhibit "9" and he did so. In the circumstance, section 5 of the Illiterates Protection Law exempted the D.W.6 from complying with the provisions of the Law. In any case, the deceased did not testify during the proceedings in this case. He died before 27th April, 1981, when the trial court started to take evidence, so, there was no evidence or complaint by him (the person who needed the protection provided by the Law) that Exhibit "9" was not read and explained to him before he thumb-printed it. The difficult position in which the appellant found itself becomes very glaring as the 2nd respondent who stepped into the shoes of the deceased, (the vendor who allegedly sold the land in dispute to the appellant) on the application of the appellant took a position which was clearly opposed to that of the appellant. In particular, the appellant averred in paragraph 16 of the Amended Statement of Claim, inter alia, that it would contend that there was no valid lease of the land in dispute to the 1st respondent by the deceased, as the deceased, who was illiterate, was not taken before a magistrate or a justice of the peace to execute the lease agreement (Exhibit "9") and the said lease agreement was never interpreted to the de

ceased. The- 2nd respondent, in his Amended Statement of Defence, not only denied paragraph 16 of the Amended Statement of Claim, he went further in paragraph 6 of his Amended Statement of Defence to aver as follows:-

5                *“6. In further answer to paragraphs 13, 14, 15, 16, 17, and 18 of the Amended Statement of Claim the 2nd Defendant states that his father late Chief Ehigiator Ozigbo Okonedo had executed in favour of the 1st defendant (prior to any transaction with the plaintiff) a deed of lease for 50 years terminating 31st April, 2024 registered at the Lands Registry Benin City as*  
 10 *No. 12 at page 12 in volume 216. The said document or copy thereof interpreted 10 the illiterate father of the 2nd defendant before a justice of the peace (a legally competent officer) will be relied upon at the trial.”*

The foregoing was not all. The 2nd respondent gave evidence which, instead of supporting the case of the appellant, knocked the bottom out of it.  
 15 He said, inter alia, as follows in relation to what the deceased did with the land in dispute in his lifetime:-

*“My father granted a lease to the 1st defendant for 50 years in respect of the land in dispute. There are documents relating to the lease transaction. My late father did not go to school ....."*  
 20 *I am in respect of the case maintaining my father's position. The correct position (is) that the land in dispute was leased to the 1st defendant and not sold to the Bishop.”*

The 2nd respondent was one of the children of the deceased and he was joined, at the instance or on the application of the appellant, as the 2nd  
 25 respondent in this case. He then stepped into the shoes of the deceased. The evidence of the 2nd respondent and the evidence of another son of the deceased (D.WA) who told the court that he knew that the deceased leased the land in dispute to the 1st respondent and did not sell it to the appellant, clearly showed that the appellant's case was in disarray.

30                Finally, on this point, that is, on the question of the application or non application of the Illiterates Protection Law to Exhibit “9”, the Court of Appeal was right in holding that the learned trial judge erred in not considering in addition to Exhibits “2” and “9”, the totality of the oral evidence before him before coming to the conclusion that the provisions of the Law were not  
 35 complied with in the execution of Exhibit “9”, if he had considered, in addition to Exhibits “2” and “9” the totality of the oral evidence, his decision on the point would have been that the provisions of the Law were complied with. In any case, there was substance in the contention that by virtue of section 5 of the Law, the provisions of the Law were not applicable to Exhibit “9”.

In short, apart from the oral evidence led on the point by the respondents, particularly the evidence of D.W.6, the legal practitioner who prepared Exhibit “9” at the request of the deceased and who saw to the proper execution of it according to law, there was in addition in favour of the 1st respondent the provision of section 5 of the Law which exempts a document prepared by a legal practitioner from compliance with the provisions of the Law. Even if the provisions of the Law were applicable to the Exhibit, the party who was competent and who had the standing to raise the question of non-compliance with the said provisions did not or had not raised it.

With reference to the second aspect of the -question raised under the first issue, I am of the view that, for a proper understanding of it, one should consider it along with the question raised under the second issue which is whether the Court of Appeal was right in raising and basing its decision on an issue not raised by either party. In the process of giving consideration to the question whether Exhibit “9” complied with the provisions of the Land Instruments Registration Law, the learned justice of the Court of Appeal stated, inter alia, as follows:

*“I must begin here by acknowledging that Exhibit 2 is a much better prepared document than Exhibit 9. That however is not the issue here. What is to be considered is sufficient compliance with the provisions of the relevant Laws. The need for proper execution is a requirement for registration under the Land Instruments Registration Law. The evidence of registration which the learned trial judge deemed important must be (a) the presence of the words of execution, signed, sealed and delivered by the within named.....”*

*(b) ‘In the presence of’ and (c) the signature of the Magistrate or justice of the peace above his designation of office. In Exhibit 2 these are set out in their proper positions in a document of this nature. But are they missing in Exhibit 9? The learned trial judge seems to think so but I do not. What is ‘wrong’ is that these requirements are not in their ‘proper’ positions. The words of Execution ‘signed and delivered by the within named lessor’ is in the document, combined with the words of interpretation. Also combined with these are the magic words in my presence’ before the signature and official designation of the justice of the peace. It is not indeed the job of the learned trial judge to guess whether the deed of lease was executed in the presence of a justice of the peace. He was not called upon in this instance to do (so), because the document speaks for itself in this instance.”*

The statement of the learned justice of the Court of Appeal quoted above was what the appellant found objectionable. According to the appel

lant, the question whether Exhibit “9” or “2” should speak for itself and of the “proper positions of o certain words in the documents were raised by the court below and determined by it without the parties being given an opportunity of being heard; it was not raised by the parties in the appellant’s view. The argument in the 1st respondent’s brief was that the appellant’s brief did not both in law and on the facts fault the consideration, findings and judgment of the court below. It is not correct to say, as the appellant had said, that the question whether Exhibit “2” or “9” should speak for itself or of the things that appeared on the face of each of the documents and their relative positions was not raised by the parties. The judgment of the learned trial Judge showed that he held the view that each of the documents should speak for itself and it was by examining the things that appeared on the face of the documents and their relative positions in the documents that he came to the conclusion that Exhibit “2” complied with the Illiterates Protection Law and the Land Instruments Registration Law and that Exhibit “9” did not. On this point, the learned trial Judge stated, inter alia as follows:-

“It is now for me to examine both Exhibits 2 and 9 for the purpose of arriving at a decision in this case and the decision in this case hinges on the said documents. Being documents they speak for themselves and there should be no difficulty in determining their validity.”

The learned trial judge then placed Exhibits “2” and “9” side by side, examined the things that appeared on the face of each of them and the relevant positions of those things. He then stated his conclusion after the comparison of the documents, in the manner aforesaid, as follows:-

“It is not for me to guess whether the deed of lease was executed in the presence of a Justice of peace. The document should speak for itself as Exhibit 2 speaks for itself.”

The foregoing statements of the learned trial judge were in response to the submission, in the brief of the appellant, who was respondent in the court below. After setting out, in the appellant’s brief the relevant provision of section 8 of the Land Instruments Registration Law, it was submitted as follows:-

“From the above, it is clear that there are 2 conditions precedent to be fulfilled in respect of Exhibit “9” before it can be registered and considered by a court. It must be seen in the face of it, that it was executed by the illiterate grantor in the presence of the designated persons set out in section 8 of the Land Instruments Registration Law, Cap.80 Laws of Bendel State, 1976 and also the designated person must subscribe to the document as a witness. It is our submission, that on the face of Exhibit “9” there is nothing

*to show it was executed in the presence of one of the designated officers. It is trite law that a document should speak for itself.*

The foregoing was not all on the insistence of the appellant in the court below that Exhibit “2” or “9” should be examined to see whether it spoke for itself in the determination of the question whether each of them complied with the provisions of the Land Instruments Registration Law. Even in this court, the brief filed by the appellant contained the following submission:-

*“We humbly submit that Exhibit “9” must be examined to see whether or not it complied with the above quoted provision of the said law. We further submit that in examining Exhibit “9” the document must speak for itself.”*

The question then is whether, bearing in mind that the learned trial judge having in his judgment given consideration to the question whether Exhibit “2” or “9” spoke for itself and to the relative positions of certain words or expressions in each of the documents, and that the appellant in this case, who was respondent in the court below, having canvassed the same questions or issues in its brief, before the court below and in its brief before this court, it was improper for the court below to give consideration to the same questions. In his comparison of Exhibit “2” with Exhibit “9”, the learned trial judge found that the words of execution ‘signed and delivered by the within named lessor’ was in both documents, combined with the words of interpretation. In each of them also were the magic words ‘in my presence’ on top or before the signature and official designation of the justice of the peace. What the learned trial Judge regarded as deficiency was that the foregoing things were in their proper places in Exhibit “2” whereas they were not in their proper places in Exhibit “9” which was badly drafted. As the learned trial Judge himself had indicated elsewhere in his judgment, he based his determination of the validity or otherwise of the documents, not on the oral evidence given during the proceedings, but by examining the contents of each of the documents which should speak for itself. One was, therefore, not surprised that, as the records showed, he based his conclusions on the relative positions, in each of the documents, of the aforesaid things. In the circumstance, it could not be justifiably said that the issues were not raised in the proceedings before the learned trial judge or in the proceedings in the court below and that it was the court below that raised and determined the issues without giving the parties the opportunity of being heard. If a court raises an issue, which the parties themselves have not raised, because it is material for the determination of the case or appeal before it, the parties must be given an opportunity to argue the point before the issue is determined. See *Ejowhomu v. Edok-Eter Mandilas Ltd.*, (1986) 5 NWLR (pt. 39) 1. In the present case, the issues were



canvassed by the parties, particularly the appellant and considered by the learned trial judge before they were considered by the court below. The court below, has, therefore, not done anything improper or erroneous.

5 With reference to the question of compliance with the relevant provisions of the Land Instruments Registration Law, the provision of section 8 thereof is as follows:”

“8. *No Instrument executed in Nigeria after the commencement of this Law, the grantor or one or more of the grantors, whereof, is illiterate shall be registered unless it has been executed by such illiterate grantor or grantors in the presence of:-*

(a) *a magistrate; or*

(b).....

..... or;

15 (c) *a justice of the peace, and is subscribed by such magistrate..... or justice of the peace as a witness thereto.”*

The legal position is that where an instrument requiring registration under the Land Instruments Registration Law is not executed before a designated authority, it is not admissible. See *Djukpan v. Orovuyevbe*. (1967) 1 All NLR 134; (1967) N.M.L.R. 287 at p. 291. In the case of Exhibit “9”, the words of Execution “signed and delivered by the within named lessor” were in it, combined with the words of interpretation. In it, also, were the words “in my presence” on top or before the signature and official designation of the justice of the peace. What the learned trial Judge regarded as deficiency was that the foregoing things were not in their proper positions in Exhibit “9”, and it was on that account only that he held that Exhibit “9” did not comply with the provisions of the Land Instruments Registration Law and was, therefore, invalid. The conclusion of the learned trial Judge, on the point, was erroneous. If, as it was the position in this case, all the essential things which an instrument like Exhibit “9” should contain are contained in it and what appears to be wrong is that they are not in their proper or correct positions, the instrument may not on that ground alone be said to be invalid. The consequence of basing a judgment on such a technical point can be very grave and may result in a miscarriage of justice. The court should not allow itself through technicalities to be used for perpetrating injustice. See *Highgrade Maritime Services Ltd., v. First Bank (Nig.) Ltd.*, (1991) 1 NWLR (Pt.167) 290.

Further, as all the essential things, particularly the signature of the justice of

the peace and the magic words: “in my presence” and “Justice of the peace” were in Exhibit “9”, the learned trial Judge should have presumed or inferred that the instrument was executed in the presence of the justice of the peace. This is because the court will presume the existence of one fact from the existence of proved fact where such a presumption or inference is irresistible 5 or where there is no other reasonable presumption or inference which fits all the facts. See High grade Maritime Services Ltd., v. First Bank (Nig.) Ltd., supra. In the circumstance, the Court of Appeal was, therefore, right in reversing the decision of the learned trial Judge, on the point, and in holding that Exhibit “9” complied with the provisions of the Land Instruments, Registration Law. 10

The question raised under the third issue was whether the court below was right in giving legal effect to Exhibit “9” (the deed of lease executed by the deceased in favour of the 1st respondent in relation to the lease of 50 years of the land in dispute) in the circumstances of this case, The court below rejected the contention of the appellant that Exhibit “9” did not comply with 15 the provisions of the illiterates Protection Law and the Land Instruments Registration Law. In the view of the court below, the instrument was valid and that accounted for the order of the court below affirming the decision of the learned trial judge, granting title to the appellant in respect of the land in dispute, subject to the 1st respondent’s enjoyment of his prior interest of 50 20 year lease conferred by Exhibit “9”. The position of the appellant, as stated in its brief, was that the main issue, on this point, was whether the printed evidence supported the judgment of the court below. It was argued that the deceased, in his Will (Exhibit “3”), denied that he granted a lease to the 1st 25 respondent and, for that reason, the court below erred in law in holding that there was no primary evidence that the deceased denied granting the alleged lease to the 1st respondent. In the view of the appellant, the title of the appellant was better than that of the 1st respondent because Exhibit “9” did not comply with the relevant Laws. I have already referred to the submission in the 1st respondent’s brief generally in relation to all the issues raised in the 30 appellant’s brief. It was that the appellant failed to fault the judgment of the court below in its consideration of the facts and the law relevant to this case.

I should state straightaway that this court has, earlier in this judgment, given consideration to the question whether Exhibit “9” complied with 35 the provisions of the Illiterates Protection Law and the Land Instruments Registration Law and the conclusion was that Exhibit “9” complied with the provisions of the aforesaid Laws and that, in any case, by virtue of section 5 of the illiterates Protection Law, the provisions of the Law did not apply to Exhibit “9” which was prepared by a legal practitioner.

In the case of the alleged statement in the Will of the deceased that he did not grant a lease of the land in dispute to the 1st respondent for fifty years, the deceased and his legal advisers ought to know that the law does not permit what is stated in an agreement, that is in writing, to be changed, altered or contradicted in that way. See section 132(1) of the Evidence Act; and *Union Bank of Nigeria Ltd., v. Professor Ozigi* (1994) 3 NACR; (1994) 3 NWLR (Pt. 333) 385. In any case, the deceased had died before the trial of this case commenced before the learned trial judge. The 2nd respondent was substituted for the deceased (grantor of the land in dispute to the appellant) on the application of the appellant. In his Amended statement of defence and in his oral evidence, the 2nd respondent admitted that the deceased granted a lease of fifty years to the 1st respondent in relation to the land in dispute. If the deceased (the grantor) never properly raised the issue that he did not grant any lease of fifty years to the 1st respondent in relation to the land in dispute and the 2nd respondent, who was substituted for him on the application of the appellant, admitted that the deceased granted the aforesaid lease to the 1st respondent for fifty years in his amended statement of defence and in his oral evidence, then there was no obligation on the 1st respondent to prove that the deceased granted a lease of the land in dispute to him for fifty years. This is because that fact was admitted in the pleading and oral evidence of the 2nd respondent who was a representative of the grantor. Averment in the pleading of a party which is admitted in the pleading of the other proper party needs not be proved. See *Uwegba v. Attorney-General, Bendel State* (1986) 7 NWLR (Pt.16)303 which, in my view, was correctly decided.

Closely connected with the question dealt with above is the competence, if any, of the appellant to challenge the validity of Exhibit "9", the deed executed by the deceased and the 1st respondent in relation to the aforesaid lease transaction to which the appellant was not a party. In so far as the said transaction was concerned, the appellant was a third person; a complete stranger. Only parties to a deed can apply to set it aside on the ground that it is null and void. The principle is not applicable to family land sold without the consent of principal family members. See *Adejumo v. Ayantegbe*, (1989) 3 NWLR (Pt.110) 417; and *Ordor v. Nwosu & Anor.*, (1974) 12S.C. 103 at p.112. The appellant, not being a party to Exhibit "9", could not properly challenge its validity especially having regard to the attitude of the 2nd respondent which was not favourable to the appellant's case as reflected in his amended statement of defence and his oral evidence.

It may be argued that the appellant was claiming through the deceased. Even in that case, the appellant would have had enormous difficulty

in discharging the burden of proving its case. The allegation made by the appellant was that the thumb-impression of the deceased was forged. Forgery is a criminal offence and the legal implication was that the allegation had to be proved beyond reasonable doubt. This is because if the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt. See section 137(1) of the Evidence Act; Omorhirhi & Ors., v. Enatevwere (1988) 1 N.W.L.R. (Pt.73) 746; and Folami v. Cole (1990) 2 N.W.L.R. (Pt.133) 445.

The evidence led by the appellant did not only fail to discharge the burden of proof under section 137(1) of the Evidence Act, it also did not discharge the burden of proof in civil proceedings, having regard to the various shortcomings which I have pointed out in the appellant's case, as presented. In particular, the position allegedly taken by the deceased was not only inconsistent it was also contradictory on the question of whether he granted 50 year lease of the land in dispute to the 1st respondent. At first, the deceased allegedly denied ever entering into any written agreement with the 1st respondent in relation to any transaction. At another stage he was alleged to have said that the agreement was oral and that the period of the lease was only three years. The deceased, Chief Okonedo, was very old and bedridden before his death. It was not clear whether whenever he alienated a parcel of land to a person, after having disposed of the same parcel of land to another person, he was being mischievous or was doing so as a result of old age which had the effect of making him to forget what he had earlier done. Just as it happened in the case of the land in dispute which he leased to the 1st respondent for fifty years and subsequently sold outright to the appellant without regard to the aforesaid lease, the same thing happened in the case of another parcel of land in the same area which he sold to the appellant. The evidence of the 7th P.W., a legal practitioner who was acting for the appellant, on the point, when being cross examined was as follows:-

*"Subsequently we find (Sic) that Total Co. Ltd had a part of the land sold to the plaintiff/company by Chief Okenedo Before Chief Okenedo gave him (sic) plaintiff/company a freehold interest, he had prior to that leased a portion of the land to Total Nig. Ltd."*

In the circumstance, how could one be sure that what the deceased did in relation to the land in dispute by effecting a freehold sale of it in favour of the appellant after granting a leasehold of it to the 1st respondent for fifty years was not on the same pattern with the sale of another parcel of land to the appellant after a portion of it had earlier been leased to Total Nigeria Limited? The legal practitioner acting for the appellant in connection with the alleged

sale of the land in dispute (P.W.7) made a search in the Lands Registry and found that the 1st respondent had registered Exhibit “9”. The evidence led by the appellant was that when the registration of Exhibit “9” was brought to the notice of the deceased he denied it. The sale of the parcel of land, which the deceased had already leased to Total Nigeria Ltd., to the appellant took place  
5 before the sale of the land in dispute to the appellant after it had been leased to the 1st respondent. That should have made the appellant to be cautious and not to rely heavily or entirely on the alleged denial by the deceased that he had earlier leased the land in dispute to the 1st appellant before the purported outright sale of the same land to the appellant. Further, the legal impli-  
10 cation of the discovery of Exhibit “9” in the Lands Registry by the solicitor acting for the appellant was that the appellant was not a bona fide purchaser for value of the land in dispute without notice as there was evidence that the solicitor reported his findings to the appellant. See *Animashaun v. Olojo* (1990) 6 N.W.L.R. (Pt. 154) 111. My conclusion is that the court below was right in  
15 giving legal effect to Exhibit “9” in the circumstances of this case.

The appeal fails. The judgment of the court below is affirmed. The appeal is dismissed with N1,000.00 costs to the 1st respondent.

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## 20 **BELGORE JSC**

I read in advance the judgment of my learned brother, Adio J .S.C and I am in full agreement that this appeal lacks merit and ought to be dismissed. The land in dispute was already encumbered by the time of purported sale to the appellant. The notice of this encumbrance could easily have been discov-  
25 ered if the appellant had been diligent enough to heed his counsel’s advice that Exhibit 9 was in existence. For the reasons clearly set out by Adio J.S.C which I adopt as mine I find no merit in this appeal and I also dismiss it. I award N1,000.00 costs to the 1st respondent.

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## **WALI JSC**

35 I have read before now the lead judgment of my learned brother Adio. J.S.C and I am in agreement with his reasoning and conclusion that the appeal has no merit.

For those same reasons I also dismiss the appeal and affirm the judgment and orders of the Court of Appeal Benin Division.

The respondents are awarded N1,000.00 costs against the appellant

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### KUTIGI JSC

I had read before now the judgment just delivered by my learned brother Adio J.S.C. I agree with him that this appeal fails and is accordingly 5 dismissed with costs as assessed.

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### IGUH JSC

My learned brother Adio, J.S.C has in his lead judgment set out the facts and the applicable law in this appeal. I do not consider it necessary to 10 repeat them. I agree with his reasoning and conclusions.

This appeal hinges on the validity or legal position of Exhibits 2 and 9. It is the contention of learned appellant's counsel, that there is nothing on the face of the deed of conveyance, Exhibit 9, to show that it was executed in the presence of a justice of the peace pursuant to the provisions of section 8 15 of the Land Instruments Registration Law, Cap 81, Laws of Bendel State, 1976. The trial court had in its judgment said of Exhibit 9 as follows:-

*"..... I am satisfied that Exhibit 9 is invalid and of no effect by reasons of the fact, that its contents were not interpreted to Chief Okonedo and by reason also of the fact that there is nothing there to show that it was 20 executed in the presence of a magistrate or justice of the peace contrary to the provisions of section 8 of Cap. 80(supra)."*

On appeal, the court below, per the lead judgment of Uche Omo, J.C.A., as he then was, closely examined the issue and held thus:-

*"On the basis of my findings on the two deficiencies relied upon in 25 respect of which the learned trial judge was in error, the order which must follow is that his decision being wrong must be set aside."*

The leaned Justice of the Court of Appeal concluded as follows:-

*"In view of the fact that I have set aside the decision of the learned 30 trial Judge, and finding inter alia that the document Exhibit 9 is valid having complied with the provisions of the Illiterates Protection Law, and not offended the provisions of the Land Instruments Registration Law, I have to further find, that as a registered document granting a 50 year lease of the land in dispute some months before the making of Exhibits 1 and 2, it has*

*priority over them, whatever interest the respondent may have in the land in dispute as a result of Exhibits 1 and 2, that interest must be subject to the prior provisions of Exhibit 9.*

Accordingly, the decision of the learned trial judge granting title to the lands conveyed by Exhibits 1 and 2 is hereby affirmed subject however to the appellant's enjoyment of his prior interest of a 50 year lease conferred on him by Exhibit 9. The trial court's orders of perpetual injunction, damages for trespass and costs are set aside."

It is necessary at this stage to set out the section of the relevant laws that feature in this appeal. Section 3 and 5 of the Illiterates Protection Law, Cap. 70, Laws of Bendel State provide as follows-

"3. Any person who shall write any letter or document at the request, on behalf, or in the name of any Illiterate person shall also write on such letter or other document his own name as the writer thereof and his address; and his so doing shall be equivalent to a statement:-

a) that he was instructed to write such letter or document by the person for whom it purports to have been written and that the letter or document fully and correctly represents his instructions; and

(b) if the letter or document purports to be signed with the signature or mark-of the illiterate person that prior to its being so signed it was read over and explained to the illiterate person, and that the signature or mark was made by such person.

5. This Law shall not apply to the writing of any letter or other document written in the course of his business by or at the direction of any person admitted to practise and practising as a legal practitioner in a High Court or the Supreme Court."

(italics supplied)

Section 8 of the Land Instruments Registration Law also states that:-

"8. No instrument executed in Nigeria after the commencement of this Law, the grantor, or one or more of the grantors, whereof is illiterate, shall be registered unless it has been executed by such illiterate grantor or grantors in the presence of

(a) a magistrate; or

(b) the president of a Grade A Customary court or a Grade B Customary court;

(c) a justice of the peace.

And is subscribed by such magistrate, customary Court President or Justice

*of the peace as a witness thereto,”*  
(italics supplied)

The first point that must be made is that the Illiterates Protection Law as its title suggests is a law to protect, and safeguard illiterates from being exploited. It is certainly not a law to penalise them and the fact that the writer of a letter or document at the request, on behalf or in the name of an illiterate did not carry out the provisions of that law did not mean that such letter or document was for that reason alone void and of no effect, see *Iro Ezera v. Inyima Ndukwe* (1961) All N.L.R. 564 and *P.Z.V. Gusau* (1962) 1 SCNLR 383; (1962) 1 All NLR 242.

It ought also to be noted that section 3 of that Law only raises or provides certain presumptions of law in respect of a document prepared at the request, on behalf, or in the name of an illiterate by any person who shall write on such document, his own name as the writer thereof and his address. These presumptions of law are fully set out in section 3 (a) and 3 (b) of that Law. The purpose of the said provisions under section 3 of the Law is also to ensure, in furtherance to the said protection of illiterates, that the writer of such a document is identified or traced. So, in *Djukpan v. Orovuyevbe* (1967) 1 All N.L.R. 134, the writer of a document for an illiterate put after his name “C.N.C.” meaning thereby “Clerk of the Native Court” which, he, infact was at all material times. Lewis, J.S.C., delivering the judgment of this court was of the view that this was a sufficient compliance with the requirement of section 3 of the Law as to the address of the writer.

The learned Justice went on-

*“The purpose of requiring the particulars of the address is to trace the writer, especially a professional letter-writer, which was not in fact the position here, and this description was a sufficient address to enable him to be traced.”*

In the present case, there does not appear to be anything on the face of Exhibit 9 to indicate that the document was interpreted to the illiterate, Ehigiator Ozigbo Okonedo. There was however the evidence of D.W.6, Felix Okonofua Esangbedo, the legal practitioner who prepared the document. His unchallenged testimony conclusively established complete compliance with section 3 of the Illiterate Protection Law. See *Isaac Omoregbe v. Daniel Lawani* (1980) 3-4 S.C. 180 at 117, *Nigerian Maritime services Ltd., v. Alhaji Bello Afolabi* (1978) 2 S.C. 79 at 81 and *Odulaja v. Haddad* (1973) 11 S.C. 357: To this extent, Exhibit 9 can be said to be unimpeachable notwithstanding the fact that it neither indicated the name of the interpreter nor is it shown that the document was interpreted to the said Ehigiator Ozigbo Okonedo. This must be so as the Illiterates Protection Law has made no mandatory provision to the



effect that the only evidence of interpretation that is legally acceptable by the court is the one on the face of such a document. I am therefore of the firm view that the evidence of D.W.6, who prepared the document, on due compliance with the presumptions of law stipulated under section 3 (a) and 3 (b) of the Illiterates Protection Law, were his name and his address as the writer to have been indicated on the document was not only cogent and material but admissible in evidence in proof of Exhibit 9. The learned trial judge was therefore in grave error when he failed to consider this material and uncontradicted evidence of D.W.6 that he interpreted the contents of the document from English to Bini language to the illiterate lessor. In my view, evidence of the facts that any document is written by a person on the instruction of an illiterate, that the contents fully and correctly represent his instructions, that prior to its being signed, it was read over and explained to the illiterate and that the signature or mark thereon was made by such illiterate may either be oral, and such oral evidence is clearly admissible in law, or it may be patent on the face of such a document where the name and address of the writer are indicated as required by law.

The above view seems to receive some support from the decision in *Alimi Lawal v. G.B. Ollivant (Nig.), Ltd., (1972) 3 S.C.124 at 137*. In that case, this court referred with approval to the finding of Aguda, J. (as he then was) where he observed as follows:-

*“And since there is no evidence either oral, or is it patent on the face of Exhibit “A”, that it was executed in the presence of a magistrate or justice of the peace, I must hold that the instrument, Exhibit “A” ought not to have been accepted by the Registrar for registration under the Law by reason of the provisions of section 8 of that Law.”*  
(italics supplied)

I must on the issue of the Illiterates Protection Law finally mention that as the purpose of that law is to protect illiterates, it stands to reason that it may not enure to a stranger to such a document, such as the appellant, See *Djukpan v. Orovuyevbe (1967) 1 All NLR 134 at 140*. The appellant, in the present case had notice of Exhibit 9. In the circumstance, the title acquired by it over the land in dispute by virtue of Exhibits 1 and 2 would be subject to the lease-hold interest in favour of the 1st respondent by Exhibit 9.

The appellant has attacked Exhibit 9 from another angle. It is the contention of the appellant’s learned counsel that Exhibit 9 did not comply with the provisions of the Land Instruments Registration Law, Cap. 81, Laws of Bendel State, 1976 in that it was not executed by the illiterate lessor before a magistrate, the president of a Grade A or B Customary Court or a Justice of the

peace who must subscribe to the instrument. There can be no doubt that the need for proper execution of an instrument, such as Exhibit 9, is a *sine qua non* before such an instrument may be registrable under the Land Instruments Registration Law. I have myself, however, examined Exhibit 9 and although it must be conceded that it was not prepared in the best possible form, it none-the-less speaks eloquently for itself. The words of execution “Signed and delivered by the within named lessor” combined with the jurat are in the document. There are also the words “in my presence” before the signature and official designation of the Justice of the peace who subscribed to the instrument. Exhibit 9 *ex facie* appears to me entirely faultless and in accordance with the provisions of the law. 5 10

There is, in the first place, no evidence *en record* from which the trial Court was able to reach its decision on the point. In the second place, it is not the function of a trial Judge by his own exercise to supply or imagine evidence which only evidence tested under cross-examination could supply. See *George Ikenye & Anor v. Akpala Ofune and others* (1985) 2 NWLR (Pt. 5) 1. I entertain no doubt that the learned trial Judge fell into a grave error when he held in the absence of any evidence that there was no evidence of proper execution of the document. I agree with the court below that the document Exhibit 9 is valid having complied with the provisions of the Illiterates Protection Law and the Land Instruments Registration Law. 15 20

Exhibit 9 granted a fifty year lease of the land in dispute to the 1st respondent well before Exhibit 1 & 2 were made in favour of the appellant. The appellant must therefore enjoy his title in respect of the land in dispute subject to the lease-hold interest created of Exhibit 9 in favour of the 1st respondent. 25

It is for the above and the more detailed reasons set out in the lead judgment of my learned brother, Adio, J.S.C., that I, too, would dismiss this appeal. I endorse the consequential orders in the lead judgment in their entirety including those as to costs. 30