

SUPREME COURT OF NIGERIA
15TH JULY, 1994. SC. 230/1989.
CORAM:- S.M.A. BELGORE, A.B. WALL, I.L. KUTIGI,
M.E. OGUNDARE, U. MOHAMMED, JJSC

PATRICK OGBU & 4 OTHERS

(For themselves and on behalf of PLAINTIFFS/APPELLANTS
the people of Akpugo)

AND

FIDELIS ANI & 4 OTHERS

(For themselves and on behalf DEFENDANTS/RESPONDENTS
of the people of Oniku)

APPEALS - Trial court's findings of facts - Based on veracity of a witness before it - Proper attitude of appellate court thereto.

EVIDENCE - Conflict - Land matters - Documents pleaded by defendants not tendered - Where evidence of a defence witness was in conflict with statement of defence - Whether trial court was right in not believing that witness.

LAND LAW- Possession - Where plaintiffs had been in possession for over 100 years - Whether trial court's finding of trespass against the defendants - Is supported by evidence.

PLEADINGS - Title to land - Failure of defendants to advert to how they acquired any title in their pleadings - Whether Court of Appeal rightly set aside the judgment given in favour of the plaintiffs.

FACTS

The Plaintiffs/ Appellants sued the Defendants/Respondents before the trial High Court claiming, N10,000 general damages for trespass, and an injunction restraining the Defendants from interfering with the plaintiffs' ownership and possession of the land in dispute. The parties are from Nkanu District now in Enugu State. The Plaintiffs pleaded that the land in dispute was granted to their people over 140 years ago by the people of Akporga Nike who were the original owners of the land. Their people went into possession and exercised various acts of ownership on the land. The same original owners granted a parcel of land to the Defendants adjacent to that of the plaintiffs. In January, 1976, the Defendants forcibly entered the plaintiffs' land and destroyed their crops growing thereon, hence this action.

The trial court found for the plaintiffs after evaluating the evidence before it. The Defendants' appeal to the Court of Appeal was allowed. The Court below raised certain issues suo motu and interfered with the trial court's conclusions on facts. Being dissatisfied the plaintiffs/Appellants have now appealed to the Supreme Court to determine inter alia, whether the Court of Appeal was right in reversing the decision of the learned trial Judge.

HELD (Unanimously allowing the appeal)

Conflict in evidence of the defence

1. The evidence of DW8 was surely in conflict with the Statement of Defence. The Defendants/Respondents pleaded several documents but none surfaced as Exhibits in trial court. This witness was more evasive than forthright and trial Court never had reason to believe him. (P. 123 L. 13)

Trial court's findings on facts - Attitude of appellate court thereto

2. It is the trial Court that can assess the veracity of a witness before it. It is not the function of the appellate Court to interfere with the findings of trial Court on facts. There are however exemptions to this rule. If finding is not supported by evidence that finding shall be set aside by appellate court; also when the finding is supported by evidence but that evidence is by law not admissible or the finding is perverse it will be set aside by appellate Court. (P.123L.20)

Whether finding of trespass is supported by evidence

3. What has occurred in this case is that trial Court, after meticulous assessment of evidence and the facts of possession found that plaintiffs had possession and were placed in possession for over one hundred years and that the present Defendants/Respondents were trespassers. The finding has been amply supported by evidence and some defence witnesses did not give cogent evidence to disturb this finding. (P. 123 L.31)

Pleadings - Failure to advert to how title was acquired

4. The Respondents never in the pleadings adverted to how they had any title to the land or how they acquired any title to it. The findings of fact by trial Court were not perverse and Court of Appeal was in error to have set them aside. (P.123L.38)

NOTABLE POINTS OF INTEREST

BELGORE.JSC

1. Court of Appeal's inordinate dwelling on facts

Court of Appeal in actual fact dwelt with facts more than the trial Court and the lead judgment in particular, going inordinately longer than the evidence before trial Court and thereafter went on conjecture. (P. 120 L.25)

2. Interfering with trial Court's conclusions on facts

This Court has on several occasions warned against interfering with conclusions of trial Courts on facts. Trial Court has many advantages a Court of Appeal never has. It sees the witnesses, hears them and assesses their demeanour and makes findings in line with what in law is admissible. (P.123L.17)

OGUNDARE.JSC

3. Court is not to provide evidence for any of the parties.

"The court below, with profound respect, was clearly in error to make use of materials not given in evidence to come to its decision. It is not the duty of a court to look for or provide evidence for any of the parties before it; its duty is mainly that of an umpire holding evenly the scale of justice between the parties". (P. 132 L.29)

4. Conflicting claims to possession of land

The law is clear that where two persons make conflicting claims to possession of land, the law ascribes possession to the person that can prove better title to the land. (P. 133 L.39)

5. Court of Appeal's misdirected reevaluation of evidence

With the evidence adduced in support of the case for the defendants it cannot be said that they have shown a title better than that of the plaintiffs, over the land in dispute. The effort made by the court below to reevaluate the evidence adduced at the trial was misdirected. In the circumstances of this case, the findings made by the learned trial Judge, being supported by the credible evidence before him, those findings ought not to have been disturbed by the court below. (P. 138 L.15)

MOHAMMED.JSC

6. When appellate court is not to make finding of facts

The Court of Appeal embarked upon what appears to be a rehearing of the

case and considered issues which were not dealt with by the trial court. An appellate court, in the absence of any finding of fact by the lower cannot put itself in the position of the lower court and make such findings. (P. 139 L.6)

5 **REPRESENTATION**

G.R.I Egonu SAN, with D.O. Okolo for the Appellants

A.N. Anyamene SAN, with J. Nkanta (Miss) for the Respondents.

CASES REFERRED TO

- 10 Okparaeke v. Egbuonu 7 WACA 73
- Cole v. Folami (1956) 1 F.S.C. 66
- Minister of Lands and Housing, Western Nigeria v. Oba (1965) N.M.L.R. 164
- Esiaka v. Obiasogwu
- Akpugo people v. Akpenwfu people 20 N.L.R. 135
- 15 Onuoha v. State (1989) 2 NWLR (pt. 101) 23
- Chukwueke v. Nwankwo (1985) 2 NWLR (Pt. 6) 195
- Egibase v. Oriaregban (1985) 2 NWLR (Pt. 10) 8§4
- Ajuwa v. Odili (1985) 2 NWLR (Pt. 9) 7ia
- Ogbede v. Onochie (1986) 2 NWLR (Pt. 23) 484
- 20 Agbonifo v. Aiwereoba (1988) 1 NWLR (Pt. 70) 3251
- Coker v. Oguntola (1985) 2 NWLR (Pt. 5) 87
- Ezewani v. Onwordi (1986) 4 NWLR (Pt. 33) 27
- Ekwunife v. Wayne (WA) Ltd (1989) 5 NWLR (Pt. 122) 422
- Kojo 11 v. Botosie (1957) 1 WLR 1223
- 25 Armels Transport v. Martins (1970) 1 All N.L.R. 27

STATUTE REFERRED TO

Evidence Act s. 74

30 **LEAD.JUDGMENT BY BELGORE JSC**

The plaintiffs at the trial court are now the appellants before this court. They won their case at the trial Court but the Court of Appeal sitting at Enugu reversed this victory of theirs and thus the appeal to this Court. The plaintiffs are inhabitants of Akpugo in the former Nkanu District of Eastern

35 Nigeria. They are now in Enugu State. The defendants who also inhabit the same district are from Oruku. The suit at the trial Court and up to now is in a representative capacity for each party. The plaintiffs filed a plan of land which is Exhibit A at trial court. Exhibit A is a very detailed and clear plan.

It has got three distinctive portions, to wit, the area verged pink which is to the

immediate North of River Inyaba, and North of this is a very extensive portion verged yellow. There are the boundary neighbours of the map - the Akporga Nike land at the extreme west and to the far North of the plan. There is also the land of Owo people to the North East and to the East is the land of Amechi Oba. The area verged pink on the plan (Exhibit A) is the one in dispute between the parties. The plaintiffs in their statement of claim, particularly in paragraph 4 thereof, averred that about 140 (one hundred and forty) years before they sued the area verged pink was granted by the owners to them and have since been exercising maximum acts of ownership thereupon. It is pertinent the paragraph 4 of Statement of Claim be set out, viz:

“About 140 years ago the people of Akporga Nike granted to the people of Akpugo the parcel of land verged pink in the Plan No. P.O./E21/77 in perpetuity under Customary Law. And consequent upon the said grant the plaintiffs and their ancestors before them took possession of the said land and have been exercising maximum acts of ownership and possession over the said land by farming and living thereon, by reaping the economic trees on the land and by fishing in the lakes on the land. The plaintiffs also have some of their jujus on the land”.

According to paragraphs 5 and 6 of the Statement of Claim, the defendant had in 1971 in a suit No.E/161/71 brought all action against the plaintiffs claiming the same area as theirs absolutely and tendered a plan No. ENC/3/72 as Exhibit 7 (in this case tendered by present appellants at trial Court as Exhibit G). In that same suit the present appellants filed their own plan tendered therein as Exhibit 8 (Now Exhibit B). Because the present respondents as plaintiffs in that case never proceeded further with the case it was struck out for want of prosecution on 20th January, 1976.

The second day, i.e. 27th January, 1976 the present respondents, acting in concert broke into the land in dispute and committed various acts of vandalism.

Members of appellants' community of Akpugo were injured, and crops were destroyed. The plaintiffs/appellants call the disputed land “Agu Efi”, the respondents call it “Oruku land” or “Otorojo”. The plaintiffs' claim therefore is for damages for trespass and order for injunction against the defendants, their servants, agents from entering or trespassing or remaining on the disputed land or doing anything to vitiate the rights or possession of the land by the plaintiffs.

The respondents as defendants deny paragraph 4 of Statement of Claim and further averred that a Court order of 8th March, 1946 as a result of a case titled Idodo Native Administration v. Akpugo all Akpugo houses on

Agu Efi should be destroyed. The said order is Exhibit D produced from National Archives, Enugu. The document, Exhibit D reads:

“In pursuance of case No. 6/46 Idodo Native Administration v. Akpugo whereby the said Native Administration ordered that all Akpugo
5 houses on Agu Efi be destroyed by 18th day of January, 1946. We hereby issue all Order of Court for the Native Administration to destroy all houses standing on above land through noncompliance with the case No. 6/46”.

The defendants/respondents though alleging the above quoted document was a Court order, the proceedings on which the order resulted,
10 and the judgment thereof were not pleaded nor produced in Court. Also this brief document cannot be said to be a matter involving the respondents, even though the appellants who are inhabiting Akpugo might possibly have been affected by it. In the absence of any certification and any link of respondents the trial court would not have rightly attached any weight to the document.
15 However, a most revealing part of respondents’ case in paragraphs 5 and 6 of Statement of Defence admitted striking out of their suit and that they entered the disputed land though denied any act of vandalism. The defendants/respondents averred that Akporga Nike people through whom the appellants claim their right to possession could not have owned the land as awbias of Iji
20 Nike. “Awbia” is all, outcast or “Osu” who could not in Ibo Customary law own land or dispose of land and that the appellants could not have derived any title or possession through them at the time of the alleged grant to them.

Apart from Exhibit A which appellants as plaintiffs tendered, the respondents despite their pleading never tendered any plan. Rather the plans
25 Exhibit Band (supra) were tendered by the appellants as plans in the previous suit struck out. The alleged Intelligence Reports of colonial District Officers, Mr. H.J.S. Clark and Mr. S.P.L. Beaumont pleaded in paragraph 12 of Statement of Defence were not tendered. Similarly, the maps and plans pleaded in paragraph 20 of Statement of Defence never surfaced at the trial. Trial Judge
30 therefore in a reasoned judgment found for the plaintiffs/appellants and granted all their prayers. In coming to his decision, trial Judge, Okadigbo J. found inter alia as follows:

“It is clear that in determining which of the two parties has the title to the land in dispute I have no difficulty in holding that the plaintiffs have
35 the title. In this connection I would like to state that I accept and believe the evidence of P.W. 2, P.W. 3, P.W. 4 and P.W. 5 to the effect that the Akporga Nike people the owners of the radical title to the land in dispute some 140 years ago granted the land in dispute to the plaintiffs and that thereafter the plaintiffs went into exclusive possession. I may observe also that the failure

on the part of the defendants to show how they came into possession of the land in dispute is fatal to their case”.

He further held;

“In short, I prefer and accept the evidence of the plaintiffs to that of the defendants with particular regard to how the parties came into possession of the land in dispute. I am satisfied that the Akporga Nike people some 140 years ago granted the land in dispute (verged pink in Exhibit A) to the plaintiffs and that the plaintiffs thereafter went into exclusive possession. Having held that the plaintiffs have established their exclusive possession to the land in dispute I am satisfied that they are entitled to institute this action claiming damages for trespass”.

The defendants/respondents then appealed. At the Court of Appeal; the decision of the trial court was set-aside. The lead judgment of Macaulay, J.C.A. (Ikwechegh, J.C.A. and Katsina-Alu, J.C.A. concurring).

What is clear is that the Court of Appeal went deep, even deeper than the trial Court on matters of fact. For example Court of Appeal held inter alia as follows:

“After hearing evidence on the part of the plaintiffs in proof of their title, the learned Judge apparently came to this conclusion, inter alia, that” I would like to state that I accept and believe the evidence of P.W. 2, P.W. 3, P.W.4 and P.W. 5 to the effect that the Akporga Nike people, owners of the radical title to the land in dispute, some 140 years ago, granted the land in dispute to the plaintiffs, and that thereafter, the plaintiffs went into exclusive possession.” This finding is obviously in conflict with, if not at odds, with the Judge’s other findings, one of which is that, “both parties were on the land claiming possession to themselves, and yet disputing the charge of trespass” levelled at each other. How did the plaintiffs prove the grant to them by the Akporga Nike people 140 years ago? Where is the evidence that it was thereafter that they went into exclusive possession?

(italics mine)

If they have proved the grant, how have they also proved acts of such possession, long and positive enough within the principle of Ekpo v. Ita? Have they proved that the defendants have not only admitted their title as flowing from the radical title of their donors, but also an admission of that grant which they have sought to show in the evidence of P.W. 2 - P.W. 7? Is this an admission within the ambit and intendment of S. 74 of the Evidence Act as expounded in Okparaeke & Ors v. Egbuonu & Ors 7 WACA 73 to show, as the Judge there held, that the admitted facts in defendants’ pleading need not be proved by the plaintiff. If the evidence of P.W. 2 and P.W. 3, the

only indigenes of Akporga Nike, is the basis of the Judge's decision, what in fact did they say, not only as witnesses but as grantees, not only about the plaintiffs title, but of the grant itself? If there was indeed a grant, why was it ever necessary at all to call as witnesses, P.W. 2, P. W. 3. as they did? Why
5 were the Akporga Nike people not parties to this suit? Are the defendants/appellants justified in raising this point in their brief of argument ?”

Further Court of Appeal held:

“The position is very different today, and sales and other forms of
10 alienation for value are commonplace. To this extent, if only under pressure for the freedom of alienation, the Court now tend to lean over backwards to accommodate the modern trend, how that land can be alienated. either under native law and custom, or by deed or conveyance in English form. When in doubt, the court examines the transaction from both law systems to
15 see whether the formalities of either machinery, have been complied with. (See Cole v. Folami (1956) SCNLR 180; (1956) 1 FSC 66: Minister of Lands and Housing, Western Nigeria v. Oba (1965) NMLR 164. In most customary systems, the central attribute in this type of transaction is notoriety coupled with other customary incidents e.g. like the payment of tributes, pledge of
20 self for personal labour, etc. After such a long passage of time, what, on the pleadings and evidence led, was the nature of this grant made to the respondents 104 years ago? What was the evidence led to prove this grant? What actually was the plaintiffs’ pleading on this vital matter of grant and did they prove it?

25 Court of Appeal in actual fact dwelt with facts more than the trial court and the lead judgment in particular, going inordinately longer than the evidence before trial court and thereafter went on conjecture. The judgment stated further:-

“I have already cited the case Esiaka v. Ohiasogwu above, and my
30 understanding of the case leads me to hold that the Akporga Nike people who refused or failed to intervene when their title was involved, but instead were, content to stand-by and watch the fight, may well have had something to hide in the previous encounter(s) leading to or away from the Hill Enquiry. It would not also entirely surprise me, if that was not the reason, or
35 one of them, why they were not anxious themselves to plead Plan AS: 31 in the light of the reported case involving Akpugo people in Obunaw - Akpuo people v. Akpenwfu people 20 NLR 135. This was a case, the verberations of which went to WACA where the questions raised therein finally ended up in the light of my researches into that other case involving the Obunaw - Akpugo

and Akpanwfu people”

The judgment of Court of Appeal had been influenced by the belief that the case for defence had not been considered by trial Court and this led to the wide and far reaching research into the evidence at trial Court and making a finding of witnesses not before them. 5

In the appeal now before this Court the appellants’ brief of Argument formulated the following issues for determination

“(a) Was the Court of Appeal right in introducing into the case matters which were not properly before it, to wit:

(i) questions relating to the proceedings in Mr. Hills inquiry and the plans tendered therein; 10

(ii) the proceedings and the judgment in Suit No. E/24/52: Ohunow Akpugo People v. Akpenufu People (20 NLR 135.) and on relying on those matters in coming to its decision?

(b) Was the Court of Appeal right in allowing the allegation that the judgment of the High Court in the above case was written on scraps of paper, an allegation which was not proved and the allegation that the trial Judge was hostile to the defendants, an allegation which was not only not proved but was abandoned by the defendants/respondents at the hearing of the appeal, to affect its judgment in the case? 15 20

(c) Was the Court of Appeal right in raising suo motu the issue here-under set out and on relying thereon for its judgment without giving the plaintiffs/appellants the opportunity to address it on the said issues:

(i) alleged admission by the plaintiffs-appellants of paragraph 21 of the statement of defence and the evidence of D.W.8. 25

(ii) the method and the incidents of the grant of the land in dispute to the plaintiffs/appellants.

(iii) interpretation of the word “plaintiffs” in relation to the evidence of P.W.S 2, 3, 4 and 5 and the judgment of the learned trial Judge as to the grant of the land in dispute to the people of Akpugo. 30

(d) Was the Court of Appeal right in holding that:

(i) the evidence of the plaintiffs/appellants in proof of the grant for the land in dispute to them was in conflict with their pleadings?

(ii) it was necessary for the plaintiffs/appellants to have filed a reply in the case? 35

(iii) if the plaintiffs/appellants proved the grant of the land in dispute to them they should also have proved their “acts of possession, long and positive enough within the principles of Ekpo v. Ita”?

(iv) Akporga Nike people, the grantors of the land in dispute to the

plaintiffs/appellants should have been parties in the case?

(v) the plaintiffs/appellants' case should have been dismissed on the pleadings?

(e)(i) Was the Court of Appeal right in reversing the decision of the learned trial Judge on the credibility of the defendants/respondents witnesses, D.W.S 2, 3, 4, 5, 6 and 8 whom it never saw or heard give evidence and in accepting as a matter of course the evidence of the said witnesses as true?

(ii) Was the Court of Appeal right in setting aside the judgment of the learned trial Judge as perverse?

(f) Was the Court of Appeal right in accepting as established facts matters set out in the defendants/respondents' brief whereas evidence on those matters were rejected by the learned trial Judge?

(g) Did the Court of Appeal properly direct itself on the questions of law and fact which arose in the case, the evidence adduced therein and the proceedings and the judgment of the trial Court?

Leave to argue an additional ground of appeal:

At the hearing of the appeal. the plaintiffs/appellants will apply to the Court for leave to argue an additional ground (11).

The proposed additional ground of appeal is as follows:

(11) That the judgment of the Court of Appeal is against the weight of evidence".

As against these issues, the respondents formulated their own issues for determination as follows:

"The respondents say that the questions for determination formulated by the appellants are rather prolix and submit that the questions for determination are:

a) Whether the Court of Appeal was right in holding the view that the plaintiffs had not proved their traditional history which was to the effect that the people of Akporga Nike made the grant of the land in dispute to them.

(b) Whether the Court of Appeal was right in holding the view that the plaintiffs had not established that they were in exclusive possession of the land in dispute ..

(c) Whether the Court of Appeal was right in holding the view that the trial Court had not properly evaluated the evidence of the witnesses that had testified in the case.

(d) Whether the issues raised by the plaintiffs in their complaints against the Court of Appeal judgment are maintainable".

To my mind both parties appear to follow different patterns in their issues and this has been informed in no small measure by the confusion generated by the method applied in deciding the case in Court of Appeal. The appellants rightly adhered to the material evidence founded upon at trial Court, but respondents prefer to re-emphasise the findings of Court of Appeal. The Court of Appeal made a mountain out of the evidence of D.W. 8, Nwatu Okenwa, who was alleged not to have been cross-examined but was fully cross-examined during trial. There was also ample evidence of the land in dispute as pleaded by plaintiffs/appellants in paragraphs, 3, 4, 6 and 7 of Statement of Claim and the testimonies of P.W. 2, P.W. 3 and P.W. 4. Court of Appeal made issue, suo motu of the people of Akporga Nike not being joined as parties as plaintiffs to claim that they had the radical title to the land in dispute. The evidence of P.W. 8 was surely in conflict with the Statement of Defence. The defendants/respondents pleaded several documents but none surfaced as Exhibits in trial court. This witness was more evasive than forthright and trial Court never had reason to believe him.

This Court has on several occasions warned against interfering with conclusions of trial Courts on facts. Trial Court has many advantages a Court of Appeal never has. It sees the witnesses, hears them and assesses their demeanour and makes findings in line with what in law is admissible.

It is the trial Court that can assess the veracity of a witness before it Onnoha v. State (1989) 2 NWLR (Pt. 1(1) 23. It is not the function of the appellate Court to interfere with the findings of trial court on facts. There are however exemptions to this rule. If findings are not supported by evidence that finding shall be set aside by appellate Court: also when the finding is supported by evidence but that evidence is by law not admissible or the finding is perverse it will be set aside by appellate court. (See Chukwueke v. Nwankwo (1985) 2 NWLR (Pt. 6) 195; Eghase v. Oriareghan (1985) 2 NWLR (Pt. 10) 884; Ajuwa v. Odifi (1985) 2 NWLR (Pt. 9) 71 0; Oghechie v. Onochie (1986) 2 NWLR (Pt. 23) 484; Aghonifo v. Aiwercoaba (1988) 1 NWLR (Pt. 70) 325. What has occurred in this case is that trial court, after meticulous assessment of evidence and the facts of possession found that plaintiffs had possession and were placed in possession for over one hundred years and that the present defendants/respondents were trespassers. The finding has been amply supported by evidence and some defence witnesses did not give cogent evidence to disturb this finding. The evidence as to owners of radical title to the land giving rise to appellant right to possession was clearly presented to trial Court. The respondents never in the pleadings adverted to how they had any title to the land or how they acquired any title to it. The findings of fact by trial

Court were not perverse and Court of Appeal was in error to have set them aside. Coker v. Oguntola (1985) 2 NWLR (Pt. 5) 87; Ezewani v. Onwordi (1986) 4 NWLR (Pt. 33) 27; Ekwunife v. Wayne (WA) Ltd. (1989) 5 NWLR (Pt.122) 422.

I find great merit in this appeal for Court of Appeal was grossly in error to interfere with the findings by the trial Court. I therefore allow this appeal and set aside the decision of Court of Appeal delivered at Enugu on 8th day of December, 1987. I restore the decision of trial High Court dated 27th day of March, 1981. I award N500.00 as costs in the Court of Appeal and N 1,000.00 as costs in this Court in favour of plaintiffs/appellants against defendants/ respondents.

WALI JSC

I had the advantage of reading before now the lead judgment of my learned brother, Belgore, J.S.C. which has just been delivered and I agree with his reasoning and conclusion that the appeal has merit.

For those same reasons which I hereby adopt as mine, I also allow this appeal and abide by the consequential orders, including that of costs.

KUTIGI JSC

I have read before now the lead judgment of my learned brother Belgore, J.S.C. I agree with his reasoning and conclusions. I will also allow the appeal, set aside the judgment of the Court of Appeal and restore the judgment of the High Court. I abide by the order for costs.

OGUNDARE, J.S.C

The plaintiffs had sued the defendants claiming, as per paragraph 12 of their Statement of Claim:

“(i) N10,000.00 general damages for trespass.

(ii) An order of injunction restraining the defendants, their servants and agents from entering or remaining on the ‘Agu Efi’ land verged pink in the Plan No. P.O./E21/77, or doing anything on the said land or in anyway whatsoever interfering with the plaintiffs’ ownership and possession of the said land.”

The plaintiffs pleaded that the land in dispute known as “Agu Efi” and shown

on Plan No. P.O./E.21/77 was granted to their people of Akpugo over 140 years ago by the owners of the land, the people of Akporga Nike. Their people went into possession after the grant and exercised thereon acts of ownership by farming and reaping economic trees on the land and fishing in the lakes on the land; they also placed their juju on it. The land has passed to successive generations of the plaintiffs' people since the grant. 5

About 100 years ago the people of Akporga granted to the defendants' people a piece or parcel of land adjacent to the land earlier granted to the plaintiffs' people on payment of customary tribute.

In 1971, the defendants' people sued the plaintiffs' people over part of the land but later withdrew the action which was accordingly struck out on 26/1/76. On 27/1/76, the defendants and their people went on the land forcibly and destroyed plaintiffs' crop growing thereon. Hence this action. The plaintiffs specifically pleaded thus: 10

"3. The people of Akporga Nike were and are the owners of the radical title to the parcels of land verged pink and yellow in the accompanying Plan No. P.O./E.21/77. 15

4. About 140 years ago the people of Akporga Nike granted to the people of Akpugo the parcel of land verged pink in the Plan No. P.O./E.21 /77 in perpetuity under Customary Law. And consequent upon the said grant the plaintiffs and their ancestors before them took possession of the said land and have been exercising maximum acts of ownership and possession over the said land by farming and living thereon, by reaping the economic trees on the land and by fishing in the lakes on the land. The plaintiffs also have some of their jujus on the land." 20 25

The defendants, in reply to plaintiffs' pleadings pleaded, inter alia, thus:

"2. The defendants admit paragraph 3 of the statement of claim to the extent only that Mr. C. de N. Hill, Assistant District Officer, so stated in his 1945 inquiry held under the inter Tribal Boundaries Settlement Ordinance. 30

3. Mr. Hill found, and this was confirmed both by the review of the said inquiry by the Resident of Onitsha Province and by the Chief Commissioner, Eastern Province, that the defendants and their forebears live and have lived north of the Nyaba River from the point where Ngene Nwachi Awna (also spelt Ngene Nwachi-Ona or Ngene Nwachi for short) empties itself into the Nyaba River eastwards to the point where the footpath from Akpawfu to Oruku crosses the said Nyaba River as shown on plan: AB/31 used at the said inquiry. The said enquiry found, and so decided, that the northernmost limit of plaintiffs' land is the Nyaba River, which forms and has always formed 35

the boundary between the plaintiffs and the defendants.

5 *5. The defendants deny paragraph 4 of the statement of claim and will put the plaintiffs to very strict proof thereof. The defendants add that on 8th March, 1946 the houses built by plaintiffs' Akpugo people on the said*
land verged pink on the plaintiffs' plan were destroyed by order of the native court of competent jurisdiction in case No. 6/46 (Idodo Native Administration v. Akpugo) despite their petition to the Chief Commissioner Eastern Provinces, against being driven to south of the Nyaba River, because those who built them were trespassers. The defendants will tender a certified copy
 10 *of the said order at the hearing of this suit."*

They denied attacking the plaintiffs on 27/1/76 or at any other time. They pleaded further:-

15 *"10. The defendants deny that the land verged pink on the plaintiffs' plan is called Agu Efi as claimed in paragraph 7 of the statement of claim and state that their entire land north of the Nyaba River is known as Otorojo but that portions thereof are known by such names as Agu Efi. Isienyi. Nkuji Mkpume, Agu Ikpa, Ururo Mbe, Ogbajie. The land the plaintiffs now call Agu Efi is far larger than what they claim was Agu Hi in suit No.*
 20 *E/161/77.*

11. *In answer to paragraph 8 of the statement of claim the defendants admit that their plan No. ENC/3/72 showed that almost the whole area verged pink thereon was cultivated by the Akpugo people but say it was precisely for this massive intrusion and interference that they instituted*
 25 *Suit No. E/61/71. The defendants will rely on the pleadings of Akpugo and Oruku in that case at the hearing of this suit.*

To plaintiffs' averment that the defendants were refugees from Amagunze and were given land by Akporga people, the defendants pleaded:

30 *"12. The defendants vehemently deny the concocted traditional history given by the plaintiffs in paragraph 9 of the statement of claim and deny vehemently that they ever paid tribute to the Akpugo Ani Juju and further say that the people of Akpuoga are sojourners in that locality and in point of fact were the 'awbias' of Iji Nike people and remained so until the coming into force on 10th May, 1956 the Abolition of the Osu System Law,*
 35 *Chapter 1 of the laws of the State. Under Nike and Nkanu Customary Law an 'aubia' (or by whatever name called) cannot effect any disposition whatsoever or make any grant of any portion of the land of his 'Amadi' to a third party. The defendants will rely on the 1935 Intelligence Report of Mr. S.P.L. Beaumont. Assistant District Officer, as well as the Intelligence Report of Mr.*

H.J.S. Clarke. Assistant District Officer. in support of these assertions.

XXXXXXXXXX

16. *The defendants plead that since their ancestors occupied the parcel of land north of Nyaba River as described in paragraph 3 above many, many years ago they and now the defendants have exercised maximum acts of ownership and possession thereof without let or hindrance from any person to wit, they have built their homes thereon, have farmed on portions of the land, cut down for their own use and sold economic trees like Iroko, and mahogany to Ujalli and Ebenebe sawyers; they have granted customary licences to tenants to cultivate portions of the land, including persons from plaintiffs' village of Akpugo, on the usual customary terms lasting for one fanning season at a time, renewable on good conduct for another farming season, the farmer paying tribute on harvesting his crops; they have fished in the Omerigwe and other lakes on the land and have allowed others from Amagunze and outside their village to fish in the lakes for a consideration; they have also granted customary licences to palm wine tappers o from Mgbowo and elsewhere to tap palm wine from the (sic) and other parts of the land. Some of these customary licences were subsequently the subject of written documents which will be tendered in evidence at the hearing of the suit.*

17. *Furthermore the defendants have and worship their jujus on the land in dispute, as Omerigwe whose priest is NwobodoOnovo of Oruku, Nkuji Mkpume, Omaba, Osum Wuluwulu, Enyiduru, Uvu Akpuagu to name a few.*

18. *The defendants have successfully asserted their rights of possession of the said land north of Nyaba River in various actions in the native courts against intruders: to name a few, Obodo Nike Native Courts Suit No. 36/33 in which defendants obtained judgment against Akpugo in respect of Agu Ikpa; Idodo Native Court Suit No. 2/44 in which defendants obtained judgment against Ndiagu Akpugo in respect of Nkuji Mkpume, Idodo Native Court Suit No.14/43 in which plaintiff people were found liable for trespass into land north or Nvaha River now claimed by the plaintiffs Idodo Native Suit No. 19/41 which established that Akpugo farmers farming within the land verged pink on plaintiffs' plan paid customary rents and tributes to Oruku: Idodi Native Court Suit NO.38/38 in which plaintiffs were found liable for trespassing on Agu Efi land, the very land in dispute in this suit. The defendants will reply on these cases in establishing numerous and positive act of ownership and possession extending over a long period of time.*

19. *The defendants built the St. Mary's R.C.M. School, (now known as the Community Primary School) on the land in dispute about 1919. They have always had their Eke Oruku Market within the land in dispute as well*
 5 *as their Nkwo market close to the Police State shown on the plaintiffs plan which is replete with inaccuracies.*

Chief Nnamena Nwa Ogbu, a warrant Chief of the colonial days who received his warrant from the Administration in 1919 built a huge house on the land in dispute before the influenza of 1918 while Chief Okenwa
 10 *Nwadenyi built his concete house about 1930 - all these without let or hindrance from any person. Many persons of Oruku now advanced in age were born on the land in dispute.*

20. The defendants will show by old government maps including the maps attached to the Intelligence Reports aforementioned that the Nyaba
 15 *Riveras itflows in aneasternly direction from its confluence with Ngene Nwachi has from ancient times marked the boundary between Akpugo (plaintiffs) south of it and defendants (Oruku) north of it, and further east between Akpawfu south of it and Oruku north of it, and still further east between Amagunze south of it and Oruku north of it.*

20 *21. As regards Mr. Hill's decisions under the inter-Tribal Boundaries Settlement Ordinance the defendants will contend that in so far as Mr. Hill purported to override the previous judgments of courts of competent jurisdiction and to let go into areas not within the strict legal terms of the said inquiry such decisions and findings are of no effect and are not binding*
 25 *in law on the defendants."*

The action proceeded to trial at the conclusion of which the learned trial Judge, in a reserved judgment, found:-

"It will be observed that although the defendants had failed to plead how they came to be in possession of the land either by inheritance, by
 30 *grant or by conquest as is usually the case, they seemed to have relied on the report of an inquiry allegedly held by Mr. Hill, an Assistant District Officer under the Inter Tribal Boundaries Settlement Ordinance in 1945. It is noteworthy and indeed very remarkable that the defendants throughout their evidence failed to produce this particular vital document and Plan No.*
 35 *AB.31 which they specifically pleaded.*

It is clear that in determining which of the two parties has the title to the land in dispute I have no difficulty in holding that the plaintiffs have the title. In this connection I would like to state that I accept and believe the evidence of P.W. 2, P.W. 3, P.W. 4 and P.W.5 to the effect that the Akporga Nike

people the owners of the radical title to the land in dispute some 140 years ago granted the land in dispute to the plaintiffs and that thereafter the plaintiffs went into exclusive possession. I may observe also that the failure on the part of the defendants to show how they came into possession of the land in dispute is fatal to their case. 5

I do not believe the evidence of the defendants and their witnesses to the effect that the defendants were in possession of the land in dispute. I do not in particular believe the evidence of D.W. 2 and D.W. 3 to the effect that they farmed or fished or tapped palmwine in the land in dispute with the permission of the defendants. D.W. 4 did not impress me as a truthful witness. 10 In fact his whole evidence according to him is based on what his father told him. The testimony of D.W. 5 to, say the least is of no evidential value. The evidence of D.W. 6 is to say the least most unreliable. He admitted in his evidence that it was his father who told him most of the things that he said in his evidence. For example he said it was his father who told him that the 15 farmland i.e. the land in dispute was the property of the defendants. He also, said in his evidence that it was his father who, told him that the Nyaba River is the boundary between the plaintiffs town and the defendants town. The most important witness for the defendant is D.W. 8. I have no hesitation in saying that he did not impress me as a witness of truth. 20

As I observed him giving evidence in the witness box I formed the impression that he deliberately lied to, the Court. In short I prefer and accept the evidence of the plaintiffs to, that of the defendants with particular regard to how the parties came into possession of the land in dispute. I am satisfied that the Akporga Nike people some 140 years ago, granted the land in 25 dispute (verged pink in Exhibit A) to, the plaintiffs and that the plaintiffs thereafter went into exclusive possession. Having held that the plaintiff have established their exclusive possession to the land in dispute I am satisfied that they are entitled to institute this action claiming damages for trespass. 30

As I have observed earlier I am satisfied from the plaintiffs' evidence that the owners of the land in dispute are the Akporga Nike people who granted the land in dispute to the plaintiffs some 140 years ago.. That being the case it is my view that the onus is upon the defendants to show that their alleged possession of the land in dispute is of such a nature as to must that of 35 the original owners. Refer to Mosalewa Thomas v. Preston Holder 12 WACA 78. I am satisfied that the defendants have failed to discharge this onus. Indeed they cannot discharge the said onus as they had clearly admitted in paragraph 2 of their pleadings that the Akporga Nike owners of the radical

title to the land in dispute.

I am satisfied from the evidence before me that the defendants broke and entered into the land in dispute which was at the time of the trespass in the exclusive possession of the plaintiffs. The defendants have not seriously denied trespassing into, the land in dispute. Their only defence was that they
 5 were owners in possession of the land in dispute. Having found that the plaintiffs were in possession when the defendant entered on the land I am of the view that the plaintiffs are entitled to judgment for damages for trespass and for an injunction restraining the defendants from further trespassing on the land in dispute.....”

10 He accordingly entered judgment for the plaintiffs in the following terms:

“.....the plaintiffs are entitled to damages for trespass which I assess at N400. I also hereby grant an injunction restraining the defendants, their servants and agents from any further trespass into, the land in dispute which is verged pink in Exhibit A. Cost to the plaintiffs against the defen-
 15 dants assessed at N300.00”

Being dissatisfied with this judgment, the defendants appealed to the Court of Appeal which allowed their appeal, set aside the judgment of the trial High Court and dismissed plaintiffs’ claims. The plaintiffs have now, with leave of the court below, appealed to this Court against the judgment of the
 20 court below. In accordance with the rules of this Court both parties filed and exchanged their respective briefs of argument. In the appellants’ Brief the following questions are set out as arising for determination in this appeal to wit:

“a. Was the Court of Appeal right in introducing into the case
 25 matters which were not properly before it, to wit,

(i) questions relating to the proceedings in Mr. Hills inquiry and the plans tendered therein

(ii) the proceedings and the judgment in Suit No. E/24/52:
 Obunaw Akpugo People 20 NLR 135. and on relying on those matters in
 30 coming to its decision?

b. Was the Court of Appeal right in allowing the allegation that the judgment of the High Court in the above case was written on scraps of paper, an allegation which was not proved and the allegation that the trial Judge was hostile on the defendants, an allegation which was not only not proved
 35 but was abandoned by the defendants/respondents at the hearing of the appeal, to affect its judgment in the case?

c. Was the Court of Appeal right in raising suo motu the issues hereunder set out and on relying thereon for its judgment without giving the plaintiffs/appellants the opportunity to address it on the said issues:

(i) *alleged admission by the plaintiffs/appellants of paragraph 21 of the statement of defence and the evidence of D.W.8.*

(ii) *the method and the incidents of the grant of the land in dispute to the plaintiffs/appellants.*

(iii) *interpretation of the word 'plaintiff' in relation to the evidence of P.W.S 2.3.4 and 5 and the judgment of the learned trial Judge as to the grant of the land in dispute to the people of Akpugo.*

d. *Was the Court of Appeal right in holding that:*

(i) *the evidence of the plaintiffs/appellants in proof of the grant of the land in dispute to them was in conflict with their pleadings?*

(ii) *it was necessary for the plaintiffs/appellants to have filed a reply in the case?*

(iii) *if the plaintiffs/appellants proved the grant of the land in dispute to them they should also have proved their 'acts of possession, long and positive enough within the principles of Ekpo v. Ita' ? ..*

(iv) *Akporga Nike people, the grantors of the land in dispute to the plaintiffs/appellants, should have been parties in the case?*

(v) *the plaintiffs/appellants' case should have been dismissed on the pleadings?*

e.(i) *Was the Court of Appeal right in reversing the decision of the learned trial Judge on the credibility of the defendants/respondents witnesses, D.W.2, 3,4,5,6, and 8 whom it never saw or heard give evidence and in accepting as a matter of course the evidence of the said witnesses as true?*

(ii) *Was the Court of Appeal right in setting aside the judgment of the learned trial Judge as perverse?*

f. *Was the Court of Appeal right in accepting as established facts matters set out in the defendants/respondents' brief whereas evidence on those matters were rejected by the learned trial Judge?*

g. *Did the Court of Appeal properly direct itself on the questions of law and fact which arose in the case, the evidence adduced therein and the proceedings and the judgment of the trial Court?"*

The defendants, for their part, formulated the following four questions:

"a. *Whether the Court of Appeal was right in holding the view that the plaintiffs had not proved their traditional history which was to the effect that the people of Akporga Nike made the grant of the land in dispute to them.*

b. *Whether the Court of Appeal was right in holding the view that the plaintiffs had not established that they were in exclusive possession of the land in dispute.*

c. Whether the Court of Appeal was right in holding the view that the trial Court had not properly evaluated the evidence of the witnesses that had testified in the case.

d. Whether the issues raised by the plaintiffs in their complaints against the Court of Appeal judgment are maintainable.”

Having regard to the judgment appealed against and the grounds of appeal, the questions as formulated by the plaintiffs are to be preferred.

Question (a):

I have given careful consideration to the submissions made on this issue. The only question formulated in the defendants/appellants’ brief in the Court of Appeal was: Did the plaintiffs prove title to the land in dispute by grant as pleaded? Rather than confine itself to this question the court below, per the lead judgment of Macaulay, J.C.A. went on a discussion of issues on which there was no evidence on the record. It was never plaintiffs’ case that they relied on *jus terti* as erroneously stated by the learned Justice that delivered the lead judgment. Plaintiffs’ case was that the land in dispute was granted to their ancestors about 140 years ago by the Akporga Nike people whom, they claimed, were the original owners of the land. The defendants admitted the plaintiffs’ averment that the Akporga Nike people were the original owners of the land but went on to say that this was the determination after an enquiry by Mr. Hill. They pleaded Mr. Hill Inquiry and a number of previous court decisions. They also pleaded maps attached to Intelligence Reports to show that the Nyaba River marked the boundary between Akpugo that is, plaintiffs) and Oruku (the defendants). They, however, failed to tender at the trial any of these vital documents pleaded by them, Notwithstanding this failure, the court below on its own went on a research and unearthed a case *Obunaw-Akpugbo people v. Akpuwfu people* 20 NLR 135 which it relied on in coming to its decision.

The court below, with profound respect, was clearly in error to make use of materials not given in evidence to come to its decision. It is not the duty of a court to look for or provide evidence for any of the parties before it; its duty is mainly that of an umpire holding evenly the scale of justice between the parties.

I answer Question (a) in the negative.

Question (b):

In the lead judgment of the court below Macaulay, J.C.A. observed:

“Before opening the argument in this appeal. Mr. Anyamene, S.A.N. invited the attention of the Court to the aspect of hostility raised in the respondent brief. He said that, much as he would have wished to skip any

mention of what had happened during the trial in the court below, though this has now regrettably been raised here, he would wish that that unhappy episode should not be allowed to discolour the even tenor of this hearing, as had happened in the court below. This gesture was equally reciprocated by the parallel assurances given by Mr. Egonu, S.A.N. that it was equally the attitude of the respondents that the appeal should proceed towards a smooth, unimpeded hearing, devoid of the sort of drama, as alleged, that characterized the trial in the court below. Whatever may or may not have happened there, what is clear is that all unsavory digressions had best be forgotten for now and this Court has decided to do so. It is also clear that the defendants/appellants are not making an issue of the judgment as such, beyond saying that, a situation where a judge reads his judgment from scraps of paper two weeks after he found himself unable, perhaps unready to furnish a copy of the judgment as required by Sec. 258(1) of the 1979 Constitution, can hardly inspire confidence. In the present social setting like the one in our country where the body politic is largely illiterate, it is tempting to suggest, or even take umbrage, as learned counsel Mr. Anyamene has done, that it is of the utmost importance that in the eyes of the people, the provisions of the Constitution should be adhered to, if only to raise the confidence of litigants in the judgment of courts, the last hope of the common man. I wonder if any learned counsel before us, can ask for less."

This passage has come under attack in this appeal. Learned counsel for the plaintiffs contended that the allegation of hostility against the defendants by the learned trial Judge having been abandoned, it was not open to the court below to comment on it in the manner as contained in the lead judgment, more so that the allegation was not proved.

It is true Mr. Anyamene, S.A.N. learned leading counsel for the defendants intimated that he would not rather comment further on the issue of hostility towards the defendants at the trial by the learned trial Judge. But this is not to say that the defendants were happy at the treatment they allegedly received in the hands of the learned trial Judge. I commend learned Senior Advocate's reaction. It would have been better if the court below had left things at that. I can, however, find nothing in the above passage that could be said to suggest that the court below accepted the truth of the allegation of hostility made against the trial Judge. For my part, I think the less said about it the better for all concerned.

A Questions (c) - (g):

As the issues raised in these question dovetail into each other, I propose to take them together. The law is clear that where two persons make conflicting claims to possession of land. the law ascribes possession to the

person that can prove better title to the land. The plaintiffs relied on a grant from the Akporga Nike people. Evidence was led in support of this grant. The learned trial Judge accepted the evidence of P.W. 2, P.W. 3, P.W. 4 and P.W. 5 on the grant and held the grant was proved. The court below, per Ikwechgh, 5 J.C.A. thought differently and the reason for this can be found in the following passage of the judgment of the learned Justice of Appeal:

“Now except the plaintiffs had first of all succeeded in establishing by satisfactory and credible evidence that the Akporga Nike people had granted this parcel of land in dispute to the plaintiffs there can be no question of the case of the defendants/appellants not having been found satisfactory and therefore not having been believed by the trial Judge. This is necessary and the reason for this would become clearer as I go on. The plaintiffs/respondents had made a pleading in this wise.

1. The people of Akporga Nke were and are the owners of the radical of title ‘to the parcels of land verged pink and yellow in the accompanying Plan No. P.O./E21/77.’

The defendants/respondents made this rejoinder in paragraph 2 of their Statement of Defence.

‘2. The defendants admit paragraph 3 of the Statement of Claim to the extent only that Mr. C. de N. Hill, Assistant District Officer, so stated in his 1945 inquiry held under the inter Tribal Boundaries Settlement Ordinance.’

These two passages appear to have this one common factor that Akporga Nike people have the radical title to the land in dispute. This fact as yet does not afford strength to the claims of either party to this litigation.

Next is paragraph 4 of the Statement of Claim which reads:-

‘4. About 140 years ago the people of Akporga Nike granted to the people of Akpugo the parcel of land verged pink in the Plan No.P.O./E21/77 in perpetuity under Customary Law. And consequent upon the said grant the plaintiffs and their ancestors before them took possession of the said land and have been exercising maximum acts of ownership and possession over the said land by farming and living thereon, by reaping the economic trees on the land and by fishing in the lakes on the land. This plaintiffs also have some of their jujus on the land.’

In answer to the above, the defence in paragraph 5 states:

‘5. The defendants deny paragraph 4 of the Statement of Claim and will put the plaintiffs to very strict proof thereof.’

The parties thus joined issues on the question of a grant of the land in dispute to the plaintiffs by the Akporga Nike people, and it demands, there

fore, that the onus of proving this grant is on the plaintiffs/respondents. It is this grant that is the foundation of the case of the plaintiffs, and they must prove it strictly and successfully before there can be any question of the defence being expected and called upon to justify any of their acts on the land. In a matter of this nature in *Chief Odofin v. Isaac Ayoola* (1984) 11 SC 72 5 at page 105, Karibi- Whyte, J.S.C. said restating the law:-

'It is well settled that where plaintiff relies on a grant or original settlement as title to claim the land in dispute, the burden is on him to establish such grant or original settlement - this he can do by cogent and acceptable evidence of tradition, whether or not accompanied by exercise of 10 dominion which alone may be sufficient to establish title'.

It has to be borne in mind that both sides were in possession of parts of this land, and so the title is in issue: *Okorie & Ors v. Chief Udom & Ors* (1960) SCNLR 326; (1960) 5 FSC 162, See also *Amako v. Amakor Obiefuna* (1974) 1 ANLR 119; (1924) 3 SC67; *Mogaji v. Cadbury Fry (Nig) Ltd.* (1985) 2 15 NWLR (Pt.7) 393 at page 402. In order to establish the title the plaintiffs claimed to have had through the grant of the Akporga Nike people some 140 years ago, the plaintiffs called P.W. 2 and P.W. 3, and these two are the important pillars upon which the edifice of the plaintiffs' case rests. These two witnesses sought to prove the grant, and P.W. 4 and P.W.5 added to the efforts of 20 the two earlier witnesses. What is the result?

The P.W. 4 and PW5 respectively said that the forefathers of the plaintiffs were granted this land by the people of Akporga Nike. But each of P.W.2 and P.W.3 said things different from these claims. P.W.2 had said this:

'I know the land in dispute in this case. It is called Agu Efi. I know 25 the people of Akpugo who are the plaintiffs in the case. My people of Akporga Nike and the plaintiffs had some transaction over this land in dispute. My people granted the land in dispute to the plaintiffs about 143 years ago for farming and residential purposes. After we had made the grant the plaintiffs entered into possession and farmed and also built residential houses on the 30 land in dispute.'

The P.W. 2 under cross-examination repeatedly said that the land was granted to plaintiffs, and that plaintiffs as a result of the grant were required to pay customary tributes. This witness thus shows that the grant was made to the plaintiffs by the Akporga Nike people perhaps about 140 35 years ago. The great boast of plaintiffs is longevity.

The P.W. 3 also said the grant was to the plaintiffs, for he said thus:-

'Many years ago about 143 years ago the plaintiffs came to my forefathers and requested for a farmland and a land on which to erect houses.

My forefathers granted the plaintiffs land for farming and residential purposes. When the plaintiffs were granted the land, they entered into possession and farmed the land and also erect houses on the land.'

This accounts for the grant that the plaintiffs pleaded in paragraph 4 of their statement of claim. But these witnesses P.W. 2 and P.W. 3 missed much of the vital proof. No grant was made to the plaintiffs who may not have lived for 143 or 140 years. The plaintiffs are descendants of their forefathers who probably lived some 140 years ago. Pleading a grant of land to plaintiffs is not the same as pleading a grant made to the ancestors of plaintiffs from whom the plaintiffs could derive title. It seems that throughout the hearing of the case this was lost sight of. The trial Judge accepted the evidence of P.W. 2 that Akporga Nike people had granted land to the plaintiffs, and he also accepted that P.W. 3 truthfully said that his people had granted land to the plaintiffs. And so the trial Judge brought himself to say:

15 *'I have no difficulty in holding that the plaintiffs have the title.'*

He repeated what P.W. 2 and P.W. 3 said, for he said that he accepted and believed what P.W. 2 and P.W. 3 said that:

20 *'Akporga Nike people the owners of the radical title to the land in dispute some 140 years ago granted the land in dispute to the plaintiffs and thereafter the plaintiffs went into exclusive possession.'*

The plaintiffs could have inherited the land granted to their ancestors, but it is fallacious argument to hold that a grant to the forefathers of the plaintiffs is a grant to the plaintiffs. This is not too fine a point not to be obvious to any person. The Akporga Nike people, P.W. 2 and P.W. 3, did not prove a grant to the forefathers of the plaintiffs, and the plaintiffs had pleaded that the grant had been made to their forefathers who before them had possessed this land, and who then thereafter transmitted the interest by succession to the plaintiffs. The trial Judge did not notice the dividing line between the ancestors of concluded that a grant of this land was made to the plaintiffs."

35 With profound respect to the learned Justice of Appeal, I think he was wrong in the construction he placed on the word "plaintiffs" appearing in the evidence of P.W. 2 and P.W. 3. "Plaintiffs" as contained in the evidence of these two witnesses could only refer to the people of Akpuga whom the named plaintiffs on the record are representing in these proceedings. The supposed difference in the evidence of P.W. 4 and P.W. 5 on the one hand and that of P.W. 2 and P.W. 3 on the other hand, as to whom the grant was made 140 years ago just does not exist. All the witnesses are id idem that the grant was made to the people of Akpuga. The learned trial Judge was perfectly in order

to accept their evidence. Having proved the grant to them, the onus shifted on the defendants to prove they had better title.

As rightly observed by the learned trial Judge, they did not plead how they came to own the land in dispute. The learned trial Judge did not believe the witnesses that testified for the defence. He was criticised by the court below for this. Is the criticism justified? D.W.1, a native of Akpugo (plaintiffs' town) testified and said nothing that was helpful to the defendants. An attempt was made to turn him into a hostile witness; the attempt failed. Would the trial Judge not be justified in rejecting his evidence? I rather think he was. 5

Next is D.W. 2. He was probably called to say that he was put on the land in dispute by the defendants and that Nyaba River was the boundary between the two communities of Akpugo and Oruku. He is not a native of Oruku but of a different local government. The land in his hometown is more fertile than the land at Otorajo where he farmed with the permission of the defendants. He did not know of his own knowledge what constituted the boundary between the communities but admitted he told the court what he was told by the defendants. The learned trial Judge did not accept the evidence of the witness that he farmed and fished on the land. The same treatment was given to the evidence of D.W. 3, another tenant of the defendants. 10 15 20

D.W. 4 was called a boundary man. Having regards to his evidence under cross-examination, I am not at all surprised that the learned trial Judge unhesitatingly rejected his evidence as a whole. He does not know what marked the boundary between his community of Amachi and the defendants' community of Oruku even though he claims they are boundarymen. But he knows what marks the boundary between Akpugo and Oruku, his community has no boundary with Akpugo. His father did not tell him the boundary between Amachi and Oruku but told him that between Akpugo and Oruku which is of no concern to him. 25

D.W.5 is another witness who claimed to be a boundaryman to Oruku Community (the defendants). He is from Akpawfu, a neighbouring village. He does not know the boundary between his community and Akpugo with whom he claims his people have boundary. But he knows the boundary between Akpugo and Oruku. 30

D.W. 6, is priest of the Omerigwe juju and a native of Oruku. He testified that he farmed on the land in dispute. The learned trial Judge considered the evidence of this witness unreliable. Having regard to the answers given by the witness to questions under cross-examination, I am not prepared to say the learned Judge was not justified in rejecting his evidence. 35

D.W. 7 is an archivist from the national Archives Enugu. He tendered

photocopy of an uncertified order purportedly made in Suit No. 6/46 by the Idodo Native Court. It is obvious that the Exhibit, apart from being inadmissible and ought to be expunged from the records, is equally valueless.

D.W. 8 is defendants' star witness who testified about the land in dispute. One significant thing about the evidence of this witness is that he did not say how his people of Oruku came to own the land in dispute. He did not say anything in proof of the vital averments in defendants' statement of defence. Indeed he did not know who Mr. C.De Hill was. This is what the learned trial Judge said about this witness:

"The most important witness for the defendants is D.W. 8. I have no hesitation in saying that he did not impress me as a witness of truth. As I observed him given evidence in the witness box I formed the impression that he deliberately lied to the Court."

It will not be correct to say, therefore, that the learned Judge did not give any reason for his disbelieving the evidence of D.W. 8.

With the evidence adduced in support of the case for the defendants it cannot be said that they have shown a title better than that of the plaintiffs, over the land in dispute. The effort made by the court below to re-evaluate the evidence adduced at the trial was misdirected. In the circumstances of this case, the findings made by the learned trial Judge, being supported by the credible evidence before him, those findings ought not to have been disturbed by the court below. Much weather was made about plaintiffs being let into possession or being let into exclusive possession. The fact that a person in possession of land is disturbed on it by another does not render the former's possession not being exclusive. It will only cease to be exclusive if others are on the land lawfully.

Learned leading counsel for the defendants alluded to the case of *Kojo v. Bonsue* (1957) 1 WLR 1223. The principle enunciated in that case will only apply where there are two conflicting versions of traditional history and it becomes necessary to decide which version is the correct one. That principle will not apply where, as in this case, the other party does not plead nor rely on traditional history but on previous inquiries and court cases in respect of which no evidence was led.

In the net result, I agree with my learned brother Belgore, J.S.C. whose judgment I have had a preview of before now, that this appeal succeeds. It is allowed by me too. I set aside the judgment of the Court of Appeal and restore that of the trial High Court. I abide with the order for costs made in the lead judgment of Belgore, J.S.C.

MOHAMMED JSC

I have had the privilege of reading the judgment of my learned brother, Belgore, J.S.C., in draft, and I entirely agree with him that the trial High Court relied on the evidence of witnesses and relevant documents to find in favour of the appellants. I agree that the respondents made a mountain out of an ant 5
hill in respect of the evidence of D.W. 8. The Court of Appeal embarked upon what appears to be a rehearing of the case and considered issues which were not dealt with by the trial Court. An appellant court, in the absence of any finding of fact by the lower court, cannot put itself in the position of the lower court and make such findings. See *Armels Transport v. Martins* (1970) 1 All 10
NLR 27.

Consequently, I agree that this appeal is meritorious and accordingly, I too would allow it and restore the judgment of the trial High Court. I abide by the orders made on costs, in the lead judgment.

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