

SUPREME COURT OF NIGERIA
2ND SEPTEMBER, 1994. SC. 222/1992.
CORAM:- M. BELLO CJN, M. L. UWAIS,
E. O. OGWUEGBU, S. U. ONU, A. I. IGUH, JJSC.

MARK UGBO & 4 OTHERS DEFENDANTS/APPELLANTS

AND

ANTHONY ABURIME PLAINTIFF/RESPONDENT

APPEALS - Concurrent findings of fact - When circumstances for disturbing them - Are held not established.

EVIDENCE - Assertion by the defendant - Where not established - Whether a blow to their defence.

EVIDENCE - Forgery allegation - In land dispute - Where the matter is not decided on the alleged forgery - Whether the issue of proof of the forgery is relevant

DAMAGES - Trespass to land - Where established - Whether N500.00 damages is excessive.

LAND LAW - Bini customary land law - Competing title to a piece of land - Proper determination of the party with a better title.

LAND LAW - Superimposition of Survey plans - Where plaintiff has established identity of the land claimed - Whether he has a duty to superimpose any plan on the other.

LAND LAW - Title - Identity of the land in dispute - Whether uncertain - In view of plaintiff's litigation plan.

LAND LAW - Trespass - Two parties entering and claiming possession to the land in dispute - Party with a better title - Is entitled to succeed in trespass.

FACTS

The Plaintiff/Respondent, before the former Bendel State High Court claimed as against the Defendants/Appellants a declaration of title to statutory right of occupancy, N500,000 damages for trespass and perpetual injunction in respect of the land in dispute. Plaintiff established that the land in dispute was granted to him via ward 1Ik elders by the Oba of Benin. He tendered 3 survey plans in proof of the identity of the land. The Defendants denied the Plaintiffs claim. They sought to establish that the land in dispute was granted to the 1st Defendant by the Oba of Benin via the same ward 1Ik elders.

The trial court found in favour of the Plaintiff on ground of his grant to the land in dispute being first in time. The Defendants appeal to the Court of Appeal was dismissed by that court which upheld the judgment of the trial court. Being dissatisfied, the Defendants have now appealed to the Supreme Court to determine inter alia, whether the identity of the land in dispute was established by the plaintiff. And whether there was any basis for consideration of the issue of priority by the lower courts,

HELD (Unanimously dismissing the appeal)

Whether identity of land is uncertain

1. The declaration of title and injunction claimed relate specifically to the area of the respondent's land verged pink on his litigation plan No. CS10/43 which was tendered in evidence as Exhibit 6. In the circumstance it cannot be seriously contended that the identity of the land in dispute verged pink on Exhibit 6 is either uncertain or unascertainable. (P.375 L.16)

Concurrent findings of fact

2. The above are concurrent findings of fact of both the trial court and the Court of Appeal and this court will not disturb them unless there is established a miscarriage of justice or a violation of some principles of substantive law or procedure or a substantial error apparent on the face of the record of proceedings is shown or such findings are perverse or are not supported by evidence or were arrived at as a result of a wrong approach to the evidence or a special circumstance is shown to warrant the interference of this court with such findings of fact. None of these circumstances has been established in this case and I have no reason for disturbing any of the said findings which are well founded and entirely sound. (P.378 L.14)

Assertion by Defendant - Where not established

3. The appellants who asserted that the land allocated to the respondent was

infact different from the land in dispute failed to establish what they pleaded and this is an additional blow to their defence. (P.379 L.3)

Super imposition of Survey Plans

4. On the particular facts of this case, there is no duty on the respondent to super-impose any plan on the other. The respondent having established the identity of the land he claimed in Exhibit 6, all that was left for him to establish on the main declaratory relief was proof of ownership of the land in dispute. The onus was rather on the appellant to satisfy the court, whether by super-imposition of plans or otherwise, that the land granted to the respondent by the Oba of Benin as alleged by the said appellants was situate elsewhere and different from the 1st appellant's piece of land. This, the appellants did not succeed in doing. (P.379 L.9)

Bini Customary Land Law

5. It therefore seems to me well settled that when there is competing title to a piece or parcel of land under Bini customary law or where two allocations have been made by the same Ward Allocation Committee, such as is the case in the present suit, the question to be asked is which of the parties had established a better title to the land and not necessarily who first obtained the Oba's approval. It would however still be right, to state that where all the equities surrounding such two allocations are equal then, obviously, the first in time must take priority.

In the present case, the 1st appellant and the respondent were found by both courts below to have complied with the necessary formalities connected with the acquisition of the piece of land in dispute. The respondent's approval Exhibit 2, bears the date 8th December, 1970 whilst the 1st appellant's approvals, Exhibits 9 and 10 are dated the 7th October, 1972 and 2nd October, 1973 respectively. The applications were all recommended to the Oba of Benin for approval by the same ward 1 Ik Elders. The findings of both courts below that the respondent's grant. Exhibit 2, is superior to the 1st appellant's grants, Exhibits 9 and 10 is endorsed. (P.382 L.26)

Forgery allegation in Land Dispute

6. 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. In the present case, however, neither the learned trial Judge nor the court below decided the issues between the parties on the basis of forgery but on the superior title of the respondent. This is sufficient to dispose of the issue of forgery raised by the appellants in this appeal. (P.383 L.9)

Damages for trespass

7. There was evidence before the trial court that the 1st appellant without justification entered upon and cleared the land in dispute and destroyed the respondent's Survey beacons and rubber trees thereon. This is definite evidence of trespass on the facts found by the courts below. This is because it has long been settled that where two parties are in a field claiming possession, the possession being disputed, as in the present case, trespass will lie at the suit of the one who can show that the title is in him. The respondent having established his title to and legal possession of the land in dispute was therefore entitled to maintain his action in trespass against the appellants. The N500.00 damages awarded to the respondent by the trial court cannot seriously be argued to be excessive and in the circumstance the same is affirmed. (P. 383 L. 25)

15 **NOTABLE POINTS OF INTEREST**

IGUHJSC

Courts are to carry out a visual perception of Survey Plans

1. It ought to be pointed out that neither the trial court nor the Court of Appeal made any super-imposition of plans as this exercise is not the duty of any court but must be left to qualified surveyors as experts to carry them out. All that the courts below, and indeed, this court did was to carry out a visual, as opposed to, an instrumental perception of the relevant plans tendered and admitted as Exhibits before the trial court. This exercise, the courts are entitled to do. (P.380 L.7)

Primary ranking of estates and interest

2. At law, as in equity, the basic principle is that estates and interests primarily rank in the order of creation. The maxim is qui prior est tempore potior est jure which literally means that he who is earlier in time is stronger in law. This principle however is applicable where the equities are equal. (P.381 L.35)

Error in printed record explained satisfactorily by counsel

3. There is finally issue number three in respect of which the appellants complained that the Court of Appeal was in error in affirming the award of N500,000.00 damages for trespass to the respondent when there was no basis for such an award. Before us, it was satisfactorily explained by learned counsel for the respondent that the award in respect of damages for trespass was in fact N500.00 and not N500,000.00 as erroneously reflected in the printed

record. (P183 L.19)

BELLO C.JN

Priority of grants under Benin Native Law

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4. The question of priority of grants under Benin native law and custom has been settled. Where there are two competing grants both made in good faith in accordance with the procedure for the allocation of land under the Benin native law and custom, the earlier grant as is the case in all other civilised laws takes priority over the latter grant. The decision of the court below cannot therefore be faulted. (P.384 L. 19) 10

REPRESENTATION

K.S. Okeaya Ineh Esq, SAN, with A.O. Okeaya-Ineh Esq and J.O. Okeaya-Ineh (Miss) for the Appellants.

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M.O. Oguntona (Miss) with Mr. U. Idachaba and T. Aburime (Miss) for the Respondent

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CASES REFERRED TO

Kwadzo v. Adjei (1944)10 WACA 274

Udekwa Amata v. Modekwu 14 WACA 580

Ezeokeke v. Umunocha Uga and Others (1962)1 All NLR (Pt 3)482 25

Suebere v. Ekparam 4 WACA 150

Jemiegebe Ifie and Others v. Godi and others (1965) NMLR 457

Baruwa v. Ogunshola (1938)4 WACA 159

Olusanmi v. Oshasona (1992)6 NWLR (Part 245) 22 at 29

Agbonife v. Aiwereoba (1988)1 NWLR (Pt.70) 325 30

Onwuka v. Ediala (1989)1 NWLR (Pt 96) 182

Awote v. Owodunni (No. 2)(1987)2 NWLR (Pt 571) 366 at 371

Udeze v. Chidebe (1990)1 NWLR (Part 125)141

Udofia v. Udom (1960) SCNLR 326

Alhaji Jubrilla Aromire v. Awoyemi (1972) 7 S.C. 113 at 121 35

Enang v. Adu (1981) 11-12 S.C 25 at 42

Nwadike v. Ibekwe (1937)4 NWLR (Pt 67)718

Igwego v. Ezeugo (1992) 6 NWLR (Pt 249) 561 at 576

- woluchem v. Gudi (1981)5 S.C. 291 at 326
 Ike v. Ugbara (1993)6 NWLR (Pt 301) 539 at 569
 Ibrahim v. Shagari (1983)2 (Pt 301)539 SCNLR 176
 Okubule v. Oyagbola (1990)4 NWLR (Pt 147)723
 5 UBN Ltd v. Professor Albert Ozigi (1994)3 NWLR (Pt 333) 385 at 407
 Nigerian Maritime Services Ltd v. Afolabi (1978)2 SC 79 at 84
 Highgrade Maritime Services Ltd v. FBN Ltd (1991)1 NWLR (Pt 167) 290
 Ogbenmwan Osawe v. Scotty Asen (1992)4 NWLR (Pt 235) 291 at 303
 Onwujuba v. Obieniu (1991)4 NWLR (Pt 183) 16 at 26
 10 Yesufu Latinwo & 2 Ors vs Busari Ajao & Anor (1973)2 SC 99 at 109
 Uwagboa and another v. Evbuomwan 4 FSC 91
 Mogaji v. Odofoin (1978)4 SC. 91
 Barclays Bank Ltd v. Bird (1954)ch. 274 at 280
 Okeaya-Inneh v. Aguebor (1970)1 All NLR 1 at 8 4
 15 Aigbe v. Edokpolo (1977)2 S.C. 1,
 Awoyegbe v. Ogbeide (1988)1 NWLR (Pt 73) 695 at 697 - 701
 Arase v. Arase (1981)5 SC 33
 Atiti Gold v. Osasseren (1970)1 All NLR 132
 Bello v. Magnus Eweka (1981)1 S.C. 101
 20 Okwuarume v. Obabokor (1966) NMLR 47
 Benson Ikoku v. Enoch Oli (1962) All NLR 194
 Nwobodo v. Onoh (1984)1 SCNLR 1
 Anyah v. A.N.N Ltd (1993)6 NWLR (Pt 247)319 at 333
 Awoonor Renner v. Daboh 2 WACA 258 at 259 and 263
 25 Lenis v. Teford (1876)1 A.C. 412 at 426
 Umeabi v. Otukoya (1978)4 SC 33

STATUTE REFERRED TO

Evidence Act s. 137(1)

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LEAD JUDGMENT BY IGUH JSC

In the High Court of the former Bendel State of Nigeria, the plaintiff, who is now the respondent instituted an action against the appellants who therein were the defendants claiming jointly and severally, as subsequently
 35 amended, as follows -

(1) *A declaration of title to statutory right of occupancy to the area verged pink on Plan No. CS10/43 filed with this statement of claim.*

(2) *N500,000.00 damages for trespass.*

(3) *Perpetual injunction to restrain the defendants, their servants*

or agents from further trespass on the land."

Pleadings were ordered in the suit and were duly settled, filed and exchanged with the same amended by various orders of court.

The case accordingly proceeded to trial and the parties testified on their own behalf and called witnesses. 5

It is convenient at this stage to set out briefly the background facts to the dispute between the parties. The plaintiff's case is that by Exhibit 2 dated the 11th July, 1970, he applied to the Oba of Benin through the elders of Isiohor village in the then Ward 11k for the grant of a piece or parcel of land. The said land measured 600 x 1000 feet and was situate at Isiohor village in the Benin Judicial Division of the former Bendel State of Nigeria, now Edo State. This application was duly approved by the Oba of Benin on the 8th December, 1970 in accordance with Bini customary law. After obtaining a grant of the said parcel of land, part of which is now in dispute, the plaintiff who was then negotiating to sell the same to one G. O. Igbinedion had the land surveyed in the name of the said Igbinedion. This survey plan is Exhibit I numbered WE. 1145 and dated the 6th January, 1971. 10 15

The proposed, sale of the land to Igbinedion failed to materialise and the plaintiff proceeded to make another survey thereof in his own name, this time. This second survey plan is numbered OSB/1562 and was tendered as Exhibit 5 in these proceedings. It is the Plaintiff's case that sometime in February, 1982, the 1st and 5th defendants broke into and entered his said piece or parcel of land, destroyed his beacons and uprooted his rubber trees thereon. About the same time, the rest of the defendants purported to resell his said land in dispute to one Iyayi Efianayi who testified as P.W 6 in this case. There was also the letter, Exhibit 3, which the 2nd, 3rd, 4th and 5th defendants wrote to the plaintiff claiming that the land in dispute was allocated to the 1st defendant and not to the plaintiff. Following these developments the plaintiff filed this action against the defendants jointly and severally as aforesaid. Exhibit 6 is the plaintiff's litigation plan No. CS/10/43 showing the land he acquired per Exhibit 2 and the portion thereof that is in dispute. 20 25 30

The defendants for their part, claimed that the 1st defendant obtained grants of three pieces of land including the land now in dispute from the Oba of Benin after due recommendations by the leaders of Isiohor village. These were in 1971, 1972 and 1973 respectively. The Oba's approvals in respect of these grants were tendered in evidence as Exhibits 9 and 10. It is their case that the 1st defendant acquired altogether three parcels of land. One measured 200 x 200 feet and two were of the size 400 x 400 feet. These pieces of land he acquired are shown in the 1st defendant's survey plan number OSA/ 35

1517/BD. 83 dated the 5th April, 1983 and are therein clearly shown marked Plots “A” “B” and “C”. This plan was tendered in evidence as Exhibit 8. The defendants asserted that the land in dispute is owned by the 1st defendant and not the plaintiff. It is their case that the plaintiff was claiming two of the 1st defendant’s pieces of land which measured 400 x 400 feet and 200 x 200 feet 5 respectively. They further claimed that the land allocated to the plaintiff was in an entirely different location.

At the conclusion of hearing, the learned trial Judge, after a most careful review of the evidence found that “the parties” were “fighting over the same piece or parcel of land” and that the approval granted to plaintiff in 10 respect of the land in dispute under Bini customary law is earlier in time than the 1st defendant’s approval. He therefore entered judgment for the plaintiff against the defendants as follows -

“Judgment is therefore entered in favour of the plaintiff as follows:-

- (1) *A declaration of title to statutory right of occupancy to the area* 15 *verged pink on Plan No. CS.10/43 Exhibit 6;*
- (2) *N500,000.00 (sic) damages for trespass;*
- (3) *perpetual injunction to restrain the defendants, their servants or agents from further trespass on the land.*

The plaintiff is entitled to the cost of this suit which I assess at N250.00k”

20 Being dissatisfied with the said judgment, the defendants lodged an appeal against the same to the Court of Appeal, Benin Division, which in a unanimous decision dismissed the appeal on the 14th July, 1992. Aggrieved by this decision of the Court of Appeal, the defendants have further appealed to this Court.

25 Altogether, five grounds of appeal were filed by the defendants, who, hereinafter will be referred to as the appellants. These grounds of appeal, without their particulars, are as follows -

“1. That the Learned Justices of the Court of Appeal erred in law and misdirected themselves on the facts in holding that the identity of land 30 *in their formulated issues for consideration was duly established in favour of the plaintiff.*

2. That the learned Justices of the Court of Appeal erred in law and misdirected themselves in affirming the Judgment of the Benin High Court when the charge of forgery alleged and pleaded by the plaintiff in respect of 35 *the 1st defendant’s Title was not proved at the trial.*

3. That the learned Justices of the Court of Appeal erred in law and misdirected themselves on the issue and consideration of priority, when there was no basis for such consideration.

4. That the learned Justices of the Court of Appeal erred in law and

on the facts in affirming the award of damages of N500,000.00 damages for trespass, when there was no basis for such finding.

5. That the Judgment of the Court of Appeal is against the weight of evidence as revealed from the Record of Appeal of the High Court.”

The parties acting pursuant to the rules of court filed and exchanged 5 their briefs of argument. The three issues identified on behalf of the appellants which this court is called upon to determine are as follows -

“1. Whether the learned Justices of the Court of Appeal were justified in affirming the judgment of the Benin High Court of 29/2/84 having regard to the plaintiff’s failure to establish and prove his claims as pleaded 10 i.e. 1st defendant/appellant’s land in Exhibit 8 was within Exhibits 1, 5 and 6 of the plaintiff and forgery of Title of land specifically pleaded in Pages 11, 12, 13 and 14 of the Amended Statement of Claim.

2. Whether in a case involving title to land disputes, allocated and 15 approved by the same Ward committee and the same grantor, it is imperative and condition precedent that the identity of the parcels of land in dispute be ascertained and established by Surveyor Expert (i.e. by Super-imposition) before the invocation or consideration of the “Doctrine of Priority” - as to dates of approval thus the proof by plaintiff through his Expert Surveyor - 20 Super imposition Exhibit 8 with Exhibits 1, 5 and 6 - plans of plaintiff was fundamental.

3. Whether the learned Justices of the Court of Appeal were justified in affirming the award of N500,000.00 damages for trespass; when there was no basis for the said award?” 25

The plaintiff who hereinafter will be referred to as the respondent for his own part, set out three issues in his brief of argument as arising in this appeal for determination.

These are -

“(1) Whether the learned Justices of the Court of Appeal were right 30 in affirming the judgment of the Benin High Court of 29th February, 1984 that on the evidence before the learned trial Judge, one could say that the Respondent proved title to the land and that the land allocated to the Respondent by Oba in Exhibit ‘2’ was the same as the land in dispute in this case. 35

(2) If the answer to issue one is in the affirmative, whether on the issue of priority of grant in respect of the same parcel of land under Bini Native Law and Custom, the Appellants’ case ought to be preferred to the Respondents’ case, who received the Oba’s approval of the 8th of December,

1970 against the Appellants' Oba's approval of 7th of October, 1972 and 12th of October, 1973.

(3) Whether the learned Justices of the Court of Appeal could have arrived at any other decision than the one arrived at in view of the overwhelming evidence in support of the Respondent's title, especially in the face of falsity of the 1st Appellant's title."

I have carefully examined the two sets of issues setout in the respective briefs of the Parties and it seems to me that the questions formulated in the appellants' brief of argument are more consistent with the issues raised in the grounds of appeal. I will therefore adopt the issues formulated by the appellants for my consideration of this appeal.

At the hearing of the appeal before us, learned counsel for the appellants, K.S. Okeaya-Inneh Esq., S.A.N. proffered oral arguments in further elucidation of the submissions contained in the appellants' written brief. He argued the first and second issues which are interrelated together.

The main thrust of the appellants' complaint on the first and second issues is that the respondent, as plaintiff before the trial court, failed to prove the identity of the land he claimed and that the 1st defendant/appellant's land shown in Exhibit 8 was within or formed part of the land in dispute as delineated in the respondent's plans Exhibits 1, 5 and 6. Learned counsel for the appellants pointed out that it is common ground that the parties obtained their title to the disputed land from the same Ward Plot committee and from the same grantor, namely, the Oba of Benin. He then stressed that failure by the respondent to establish that the piece or parcel of land claimed by the 1st appellant fell within or formed part and parcel of the larger area of land claimed by the said respondent is fatal to his claims. He contended that the respondent ought to have super-imposed the 1st appellant's plan, Exhibit 8, on his own Plans Exhibits 1, 5 or 6 to establish that the land claimed by the 1st appellant in Exhibit 8 is within Exhibit 6. He argued that unless it was established that the land claimed by the 1st appellant is within the land claimed by the respondent, a consideration of who had a better title to the land or the doctrine of priorities would not apply. He further contended that the respondent failed to prove strictly the allegation of forgery of the 1st appellant's title deed as pleaded in paragraphs 12 & 14 of the amended statement of defence.

On the third issue which concerns the damages awarded, learned counsel submitted that there was no basis for the award of N500,000.00 or any damage at all to the respondent as there was no positive evidence of acts of trespass to justify an award. He finally urged the court to allow this appeal and to set

aside the judgment of the Court of Appeal which wrongly affirmed the decision of the Benin High Court and to dismiss the respondent's claims in their entirety.

Learned counsel for the respondent, M. O. Oguntona (Miss), in her reply, referred to paragraph 13 of the amended Statement of Defence and pointed out that the land in dispute is clearly known to the parties. She argued that the respondent having tendered the Survey Plan of the land in dispute, the onus was on the appellants to establish that the land claimed by the 1st appellant did not fall within the land in dispute. She submitted that there was ample evidence accepted by the trial court which left no doubt on the identity and certainty of the land in dispute. It was then further argued in the respondent's brief that the Survey Plan of the land in dispute having been produced by the said respondent, the onus was on the 1st appellant to satisfy the court whether by way of super-imposition of plans or otherwise that the land claimed by him did not fall within the land in dispute. It was submitted that both parties obtained their grants of the same land from a common source and that what mattered was who had better title thereto. It was then contended on the evidence that what mattered was who had a better title to the land in dispute. The court was urged to uphold the concurrent findings of both the trial court and the Court of Appeal to the effect that the respondent had a better title to the land in dispute.

On the issue of forgery, it was pointed out that the case was not decided on forgery but on the superior title of the respondent. The court's attention was also drawn to the fact that the quantum of damages for trespass awarded to the respondent was N500.00 and not N500,000.00 as was erroneously indicated on the printed record. Learned respondent's counsel urged the court to dismiss this appeal.

In line with the presentation of the arguments of learned appellants' counsel in this appeal, I propose also to consider issues one and two together. These deal with the identity of the land in dispute and whether or not the land claimed by the 1st appellant was established to form part or portion of the land in dispute.

It cannot be over-emphasized that before a declaration of title should be granted, the area of land to which it relates must be ascertained with certainty and precision, the test being whether a surveyor can from the record produce an accurate plan of such land. See *Kwado v. Adjei* (1944) 10 WACA 274; *Udekwu Amata v. Modekwe* 14 WACA 580 and *Ezeokeke v. Umunocha Uga and Ors* (1962) 1 All NLR (Pt. 3) 482. Similarly for an injunction in respect of land to be granted, it must be tied to a plan or an identifiable area but must be refused if the area to which it relates is vague or uncertain: See *Suebere v.*

Ekparam 4 WACA 150; Jemiegbe Ifie and Ors v. Cedi and Ors (1965) NMLR 457. The onus lies on a plaintiff who seeks a declaration of title or an injunction in respect of land to show clearly the area of land to which his claim relates. This onus, the plaintiff can discharge by such oral description of the land that any surveyor, as I have already indicated, acting on such a description could produce a plan of the land in dispute. See Baruwa v. Ogunshola (1938) 4 WACA 159; Olusanmi v. Oshasona (1992) 6 NWLR (Pt. 245) 22 at 29; Agbonifo v. Aiwereoba (1988) 1 NWLR (Pt. 70) 325; Onwuka v. Ediala (1989) 1 NWLR (Pt. 96) 182; Awote v. Owodunni (No.2) (1987) 2 NWLR (Pt. 57) 366 at 371 and Udeze v. Chidebe (1990) 1 NWLR (Pt. 125) 141.

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Apart from proof by oral description as aforesaid, a more common and perhaps a better and more satisfactory method of proving, the identity and extent of land claimed is by filing a Survey plan reflecting all the features of the land in dispute and showing clearly all its boundaries. See Udofia v. Afia (1940) 6 WACA 216; Okorie v. Udom (1960) SCNLR 326 and Olusanmi v. Oshasona, supra. Indeed, in Alhaji Jubrilla Aromire v. Awoyemi (1972) 2 S.C. 1; (1972) 1 All NLR (Pt.1) 101. This court on this issue of identity of the land in dispute pronounced as follows:

20 *"We are not impressed by the distinctions which are sought to be thereby introduced for very often among the members of the community concerned, the same place bears different names and it is only fair to rest identification of places on plans produced in the case ..."*

(italics supplied)

25 Having said all these, it is relevant to mention that following the order for pleadings in the suit, the plaintiff/respondent filed his survey plan No. CS10/43, Exhibit 6. Exhibit 6 shows the entire land that was granted to him by the Oba of Benin on the recommendation of the elders of Isiohor village (Ward 11k) and is therein verged green. Part of the said land granted to the respondent which is the subject matter of this action is also shown verged pink on the said plan, Exhibit 6.

30 It ought to be stated that although three survey plans, to wit, Exhibits 1, 5 and 6 were tendered by the respondent at the hearing before the trial court, it is clear from the evidence that they are all plans of the same piece or parcel of land said to have been granted to the respondent per Exhibit 2. The trial court so found. Indeed each and everyone of these Exhibits shows the four survey beacons which demarcate the entire land granted to the respondent. These survey beacons are numbered as MQ 4383, MQ 4384, MQ 4385 and MQ 4378.

The first survey plan, Exhibit 1, was carried out in the name of one

land, now in dispute. is allotted only to the 1st defendant and NOT to the plaintiff: they would therefore contend that the age of plaintiff's Application is irrelevant to the issue before the Court.

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16. The defendants deny paragraphs 15 and 16 of the Statement of Claim; and would at the hearing of this suit lead evidence to establish the fact that the 1st defendant acquired the parcels of land now in dispute in accordance with Bini Customary Land Law."

10 The only land in dispute in the present action is that claimed by the plaintiff/respondent shown in his Plan Exhibit 6 and therein verged pink. The appellants by paragraph 13 of their amended Statement of Defence denied paragraph 11 of the respondent's amended Statement of Claim and contended that they would at the trial "lead evidence to show that the land, now in
15 dispute was allotted only to the 1st defendant and NOT to the plaintiff." Similarly, by paragraph 16 of the appellants' amended Statement of Defence, they denied paragraphs 15 and 16 of the respondent's amended Statement of Claim but claimed that they would lead evidence to establish that the 1st
20 defendant acquired "the land now in dispute" in accordance with Bini Customary Land Law. As pointed out, the only land in dispute in this case is that claimed by the respondent which each side lays claim to. The disputed land is clearly known to both sides and it seems to me too late in the day now for the appellants to deny knowledge of the identity of the land.

Still on the identity of the land in dispute, there is yet the evidence of
25 D.W. 2 Otasowie Osaikhuiwu, the licensed Surveyor who produced the 1st appellant's Plan, Exhibit 8, on his instructions. This witness testified as follows -

"I know the land in dispute. The 1st defendant took me to the land in dispute, he showed me the parcel of land and I surveyed it..... .."

30 *I carried out the survey and produced a Plan..... This is the Plan No. OSA/1517/BD83 tendered and marked as Exhibit 8"*

The first significant observation one must make is that D.W.2 produced Exhibit 8 on the instructions of the 1st appellant who himself admitted this fact in his evidence before the court. I will return to Exhibit 8 later in this
35 judgment. It is now convenient to dispose of the question whether the land claimed by the 1st appellant in Exhibit 8 was established to be the same as or forms any part of the respondent's land in dispute as shown in the Plan Exhibit
6.

In this connection learned Counsel for the appellants argued with

considerable force that failure by the respondent to super-impose the 1st appellant's Plan on Exhibit 6 to establish that the land claimed by the 1st appellant was part of the land in dispute is fatal to the respondent's claims. With profound respect to the learned Senior Advocate, I am unable to accept that this submission has any merit. In the first place, the learned trial Judge in his well considered judgment found as a fact that both the appellants and the respondent were talking about the same piece or parcel of land which is the land in dispute. He also found that the parties were fighting over the same piece or parcel of land and that the land in dispute is part of the piece of land granted to the respondent by the Oba of Benin per Exhibit 2. Said the learned trial Judge -

"The land allocated to the plaintiff, that is 600' x 1000' can be traced on the ground. The Plot Allotment Committee beacons are shown, and the land is described with reference to Dr. Ogbemudia's plot in Isiohor village that is, Palm Royal Hotel. It is known that plaintiff's land is on the left of this hotel and on the right of Bendel Development and Property Authority Housing Estate backing Benin-Lagos road. P.W.1 and P.W.5 both surveyors have been to this land with Exhibit 2 and their description and location of the said land tally with the above. It was only the 5th defendant, 2nd defendant and D.W.1 that described plaintiff's land with reference to School of Supply and Transport. There is evidence that plaintiff has other plots at Isiohor village and I am of the opinion that the description is not correct, 2nd defendant said that the plaintiff's land had the same boundary with Dr. Ogbemudia, that in effect was Palm Royal Hotel. He was right"

He then went on -

"The reasons why I believe that the plaintiff and 1st defendant are talking about the same piece of land as the land in dispute are:-

(1) the plaintiff said that in February, 1982 he found 1st defendant on the land and that he had destroyed the survey beacons and the rubber trees;

(2) 1st defendant said in evidence that the plaintiff was claiming 200' x 200' and the first 400' x 400' allocated to him by the villagers;

(3) the villagers wrote Exhibit 3 in respect of the land in dispute to the plaintiff.

I take it that the parties are fighting over the same parcel of land even though the case of the plaintiff shows more clearly the land in dispute"

The same issues were contested on appeal and the court below in affirming the findings of the trial court per the lead judgment of Akpabio, J.C.A., concurred to by Ejiwunmi and Ogebe, JJ.C.A., had this to say -

"In the instant case the location and dimension of the land, as contained in

the Oba's approval, Exhibit 2, clearly agree with those of the land in dispute, namely that the land measures 600ft x 1000ft, and the land is also situate "on the left side of Colonel Ogbemudia's plot at Isiohor village"

A little later in their judgment, the Court of Appeal continued as follows-

However, that notwithstanding, it was the evidence of one Ivbarayi

5 William (P.W.1), the Licenced Surveyor who drew the first plan of Respondent (Exhibit 1) that:

"I saw the Ward beacons on the ground, they agreed with those in the approval. This, is a copy of the survey I produced. Survey No. WB 1145 tendered and marked as Exhibit 1."

10 The learned trial Judge rightly accepted the above evidence, and those of other two surveyors who testified in the same vein, to be satisfactory evidence that the land in the Oba's approval Exhibit 2, was the same as the land in dispute and I agree with him."

The above are concurrent findings of fact of both the trial court and
15 the Court of Appeal and this court will not disturb them unless there is established a miscarriage of justice or a violation of some principles of substantive law or procedure or a substantial error apparent on the face of the record of proceedings is shown or such findings are perverse or are not supported by evidence or were arrived at as a result of a wrong approach to the evidence or
20 a special circumstance is shown to warrant the interference of this court with such findings of fact. See Enang v. Adu (1981) 11- 12 S.C. 25 at 42; Nwadike v. Ibekwe (1987) 4 NWLR (Pt.67) 718; Igwego v. Ezeugo (1992) 6 NWLR (Pt.249) 561 at 576; Woluchem v. Gudi (1981) 5 S.C. 291 at 326; Ike v. Ugboaja (1993) 6 NWLR (Pt. 301) 539 at 569; Ibrahim v. Shagari (1983) 2 SCNLR 176 etc. etc.

25 None of these circumstances has been established in this case and I have no reason for disturbing any of the said findings which in my view are well founded and entirely sound.

It should be mentioned that it was also the contention of the appel-
30 lants that the land allocated to the respondent by the Oba of Benin in Exhibit 2 was in fact situate in an entirely different location along Isiohor - Egban Road at the site occupied by the Nigerian Army (Stores and Transport) Training School, Isiohor, and that it was the respondent who sold the land to the SNT. The respondent denied this allegation. The point here is that in civil
35 cases, the burden of proving a particular fact is on the party who asserts it. See Okuhule v. Oyagbola (1990) 4 NWLR (Pt.147) 723; Ike v. Ughoaja (1993) 6 NWLR (Pt. 301) 539 and UBN Ltd. v. Professor Albert Ozigi (1994) 3 NWLR (Pt. 333) 385 at 407. This onus however is not static but shifts from side to side as circumstances of a case warrant and the onus of adducing further evidence is

on the party who will fail if that evidence is not adduced. See *Nigerian Maritime Services Ltd. v. Afalahi* (1978) 2 SC 79 at 84; *Highgrade Maritime Services Ltd. v. FBN Ltd.* (1991) 1 NWLR (Pt. 167) 290. The appellants who asserted that the land allocated to the respondent was infact different from the land in dispute failed to establish what they pleaded and this is an additional blow to their defence. See too *Ogbenmwan Osawe v. Scotty Asuen* (1992) 4 NWLR (Pt. 235) 291 at 303. 5

There is, finally, on the two issues under consideration, the question of superimposition of plans raised by the learned counsel for the appellants. The first point that must be made is that on the particular facts of this case, there is no duty on the respondent to super-impose any plan on the other. The respondent having established the identity of the land he claimed in Exhibit 6, all that was left for him to establish on the main declaratory relief was proof of ownership of the land in dispute. The onus was rather on the appellants to satisfy the court, whether by super-imposition of plans or otherwise, that the land granted to the respondent by the Oba of Benin as alleged by the said appellants was situate elsewhere and different from the 1st appellant's piece of land. This, the appellants did not succeed in doing. 10 15

On the contrary, a visual perception of the appellants' plan, Exhibit 8 shows in no mistaken terms that one of the three pieces of land claimed by the 1st appellant and therein marked "Plot A" is the same piece or parcel of land claimed by the respondent in this suit. The land claimed by the 1st appellant in Exhibit 8 comprises of three contiguous plots of land marked Plots 'A', 'B' and 'C'. All three plots are altogether verged purple in Exhibit 8. Against the entire land verged purple is marked "Landed property of Mark Ugbo, 1st defendant". Within the said area verged purple is plot "A" which is more particularly verged yellow and described as "Portion of 1st defendant's land now being claimed by the plaintiff". It is therefore clear, as found by the courts below, that both parties were fighting over the same piece or parcel of land. I find it strange in these circumstances that the 1st appellant is able to contend that it was not established the land he claimed was within the land in dispute as claimed by the respondent. On the particular facts of this case, it does not appear to me that there is any necessity on the part of the respondent for any super-imposition of plans having regard to the state of the pleadings and the plans tendered. 20 25 30

I think it is necessary at the risk of repetition to observe that the land allocated to the respondent, on the concurrent findings of the two courts below, is the piece or parcel of land demarcated on Exhibit 6 with survey beacons numbers MQ 4383, MQ4384, MQ4385 and MQ4378. It is significant that all four pillars numbers MQ4383. MQ4384. MQ4385 and MQ 4378 are also 35

shown in the 1st appellant's plan Exhibit 8. It seems to me that anyone in the circumstance can see for himself that the parties are not only claiming the same piece or parcel of land but that the land marked Plot "A" claimed by the 1st appellant is completely within the land allocated to the respondent as found by the courts below and demarcated with the said four survey beacons which appear on both Exhibits 6 and 8.

It ought to be pointed out that neither the trial court nor the Court of Appeal made any super-imposition of plans as this exercise is not the duty of any court but must be left to qualified surveyors as experts to carry them out. All that the courts below, and indeed, this court did was to carry out a visual, as opposed to, an instrumental perception of the relevant plans tendered and admitted as Exhibits before the trial court. This exercise, the courts are entitled to do. See *Onwujuha v. Ohienu* (1991) 4 NWLR (Pt.183) 16 at 26 where this court Per Uwais, J.S.C., justified the position as follows -

"The word 'super-impose' means 'superpose on or upon or above something else', See the pocket Oxford Dictionary. In terms of Survey Plan only a qualified Surveyor as an expert can accurately super-impose one plan on another. But in the context of the aforementioned excerpt, the learned trial judge was concerned with a visual perception as opposed to instrumental perception expected of a surveyor when he compared the two plans. Surely he was entitled to do so in order to arrive at a logical conclusion on the identity of the land in dispute - See Yesufu Latinwo & Ors. v. Busari Ajao & Anor. (1973) 2 SC 99 at 109".

In my view, Exhibits 6 and 8 put the issues of the identity of the land in dispute and whether or not the land claimed by the 1st appellant was within the land in dispute at complete rest.

On the respondent's application Exhibit 2 for a grant of the land in dispute, the learned trial Judge stated:

'The Plaintiff applied to the Elders of Isiohor village Ward 11k for a piece of land measuring 600' x 1000'. P. W. 2 Omoruyi the secretary to the Ward and four others were sent to demarcate the land. Thereafter the plaintiff filed Exhibit 2 which was recommended to the Oba for approval by Elders. The Oba signified his approval on 8th December, 1970. Thus the plaintiff satisfied the Bini native law and custom of allocation of land.'

Then, on the 1st appellant's purported grant, Exhibit 9, he commented- Exhibit 9 was a similar application by 1st defendant to the Elders of Isiohor village for a piece of land measuring 200' x 200'. It received the Oba's approval. It seems that this 200' x 200' and another 400' x 400' granted to 1st defendant by the Oba of Benin is the land in dispute"

On the question of ownership of the land in dispute, the application of Bini Customary Law to the grants and the doctrine of priorities, the learned trial Judge commented as follows -

“Under Bini native law and custom there is no individual ownership of land in Benin: all lands are vested in the Oba and the people. Uwaghoa and another v. Evhuomwan: (1959) 4 FSC 91; (1959) SCNLR 229. In Benin City an applicant for land before 28th March, 1978 had to apply to the Plot Allotment Committee of the Ward where the land was situated. While in the villages for example, Isiohor, the applicant had to route his application orally or in writing through the Odionwere and elders of the village. In either case possessory title to land did not pass till the Oba of Benin signified his approval by signing and dating the application. In the case in hand the plaintiff and the 1st defendant passed through the formalities referred to above. Under Bini native law and custom where a Plot Allotment Committee of a Ward allocated one plot of land to two or more persons, the applicant whose approval has an earlier date gets the title provided he passed through the formalities of land allocation in Benin. Land which was previously allocated with the approval of the Oba of Benin cannot be subject of reallocation. Exhibit 2, plaintiff’s approval, bears 8th December, 1970 while Exhibits 9 and Exhibit 10 are dated 7th October, 1972 and 2nd October, 1973 respectively.....”

The approval of the plaintiff Exhibit 2 has an earlier date than Exhibits 9 and 10. Under Benin native law and custom the possessory title of the land in dispute is in the plaintiff’

The issue was also canvassed before the Court below which held thus:-

“.....it was conceded by learned counsel on both sides that there was no system of registration of titles under Bini native law and custom. That being the case, priority would definitely depend on the date of Oba’s approval..... On the totality of the foregoing, it appears that notwithstanding the partially accurate statement of the law of priority under Benin Customary Land Law, the learned trial Judge had accurately weighed the totality of the evidence adduced in favour of both parties in an imaginary scale of justice, as required by the Supreme Court in Mogaji v. Odofin (1978) 4 SC 91 and rightly came to the conclusion that the respondent proved a better title”

At law, as in equity, the basic principle is that estates and interests primarily rank in the order of creation. The maxim is Qui prior est tempore potior est jure which literally means that he who is earlier in time is stronger in law. See Barclays Bank Ltd. v. Bird (1954) Ch. 274 at 280. This principle however is applicable where the equities are equal.

The doctrine of priorities under Bini-Customary law has however been examined by this court in a number of cases such as Okeaya-Inneh v. Aguehor (1970) 1 All NLR 1 at 8; Aighe v. Edokpolo (1977) 2 SC 1; Awoyeghe v. Ogheide (1988) 1 NWLR (Pt. 73) 695 at 697 -701; Arase v. Arase (1981) 5 SC 33; Atiti Gold v. Osaseren (1970) 1 All NLR 132; Bello v. Magnus Eweka (1981) 1 SC 101 etc. In Awoegbe v. Ogbeide, supra, Craig, J.S.C., in the lead judgment of this court on the issue of the doctrine of priorities under Bini customary law pronounced as follows -

“When there is competing title to a piece of land, the question to be asked is who has made a better title and not who first obtained the Oba’s approval”

In his own contribution in the same case, Nnamani, J. S. C., after a review of most of the previous decisions on the issue held as follows -

“Where two allocations have been made by the same Ward Allocation Committee, the first one takes priority, if two separate plot allotment committees allocate a piece of land, the issue of priority does not arise. One person in the case of such a dispute will not get title just because he got the approval first”

Earlier on, in the case of Atiti Gold v. Beatrice Asareren, supra, Coker, J.S.C., had pronounced as follows -

“The question at all times was which of the parties had made a good title to the land and certainly not which of them first obtained the Oba’s approval which according to the evidence, again rightly accepted by the learned Chief Justice, was but a single though culminating step in a whole chain of events and conditions to be strictly fulfilled by a prospective purchaser”

It therefore seems to me well settled that when there is competing title to a piece or parcel of land under Bini customary law or where two allocations have been made by the same Ward Allocation Committee, such as is the case in the present suit, the question to be asked is which of the parties had established a better title to the land and not necessarily who first obtained the aba’s approval. It would however still be right, in my view, to state that where all the equities surrounding such two allocations are equal, then, obviously, the first in time must take priority.

In the present case, the 1st appellant and the respondent were found by both courts below to have complied with the necessary formalities connected with the acquisition of the piece of land in dispute. The respondent’s approval, Exhibit 2, bears the date 8th December, 1970 whilst the 1st appellant’s approvals, Exhibits 9 and 10 are dated the 7th October, 1972 and 2nd October, 1973 respectively. The applications were all recommended to the Oba of Benin

for approval by the same Ward 11k Elders. It seems to me clear and I endorse the findings of both courts below that the respondents grant, Exhibit 2, is superior to the 1st appellant's grants, Exhibits 9 and 10.

On the issue of the forgery of Exhibit 10 pleaded in paragraphs 12 and 14 of the respondent's amended Statement of Claim, the law is well settled that although it is true that in civil cases, the preponderance of probability may constitute sufficient ground for a verdict, this general rule is subject to the statutory proposition in Section 137(1) of the Evidence Act to the effect that 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. 10

See Okwuarume v. Ohahokor (1966) NMLR 47; Benson Ikoku v. Enoch Oli (1962) All NLR 194; (1962) 1 SCNLR 307; Nwohodo v. Onoh (1984) 1 SCNLR 1 and Anyah v. ANN Ltd. (1992) 6 NWLR (Pt. 247) 319 at 333. In the present case, however, neither the learned trial Judge nor the court below decided the issues between the parties on the basis of forgery but on the superior title of the respondent. In my view, this is sufficient to dispose of the issue of forgery raised by the appellants in this appeal. 15

There is finally issue number three in respect of which the appellants complained that the Court of Appeal was in error in affirming the award of N500,000.00 damages for trespass to the respondent when there was no basis for such an award. Before us, it was satisfactorily explained by learned counsel for the respondent that the award in respect of damages for trespass was in fact N500.00 and not N500,000.00 as erroneously reflected in the printed record. There was evidence before the trial court that the 1st appellant without justification entered upon and cleared the land in dispute and destroyed the respondent's Survey beacons and rubber trees thereon. This is definite evidence of trespass on the facts found by the courts below. This is because it has long been settled that where two parties are in a field claiming possession, the possession being disputed, as in the present case, trespass will lie at the suit of the one who can show that the title is in him. See Awoonor Renner v. Daboh 2WACA 258 at 259 and 263; Lows v. Telford (1876) 1 AC 412 at 426 and Umeobi V. Otukoya (1978) 4 SC 33. The respondent having established his title to and legal possession of the land in dispute was therefore entitled to maintain his action in trespass against the appellants. The N500.00 damages awarded to the respondent by trial Court cannot seriously be argued to be excessive and I must in the circumstance affirm the same. 20 25 30 35

For the reasons set out above, I have come to the irresistible conclusion that this appeal is totally devoid of substance.

Consequently it is hereby dismissed. The judgment of the trial court as affirmed by the Court of Appeal is hereby further affirmed. There will be costs to the respondent against the appellants which I assess and fix at N1,000.00k

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BELLO CJN

I read the judgment of my learned Brother, Iguh J.S.C. while in draft.

10 I adopt it as mine.

The main issues canvassed in the appeal dealt with two concurrent findings of facts by the trial court and the Court of Appeal on the identity of the land in dispute and priority of grants by the Oba of Benin under the Benin Native Law and custom. The trial court found the identity of the land was
15 clearly established by the survey plan Exhibit 6, and the land had been granted to the respondent by the Oba of Benin on 8th December, 1970 and thereafter parcels of the same land were granted to the Appellant on 7th October, 1972 and 2nd October, 1973. The court found that the grant to the Respondent had priority and awarded the land to him. The Court of Appeal affirmed the deci-
20 sion.

The question of priority of grants under Benin Native Law and Customs has been settled. Where there are two competing grants both made in good faith in accordance with the procedure for the allocation of land under the Benin Native Law and Customs, the earlier grant as is the case in all other
25 civilised laws takes priority over the latter grant. *Okeaya-Inneh v. Aguebor* (1970) 1 All NLR at 8; *Aigbe v. Edokpolo* (1977) 2 SC 1; *Awoyegbe v. Ogbeide* (1988) 1 NWLR (Pt. 73) 695 at 697 - 701, *Arase v. Arose* (1981) 33; *Atiti Gold v. Osaseren* (1970) 1 All NLR 132; *Bello v. Magnus Eweka* (1981) 1 S. C. 101 etc. The decision of the court below cannot therefore be faulted.

30 Accordingly, I too dismiss the appeal but reduce the award of damages to N500.00.

UWAIS JSC

35 I have had the opportunity of reading in draft the judgment read by my learned brother, Iguh, J.S.C. I agree that this appeal lacks merit and that it should be dismissed. The appeal is hereby dismissed with costs in favour of the respondent as assessed in the said judgment.

OGWUEGBU JSC

I have had the opportunity of reading in draft the judgment just read by my learned Brother, Iguh J.S.C. I agree that the appeal has no merit.

The identity of the land was not in dispute and the learned trial judge after comparing the survey plans tendered by both parties, found that the dispute was over the same parcel of land which was more clearly shown in the plaintiff/respondent's survey plans and verged yellow in Exhibit "8" filed by the 1st appellant.

I hereby dismiss the appeal. I affirm the decisions of the courts below and abide by the order for costs as contained in the lead judgment of my learned brother, Iguh J.S.C.

ONU JSC

Having had the privilege of a preview of the judgment of my learned brother, Iguh, J.S.C., just read in draft form, I entirely agree with his reasoning and conclusion. I adopt the same as mine with nothing further to add thereto.