

SUPREME COURT OF NIGERIA
14TH OCTOBER, 1994. SC. 10/1989
CORAM:- S. M. A. BELGORE, A. B. WALI,
M. E. OGUNDARE, S. U. ONU, A. I. IGUH, JJSC.

AGWAM OBIOHA & 5 OTHERS

(For themselves and on behalf
of the people of Umueke
Owerri Nkwoji)

..... APPELLANTS

AND

CHIEF NWOFOR DURU & 3 OTHERS

(For themselves and
on behalf of Umuchioke Amaigbo)

..... RESPONDENTS

APPEALS - Leave of court - Where not obtained in respect of an additional ground - That ground will be struck out as incompetent.

LAND LAW - Conflicts in traditional histories - Duty of the trial judge - To determine which of the two histories is more probable.

LAND LAW - Traditional evidence - Where carefully evaluated - Whether trial judge's conclusion can be faulted.

LAND LAW - Traditional evidence of plaintiffs - Whether good in law - As confirmed by the Court of Appeal

LAND LAW - Trespass - Whether by acting in excess of the rights-granted to them - The appellants become trespassers.

FACTS

In the high court of Imo State Holden at Nkwere, the respondents as plaintiffs instituted an action against the appellants. Respondents claimed title to the land in dispute, damages for trespass and perpetual injunction. In contending that they were owners of the land, they stated how the land devolved on them by inheritance from their great ancestor and other ancestors. The plaintiffs averred at part of the land on which the defendants/appeal

lants now live was donated to them by plaintiffs' ancestors. The cause of the plaintiffs action was when the defendants planted types of trees which they were not permitted to plant on the land in dispute and cleared part of it preparatory to building a house. The defendants on their part, claimed ownership of the land in dispute from time immemorial through their ancestors. They admitted some of the plaintiffs' assertions and sought to explain others away.

The trial court found conflicts in defendants' traditional history, held they were not probable and gave judgment in favour of the plaintiffs. The defendants' appeal to the Court of Appeal was dismissed. Being dissatisfied the defendants have further appealed to the Supreme Court to determine inter alia, whether the Court of Appeal was right in not finding that the trial judge did not properly direct himself on the proper approach to be adopted in law where there are conflicts in the traditional evidence adduced by the parties in an action for declaration of title.

HELD (Unanimously dismissing the appeal per lead judgment of **ONU JSC**)
Conflicts in traditional histories - Duty of trial judge

1. It is not the law that once there are conflicts in the traditional histories, given by the two parties in a suit the trial Judge must promptly declare them inconclusive and thereupon proceed to consider recent acts. The trial Judge has a duty to find which of the two histories is more probable by testing it against other evidence in the case. It is when he can neither find any of the two histories probable nor conclusive that he would declare both inconclusive and proceed to decide the case on the basis of numerous and positive acts of possession and ownership. (P.250 L17)

Traditional evidence carefully evaluated

2. As in the case in hand, the learned trial Judge; in my view, appreciated the nature of the traditional evidence, had carefully evaluated it, made deductions thereof and gave reasons for arriving at the conclusion he did, he cannot, in my view, be faulted. (P.253 L34)

Traditional evidence - Whether good in Law

3. Thus, the traditional evidence adduced in the instant case is not only good in law but the confirmation of same by the court below, in my view, cannot be faulted. (P.256 L9)

Leave of court - Where not obtained

4. It is enough here to say that leave not having been specifically sought or

obtained by the Defendants to canvass Additional ground 5 as a fresh point, issue 2 from which it is formulated is not properly before this Court. This Court has held in a number of cases. That in order to urge issues or matters which were not urged in the court below, one has to apply specifically for leave to do so. The same not having been done in the instant case, Additional Ground 5 is incompetent and it is accordingly struck out. With Additional Ground 5 struck out, the argument on issue 2 is rendered inept and of no avail to the Defendants. (P.257 L8)

Trespass - Acting in excess of right granted

5. The question then is, had the Defendants by their act of planting permanent crops and even attempting to build a house on the land in dispute acted in excess of their rights and became trespassers? This issue is accordingly answered in the affirmative. (P.259 L16)

NOTABLE POINTS OF INTEREST

ONU JSC

1. Heavy reliance on Demeanour of witnesses

The approach adopted by the learned trial Judge above would seem to me perfectly in accordance with the law, notwithstanding the Defendants' complaint that he relied heavily on the demeanour of witnesses in arriving at his conclusion on the conflicting traditional history. That this is so, finds support in its confirmation by the court below, which after a dispassionate review and consideration, confirmed the same. (P.253 L5)

OGUNDARE JSC

2. When Kojo v. Bonsie principle will be applicable

This approach to a resolution of conflicting traditional histories is, in my respectful view, applicable where both histories are plausible and capable of credibility. Where however, as in the case on hand the traditional history put out by one of the parties is so intrinsically conflicting that a reasonable tribunal would not place credence on it, there is no room for the application I of the approach. (P.261 L29)

3. *Whether Defendants were trespassers*

On the evidence, the defendants having exceeded the permission given their by the Plaintiffs, they became trespassers and were rightly condemned it damages by the learned trial Judge.

5 **IGUHJSC**

4. *Decision fully supported by ample evidence*

There can be no doubt that the learned trial judge in the present case appreciated the nature of the traditional evidence led before the court. This he
 10 carefully weighed and evaluated together with various other issues of fact. He also proceeded to test the said traditional evidence with establish facts and acts in recent years over the land in dispute. This exercise he meticulously conducted giving cogent reasons for arriving at the conclusion that the land
 15 in dispute is the property of the respondents. His decision is fully supported by ample evidence before the trial court and was also rightly affirmed by the court below. I find myself unable to identify any reason upon which to disturb the same.

REPRESENTATION

20 Miss O. Dada for the Appellants.
 P.U. Nnoli holding Chike Ofodile SAN’S brief for the Respondents.

CASES REFERRED TO

- Kojo II v. Bonsie (1957) 1 WLR 1223
- 25 Aikhionbare v. Omoregie (1976) 12 SCI
- Udeze v. Chidebe (1990) 1 NWLR (Pt.125) 141
- Agedegudu v. Ajenifuja (1963) 1 All NLR 109
- Alade v. Lawrence Awo (1975) 4 SC 215
- Ekpo v. Ita (1932) 11 NLR 68
- 30 Lawal v. Dawodu (1972) 8 - 9 SC 83
- Mogaji v. Cadbury (Nig) Ltd. (1985) 2 NWLR (Pt.7) 593
- Ogbuokwelu v. Umeanafunkwa (1994) 4 NWLR (Pt.341) 676
- Kalio v. Woluchem (1985) 1 NWLR (Pt.4) 610
- Fasoro v. Beyioku (1988) 2 NWLR (Pt.76) 263
- 35 Iga v. Amakiri (1976) 11 SC 11
- Sosan v. Ademuyiwa (1986) 3 NWLR (Pt. 27) 241
- Ajuwon v. Adeoti (1990) 2 NWLR (Pt.132) 271
- A-G Bendel State v. Aiyedun (1988) 5 NWLR (Pt.118) 646
- Hillen & Pettigrew v. I.C.I. (Alkali) Ltd (1936) AG 65

Hickman v. Maisey (1900) 1QB 752

Okagbue v. Romaine (1982) 5 SC 133

LEAD JUDGMENT BY ONU JSC

This is an appeal against the decision of the Court of Appeal sitting in Enugu wherein that Court (per Nnaemeka-Agu, J.C.A. as he then was, 5 Maidama, J.C.A. and Babalakin, J.C.A. as he then was) on 15th September, 1987 dismissed the appeal of the Appellants who were defendants in the High Court of Imo State (per Johnson, J.) holden at Nkwerre. The suit was commenced at the instance of the Respondents who as Plaintiffs claimed for a customary right of occupancy or title to a piece or parcel of land called ‘Mbara 10 Nwakwu Inuchioke’, damages for trespass and perpetual injunction. The case which was fought in representative capacities turned mainly on the traditional history of inheritance and possession. Pleadings were ordered, duly filed and exchanged by the parties. Before trial commenced, however, the Plaintiffs amended their statement of claim. 15

It is pertinent first to set out the relevant facts of the case which may briefly be summarized as follows:-

The Plaintiffs/Respondents (hereinafter in this judgment referred to simply as Plaintiffs) Who are from Umuchioke of Amaigbo, sued the Defendants/Appellants (hereinafter referred to as Defendants simpliciter) on behalf 20 of themselves and the people of Umueke Nkwerre Nkwoji, for a declaration that they are entitled to the customary right of occupancy over “*Mbara Nwakwu*” in Orlu judicial Division of the High Court of Imo State, N100.00 damages for trespass and perpetual injunction. Not only did the plaintiffs contend that they were the owners of the land in dispute but that it devolved 25 on them by inheritance from their great ancestor, one Chioke who was one of the many sons of Igbo, the founder of Amaigbo.

They further contend that Chioke had four children, namely, Duruji, Ndiumu, Agirisi and Chioke. That on the death of Chioke, the land descended on his four children and on the death of the four children the 3 present plain- 30 tiffs inherited the land and that they have been in possession of the land without any disturbance from any quarter.

It is the plaintiffs’ further contention that part of the land on which the Defendants now live was donated to their ancestors by their (plaintiffs’) 35 ancestors. They also claim that an ancient trench (Nkoro) on the eastern side of the land in dispute forms the boundary between the land donated to the ancestors of the Defendants and the rest of their extensive land now tres-

passed upon by the Defendants, adding that the Defendants completed their last act of trespass when they not only planted semi-permanent trees such as coconut in place of vegetables and cassava, they had in the past permitted them to grow especially their wives who were their (plaintiffs') daughters to plant thereon, but erected a living house near the trench.

5 The Defendants for their part, claimed that the said "*Mbara Nwakwu*" land in dispute belonged to them from time immemorial, having been first occupied by their ancestor, Ezealaodu. That on the death of Ezealaodu, he was succeeded by his sons Okeaka, Ahamonu, Onyemekwe, Egeonu, Esibemi, Obioha, Nnajuba, Chukwendu, Chukwukere, Nwokolo and Uzoho. That each
10 of these ancestors of theirs owned, occupied, possessed and enjoyed the land in dispute without any interference from the Plaintiffs or anyone else. They claimed to share a boundary with the Plaintiffs on the Western side and that this boundary is marked by a footpath that passed the land in dispute linking Eziam and Nkwerre though denying that it was widened into a
15 motorable road with the permission of the Plaintiffs.

The Defendants further denied the Plaintiffs' averment that they farm on the land in dispute with the latter's permission but however admitted that the cause of action arose when they (Defendants) felled some economic trees and cleared part of the land preparatory to building on part of the land in dispute.
20 They also agreed with the Plaintiffs that there was an Ogirisi tree on the Western Boundary of the land in dispute but asserted that it was a ritual tree where the two villages of Umuchioke and Umueke took traditional Ibo oath of peace and harmony known as 'Igbandu'.

The Defendants not only further claimed that the Plaintiffs owned land from
25 the Ogirisi tree to their village and that they (Defendants) owned land from the tree to Umueke Village but that the Plaintiffs destroyed the said Ogirisi tree in anticipation of this case.

Finally, they denied that the ancient trench (Nkoro) formed any boundary with the Plaintiffs; that the trench was used as a defensive measure in the
30 olden days to protect a village from outside attacks and that there are in fact three trenches between the Plaintiffs' and their (Defendants') village.

The learned trial judge in a considered judgment found for the Plaintiffs, as earlier alluded to while the Defendants' appeal to the Court below as also stated above, was unsuccessful. Being dissatisfied, the Defendants have
35 further appealed to this Court on three grounds contained in a Notice of Appeal dated 4th December, 1987; they were, however, on the 4th June, 1990 granted inter alia, leave to argue additional grounds of mixed law and fact.

Briefs of argument were tiled and exchanged by the parties in accordance with the rules of this Court. Three issues were formulated as arising for

our determination by the Defendants, viz:

1. *Whether the Court of Appeal was right, in law in confirming the judgment of the trial Court when the trial judge did not properly direct himself on the proper approach to be adopted in law where there are conflicts in the traditional evidence adduced by the parties in an action for declaration of title.* 5

2. *Whether the Court of Appeal was right in law in confirming the judgment of the trial Court which granted the Plaintiffs a Declaration of title to the land in dispute when the pleadings and evidence of traditional history of the Plaintiffs were incurably hollow and insufficient in law to support the grant of a declaration of title.* 10

3. *Whether the Court of Appeal was right in law in holding that the Appellants were liable as trespassers on the land in dispute by reason of the fact that they had started to use the land for purpose other than the one for which they were permitted to use it.* 15

The Plaintiffs proffered three similar issues for our determination which I do not consider necessary to set down here since they infact overlap those of the Defendant.

At the hearing of this appeal on 18th July, 1994 learned counsel on either side each adopted his brief of argument and rested his case without any further oral expatiation thereto. 20

I will now proceed to consider the issues seriatim as argued. Issue No.1 which is related to additional ground 4 is to the effect that, it having been clearly settled that where there is a conflict of traditional history, demeanour of the witnesses who testify on such traditional history is little guide to the truth and that the best way to resolve the conflict, is to test such history by reference to the facts in recent years as established by evidence and seeing which of the two conflicting histories is the more probable. Reliance was placed on the Privy Council case of KOJO II v. BONSIE (1957) 1 WLR 1223, followed by such other cases as OKIJI v. ADEJOBI (1960) 5 FSC 41, ADENLE v. OYEGBADE (1967) NMLR 136 and AIKHIONBARE v. OMOREGIE (1976) 12 S.C. 1. In applying the test laid down in KOJO II v. BONSIE (supra), it is argued, it becomes mandatory of the trial Judge faced with conflicting traditional histories, to show or state in his judgment on its face, that he had properly directed his mind before reaching the conclusion he arrives at or else he would either be guilty of a misdirection or non-direction. The cases of CHIDIAC v. LAGUDA (1964) NMLR 123 at 125 and UDEZE AND CHIDEBE (1990) 1 NWLR (Part 125) 141 at 162, were called in aid. After we were referred to several passages in the Record, it was submitted on Defendants' behalf that the learned trial Judge in this case having relied heavily on the demeanour 25 30 35

of the witnesses in coming to his conclusion on the conflicting traditional histories, the Court below ought not to have affirmed his decision since there was a non-direction or misdirection on his part as to the correct test to be adopted.

5 The applicable principles as eloquently stated by Lord Denning, inter alia in KOJO II v. BONSIE (supra) at page 1226 is:-

“Witnesses of the utmost veracity may speak honestly but erroneously as to what took place a hundred years or more ago. Where there is a conflict of traditional history, one side or the other must be mistaken, yet both may be honest in their belief. In such a case demeanour is little guide to the truth. The best way is to test the traditional history by reference to the facts in recent, years as established by evidence and by seeing which of two competing histories is the more probable.”

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 In the instant case, the learned trial Judge found as a fact that the traditional histories of the Plaintiffs and Defendants as to ownership of the land in dispute were conflicting. It is not the law that once, there are conflicts in the traditional histories, given by the two parties in a suit the trial Judge must promptly declare them inconclusive and thereupon proceed to consider recent acts. What indeed happens, and that is why the principle in KOJO II v. BONSIE (supra) was enunciated, is that the case itself being one fought on hearsay upon hearsay, the trial Judge has a duty to find which of the two histories is more probable by testing it against other evidence in the case. It is when he can neither find any of the two histories probable nor conclusive (see SUNMONU AGEDEGUDU v. SANNAJENIFUKA & ORS (1963) 1 ALL N. L. R. 109) that he would declare both inconclusive (See OYIBO IRIRI v. ESERORAYE ERHURHOBARA & ANOR. (1991) 2 NWLR (Part 173) 252; P.M. ALADE v. LAWRENCE AWO (1975) 4 S.C. 215) and proceed to decide the case on the basis of numerous and positive acts of possession and ownership - see EKPO v. ITA (1932) 11 NLR 68; CHIEF ALHAJI K.O.S. ARE & ANOR. v. RAJI IPAYE & ORS, (1990) 2 NWLR (Part 132) 298 and CHIEF OYELAKIN BALOGUN & ORS. V. OLADOSU AKANJI & ANOR. (1988) 1 NWLR (Part 70) 301.

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 Indeed, in the case of Y.A. LAWAL V. CHIEF YAKUBU DAWODU & ANOR. (1972) 8/9 S.C. 83, this Court put it succinctly thus:

35 *“In a case of declaration of title to land the onus is on the plaintiff to prove by traditional evidence or actual acts of possession or both, that he is the owner of the Land in dispute. If the evidence of tradition failed and indeed if it is proposed to test the probability of such traditional evidence, recourse must be had to the evidence of actual user and possession of the*

land in dispute.“

See also MOGAJI V. CADBURY (NIGERIA) LTD. (1985) 2 NWLR (Part 7) 593 and KASALI V. LAWAL (1986) 3 NWLR (Part 28) 305.

Now, it is the contention of the Defendants in their Brief in which they demonstrated from several passages in the Record, that not only did the learned trial Judge rely on the demeanour of the witnesses but rather went ahead to engage in the evaluation of those witnesses’ evidence wherein the use of such hackney words as I believe’, ‘I am satisfied’ had been applied in coming to his conclusion on the conflicting traditional evidence.

It is true that the learned trial Judge employed such words in the following passages after evaluating the evidence and making deductions thus: 10

Plaintiffs maintained that after marking out the area given to defendants to settle, it was later separated by an ancient trench (Nkoro) from a vacant parcel of farm land whose ownership and possession was still retained by the ancestors of the plaintiffs, as inherited by present plaintiffs. In other words, the trench, became boundary between the area of land given out and the area of land not given out - the farmland. Both parties agreed that this trench was indeed ancient in origin. This story appears more probable and I strongly believe him. I am satisfied on the facts that it is the ancient trench, not the footpath, that forms the boundary between both parties” 15
“I must say that 1st Plaintiff impressed me as a witness of truth.” 20

“With regard to item 5, I believe the evidence that Defendants and their wives cultivate the land by the authority of the Plaintiffs. “
and finally that -

“Lastly, on item 8, I noticed that the Plaintiffs’ claim to ownership of the Ogirishi juju tree on the land was never challenged by Defendants. The Defendants conceded this to Plaintiffs in paragraph 7 of their statement of defence. Rather, what the Defendants were saying were ‘that the Ogirishi Shrine was the venue of igbandu ceremony’ - meaning peace making. I disbelieve this evidence. I believe the Plaintiffs that at the beginning of each farming season they usually perform certain sacrifice at the shrine, thus appealing to their gods for peaceful farming and for rich harvest. This story is more consistent with truth. “ 25
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(The underlining above is mine).

Furthermore, from the pleadings of both parties, the evidence led in support thereof and the clear portrayal that their traditional histories or evidence were in conflict, the approach adopted by the learned trial Judge borne out in the following findings in his judgment becomes self-evident. In the first excerpt he found as follows:- 35

“In cross-examination, 6th defendant admitted that the cause of the

dispute was the clearing of the bush, cutting down the trees on part of the land in preparation for a building. He admitted that before this case, both sides have been living peacefully. That since his life time, history has never recorded any war being fought between the people of both sides. This of course renders the story about the use of Ogirisihi tree for “IGBANDU” ceremony and for prevention of enemy infiltrators in times of war very doubtful. It contradicts the 6th Defendant when he said:- “I agree that Igbandu” is an act of peace making following a dispute”; yet he emphasized that there had never been a dispute between them and the plaintiffs.”

In the second excerpt he found -
 10 “At first he (D.W.1) said he had boundary with the plaintiffs. D.W.1 ridiculed himself when in answer to the question “who farms between him (i.e.) the four feet space and the land in dispute” he mentioned Oguenu, Amaraegbu and Ozumonye Obioha. It is difficult, if not impracticable, to see how these three men can cultivate conveniently an area measuring only four
 15 feet.”

Thirdly, the learned trial Judge went on to say that:-
 “Really, I observed that D.W.1 is the only boundary man as well as the only independent witness called by defendants. I am compelled to say that the evidence of this witness does not help in any respect the defence case. Rather
 20 his evidence favoured plaintiffs.”

Fourthly, in reviewing the evidence of D.W. 2, the learned trial Judge held:
 “That he was told by the defendants that the point at which the Ogirishi tree existed had been the place of sacrifice. I observed that this evidence contradicts the defendants’ who maintained that the Ogirishi tree was a place of
 25 Igbandu not sacrifice. Continuing D.W.2 stated that the widened foot-path passed the land of the plaintiffs to Eziam town. Here again, this evidence of D.W.2 contradicts the defendants and supports the plaintiff:”
 “that the widened foot path crossed the plaintiffs land linking the defendants village to Eziam town.”

30 Fifthly, the learned trial Judge observed thus:
 “It must be noted that earlier on the defendants had stated that plaintiffs destroyed the stump of the “Original” juju tree by pouring acid upon it; whereas in his evidence the D. W.2 said defendants told him during the inspection and survey of the land “that the plaintiffs destroyed it by burning” this is an obvious inconsistency.”

35 After setting down the issues which in his considered view were not in dispute between the parties and those he found to be in controversy between them. The learned trial Judge finally resolved all of them in Plaintiffs’ favour and proceeded to conclude as follows:-

“Having given very anxious consideration to the evidence on both sides: I found the evidence of traditional history by plaintiffs more probable.

It is straight forward and indeed more convincing and I have no difficulty in believing the plaintiffs”.

The approach adopted by the learned trial Judge above would seem to me perfectly in accordance with the law, notwithstanding the Defendants’ 5 complaint that he relied heavily on the demeanour of witnesses in arriving at his conclusion on the conflicting traditional history. That this is so, finds support in its confirmation by the court below, which after a dispassionate review and consideration, confirmed the same by holding as follows:-

“There is no doubt that the learned Trial Judge himself appreciates 10 the nature of traditional evidence hence he proceeded to test same with acts in recent years as is obvious from part of his judgment thus:”

Continuing in confirmation, the learned Justices further held:

“The learned Trial Judge carefully evaluated the evidence led, made deductions therefrom and gave reasons for such deductions. He did not 15 solely depend on the demeanour of the witnesses to arrive at his conclusions. There is nothing however inherently wrong with the use of such expressions as “I believe this” or “I believe that” or “I watched his demeanour and he impressed me as a witness of truth.” Where it can be shown, as in this 2 case, that the learned Trial Judge actually evaluated the evidence of the 20 witnesses who testified before him.”

A similar instance as in the case in hand arose in ALHAJI K.O.S. ARE & ANOR. v. RAJI IPAYE, & ORS. (supra), a case involving traditional evidence of grant where this Court (per Nnamani, JSC) at Page 312 of the 2 Report 25 said:

“No one can say that the Trial Judge’s acceptance of Salawu’s evidence was based just on his demeanour or the undesirable I believe. I believe. It was borne out of a recognition of the authority Salawu had in giving evidence on those matters - he was born and bred at Alase. He also gave detailed and unequivocal evidence about the parties and their ancestors. I agree with Mr. Adekola for the 2nd - 4th defendants that the Trial Judge cannot be faulted here.” 30

As in the case in hand, the learned trial Judge in my view appreciated the nature of the traditional evidence, had carefully evaluated it, made deductions thereof and gave reasons for arriving at the conclusion he did, he cannot, in 35 my view, be faulted. See OGBUOKWELU v. UMEANAFUNKWA (1994) 4 NWLR (Part 341) 676.

This issue is therefore resolved against the Defendants. In respect of Issue 2 which overlaps Additional ground 5, the gravamen of the

Defendants’ contention is that where a plaintiff is relying on traditional history or evidence of inheritance in proof of his title to the disputed land, he should plead and give evidence of facts relating to:-

(a) *How the land was founded;*

(b) *The persons who founded the land and exercised original acts of possession;*

(c) *The persons on whom the title in respect of the land devolved since its first founding.*

In addition, it is submitted that the traditional evidence of the plaintiffs is incurably hollow, as it failed to show how the land was founded by Chioke and the original acts of ownership and/or possession exercised on the land.

It is well to begin the answer to the question posed here by first adverting to paragraphs 3 and 4 of the Plaintiffs amended statement of claim which aver thus:

“3. *The plaintiffs are owners in possession of Mbara Nwakwu land, part of which is now in dispute. This land was inherited from their ancestor known as CHIOKE. CHIOKE was one of the many sons of Igbo, founder of Amaigbo. Like their ancestor before them the plaintiffs have at all relevant time performed acts of maximum ownership on their said land without interference from anyone.*”

“4. *Chioke had four children, namely:-*

DURUJI, NDIUMU, AGIRISI and OKWARAFOR On the death of children of Chioke their children the present plaintiffs continued to enjoy the land in common without let or hindrance. The first named plaintiff is from the line of Duruji, the second from the line of Ndiumu, the 3rd from the line of Agirisi while the fourth is from the line of Okwarafor.”

Giving evidence in support of the Plaintiffs’ traditional history set out above 1st Plaintiff said inter alia:

“*Our great ancestor was one Igbo. This Igbo begat Chioke, Chioke got four sons namely:- UMUDURUJI, NDIUMU, UMUDURUAGRISI and UMUOKWARAOFOR. The land in dispute descended from Chioke when he Chioke died, his four sons inherited the land in common. I am from Duruji line. The 2nd Plaintiff comes from Ndiumu. The 3rd Plaintiff comes from Umoduruagrissi while the 4th plaintiff is from umuokwarafor line*”.

Now, after evidence and addresses by counsel were concluded, the learned trial judge held inter alia:-

“*The Defendants have neither ownership nor possession of the land in dispute. The Plaintiffs’ evidence on traditional history and acts of ownership and possession, contained materials enough to entitle them to the exercise of court’s discretion in their favour.*

Consequently, I am satisfied that the Plaintiffs are entitled to the declaration and I accordingly grant it. “

In affirming the above conclusion of the learned trial Judge, the court below held thus:

“It is here obvious that the learned trial Judge did not base his judgment on traditional evidence alone. He also based it on acts of possession and ‘ownership which he found had been proved by the Respondents. “ 5

From the foregoing, I take the view that the guiding principle of law where a party relies on traditional history and acts of continuous exclusive possession has been satisfied. Compare W.P. DANIEL KALIO & ANOR v. ATHANASTUS OBI WOLUCHEM & ANOR (1985) 1 NWLR (Part 4) 610, 10 where this Court faced with, among others, the issue of whether a member of a family who sold land as his personal property with the knowledge and confirmation of a principal member of the family who also was paramount head of the Community to which the family belongs, can later in conjunction with other members of the family derogate from the sale on the ground that the land 15 is family land, when the other members of the family did not dispute the sale for over 14 years. It was there held, allowing the appeal inter alia, at pages 628-629 of the Report:

“Thus where title is derived by grant or inheritance, the traditional history or evidence of acts of continuous exclusive possession should be 20 given to justify the grant”

See also P.M. ALADE v. LAWRENCE AWO (supra) and PIARO v. TENALO & ORS. (1976) 12 S.C. 31, the latter in which this Court held that

“.... in such cases the pleading should aver facts relating to 25 the founding of the land in dispute; the persons who founded the land and exercised original acts of possession, and the person on whom the title in respect of the land was devolved since its first founding, as necessary for determination of the issue in what communal capacity the land was being held.” 30

As indeed pointed out by this Court in FASORO v. BEYIOKU (1988) 2 NWLR (Part 76) 263 at page 271:

“One cannot really talk of acts of ownership without first establishing that ownership. Where a party’s root of title is pleaded as say - a grant, or a sale or conquest etc. that root has to be established first, and any conse- 35 quential acts following therefrom can then properly qualify as acts of ownership. In other words, acts of ownership are done because of, and in pursuance to the ownership. Ownership form the quo warranto of these acts of as it gives legality to acts which would have otherwise been acts of trespass”.

As Oputa, J.S.C. went on to illustrate at pages 273-274 of the Report:

“I am in complete and total agreement that once radical title has been pleaded and proved, acts of ownership or possession resulting from such title, need no longer be considered for they are then non-issues. Conversely, where, as in this case the title pleaded had not been proved, there, also it will be unnecessary to consider acts of possession and the dictum in *EKPO v. Ira* (*supra*) for the acts there become no longer acts of possession but acts of trespass. *DA COSTA v. IKOMI* (1968) 1 All NLR 394.”

Thus, the traditional evidence adduced in the instant case is not only good in law but the confirmation of same by the court below, in my view, cannot be faulted. Should I be wrong in my conclusion above, I take the view that the Defendants by their conduct are estopped from disputing Plaintiffs’ title to the land. I shall illustrate this by referring to paragraphs 5 and 8 of the Plaintiffs’ amended statement of claim where they pleaded as follows:-

“5. About 1964 one late Ogueru and late Ubegbu Chukwukere of defendants’ village obtained permission from plaintiffs’ Chief or their young men to widen the footpath into a motorable road which passes through the land and now connects Ezlama and Nkwerre with the defendants’ village.”

“8. the plaintiffs and before them, their ancestor because of the good relations and particularly, because of many of their daughters married by the defendants’ people of Umueke Owerre Nkwoji, have from time to time permitted the defendants people’s wives to cultivate cassava and vegetables on area of this extensive land contiguous to the defendants’ village which lies just across the ancient Nkoro (Trench) boundary which separates the said land from the Umueke village of defendants .”

Not only did 1st Plaintiff, their star witness as well as D.W. 2 the Defendants’ Surveyor, testify in line with the above pleadings, the learned trial Judge accepted same while the court below confirmed it in the following words:

“It is true that the appellants were permitted to farm on the land but the farming leave or licence did not cover the planting of permanent crops.

As the above findings have not been challenged herein on appeal, the Defendants by their conduct are estopped from challenging the Plaintiffs’ title to the land in dispute. See sections 150 and 151 of the Evidence Act and the case of *JOE IGA & ORS. v. CHIEF EZEKIELAMAKIRI & ORS.* (1976) 11 S. C. at 12 - 13.

The plea of estoppel herein succeeds; it is a bar to proceedings by the Defendants. As evidence, it is conclusive; it forbids the court from going into the

merits of the case. See MRS G.R.A. SOSAN v. DR. M.B. ADEMUYWA (1986) 3 NWLR (Part 27) 241 at 246.

My consideration of this issue (Issue 2) above apart, learned counsel for the Plaintiffs has additionally raised an objection to the ground from which it is distilled i.e. Additional ground 5. It is that leave of this Court was neither sought nor obtained before raising it. Merely asking leave of Court to file 5 additional grounds of appeal, it is argued, does not automatically confer a party with the right to argue a fresh point without leave.

It is enough here to say that leave not having been specifically sought or obtained by the Defendants to canvass Additional ground 5 as a fresh point, issue 2 from which it is formulated is not properly before this Court. 10 This Court has held in a number of cases including AMUSA OPOOLAADIO v. THE STATE (1986) 2 NWLR (Part 24) 581 at 588 and ALHAJI LATIFU NUWON & ORS. v. MADAMALIMOTO ADEOTI (1990) 2 NWLR (Part 132) 271 at 283, 296, that in order to urge issues or matters which were not urged in the court below, one has to apply specifically for leave to do so. The same not 15 having been done in the instant case, Additional Ground 5 is incompetent and it is accordingly struck out. With Additional Ground 5 struck out, the argument on issue 2 is rendered inept and of no avail to the Defendants.

The Defendants' grouse in Issue 3, which relates to original ground 20 3 is whether the Court of Appeal was right in law in holding that they were liable as trespassers on the land in dispute by reason of the fact that they had started to use the land for purposes other than the one for which they were permitted to use it.

The Defendants have submitted that it is not trespass to use a piece of land 25 for a purpose other than for which the grant was made. They therefore contend that at best, such a change of use, could only ground an action for forfeiture but can never ground an action for trespass.

Now, in paragraphs 8, 9, and 10 of the Plaintiffs' amended Statement of Claim, along the lines of which they testified in the trial court, they averred 30 as follows:-

"8. The plaintiffs and before them, their ancestors because of the said good relations and particularly, because of many of their daughters married by the defendants' people of Umueke Owerre Nkwoji, have from time to time permitted the defendants' people's wives to cultivate cassava and 35 vegetable on areas of this extensive land contiguous to the defendants' village which lies just across the ancient Nkoro (Trench) boundary which separates the said land from the Umueke village of defendants."

"9. The said land is mainly open bush and grass land suitable

mainly for cassava and vegetable cultivation. The plaintiffs had in recent times noticed that defendants' wives and people cultivated anaemic plantain tubers on the areas allowed them by plaintiffs for seasonal cassava farming. The said plantains which are semi-permanent crops could not be properly cultivated on those areas in the ordinary course of good husbandry.

5 The presence of these unsuitable crops put the plaintiff in surprise. There were also attempts to cultivate inside the boundary trench in an effort to level and close it. Anaemic coconut trees, raffia palm seedlings and pineapple suckers which are unsuitable for this type of land (Ikpa or Ozara or grassland) have been unlawfully planted on the floor and around the trench
10 by the defendants' people without leave of the plaintiffs.

"10. Subsequent to the unusual cultivation of unsuitable crops such as the said plantains and attempts to farm and close the ancient Nkoro, the plaintiffs noticed that the area marked Red on the plaintiffs' plan had been cleared of economic trees thereon in preparation for erection of a house or
15 some such permanent structures."

In paragraphs 9, 10 and 11 of the Defendants' statement of defence they in gist admitted the following:-

(a) Having cassava, yam, pineapples etc on the land

(b) Having permanent economic crops thereon such as palm trees,
20 plantain etc. and

(c) Clearing the portion marked red in Plaintiffs' plan.

At the close of the cases of both parties, the learned trial judge in his judgment held, while commenting specifically on the testimony of 6th Defendant, inter alia, thus:

25 He said that prior to this dispute they never had any trouble over this land with the defendants. Incidentally, I must say that this piece of evidence agrees with plaintiffs' story that it is the attempt for the first time by the defendants to construct a structure of permanent character on the land that provoked this action.

30 The learned trial Judge went on to find as a fact that-

"It was in obedience to this injunction that the defendants had in the past consistently regarded the ancient trench as their boundary line. To establish this point, it is in evidence that from time immemorial the defendants had never erected a single building beyond the trench and inside the
35 land in dispute. This is further confirmed by the parties' survey plans Exhibit "A" and "B" which showed that the last houses of the defendants, such as those of Chikwem Uzoho, Nwaneri and John Maduagwu, stopped very close to the ancient trench on the defendants' side. As it is well known that because both parties have maintained the ancient trench as the boundary

line hence the defendants did not extend their houses to the land in dispute. This fact is borne out by the admission by defendants that it is their first attempt to erect a building inside this land that provoked this action

The above findings of the learned trial Judge were confirmed by the court below when it held as follows:-

"It is true that the appellants were permitted to farm on the land, but the farming leave or licence did not cover the planting of permanent crops or the building of houses thereon as the appellants attempts to do.

Once an invitee to premises uses the premises for the purpose other than for which he was invited he becomes in law, a trespasser.

There is evidence that the appellants have started to use the land in dispute for purpose other than the one for which they are permitted to use it, they there and then become trespassers and damages for trespass was rightly awarded against them."

The question then is, had the Defendants by their act of planting permanent crops and even attempting to build a house on the land in dispute acted in excess of their rights and became trespassers? Now, *"trespass to land consists of any unjustifiable intrusion by one person upon land in the possession of another,* "See Clerk and Lindell on Torts, 14th Edition, page 758, paragraph 1311. OGUNBIYI V.ADEWUNMI (1988)5 NWLR (part 59) 144 at 156 and A.G. BENDEL V.AIYEDUN (1988)5 NWLR (part 188)646.

See also HILLEN AND PETTIGREW V, I.C.I. (ALKALI) LIMITED (1936) A.C. 65 at pages 69-70 where Lord Atkin said:

"As Scrutton L.J. has pointedly said:

"When you invite a person into your house to use the staircase you do not invite him to slide down the banisters so far as he sets foot on so much of the premises as lie outside the invitation he is not an invitee but a trespasser, and his rights must be determined accordingly. In the present case the stevedores knew that they ought not to use the covered hatch in order to load cargo from it; for them for such a purpose it was out of bounds; they were trespassers."

See also HARRISON V. DUKE OF RUTLAND & ORS. (1893) Q.B. 142 at 152-153; HICKMAN V. MAISEY (1900) 1 Q.B. 759 and OKAGBUE V RO-MAINE (1982)5 SC. 133 at 148, a case whose circumstances are similar to those of the instant case wherein Idigbe, J.S.C. said as follows:-

It is my view that an invitee to premises is invited to use the premises for the purpose for which he is invited or permitted to be there, if he exceeds the area of invitation or permission he becomes, in law, a trespasser."

This issue is accordingly answered in the affirmative. In the result, this appeal lacks merit and it fails. It is accordingly dismissed by me. The decision of the Court of Appeal sitting in Enugu is hereby affirmed with N1,000.00 costs to the Plaintiffs.

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BELGORE JSC

I agree with the judgment of my learned brother Onu, J.S.C. that this appeal has no merit and it must fail. Learned trial judge whose judgment was upheld by Court of Appeal dispassionately reviewed the evidence and found
10 on all the facts available before him that the present respondent had better title. The principle in Ekpo vs Ita II NLR 68 that the onus is on the plaintiff in a claim to title to land to prove to the satisfaction of the Court his acts of possession giving rise to presumption of ownership have been numerous and positive. There are several decisions of this Court, over the years affirming
15 this principle including the Privy Council decision of Kodjo II vs Bonsie (1957) I WLR 1223. I find no reason to interfere with the decision of the Court of Appeal and I also dismiss this appeal and make the same consequential orders as in the judgment of Onu, J.S.C.

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WALI JSC

I have had the privilege of a preview of the lead judgment of my learned brother, Onu, JSC, just delivered. He has adequately dealt with all the issues raised and canvassed in this appeal, particularly the application of the principle enunciated in KOJO II V. BONSIE (1957) WLR 1223, as regards the
25 traditional evidence adduced by the plaintiffs/respondents. The learned trial judge had held and found as a fact that on both the traditional history and the evidence of acts of user and occupation, the plaintiffs/respondents had proved both. These findings have not been faulted and the Court of Appeal was right
30 to affirm them. I see no reason to interfere with the judgments of both the trial court and the Court of Appeal and I hereby also confirm them. The findings of fact made by the learned trial judge are unassailable.

Consequently, I too find no merit in this appeal and I hereby dismiss it, endorsing the order for costs contained in the lead judgment of my learned
35 brother, Onu JSC.

OGUNDARE JSC

I have had the advantage of a preview of the judgment of my learned brother Onu JSC just delivered. I agree with his conclusion that this appeal is lacking in merit.

The appeal is essentially against the concurrent findings of both the trial High Court and the Court of Appeal. The attitude of this Court in such a case is well known and it is that where there is sufficient evidence supporting concurrent findings of facts by lower courts, such findings should not be disturbed. See *Njoku v. Eme* (1973) 5SC,293; *Chinwendu v. Mbamali* (1980) 3/4sc.31; *Ibodo v. Enarofia* (1980) 5-7SC.42 and *Sobakin v. The State* (1981) 5 SC75. Such findings may however, be disturbed by this Court if there is some miscarriage of justice and violation of some principles of Law and practice or where there is a substantial error apparent on the record of proceedings. See *Ibodo v. Enarofia* (supra); *Enang v. Adu* (1981) 11-12 SC.25 I have examined the evidence on record and I am satisfied that the findings made by both the trial High Court and affirmed by the Court of Appeal are sufficiently supported by the evidence on record.

It is contended by the Appellants that the trial court failed to apply the approach laid down by the Privy Council, and followed in numerous cases in this country, in *Kojo II v. Bonsie* (1957) 1 WLR 1223, 1226, where Lord Denning stated:

“Witnesses of the utmost veracity may speak honestly but erroneously as to what took place a hundred years or more ago. Where there is a conflict of traditional history, one side or the other must be mistaken, yet both may be honest in their belief. In such a case demeanour is little guide to the truth. The best way is to test the traditional history by reference to the facts in recent years as established by evidence and by seeing which of two competing histories is the more probable.”

This approach to a resolution of conflicting traditional histories is, in my respectful view, applicable where both histories are plausible and capable of credibility. Where however, as in the case on hand the traditional history put out by one of the parties is so intrinsically conflicting that a reasonable tribunal would not place credence on it, there is no room for the application of the approach. Witnesses for the defence, as rightly found by the learned trial judge, contradicted each other on the traditional history relied on for the defence. The learned trial judge would be right, in my respectful view, in such a case to reject the traditional history relied on by the defence.

Similarly, where there is evidence adduced by one side supportive of the traditional history relied on by the other side, the trial judge would be right in accepting the latter traditional history. The learned trial judge, considered the evidence as to recent acts on the land in coming to his decision to accept
5 Plaintiffs' version of the traditional history. All these taken together, the complaint against his approach to the resolution of the conflicting traditional histories put forward by the parties cannot be sustained. The court below in my view, is right to affirm the findings of the trial judge.

It is also contended that as the Plaintiffs admitted that they put the
10 defendants on the land, the courts below are wrong in holding the defendants liable in trespass merely because they effected a change in the use of the land. The defendants contended that in such a case the proper action was one for forfeiture and not for damages for trespass. I do not agree with the defendants' contention. On the evidence, the defendants having exceeded the per-
15 mission given them by the Plaintiffs, they became trespassers and were rightly condemned in damages by the learned trial Judge. My learned brother Onu JSC has reviewed, in detail, the authorities on the point. I need not go over them again.

For the reasons I have given above and the fuller reasons in the
20 judgment of my learned brother, I too dismiss this appeal and affirm the judgment of the Court below with costs as assessed in the lead judgment.

IGUHJSC

I have had the advantage of reading in draft the judgment just delivered by my learned brother, Onu, J .S.C. I agree with the reasoning and conclusion therein and adopt the same as mine.

No doubt, where as ill the present case, there is a conflict of traditional history in respect of ownership of land in dispute, one side or the other might be mistaken, but honest in their belief. In such a situation, it is a recognised
30 principle of practice that the demeanour of the parties and/or their witnesses must be of little guide to the truth and that the best way of arriving at the truth of the matter is to test such traditional histories by reference to the facts in recent years as established by evidence and arriving at a decision as to which of the two competing histories is the more probable. See *Kojo II v. Bonsie*
35 (1957) I W.L.R.1223, *Okiji v. Adejobi* (1960) 5 FSC 41 and *Aikhionabara v. Omoregie* (1976) 12 SC 1.

There can be no doubt that the learned trial judge in the present case appreciated the nature of the traditional evidence led before the court. This he carefully weighed and evaluated together with various other issues of fact. He

also proceeded to test the said traditional evidence with established facts and acts in recent years over land in dispute. This exercise he meticulously conducted giving cogent reasons for arriving at the conclusion that the land in dispute is the property of the respondents. His decision is fully supported by ample evidence before the trial court and was also rightly affirmed by the court 5 below. I find myself unable to identify any reason upon which to disturb the same.

It is for the foregoing and the fuller reasons contained in the lead judgment of my learned brother, Onu, J S. C. that I agree that this appeal lacks merit and must be dismissed. I, too, hereby dismiss it and abide by the order 10 for costs contained in the lead judgment.

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