

SUPREME COURT OF NIGERIA
29TH APRIL, 1994. SC. 283/1989
CORAM:-M. L. UWAIS, O. OLATAWURA,
M. E. OGUNDARE, E. O. OGWUEGBU, ADIO, JJSC.

OLALERE IGE & ANOTHER DEFENDANTS/
APPELLANTS

AND

DAVID OYEKUNLE AKOJU PLAINTIFFS/
& 4 OTHERS (For themselves and on RESPONDENTS
behalf of Akoju Family)

APPEALS - Upholding of Findings - Land dispute - Court of Appeal's upholding of trial Court's judgment in plaintiffs' favour - Whether justifiable.

EVIDENCE - Conflict - Claim of title to land - Where a party's evidence on the issue of boundaries is contradictory - Whether any reliable tribunal will believe that party.

EVIDENCE - Pleadings - Land matters - Evidence on a fact that is not pleaded - Goes to no issue.

LAND LAW - Traditional evidence - Conflict therein - Plaintiffs held entitled to succeed on traditional evidence - Irrespective of appellants' allegation that the two lower courts failed to apply the Kojo II v. Bonsie principle.

LAND LAW - Title - Conflicting claim of ownership by the parties - Based on traditional history and acts of ownership - Plaintiff has the right to rely on either of the grounds to sustain his claim.

FACTS

The Plaintiffs/Respondents in a representative capacity filed an action against the Defendants/Appellants personally before the High Court. The Plaintiffs who claimed the land in dispute situate at Ibadan was their family land, sued for N10,000.00 general damages for trespass and injunction. The Defendants on their part claimed that the land in dispute was also their family land. Both parties relied on traditional evidence and various acts of ownership. It was part of the Plaintiffs' case that the Defendants' ancestor

was their customary tenant. The Defendants trespassed on the land in dispute which was not part of the area granted to them under the customary tenancy. The Defendants denied the claim and set up their traditional history of how the land in dispute belongs to them.

The trial court found in favour of the plaintiffs, granted the reliefs sought by them based on its being satisfied with their traditional evidence as supporting their first settlement on the land in dispute. The trial court also held that the Plaintiffs have established numerous and positive acts of ownership that show they are absolute owners of the land in dispute. The Defendants' appeal to the Court of Appeal was dismissed and the trial court's decision was upheld. Being dissatisfied, the Defendants have further appealed to the Supreme Court to determine inter alia, whether on the totality of the evidence, the judgment in favour of the Plaintiffs is justifiable. Defendants contended that the principle laid down in Kojo II v. Bonsie was not applied by the two lower courts. The said principle is to the effect that where there are conflicting traditional histories, reference should be made to facts in recent years in order to ascertain which of the two competing histories is more probable.

HELD (unanimously dismissing the appeal)

1. Where a party's evidence on issue of boundaries is conflicting and contradictory as in this case, no reliable tribunal will believe the party. (P.44 L 38)
2. Even if the principle of law stated in Kojo v. Bonsie (1957) 1 WLR 1223 applies, from the finding made by the learned trial Judge that the Plaintiffs proved their case, they are entitled to succeed even on traditional evidence. (P.46 L 11)
3. From the records, the trial Judge did not rely on traditional evidence in sustaining acts of possession and various acts of ownership. Moreover, a plaintiff in a declaration of title can rely on either traditional history or positive and numerous acts of ownership over a long period of time to sustain his claim. (P. 47 L 2)
4. On the issue of Appellants' allegation that the trial court failed to consider the evidence of 6th and 7th defence witnesses, it was not averred that the witnesses were caretakers. That a man farms on a piece of land is not the same thing as being a caretaker of that land and since this salient point was not pleaded, any evidence based on it went to no issue. (P. 47 L 7 & P. 47 L 33)
5. The Court of Appeal was right to have come to the conclusion of upholding the trial court's findings in favour of the Respondents as fully supported by

the evidence. And these concurrent findings of fact in favour of the Respondents can only be set aside if they are perverse. (P. 48 L 24)

NOTABLE POINTS OF INTEREST

OLATAWURAJSC

1. Demeanour of a witness

“While it is true that demeanour of a witness may not be a guide to the truth, the conclusions of a trial judge on how a witness behaved in the box should not be lightly disregarded”. (P.44 L 39)

2. Contradiction in evidence as opposed to pleaded facts

When the evidence of a witness in court is different from the facts pleaded, or is contradictory to the facts pleaded, such evidence should be rejected (P.48L1)

OGUNDAREJSC

3. Lower Courts’ failure to apply a principle - When the Supreme Court will apply that principle

“While it is true that it does not appear on the record that the learned trial Judge and the Court below applied the principle laid down in Kojo II v Bonsie & Ors. (1957) 1 WLR 1223 at 1226-1227 which principle has been adopted by this Court in numerous cases, this Court is in a position to apply the principle, ..” (P.49L 21)

OGWUEGBUJSC

4. Conflict in evidence of traditional history - Need to apply the principle in Kojo II v. Bonsie

‘There was clearly conflict in the evidence of traditional history adduced by the parties. In such a case, recourse should have been made to the principles enunciated in Kojo II v. Bonsie supra. The principles were not applied in this case by the courts below. The learned trial judge later made findings on acts of traditional evidence in the alternative. This is not a proper approach. However the respondents’ evidence on traditional history is overwhelming and their acts of ownership support their case”. (P. 50 L 11)

REPRESENTATION:

A. O. Abiose for the Appellants.

Chief E.A. Adisa for the Respondents.

CASES REFERRED TO

- Ehimare v. Emomyon (1985) 2 SC 49 at 54 and 55
 Okoye v. Kpajie (1972) 6 SC 176
 Kojo II v. Bonsie (1957) 1 WLR 1223 at 1226 - 7
 5 Are v. Ipaye (1990) 2 NWLR (pt. 132) 298
 Idundun v. Okumagba (1976) 10 SC 227
 Balogun v. Akanji (1988) 2 SC 199
 Woluchem v. Gudi (1981) NSCC 214
 Emegokwue v. Okadigbo (1973) NSCC 220
 10 Ogunde v. Ojomu (1972) NSCC 240
 Nnafiogor v. Ukonu (1986) NSCC 1067
 Balogun v. Libiran (1988) NSCC 1056
 Coker v. Oguntola (1985) NSCC 69
 Alade v. Awo (1975) 4 SC 215
 15 Enang v. Adu (1981) 11-12 SC 25

LEAD JUDGMENT BY OLATAWURA JSC

The land in dispute has been claimed by both parties as being their
 20 family land. It was in 1981 that the respondent (hereinafter referred to as the
 Plaintiffs) took out a writ of summons against the appellants (hereafter called
 the defendants) after an alleged trespass by the defendants in 1980 and claimed
 the following reliefs:

“(a) N10,000.00 being special and general damages for trespass
 25 committed by the defendants.

(b) Injunction restraining the defendants, their servants, agents
 and others claiming through them from committing further trespass on the
 said land.”

Pleadings were ordered, filed and exchanged. Both parties relied on
 30 traditional evidence and various acts of ownership. The plaintiffs’ action was
 in a representative capacity while the defendants were sued personally.

The plaintiffs traced their root of title to their ancestor, one Akinfenwa
 Akoju, a warrior and a hunter who hailed from Oyo Ile and came to settle at
 Ibadan during the reign of Bashorun Oluyole of Ibadan. On his arrival at
 35 Ibadan, he settled at Ile Jegba Ayorunbo in Bere, Ibadan. Akoju settled on a
 large portion of land of which the land in dispute forms a part. He built a hut on
 the land, farmed thereon and planted palm trees, cocoa, oranges, kolanut trees
 and other food crops. The Plan of the entire land farmed by Akoju was ten-
 dered and marked Exhibit A. The portion of the land in dispute is within Exhibit

A. It was part of the case of the plaintiffs that the defendants' ancestor, one Guguru was the plaintiffs' tenant and the portion of the land granted to Guguru as a customary tenant is edged blue on Exhibit A. The immediate cause of this action was that the defendants left the area granted to their ancestor Guguru and trespassed on the area edged Yellow on Exhibit A. The plaintiffs mentioned their boundary - men who settled within the same area at the same time with their ancestors. These boundary-men were Parakoyi Alarobo, Edun Olosaoko, Oluwa and Agodi. It was part of the plaintiffs' case that their ancestor Akoju allotted portions of his land to his junior brothers who cultivated same and planted cash and food crops thereon. Their ancestor Akoyi and successive heads of their family took possession of the land, exercised absolute right of ownership without let or hindrance from anybody.

After the death of Taiwo Guguru, the original customary tenant, his children abandoned the land granted to him. Suwebatu, Buremo and Amusa took advantage of this and they (defendants) started to sell the land granted to Guguru. The plaintiffs ejected these people and were reported to the police. The allegation of sale by the defendants was denied by the defendants who appealed to the plaintiffs to show them (i.e. the defendants) the original land granted to their ancestor as a customary tenant, and were allowed to resume possession of that portion in 1980. It was in 1981 that the defendants trespassed into other portion of the plaintiffs' land.

In 1966, the plaintiffs were paid compensation by the Western State Government in respect of part of their land acquired for the use of the Ministry of Agriculture and Natural Resources.

The defendants on the other hand denied the claim of the plaintiffs based on traditional history and various acts of ownership. Rather it was part of their assertions that their ownership of the land in dispute was never disturbed by the plaintiffs. Their own traditional history was based on the fact that the first person to settle on the land in dispute called Aba Gururu (Guguru's Settlement) was their ancestor Fatoyinbo Guguru who after his death was succeeded on the land by his children and grand children Fabiyi, Ereosun and Ige were born on the land in dispute. They also built houses on the land. They mentioned their own tenants: Okunola Buraimo and Alabi Kaja. It was these two tenants that allocated a piece of land to David Akoju (1st plaintiff) for farming purposes. David Akoju later sold the land allocated to him to one TIJANIAYERETI. It was however in 1981 he came back to the land and started to sell parts of the land in dispute. Their caretaker of the land, one Alhaji Aminu reported him first to the police and later to the defendants. While acknowledging the fact of acquisition of the land by the Western State Gov-

ernment but asserted that the land so acquired was not part of the defendants' land, consequently they were not in a position to know those who were paid the compensation. They finally denied trespassing into the plaintiffs' land.

Both parties called evidence in support of their respective and conflicting claims. After a thorough and meticulous review of the evidence, consideration of the submissions made by their counsel, the learned trial Judge, Akin Oloko, J. gave judgment on 29th February, 1984 in favour of the plaintiffs. On the traditional history, the learned Judge said:

“I am satisfied that the plaintiffs have produced and I so believe, cogent traditional evidence to support their first settlement on area edged ‘Red’ in Exhibit A.”

On the various acts of ownership put forward by both parties, the learned trial Judge said:

“I am satisfied that the plaintiffs have established numerous and positive acts of ownership within living memory sufficient to establish that they are the absolute owners of the land in dispute and I so declare. The coming on the, land in dispute by the defendants around 1981 constituted a trespass and I so find.”

In other words, the plaintiffs succeeded both on traditional history and various acts of ownership put forward in their Statement of Claim.

The defendants appealed to the Court of Appeal Ibadan against this judgment. On 13th April 1987 the Court of Appeal in a unanimous decision, coram: Uche Omo and Kutigi, JJ.C.A. (as they were then) and Omololu-Thomas, J.C.A dismissed the appeal. In the lead judgment of the Court, Omololu-Thomas, J.C.A. said:

“From the pleadings and evidence the findings of the trial Judge seem to me justified. The appellants, having their root of title on settlement, and having failed to prove it cannot be said to have derived a better title than the respondents whose root of title had been proved. (Refer to J.E. *Ehimare v. O. Emonyon* (1985) 2 S.C 49 at 54 and 55; (1985) 1 NWLR (Pt.2) 177 cited by the respondents' counsel; refer also to *Okorie v. Udom* (1960) 57 S.C 162 (1960) SCNLR 326. The trial Judge held, and his findings seem to me fully supported by evidence that the respondents have discharged the onus of proof of title by settlement and acts of ownership, and the same cannot be said in regard to the appellants' case. The legal consequence of the findings as rightly suggested by the respondents' counsel must surely be that the respondents are in exclusive possession or have right thereto as far as the area of the land in dispute trespassed upon (edged ‘Yellow’ in exhibit A) is concerned (Refer to *Amakor v. Obiefuna* (supra) and *Okoye v. Kpajie*

(1972) 6 S.C.176.”

The defendants through their amended Notice of Appeal, pursuant to the leave granted by this Court on 26th October, 1987, filed six grounds of appeal. Briefs were filed by the plaintiffs and the defendants. The defendants in their brief filed on 16th November, 1990 formulated 4 issues for determination. They are read thus:

“(1) *Is the procedure adopted by the trial Court and endorsed by the Court of Appeal in resolving the conflict in the evidence of traditional history adduced by the parties right in law?* - Ground 1.

(2) *Are the acts of ownership and possession upon which the trial court and the Court of Appeal based their decision in favour of the respondents established in law?* - Grounds 2 & 4.

(3) *Was the Court of Appeal right when it failed to consider and evaluate the evidence of 6th D.W., 7th D.W. and other evidence of the appellants to the effect that Okunola Buraimoh and Amusa Okunola were their caretakers on the land in dispute?* - Ground 3.

(4) *On the totality of the established evidence on record, is the judgment in favour of the respondents justifiable?* -Ground 5.”

The plaintiffs also formulated the following four issues for determination:

“(1) *Whether the Court of Appeal rightly affirmed the conclusion of the trial court that he was satisfied that the respondents have produced cogent traditional evidence to support their early settlement on the land verged Red in Exhibit “A” without any further application of the test in Kojo II v. Bonsie (1957) 1 WLR. 1223 at p. 1226-7.*

(2) *Whether the Court of Appeal rightly affirmed the conclusion of the trial court that the respondents have established numerous and positive acts of ownership to establish they are the absolute owners of the land in dispute.*

(3) *Whether the Court of Appeal as well as the trial court were right in rejecting or/and disregarding the evidence of 6th D.W. and 7th D.W. as to Okunola Buraimoh and Amusa Okunola being caretakers of the land in dispute.*

(4) *Whether the judgment in favour of the respondents is right having regard to the totality of the legal evidence on record.”*

Oral submission was made in further elucidation of the briefs filed. We had earlier over-ruled the preliminary objection filed by Chief Adisa, learned counsel for the plaintiffs on the ground that the defendants should not be allowed to raise issues not raised in the court below.

Mr. Abiose, learned counsel for the defendants, referred to the prin-

ciple laid down *Kojo II v. Bonsie & Ors.* (1957) 1 WLR. 1223 at 1226-7 and that the trial court did not follow that principle of law. Learned counsel then urged us to look into acts of ownership and possession.

On Issue II, learned counsel agreed that the approach of the learned trial Judge on page 60 lines 21-28 of the record was right. Learned counsel then referred to the finding of facts by the trial Judge and submitted that since these facts were not established, the Court of Appeal was wrong to have confirmed them, he finally, urged that the plaintiffs' case be dismissed, and that the appeal be allowed.

In his oral submission, Chief Adisa, learned counsel for the plaintiffs, referred to paragraph 6 of the Statement of Defence showing the boundary-men and that having accepted the evidence of the plaintiffs' witnesses with regard to the boundary, the traditional evidence given by the plaintiffs was overwhelming and rightly accepted by the learned trial Judge. The findings were confirmed by the lower court. He finally urged that the appeal be dismissed.

Issue 1 as stated above deals with the way and manner the two lower courts resolved the conflicting evidence on traditional history. Learned counsel for the appellants in his brief has admitted that there were concurrent findings on the traditional history and cited *Are v Ipaye* (1990) 2 NWLR (Pt.132) 298 as to when the concurrent findings can be set aside.

It does not appear to me that the learned counsel for the defendants appreciates fully the findings of the learned trial Judge on this issue of traditional evidence. The defendants' counsel quoted in part why the learned trial Judge preferred the plaintiffs' evidence to that of the defendant, but chose to omit why he could not have believed the evidence of the defendants. The learned trial Judge treated each witness and recorded his impression. The 84-year old man - Samuel Olajide Mogaji Agodi was credited as knowing, what one will say, why he was called to give evidence, i.e. to support the case of the defendants, that Guguru was the owner of the land. The Judge's impression of this witness was that he did not even know the real name of Guguru, he said:

"Even though I gave allowance for his age, he was not a useful witness. I do not rely on his traditional evidence."

The learned counsel for the defendants in her address to the High Court merely asked the Judge to choose between the two sets of traditional evidence because her clients gave "better traditional evidence".

Where a party's evidence on issue of boundaries is conflicting and contradictory as in this case, no reliable tribunal will believe the party. While it is true that demeanour of a witness may not be a guide to the truth, the

conclusions of a trial Judge on how a witness behaved in the box should not be lightly disregarded. The basis for the test suggested by Mr. Abiose, learned counsel for the defendants appears to me misconceived. The Court of Appeal after a thorough consideration of the principle in *Kojo II v. Bonsie & Ors.* (supra) said:

“Having concluded firmly that the traditional evidence of the respondents in support of settlement is cogent it is no longer necessary to test, as proposed by the learned appellants’ counsel, the traditional histories again by reference to facts in recent years in order to ascertain which of the two competing histories is more probable. The case of Koji II v. Bonsie & Anor (1957) 11 WLR 1223 (sic) being relied upon by counsel is unhelpful to her in the circumstance.” 5 10

It would appear that the contention of the appellants’ counsel is that reference to facts in recent years should have solved the conflict. What are the facts in favour of the defendants? There is none. The facts in favour of the plaintiffs are as pleaded in the plaintiffs’ pleading and supported by evidence. 15 The plaintiffs averred in paragraphs 15-19 and 21 as follows:

“15. The site on which their ancestor first built a hut has three houses built on it by members of the plaintiffs’ family.

16. After Taiwo Guguru’s death, his children abandoned the land held by their ancestor as customary tenant. 20

17. The plaintiff drove away (1) Suwebatu (2) Buremo and (3) Amusa who were selling the land of which Taiwo Guguru, the father of the defendants, was our tenant.

18. These people were taken to the police station and their allegation that the defendants sold the land (they were selling) to them was denied by the defendants at the police station. 25

19. The two defendants then begged the plaintiffs to show them the portion of land of which their father was a customary tenant and the said portion was shown to them and they were allowed to resume its possession in 1980. 30

....

21. In 1966, the plaintiffs received compensation for crops and land acquired by the Western State Government for the use of the Ministry of Agriculture and Natural Resources. Portion of the acquired land forms boundary with the land in dispute.” 35

In respect of paragraph 20 of the Statement of Defence, the learned trial Judge said:

“Both plans tendered in this case, i.e. Exhibits A & C show that Agricultural Diary farms (forms) boundary with the area being claimed by

the plaintiffs in Exhibit' A'. The claim by the defendants that the plaintiffs' family has no land in that area is unsustainable. I believe and accept the evidence of the plaintiffs that Western State Government acquired portion of their land in 1966 for which they were paid compensation.

5 *I am satisfied that the plaintiffs have established numerous and positive acts of ownership within living memory sufficient to establish that they are the absolute owners of the land in dispute and I so declare. The coming on the land in dispute by the defendants around 1981 constituted a trespass and I so find."*

10 Even if the principle of law stated in *Kojo II v. Bonsie & Ors.* (supra) applies, I am of the firm view that with the findings made above by the learned trial Judge that the plaintiffs prove their case, they are entitled to succeed even on traditional evidence: *Idundun v. Okumagba* (1976) 10 S.C. 227; Chief *Oyelakin Balogun & Ors. v. Oladosu Akanji & Ors.* (1988) 1 NWLR (Pt.70) 301
15 (1988) 2 S.C. 199; *Stool of Abinabina v. Enyimadu* 12 W.A.C.A 171.

The damaging effect of the conclusions reached by the lower court in respect of the defendants' case is graphically summarised by the Court of Appeal thus:

20 *"Looking at the evidence as a whole, it seems that the respondents had established their case by more positive and cogent evidence while one cannot say the same thing about the appellants' case. Where the appellants' witnesses did not adduce evidence in support of the respondents' case, they gave conflicting evidence on issues on their traditional history and boundaries and acts of ownership. The veracity of their important witnesses on*
25 *vital issues were questionable, and the learned trial Judge rightly discredited them. They gave conflicting evidence even on their traditional boundaries. For example, 2 D.W. testified confirming the respondents' boundary men as theirs. The 3 D.W gave different set of boundary men than that pleaded."*

30 I will therefore disagree with the Defendants' counsel where he concluded on page 9 paragraph 7.2.5 thus:

"The finding on traditional evidence was therefore bound to affect his consideration and findings on acts of ownership."

The learned trial Judge found in the alternative, by saying:

35 *"Assuming that my finding that the plaintiffs succeed in their traditional evidence is wrong, I shall now proceed to consider whether the plaintiffs have established such numerous and positive acts of ownership which (sic) living memory sufficient to establish that they are absolute owners of*

the land in dispute.

In other words, he did not rely on traditional evidence so as to sustain acts of possession and various acts of ownership. A plaintiff in a declaration to title can rely on either traditional history or positive and numerous acts of ownership over a long period of time to sustain his claim. I will therefore answer questions 1 and 2 by the defendants in the positive. 5

For ease of reference Issue 3 is about the failure of the lower court to consider and evaluate the evidence of 6th D.W., 7th D.W. and other evidence of the appellants with regard to Okunola Buraimoh and Amusa Okunola described as caretakers. Ground 3 of the ground of appeal which is supposed to have given rise to this issue complains of misdirection in law. It appears to me that an allegation of non-consideration of the evidence of a witness is different from the consideration of the evidence based on a wrong evaluation of the evidence of the witness. The passage quoted by the learned counsel in his brief to wit: 10

“Contrary to the submissions of the appellants’ counsel; there is no pleading to support the evidence that Okunola (sic) Buraimoh and/or Amusa Okunola (sic) were ever caretakers on the land in dispute. The evidence of 6 D.W. and 7 D.W. to the effect go to no issue and ought to be ignored as the learned trial Judge did.” shows clearly the conclusion reached by the lower court. The defendants’ counsel relied on paragraph 17, 18 and 19 of the Statement of Defence where they averred as follows: 15 20

“17. Okunola Buraimoh and Alabi Kajal farmed upon the land, supervised the allocation of the farmland and accounted to Guguru family.

18. When Okunola Buraimoh died he was replaced by Alhaji Aminu and Amusa a member of Parakoyi Alarobo family. Bada also farmed on the land. 25

19. Okunola Buraimoh and Alabi Kajal with the consent of Guguru family allocated a piece of land to David Akoju to farm and about 15 years ago David Akoju sold the said piece of land allocated to him to Tijani Ayereti.” 30

That a man farms on a piece of land is not the same thing as being a caretaker of that piece of land. It must be averred that these witnesses were caretakers. It was for this reason and since this salient fact was not pleaded as such, any evidence based on it went to no issue: *Woluchem & Ors. v. Gudi & Ors.* (1981) N.S.C.C. 214; (1981) 5 S.C. 291 *Omorhirhi & Ors. v. Ematevwere* (1988) 1 NWLR (Pt.73) 746 (1988) N.S.C.C. 511; *Lemomu v. Alli-Balogun* (DECD) (1957) N.S.C.C.; (1975) 3 S.C. 87-100. 35

When the evidence of a witness in court is different from the facts pleaded, or is contradictory to the facts pleaded, such evidence should be

rejected: *Emegokwue v. Okadigbo* (1973) N.S.C.C. 220; (1973) 4 S.C. 113. If the issue of caretakership is relevant, it ought to have been pleaded: *Ogunde v. Ojomu* (1972) N.S.C.C. 240; (1972) 4 S.C. 105. It is for these reasons that the Court of Appeal on the totality of the evidence led concluded thus:

“On the whole, I consider that the learned trial Judge weighed the evidence and adequately evaluated them. His decision was based on proof of ownership by traditional history and acts of ownership, and his findings seem to me reasonable. I am satisfied that from the facts proved and the credible evidence and the pointed strength in the respondents’ case which the learned trial Judge considered in view of the state of the pleadings and the apparent inconsistencies and admission in the evidence of the appellants’ witnesses, the learned trial Judge could not have come to any different conclusion than that arrived at, having regard to the principle in Mogaji v. Odofin (supra) and Victor Woluchem & Ors. v. Chief Simoh Gudi & Ors. (supra). The imaginary scale weighed heavily in my opinion in the respondents’ favour. The appellants failed to prove that the findings are perverse or that they are not supported by evidence or that the case for the appellants has not been considered before his acceptance of the respondents’ case. (See also Lucy Onowon & Anor v. J.J.I. Iserihien (1976) 9 and 10 S.C. 75. His findings are fully supported by the evidence.”

These are concurrent findings of fact which can only be set aside if they are perverse: *Nnajifor & Ors. v. Ukonu & Ors.* (1986) N.S.C.C. 1067; (No.2) (1986) 4 NWLR (Pt.36) 505; *Balogun v. Labiran* (1988) 3 NWLR (Pt.80) 66. (1988) N.S.C.C. 1056; (1988) 3 NWLR (Pt.80) 66; *Coker v. Oguntola & Ors.* (1985) 2 NWLR (Pt.5) 87 (1985) N.S.C.C. 69; (1985) 2 NWLR (Pt.5) 87.

The lower court is right to have come to these conclusion. This takes care of Issue 4 raised by the defendants. In sum, the appeal fails and is hereby dismissed. I award the sum of N1,000.00 costs in favour of the plaintiffs.

UWAIS JSC

I have had the opportunity of reading in draft the judgment read by my learned brother Olatawura, J.S.C. For the reasons contained therein I too will dismiss the appeal with N1,000.00 costs to the respondents.

OGUNDARE JSC

I have had the advantage of a preview of the judgment of my learned brother Olatawura J.S.C. just delivered. I agree with him that this appeal is totally lacking in merit.

In the light of the findings of fact made by the learned trial Judge and supported by the overwhelming credible evidence before him and the affirmation by the court below of these findings of facts and the defendants/appellants having failed to show that those findings are perverse. I can see no justification in reversing those concurrent findings of fact. The learned trial Judge found specifically that:-

"I am satisfied that plaintiffs have established numerous and positive acts of ownership within living memory sufficient to establish that they are the absolute owners of the land in dispute and I so declare."

This specific finding is supported by the credible evidence before him. The learned trial Judge also found that it was the plaintiffs/respondents who gave Aiyenreti the part of the land being claimed by the parties and on which the said Aiyenreti was carrying on a block making industry. He also found as a fact that it was to the plaintiffs that compensation was paid by the Western State Government for the area of the land that was acquired by the State Government some years ago. These are acts of ownership in recent times.

While it is true that it does not appear on the record that the learned trial Judge and the Court below applied the principle laid down in *Kojo II v. Bonsie & Ors.* (1957) 1 WLR 1223 at 1226-1227 which principle has been adopted by this Court in numerous cases, this Court is in a position to appeal the principle; this point was conceded by Mr. Abiose in his submission before us. Having regard to the findings of fact made by the learned trial Judge which as I have earlier stated, are adequately supported by the credible facts before him and adopting the proper approach to the resolution of conflict in traditional evidence as appearing in this case, I have come to the conclusion that the traditional history or settlement on the land by Akoje (plaintiffs' ancestor) is to be preferred. With this conclusion plaintiffs showed a better title to the land in dispute and the two courts below rightly gave judgment in their favour.

From what I have said above and in the light of the fuller reasons given by my learned brother in his lead judgment, I dismiss this appeal and affirm the judgment of the Court below. I abide by the order for costs made in the lead judgment.

OGWUEGBU JSC

I have had a preview of the judgment of my learned brother Olatawura, J.S.C and for the reasons given by him, I agree that this appeal fails.

The complaint of the appellants in their first issue for determination is this:

“Is the procedure adopted by the trial court and endorsed by the Court of Appeal in resolving the conflict in the evidence of traditional history adduced by the parties right in law - Ground 1.”

5 It was submitted on behalf of the appellants in this court that the conclusion reached by the learned trial Judge which was endorsed by the court below in relation to the traditional evidence of the parties was not arrived at in accordance with the established principles in *Kojo II v. Bonsie* (1957) 1 WLR 1223 at 1226 and subsequent decisions of this court.

10 There was clearly conflict in the evidence of traditional history adduced by the parties. In such a case, recourse should have been made to the principles enunciated in *Kojo II v. Bonsie* supra. The principles were not applied in this case by the courts below. The learned trial Judge later made findings on acts of ownership in recent years after he had concluded his finding on tradi-
15 tional evidence in the alternative. This is not a proper approach.

However the respondents’ evidence on traditional history is overwhelming and their acts of ownership support their case. The error which was committed in this case by the courts below is not the type in *Alade v. Awo* (1975) 4 SC. 215 cited by appellants’ counsel where the trial Judge rejected the
20 plaintiff’s traditional evidence in support of his title which evidence was not challenged or shaken by cross-examination. In that case, the plaintiff also discharged the burden of proof cast on him.

The appeal is against two concurrent findings of two lower courts. This court will not interfere with their findings. The appellants have not shown
25 any special circumstances that would justify such interference: *Enang v. Adu* (1981) 11 -12 S.C. 15 at 42. *Abinabina v. Enyimadu* 12 WACA 171 at 173 and *Are v. Ipaye & ors.* (1990) NWLR (Pt.132) 298.

For these reasons and the reasons contained in the judgment read by my learned brother Olatawura, J.S.C. I too hold that there is no merit in this
30 appeal. Accordingly, the appeal is hereby dismissed and the decision of the lower courts affirmed. I make the same order as to costs as contained in the lead judgment.

ADIO JSC

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I have had the advantage of reading, in draft, the judgment just read by my learned brother, Olatawura J.S.C., and I agree with it. The appeal has no merit and I too dismiss it with N1,000 costs to the respondents.