

**SUPREME COURT OF NIGERIA**  
29TH APRIL, 1994. SC.292/1990  
**CORAM:- M. L. UWAI, O. OLATAWURA,**  
**E. O. OGWUEGBU, S. U. ONU, Y. O. ADIO, JJSC.**

OSENI ABOYEJI ..... PLAINTIFF/APPELLANT  
AND  
AMUSA MOMOH & 2 OTHERS ..... DEFENDANTS/RESPONDENTS

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*APPEALS - Crossappeal - Failure to crossappeal before the Court of Appeal - Against rejection of document - Whether the issue can be re-opened before the Supreme Court.*

*EVIDENCE - Visit to the locus in quo - Where evidence taken thereat is a nullity - Whether the entire judgment is rendered a nullity thereby - Whether retrial will be ordered in all cases of wrongful admission of evidence.*

*EVIDENCE - Boundaries - Land matters - Where oral evidence of boundaries proffered was not pleaded - Whether the burden to establish boundaries by credible evidence is discharged.*

*LAND LAW - Title - Proof of a better title by the defendants - Failure of plaintiff to establish his tenancy - Whether plaintiff can maintain an action in trespass.*

*LANDLORD & TENANT - Oral evidence of a tenancy agreement - Can be given by a tenant though the agreement is not tendered - Where the agreement is rejected for not being registered - Whether hollow oral evidence is of any use.*

*PLEADINGS - Deviation from pleadings in appellant's oral testimony - Thereby making a case that was not pleaded - Whether onus of proof is Discharged.*

*PRACTICE & PROCEDURE - Order of retrial - Though a decision based on trial judge's personal view cannot stand - Whether retrial will be ordered - Where a party has failed to prove his case.*

*PRACTICE & PROCEDURE - Order of dismissal - Where appellant's case on uncertainty - As can be deduced from appellant's own admission - dismissal is the proper order.*

### **FACTS**

The Plaintiff/Appellant filed an action against the Defendants/Respondents before the Ondo State High Court Ado-Ekiti claiming possession of the land in dispute and ownership of the crops thereon. He also claimed damages for trespass and sought perpetual injunction against the Defendants. Whereas the Plaintiff averred in his statement of claim that possession was granted to him by the Chiefs of Aisegba-Ekiti, he ended up leading evidence establishing that one Aruwa granted the land to him in 1960. Plaintiff's tenancy agreement sought to be tendered was rejected for not being registered. Non admissible survey plan was tendered by the plaintiff so that in all, he failed to prove the claim set up by him.

The trial Judge that visited the locus in quo, adopted an irregular procedure at the locus and relied on his personal view in giving judgment for the plaintiff. The Defendants appeal to the Court of Appeal was upheld and the plaintiff's case was dismissed. Being dissatisfied the Plaintiff/Appellant has now appealed to the Supreme Court to determine eight issues raised by him which as observed by his Lordship, Olatawura JSC, can be reduced to only one issue to wit "Has the plaintiff proved his case in view of the pleading and the evidence led?"

### **HELD** (Unanimously dismissing the appeal)

1. It is not correct that where evidence taken at the locus is a nullity, it extends to the entire judgment founded thereon. Rather, the law is that evidence wrongly obtained at the locus as happened in the instant case is to be expunged by the appeal court. So that if what remains of the evidence can still support the judgment it stays, if not, it is reversed. (P. 9 L 24)
2. The hopelessness of the Appellant's case as made would still not have saved the situation of admitting inadmissible evidence of the visit to the locus. Hence to urge that a retrial be ordered would be unfair. (P. 11 L7)
3. The law would recognise the right in a tenant to give oral evidence of a tenancy agreement to prove the existence of the grant though the agreement itself is not tendered. But in the instant case, the tenancy agreement was rejected for not being registered while the Appellant's oral evidence was hollow. (P. 11 L 15)

4. The Appellant deviated from his pleadings when in his testimony, he made a case otherwise than he thereon pleaded. Thus, the onus that lay on the Appellant to prove his case by credible evidence in keeping with his pleading was not discharged. (P. 11 L 35)

5. A decision based on a trial court's personal view cannot be allowed to stand. A retrial may be ordered when there has been no just trial and not as in the instant case, when a party has failed to prove his case and wants another opportunity of proving what he failed to prove in the first instance. (P. 13 L 12).

6. The Respondents proved a better title and as far as they are concerned, the Appellant is a trespasser and was so treated. Since the law is that a trespasser in possession is not in legal or legitimate possession and the Appellant having failed to show he was a tenant of any known landlord and so in possession, he cannot maintain an action in trespass. (P. 15 L 1)

7. The total of the Appellant's case borders on uncertainty. That the Appellant stated that he was ready to pay 'Ishakole' to whoever one Aruwa might indicate was owner of the land in dispute is an admission of the uncertainty of his grant. For that reason, an order of dismissal of the Appellant's case is an appropriate order to make. (P. 15 L 34)

8. The oral evidence of boundaries preferred by the Appellant in court was unpleaded and the total of the evidence given by him did not support his case. The end result of the question of boundaries is that the Appellant failed woefully to discharge the burden that lay on him to establish such boundaries by adducing credible evidence. (P. 16 L 13)

9. The Appellant did not crossappeal against the rejection of the purported tenancy agreement he sought to tender in the court below and it is no more open to him to reopen the issue before the Supreme Court. Moreover, the rejected tenancy agreement having been made eight years after the alleged grant and constituting a nebulous document of ill-defined boundaries which could not withstand the test of veracity, was appropriately rejected for its hollowness. (P. 16 L 30)

#### **NOTABLE POINTS OF INTEREST**

**ONUJSC**

***Visit to the locus - When irregularity is not fatal to proceedings***

1. “The fact that in the instant case evidence was no more given by witnesses  
 5 in court after the visit to the locus and at the locus it considered irrelevant  
 matters unconnected with what was pleaded by the parties, are not fatal to  
 the proceedings in view of this Court’s earlier decisions in *MUSA MAJI V.*  
*MALLAM SHEWU SHAFI* (1965) NMLR 33 at 34”. (P. 10 L 12)

10 ***Reliance on a grant as root of title - Proof thereof***

2. It is an established principle of law that where a party pleads and relies on a  
 grant as his root of title, he is under a duty to prove such grant to the satisfac-  
 tion of the trial court. (P. 13 L 33).

15 ***Failure to prove boundaries of land - Implications***

3. “In the answer to this issue, it is pertinent to point out that in the instant  
 case the appellant did not tender his survey plan of the land he claimed. Nor  
 did he prove by oral evidence, as he ought to, the boundaries of the said  
 land. This court has laid down the principle for quite some time now, that a  
 20 party failing to give evidence of boundaries to the land in dispute which he  
 claims, is not entitled to succeed.” (P. 16 L 4)

**OLATAWURA.JSC**

25 ***Pleadings - Implications of leading evidence not pleaded***

4. The evidence led was the exact opposite of what was pleaded, hence the  
 trial court ought to have rejected it. A party who claims through a particular set  
 of people (as in this case the Chiefs of Aisegba) cannot be allowed to set up  
 another claim through other person or set of people not pleaded. (P. 20 L 36)

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**OGWUEGBU.JSC**

***Visit to the locus in quo - Need to comply with the procedure***

5. “The learned trial judge did not comply with either of the two procedures  
 and compounded the matter by supporting some of his findings of fact with  
 35 the observations he made at the locus as if they were evidence. An observa-  
 tion does not do away with the necessity for evidence. It is not in itself  
 evidence. Where a trial judge makes a visit to a locus in quo, it is not proper for  
 him to treat his perception at the scene as a finding of fact without evidence of  
 such a perception being given by a witness either at the locus or later in court

after the inspection”. (P. 26 L 31)

***Whether irregular procedure at locus will ground a retrial***

6. “The irregular procedure and the use of the observations made by the learned trial judge in part of his findings though deprecated do not entitle the appellant to have a second bite at the cherry when his case in the court of trial failed completely. When it suited him, he did not complain of the irregularity. It is therefore my view that the provisions of Section 77 (d) (ii) of the Evidence Act should not be called in aid by litigants whose cases are unsupportable as in this case”. (P. 29 L 11)

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**REPRESENTATION:**

Chief Adeyinka Adeoye for the Appellant  
A.O. Akanle Esq. for the Respondents.

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**CASES REFERRED TO**

- R. v. Togbe 12 WACA 184  
 Awoyegbe & Anor v. Ogbeide (1988) 1 NWLR 695 at 799 and 710  
 Ajayi v. Fisher 1 FSC 90 at 92 20  
 Yongo v. C.O.P. (1990) 5 NWLR (Part 148) 103 at 114  
 Seismograph Services Ltd. v. Benedict Etedjere Onokpasa (1972) 1 All NLR (Part 1) 343  
 Chief Nwizuk v. Chief Eneyok (1953) 14 W.A.C.A. 354  
 Olubode v. Salami (1985) 2 N.W.L.R. 282 25  
 Maji v. Shafi (1965) NMLR 33 at 34  
 Ejidike v. Obiora (1951) 13 WACA 270 at 274  
 Thompson Organisation & Ors. v. N.I.P.C. (1969) 1 NMLR 192 at 103-104  
 Emegokwe v. Okadigbo (1973) 1 NMLR 192 at 195  
 Maduabuchukwu v. Umunakwe (1990) 2 NWLR (part 134) 598 at 608 30  
 Uredi v. Dada (1988) 1 NWLR (Part 69) 237 at 246  
 The State v. Albangbee (1988) 3 NWLR (Part 156) 254  
 Duru v. Nwosu (1989) 4 NWLR (Part 113) 24 at 42  
 Elias v. Disu (1962) 1 All NLR 214 at 219  
 Onifade v. Olayiwola (1990) 7 NWLR (Part 161) 130 at 161 35  
 Chief Odofin v. Ayoola (1984) 11 S.C. 72 at 106 and 116  
 Joshua Ogunleye v. Babatayo Oni (1990) 2 NWLR (Part 135) 745  
 Olarewaju v. Bamigboye (1987) 3 NWLR (Part 60) 353 at 359  
 Da Costa v. Ikomi (1968) 1 All N.L.R. 394 at 398

Talabi v. Adeseye (1973) 1 NMLR 8 at 10  
 Adeleke v. Adewusi (1961) 1 All NLR 37  
 Ekwere v. Iyiegb (1972) 6 S.C. 116 at 138  
 Raimi v. Akintoye (1986) 1 N.S.C.C. 649  
 Metalimpex v. A.G. Leventis & Co. Nig. Ltd (1976) All N.L.R.  
 5 79 at 88  
 Total Nig. Ltd v. Nwako (1978) 5 SC. 1  
 Ochiaeri v. Akabeze (1992) N.W.L.R. (pt. 221) 1

### **STATUTES & RULES REFERRED TO**

- 10 Supreme Court Rules O. 2 r. 9 (1), O. 6 r. 5 (1) (b)  
 Evidence Act s. 76 (d) (ii)  
 Land Instruments Registration Law Cap. 56 Vol. III  
 Laws of Western Region of Nigeria 1959 s. 16

### **LEAD JUDGMENT BY ONU JSC**

- 15 In the High Court of Ondo State at Ado-Ekiti, the plaintiff, now ap-  
 pellant claimed as against the three defendants, now respondents, for owner-  
 ship and possession of a farmland at Imola on Aba Bolorunduro Road, Aisegba-  
 Ekiti; N1,300 general and special damages for trespass and misappropriation  
 20 of his crops and finally for injunction.

Pleadings were ordered, filed and exchanged with the respondents  
 who filed a joint Statement of Defence, amending same before the case went  
 to trial. The appellant testified and called witnesses to show-

- (a) That in 1960 he was given a grant of land by one Aruwa (in his  
 25 Statement of Claim he however averred that by a tenancy agreement between  
 him and the chiefs of Aishegba-Ekiti he entered into an agreement for the  
 piece of land and his tenancy agreement he would found at the trial). See  
 paragraph 6 of the appellant's statement of claim at page 22 of the record and  
 compare same with his evidence at pages 57-59 of the record of appeal.

- 30 (b) At the trial the tenancy agreement was rejected in evidence when  
 appellant sought to tender it.

(c) Appellant tendered the survey plan made in 1968 following his  
 grant of the land and it was received for identification only

- (d) Appellant called no boundary witnesses albeit that he pleaded  
 35 their existence. One of the boundary men mentioned by him however testified  
 as D.W.3 for the respondents while the second only appeared at the locus and  
 there, contrary to expectation testified for the respondents.

(e) The boundaries he gave evidence of were not contained in his  
 pleading.

(f) He failed to call as witness, his grantor be it Aruwa or any of the Aisegba Chiefs.

(g) At the inspection of the land in dispute, the appellant was found to be encircled by the lands of the respondents rather than as he pleaded that they (respondents) had a common boundary on one side or were adjacent to him, adding that he first sighted the respondents on the land in 1965 whereas his tenancy agreement which was technically rejected at the hearing for non-registration, he purported to have entered into in 1968.

The second respondent testified for the defence (the 1st respondent who was the late Olukare of Ikare, having died during the pendency of the suit) and called witnesses inclusive of:

(a) Their grantor who asserted he made the grant of the land in dispute to them.

(b) A brother of the grantor who asserted he went to plot out the parcels for them. He stated the boundaries and added that he personally delivered their portions to them.

(c) Their third and fourth boundary men were called and they testified in support of their claim to the land in dispute.

The learned trial Judge (Adeloye, J. as he then was) using the fact of his visit to the locus in quo and ostensibly taking into account other sentimental matters of the appellant being a stranger/settler from Omuaran in Kwara state and was therefore being mistreated as such a stranger element in other people's land; coupled with an unpleaded fact that the two families of Aisegba and Iluomoba were involved in litigation over the larger piece of land encompassing the one in dispute, proceeded at the close of evidence to give judgment to the appellant for all his claims as hereinbefore set out.

Being dissatisfied with this decision, the respondents appealed to the Court of Appeal sitting in Benin, which upon hearing the parties, reversed the decision of the trial court by a majority of two to one and ordering appellant's claims to be dismissed with costs.

Being aggrieved, the appellant has appealed to this court, filing a Notice of Appeal containing eight grounds.

Briefs of argument were filed and exchanged by the parties in accordance with the rules of court. Eight issues distilled out of the eight grounds were submitted for our determination. They are:-

1. Where an appeal court finds that the trial court had followed an illegal procedure during the trial and had based its judgment on evidence obtained illegally, and the appeal court sets aside the said judgment, what is

the proper order which the appeal court ought to make, order of dismissal or order of retrial?

2. Where the tenancy agreement is rejected in evidence because it  
5 was not registered, whether or not the tenant can give evidence of the relationship of tenant and landlord to prove the existence of the grant to him?

3. Where an appeal court finds that a trial Judge had during the trial based his judgment on his view instead of on evidence whether a proper trial can be said to have taken place, and if not, what order should the appeal court  
10 make?

4. Whether or not the interest of a plaintiff in possession should be protected until the true owner of the land is known?

5. Where the most central and material conflict between the plaintiff and the defendant had not been resolved during the trial in the trial court, and  
15 the appeal court sets aside the judgment of the trial court, what is the appropriate order which the appeal court ought to make, order of dismissal or order of retrial?

6. Whether or not the non-admission of the survey plan in evidence necessarily means that boundaries of the farm have not been proved?

20 7. Where a tenant farmer is plaintiff in possession and his title is defective or not, namely, it is not yet confirmed whether his landlord or somebody else has legal title to the farmland, can the tenant farmer maintain an action in trespass and has he any interest in the farm or crops which the court of Justice must protect or enforce?

25 8. Where a tenancy agreement is not admissible to prove title because it was registered, is the same tenancy agreement admissible for any other purpose?

At the hearing of this appeal on 7th February, 1994 learned counsel for the respondents, Mr. Akanle submitted that he had brought a preliminary  
30 objection pursuant to order 2 Rule 9(1) and Order 6 Rule 5(1) (b) of the Supreme Court Rules to have all eight grounds of appeal struck out in that being grounds of mixed law and facts, no leave was sought and obtained from either the court below or of this court to argue them. Learned counsel for the appellant, Chief Adeoye, replied that while it was true that he never asked for leave,  
35 the grounds being those of law alone they were without more arguable. He therefore referred us to the Notice of Appeal at pages 162-166 of the records and touched on all grounds of appeal to demonstrate each was a ground of law simpliciter. We agreed with him, overruled the preliminary objection and so held all grounds to be arguable.



Learned counsel on either side thereupon relied on their briefs of argument. In addition, learned counsel for the respondents submitted that the appeal of the appellant be dismissed instead of ordering a retrial. As the respondents ostensibly adopts the issues formulated by the appellant, in my consideration of the appeal I shall proceed to deal with them serially hereunder thus: 5

#### ISSUE 1 -

In answering the 1st issue, it is pertinent to point out from the on set that the grouse therein applies mainly to the evidence taken at the locus. As learned counsel for the appellant concedes in the appellant's Brief, the procedure followed by the trial court to obtain evidence thereat was highly irregular. For instance, those who gave evidence thereat neither swore on oath nor by affirmation. Instead of swearing or affirming the witnesses; what the learned trial Judge did was to conduct an interview whereby he took or regarded all the answers he got as evidence in breach of section 76(ii) of the Evidence Act which provides inter alia. 10 15

*"...In the case of such inspection being ordered or permitted, the court shall either be adjourned to the place where the subject matter of the said inspection may be and the proceedings shall continue at that place until the court further adjourns back to its original place or to some other place of sitting, or the court shall attend and make an inspection of the subject-matter only, evidence if any, of what transpired there being given in court afterwards ..."* 20

While I agree with the appellant's submitted that the learned trial Judge in the instant case failed to comply with the mandatory provisions of the above sections as clearly restated in R. v. Togbe 12 WACA 184 and Awoyegbe & Anor v. Ogbeide (1988) 1 NWLR (Pt.73) 695 at 799 and 710. I would not subscribe to the view that evidence taken at the locus is a nullity and by extension, the entire judgment founded thereon. Rather the law, in my view, is that evidence wrongly obtained as happened at the locus in the instant case, is to be expunged or discountenanced by the appeal court. Such that if what remains of the evidence can still support the judgment, it stays, if not, it is reversed and an order of dismissal or retrial is made as the circumstances demand. See Ajayi v. Fisher (1956) SCNLR 279; (1956) 1 F.S.C. 90 at 92 and Yongo v. O.O.P (1990) 5 NWLR (Pt 148) 104 at 114 Indeed, as was held by this court in Seismograph Services Ltd v. Benedict Etedjere Onokpasa (1972) 1 All NLR (Pt. 1) 343 in which Chief Aaron Nwizuk v. Warribo Eneyok (1953) 14 WACA 354 was distinguished, the trial Judge's own observations at an inspection of the scene are not facts and proceed to make findings on them, 25 30 35

unless evidence thereon has been received at the scene or in court through a  
5 witness and the parties have been given an opportunity to hear the additional  
evidence and cross-examine on it. See Popoola Olubode & 2 Ors v. Alhaji  
Salami (1985) 2 NWLR (Pt.7) 282.

The fact that in the instant case evidence was no more given by  
witnesses in court after the visit to the locus and at the locus it considered  
10 irrelevant matters unconnected with what was pleaded by the parties, are not  
fatal to the proceedings in view of this court's earlier decisions in Musa Maji  
v. Mallam Shewu Shaft (1965) NMLR 33 at 34 and Nwizuk v. Eneyok (supra). In  
Awoyegbe v Ogbide (supra), a case involving land allocation under Bini cus-  
tomary law and in which the two cases above were followed, this court held  
15 that a mere absence of a record of inspection of a locus in quo by the Judge  
(which is not what happened in the instant case) is not necessarily fatal to the  
case and that a statement by a Judge in a solemn judgment should be ac-  
cepted as a correct account of what occurred. In that case Awoyegbe v. Ogbeide  
(supra) the statement made by the trial Judge in his "solemn" judgment, as in  
20 the instant case, not being a correct account of what occurred as no witness  
gave that evidence, this court held that he erred in law and that the Court of  
Appeal was right to have upheld the appeal before it on that ground. As  
Oputa, J.S.C put it in that case:

25 *"In effect what the trial Judge had done was to treat his view of the  
locus as 'findings' in the case."*

It is perhaps pertinent in the instant case where the learned trial  
Judge erroneously but not fatally took into account unpleaded facts and  
evidence not before him, to re-echo Oputa, J.S.C's timely warning with refer-  
ence to the West Africa Court of Appeal's case A. Ejidike & Anor. v. Christo-  
30 pher Obiora (1951) 13 WACA 270 at 274 where Sir John Verity Ag. President of  
the court said:

*"..... in all cases in which a visit is paid by the court to the locus in  
quo in a civil action (and likewise in a criminal case) the Judge should be  
careful to avoid placing himself in the position of a witness and arriving at  
35 conclusions based upon his personal observations of which there is no evi-  
dence upon the record. When there is conflicting evidence as to physical  
facts, I have no doubt that he may use his own observations to resolve the  
conflict, but I do not think it is open to him to substitute the result of his  
observation for the sworn testimony nor to reach conclusions upon some*

*thing he has observed in the absence of any testimony of oath as to the existence of the facts he has observed. Should he do so he would in my view, be usurping the position of the witnesses.....”*

In the instant case, it is enough as observed above to either expunge the things stated at the locus in quo or to discountenance them as irrelevant and proceed to decide the rest of the case according to substantial justice. 5

In the instant case in hand, were the inadmissible evidence of the visit to locus have been admissible, the hopelessness of the appellant’s case as made, would still not have saved the situation. Hence, to urge that a retrial should be ordered would be unfair if not illegal, as I shall seek to show elsewhere in this judgment. Indeed, rather than appeal against the findings of the trial court and subsequently that of the court below on locus in quo, the appellant conceded to the irregularity thereat. 10

#### ISSUE 2:

In relation to issue 2, the law would clearly seem to recognise the right in a tenant to give oral evidence of a tenancy agreement to prove the existence of the grant albeit that the document itself (tenancy agreement) is not produced or tendered. Be that as it may, the trouble in the instant case is the tenancy agreement or document of grant was rejected on the technical legal ground that it was not registered, while the oral evidence given by the appellant was hollow. That this is so can be gathered from the appellant’s own terse evidence on the point at page 57 lines, 30-33 of the Record of Proceedings. Said he when he was examined in Chief: 15 20

*“About six years after I had been given the land Aruwa gave me a document of agreement. I signed the agreement. So too did Aruwa; I was given the document. I have kept in (sic) since.”* 25

When it is known that in Paragraph 6 of his Statement of Claim the appellant had pleaded that:

*“(6) In the year 1960, the plaintiff was granted the possession of a piece of land at a place called Imola on Aba Bolorunduro Road in Aisegba Ekiti by a tenancy agreement between the plaintiff and the Chiefs of Asegba Ekiti. The tenancy agreement will be tendered and is hereby pleaded.”* 30

This piece of pleading derogates from or is not in consonance with the evidence set out above which he later gave when he testified before the trial court. The appellant therefore clearly deviated from his pleadings when in his testimony, he made a case otherwise than he therein pleaded. For instance, his evidence in chief that Aruwa gave him a document of agreement (not the chief of Aisegba, Ekiti) which both he (appellant) and Aruwa signed, he was making a case other than as contained in his Statement of Claim. Such a piece 35

of evidence where adduced goes to no issue. See *N.I.P.C. v. Thompson Organisation & Ors.* (1969) 1 NMLR 192 at 103-104; *Emegokwue v. Okadigbo* (1973) 1 NMLR 192 at 195; *Maduabuchukwu v. Umunakwe* (1990) 2 NWLR 5 (Pt.134) 598 at 608; and *Uredi v.Dada* (1988) 1 NWLR (Pt.69) 237 at 246.

Besides, the appellant did not say specifically, who Aruwa was whether the head of Aisegba chiefs one of them or what! Hence, the onus that law on the appellant to prove his case by credible evidence in keeping with his pleading was not discharged. Indeed, appellant's case was so wobbly that he 10 damagingly made the fatal admission as part of his testimony at page 58, lines 25-27 thus:

*"...I am claiming the farm not the land I am ready to pay Ishakola to the defendants if it happens that the land does not belong to Aruwa."*

Calling Aruwa's son to wit: 3rd P.W. (Clement Faloye) to lend sup- 15 port to appellant's case as submitted by learned counsel for the appellant, would have come to naught and of no avail in the light of his clear manifestation of the appellant's non-investigation of the root of his purported grantor's title to the disputed piece of land before entering into possession in 1960. When 3rd P.W. in fact came forward to testify for the appellant in support of 20 the grant, nothing from his testimony left a tell-tale from which to decipher that Aruwa was a chief or one of the chiefs of Aisegba who as head, could dispose of the land. For its brevity and its capacity to do more harm than good to appellant's case, I quote hereunder 3rd P.W.'s evidence at page 61 of the Record as follows:-

25      *"I am a farmer. I know the plaintiff I know Aruwa he is my father. There was a transaction between plaintiff and Aruwa. Plaintiff was given land by Aruwa. I went with plaintiff to measure the land out to him. I told him the land belonged to Aruwa. Plaintiff cultivated the land and planted co-  
coa, kola-nut, plantain. I know the defendants ..."*  
30 (the italics is mine).

The import of the underlined words is to bring out glaringly the fact that this piece of evidence led at appellant's instance bore no relevance to his pleading in which his grantors are shown to be in the evidence adduced. Here, the submission of the learned counsel for the appellant that by the respon- 35 dents' . Statement of Defence wherein they pleaded at paragraph 12 that -

*"It was about 1965 that the plaintiff, the land in dispute had laid claim thereto saying that some Chiefs at Aisegba had granted him possession of the land"*

may be likened to an admission giving rise to the legal proposition that what

is admitted needs no further proof. See *Owosho v. Dada* (1984) 7 SC. 149 at 163-164. This is because such a submission is erroneous and baseless. Thus, should one accept learned counsel for appellant's submission which in essence is nothing but a right-about-turn he is making, his proposition that a customary tenancy needs not be in writing goes solidly against the grain of his pleading which relies for support on a purported written agreement. It is for this reason above anything else, that the trial court's finding that the appellant's and 3rd P.W.'s evidence went to no issue and the court below's affirmation of same, is in my respectful view, unimpeachable. 10

#### ISSUE 3:

While in answer to this issue, I take the firm view that a decision based on a trial court's personal view cannot be allowed to stand. See *Ejidi v. Obiora* 13 WACA 270 at 273-274; *The State v. Aibangbee* (1988) 3 NWLR (Pt.84) 548; in view of all I have said already under. Issue 1 above. where personal view hereinbefore discussed in relation to the visit to locus is dis- 15  
countenanced and it is acknowledged that the appellant's case is incurably bad, his case ought to be dismissed. The consequence of all these is that an order for retrial is totally out of the question here. A retrial may be ordered when there has been no just trial and not, as in the instant case, when a party 20  
has failed to prove his case and in addition wants another opportunity of proving what he failed to prove in the first instance. See *Duru v. Nwosu*. (1989) 4 NWLR (Pt. 113) 24 at 42; *Elias v. Disu* (1962) 1 SCNLR 361; (1962) 1 All NLR 214 at 219 and *Onifade v. Olayiwola* (1990) 7 NWLR (Pt.161) 130 at 161. 25

#### ISSUE 4:

This issue is as to whether or not the interest of a plaintiff in possession should be protected until the true owner of the land is known.

Suffice it here to say in answer to it that the appellant in the instant case failed woefully to prove his grant. In the first place, he called no grantor. 30  
Indeed, he pleaded one grantor to wit: Aisegba Chiefs but he gave evidence of another, namely, one Aruwa whose role was not known or stated. Secondly, the appellant did not prove the extent of his grant. It is an established principle of law that where a party pleads and relies on grant as his root of title, he is under a duty to prove such grant to the satisfaction of the trial court. So held 35  
this court in *Chief O. Odojin v. Isaac Ayoola* (1984) 11 SC. 72 at 106 and 116. In the case in hand, the appellant did not prove the extent of his grant 2nd P.W. (Yahaya Bello) and 3rd P.W. (Clement Faloye), having contradicted themselves

as to its dimension. On the other hand, the respondents proved their grant with certainty and their grantor D.W.1. (Chief Ojo Boisa) testified on their behalf in confirmation thereof.

The court below so upheld. Compare the case of Joshua Ogunleye v. Babatunde Oni (1990) 2 NWLR (Pt.135) 745 where there was no confusion on the part of the learned trial Judge as to the distinction between a grant and a title. In the instant case, however, there is an utter failure on the part of the appellant as plaintiff to simply establish who his grantor was and the extent of his grant therefore; a failure to which the learned trial Judge contributed in erroneously finding in his favour. Also in Ogunleye v. Oni (supra) where inter alia one of the issues submitted for the determination of the Supreme Court was what is required to prove by a plaintiff who relies upon a grant for his root of title to land, Nnaemeka-Agu J.S.C at pages 782-783, paragraphs A-H said:

*“One significant off-shoot in this case is the apparent confusion by the learned trial Judge as to the difference between a grant and a title. He assumed that a proof of a grant necessarily amounted to proof of title. But in my respectful opinion it is not necessarily always so. No doubt, proof of a grant is one of the five ways of proving a title: See Idundun v. Okumagba (1976)9-10 SC. 227; also Piaro v. Tenalo (1976) 12 SC. 31 at page 37. But it would be wrong to assume, as the learned trial Judge obviously did in this case, that all that a person who resorts to grant as a method of proving his title to land needs to do is to produce the document of grant and rest his case. Rather, whereas, depending upon the issues that emerged on the pleading, it may suffice where the title to the grantor has been admitted, a different situation arises, in a case like this where an issue has been raised as to the title of the grantor. In such a case the origin of the grantor’s title has to be averred on the pleading and proved by evidence. See Mogaji v. Cadbury Nigeria Ltd. (1985) 2 NWLR (Pt.7) 393 at 431 and Elias v. Omo-Bare (1982) 5 SC. 25 at 57-58.”*

30

In the instant case, not only was the grantor’s title denied, the grantor’s name and the extent of the grant as pleaded by the appellant were otherwise than as pleaded. Moreover, the document constituting the grant (the tenancy agreement) having been effectively barred from forming part of the evidence of the grant and for good legal reason, evidence led at the trial constitutes evidence not led in support of the pleading and therefore goes to no issue. See Olanrewaju v. Bamigboye (1987) 3 NWLR (Pt.60) 353 at 359 following Emegokwue v. Okadigbo (1973) 4 SC. 113.

Thus, the respondents proved a better title and as far as they are concerned, the appellant is a trespasser and was so treated. The law is firmly established that a trespasser in possession is not in legal or legitimate possession. See *Da Costa v. Ikomi* (1968) 1 All NLR 394 at 398; *Talabi v. Adeseye* (1973) 1 NWLR 8 at 10; *Badiru v. Ozoh* (1986) 4 NWLR. (Pt.38) 724. The appellant's interest in the land in dispute, if any, was therefore in trespass and such cannot be protected by law. As a tenant cannot be sued in trespass See *Adeleke v. Coke* (1961) 1 All NLR 35 and only the person in actual possession can. See *Ekwere v. Iyiegbu* (1972) 6 SC. 116 at 138 since the appellant has failed to show he was a tenant of any known landlord and so in possession, he cannot maintain an action in trespass. See *Joseph Atoyebi Oyeibanji v. Bashiru Okunola* (1968) NMLR 221.

#### ISSUE 5:

The poser in this issue is: Where the most central and material conflict between the plaintiff and defendant had not been resolved during the trial in the trial court, and the appeal court sets aside the judgment of the trial court, what is the appropriate order which the appeal court ought to make, order of dismissal or order of retrial?

Here too, even though the respondents in their pleadings as well as in the testimony before court conceded that a land dispute existed between Ijan, 1st D.W.'s town and Aisegba, there is however nothing to show that the land in dispute is the instant case is part of or the same land in dispute before the Boundary Commission. The 1st D.W. testified, following strictly the pleading of the defence, that the land in dispute is his family land over which he has over 200 tenants. Nobody from Aisegba whose chiefs the appellant had pleaded (though he led no evidence to prove) were his grantors, came forward to challenge 1st D.W. over his claim. Surely, if the land in dispute here is part of the land in issue before the Boundary Commission, Aisegba people would have come forward to affirm the purported grant made to the appellant and debunked the claim of the respondent's grantor i.e. 1st D.W. The appellant cannot be heard to approbate and reprobate at same time having filed the action herein himself originally and none of his alleged grantors has come forward to assert any claim to the disputed land. The sum total of the appellant's case borders on uncertainty, to wit: that he is unsure of the owners of the disputed land; while his alleged grantors either disallowed him or were unhelpful to this cause. That at the end of the day, the appellant stated he was ready to pay 'ishakole' to whoever Aruwa might indicate was the owner of the land in dispute, is an admission on his part of the uncertainty of his grant. For

that, an order of dismissal of the appellant's case, is an appropriate order to make.

ISSUE 6:

In answer to this issue, it is pertinent to point out that in the instant  
5 case the appellant did not tender survey plan of the land he claimed. Nor did  
he prove by oral evidence, as he ought to, the boundaries of the said land.  
This court has laid down the principle for quite some time now, that a party  
failing to give evidence of boundaries to the land in dispute which he claims,  
is not entitled to succeed. See *A.W. Elias v. Alhaji B. A. Suleimon* (1974)  
10 NMLR. 193; (1973) 1 All NLR. (Pt.2) 282. For the requirement that the appellant  
as plaintiff ought to prove by evidence in court the boundaries of his land, he  
could as well, supplement this by what is observed during inspection at the  
locus. In the case in hand, the oral evidence of boundaries that appellant  
15 proffered in court was not only unpleaded, the sum total of the evidence given  
by him did not support his case. The trial court albeit in an attempt to help him  
out the locus wrongly and unjustifiably found for him on evidence which was  
neither documentarily nor orally credible as well as convincing. The end result  
on the question of boundaries in the case in hand therefore is that the appel-  
20 lant failed woefully to discharge the burden that lay on him to establish such  
boundaries by adducing any credible evidence. See *Akinola Baruwa v.*  
*Ogunsola & Ors.* (1938) 4 WACA 159; *Epi v. Aighedion* (1972) 10 SC. 53;  
*Udofia v. Afia* (1940) 6WACA. 216; and *Ezendu v. Obiagwu* (1986) 2 NWLR  
(Pt.21) 208 at 214-215.

25 ISSUE 7

I adopt my consideration of Issue 4 above. I only wish to add that  
whatever, if any, the appellant has on the land he does so in trespass and the  
law does not and cannot afford him protection.

ISSUE 8:

30 As demonstrated elsewhere in this judgment the purported tenancy  
agreement the appellant sought to tender at the hearing of the case herein on  
appeal was rejected and rightly so in my view. The appellant, as transpired did  
not cross-appeal against the rejection in the court below. It is therefore not  
open to him here to re-open the issue. What is more, as earlier shown, the  
35 rejected tenancy agreement having been made in 1968, eight years after the  
alleged grant in 1960 and constituting a nebulous document of ill-defined  
boundaries which could not withstand the test of veracity; its rejection was  
appropriate for its hollowness. See *Erinosho v. Owokoniran* (1965) NMLR 479  
at 483; *Adenle v. Oyegbade* (1967) NMLR 136 at 138 and *Eze v. Igiliegb* 14



WACA 61.

The result of all I have been saying is that the issues having been answered against the appellant this appeal fails and it is accordingly dismissed. The appellant is to pay costs assessed at N350 and N1,000 in the court below and in this court respectively to the respondents inclusive of out of pocket expenses.

5

### UWAIS JSC

This appeal has no merit and ought to be dismissed. The appellant, who was the plaintiff in the High Court of Ondo State (Adeloye J, as he then was), brought an action claiming (1) for a declaration that he was entitled to the possession of the land in dispute; (2) a perpetual injunction to restrain the 1st respondent, his agents or servants from committing further trespass on the land in dispute or harvesting the crops on the said land; and (3) special damages for unlawful harvest from the farm on the land in dispute and general damages for trespass.

Pleadings were settled between the parties. The evidence adduced by the appellant went contrary to his pleadings. He could not establish the boundary of the land in dispute nor could he prove the owner of the land. Although he pleaded that he was granted possession of the land by virtue of a written tenancy agreement between him and the Chiefs of Aisegba Ekiti, he failed to produce the written agreement or call any of the Chiefs to prove the agreement. It is obvious, therefore, that the appellant did not prove his claim. But surprisingly, the learned trial Judge held that the land in dispute was granted to the appellant by Aruwa family of Aisegba. It was not his case on his pleadings that it was Aruwa family that put him in possession but the Chiefs of Aisegba Ekiti. It is appropriate, therefore, that the majority in the Court of Appeal (Ogundare, J.C.A ..., as he then was and Ejiwunmi J.C.A .. with Ndoma-Egba J.C.A .. dissenting) set aside the decision of the trial court.

It is elementary that the parties to a case are bound by their pleadings. They cannot depart from the pleadings in their testimony or the evidence they adduce. Doing so renders the evidence they call to no issue and fatal to their case. The majority in the Court of Appeal was, therefore, right in setting aside the decision of the trial court. I see no merit in the appeal.

I agree with my learned brother Onu, J.S.C., whose judgment I read in draft, that the appeal be dismissed with costs to the respondent as assessed by him.

**OLATAWURA JSC**

It is trite law that a Statement of Claim supersedes the writ of summons. The claim by the appellant (who will now be referred to as the plaintiff) as shown in paragraph 14 of the Statement of Claim does not refer specifically to any piece of land. That alone is sufficient to have the case dismissed. The respondents were sued personally. They will hereafter be referred to as the defendants. Paragraph 14 of the Statement of Claim, apart from the items of particulars of damages reads:

10      “By reason of the above premises the plaintiff claims as follows:-

(a) The declaration that the plaintiff is entitled to the possession of the land in dispute and the ownership of the crops thereon.

(b) The plaintiff seeks a perpetual injunction restraining the 1st defendant and or his agents, representative or servants from further trespassing into the land in dispute and from harvesting any of the crops thereon.

(c) The plaintiff asks for general damages for trespass and special damages for unlawful harvests from the farm both amounting to One Thousand three Hundred Naira (N1,300) only.

The plaintiff, according to his pleading, is a native of Omu-Aran in Kwara State. He relied on a grant by the Chiefs of Aisegba in Ekiti, Ondo State. The grant was in writing. It was after the alleged grant that he went into possession, cleared the forest, cultivated the land and planted various crops such as Cocoa, Kolanuts, Bananas, Yams, Citrus and Coffee. It was in 1965 that the defendants entered the farmland and harvested the crops. There was an interval of about 5 years when, according to the plaintiff, the defendants did not trespass into his land. They resumed the act of trespass in 1970 and continued until he filed his action. In paragraph 13 of the Statement of Claim he pleaded generally a nondescript survey plan and promised to tender the original plan in evidence.

20      The defendants on the other hand averred that the late Olukare, Oba Momoh III was granted an area which included the land in dispute by members of “BAISA” family of Iluomoba in Ekiti. Baisa family was the original owner of the land in dispute. The land in dispute is edged red in Survey plan FA4952. As at the time of the grant to Oba Momoh III, the land was a virgin forest. Oba Momoh went into possession and cultivated a large piece of land out of the land granted to him. He planted various crops on the land e.g cocoa, coffee, kolanut and cocoyam, just to mention a few. The grant to Oba Momoh III was not a sale. It was however subject to the payment of Isakole as soon as the cocoa started yielding fruits. He started paying Isakole in 1974 i.e. two

years prior to his death in 1976. It was in 1965 that the plaintiff entered the land in dispute and claimed it on the ground that some chiefs from Aisegba had granted him possession of it.

The case came before Adeloye, J. (as he then was) for hearing on 5th July, 1978. The plaintiff gave evidence and called three witnesses. In his evidence before the court, the plaintiff said he went to one ARUWA in Aisegba who granted him some land for farming. He cleared the land and planted cocoa; kolanuts, palm trees etc. It was six years thereafter that ARUWA gave him a document they both signed. Defendants' farm is adjacent to his farm. He instructed a surveyor to survey the farm. The surveyor gave him a copy of the survey plan. He could not find or locate the surveyor again. The copy of the survey plan in his possession was tendered for identification. He described the boundaries of the farm. His boundary men were the defendants, Sunday and one Aremu. He identified the 2nd and 3rd defendants and accused them of stealing his yams. He did not go to the farm again for fear of being killed by the defendants. Towards the end of his evidence-in chief, the plaintiff said:

*"I am claiming the farm not the land. I am ready to pay Isakole to the defendants if it happens that the land does not belong to Aruwa."*

Objection was raised when an attempt to tender a tenancy agreement dated 24/12/68 was made. The court reserved ruling on the objection which was given when the judgment was delivered. The tenancy agreement was rejected. Under cross-examination, the plaintiff said:

*"Aruwa who gave me the land told me that it is his".*

The first witness called supported his claim that the farm belonged to the plaintiff. Under cross-examination the witness said:

*"I only know that the farm was sold to plaintiff by Aruwa from Aisegba."*

The witness confirmed that Aruwa claimed to be the owner. The second witness for the plaintiff confirmed the ownership of the plaintiff. The third witness was the son of Aruwa. He also confirmed of the plaintiff and that the plaintiff cultivated the land and planted cash crops. The defendant called evidence of grant by Baisa family. The first witness was the head of the family. He denied the claim of the plaintiff. He confirmed that the land was granted to 1st defendant when the land was a virgin forest. The ownership of the land itself was the subject of a dispute between the two communities AISEGBA and ILUOMOBA. The matter was referred to the Boundary Commission. Both counsel addressed the court.

In the plaintiff counsel's address, the learned counsel said:  
"Plaintiff cannot say with certainty who the owner of the land is"

The learned trial Judge reviewed the evidence before him and said:

*"In view of my findings, I grant possession of the farm in dispute as described in plaintiff's evidence and identified by court to the plaintiff.*

*I also grant the injunction sought against defendants, their servants and agents."*

5 Aggrieved by the decision of the High Court, the defendants appealed to the Court of Appeal. On 17th March, 1989, the Court of Appeal by a majority decision set aside the judgment of the learned trial Judge and dismissed the plaintiff's claims.

It is against that decision the plaintiff has appealed to this court.  
10 Briefs were filed and exchanged. The preliminary objection filed by Mr. Akanle against all the grounds of appeal on the ground that they are mixed law and fact for which leave of this court or that of the court below was required was dismissed by us. My learned brother Onu, J.S.C. has set out in the lead judgment the eight issues for determination raised in the appellant's brief. I need  
15 not repeat them again.

It would appear from the respondents' brief that the respondents agreed with the appellant on the issues for determination. With respect due to both counsel, the only issue which called for determination is:

Has the plaintiff proved his case in view of the pleading and the  
20 evidence led?

Before going into the merit of the appeal, I will point out that a careful analysis of the judgment of the lower court reveals that irrelevant issues had been raised by the appellant.

The plank on which the plaintiff based his case is set out in paragraphs 6 and 7 of the Statement of Claim. These paragraphs read thus:

“(6) *In the year 1960, the plaintiff was granted the possession of a piece of land at a place called Imola on Aba Bolorunduro Road in Aisegba Ekiti by a tenancy agreement between the plaintiff and the Chiefs of Aisegba Ekiti. The tenancy agreement will be tendered and is hereby pleaded.*

30 (7) *Soon after the grant, and in the same 1960, the plaintiff cleared the forest on the said land, cultivated the land and planted various crops thereon including, inter alia, cocoa, kolanuts, bananas, yams, citrus, and coffee, and since 1960 the plaintiff has assiduously been tilling the said farm, and the above-mentioned crops have grown to adults and are now  
35 yielding seasonal fruits."*

The evidence led was the exact opposite of what was pleaded, hence the trial court ought to have rejected it: *N.I.P.C. v. Thompson Organisation Ltd & Ors* (1969) NSCC 161; *Emegokwue v. Okadigbo* (1973) NSCC 220; *Raimi v. Akintoye* (1986) 3 NWLR (Pt.26) 97; (1986) 1 NSCC 649

A party who claims through a particular set of people (as in this case Chiefs of Aisegba) cannot be allowed to set up another claim through other person or set of people not pleaded. The learned trial Judge was therefore in grave error to have found as follows:

*"I believe plaintiff that the Aruwa family of Aisegba granted him land."*

It was for this reason that in the lead judgment of Ogundare, J.C.A. 5 (as he then was), the learned Justice observed thus:

"He (the plaintiff) did not call any chief from Aisegba to testify as to the grant made to him. Indeed, contrary to his pleading he testified that it was one Aruwa that granted him land. In the light of this conflict it is difficult to see how the respondent could be said to have proved his case. His evidence and that of P.W.3 to the effect that Aruwa gave respondent land went to no issue 10 and should have been ignored by the learned trial Judge.

I agree with this principle of law. The other arm of the claim i.e. injunction should have been dismissed also in that no plan was tendered. Although a survey plan is not of necessity where the other side admits the area of land in dispute or when from the description given at the trial the tendering or production of a plan would have been superfluous since the identity of the land is not in doubt. The learned trial Judge went out of his way to have granted possession when as a result of his visit to the in quo in locus he gave ample support to a serious issue not supported by evidence i.e. identity of the land. 20

It is for these reasons and the fuller reasons in the lead judgment of my learned brother Onu, J.S.C. that I will also dismiss this appeal which is unmeritorious. I abide by the order for costs in the lead judgment.

25

### OGWUEGBU JSC

The plaintiff who is the appellant in this court instituted an action 30 against the defendants in the High Court of justice of the then Western State of Nigeria in the Ekiti Judicial Division holden at Ado-Ekiti. He claimed a declaration that he is entitled to the possession of the land in dispute and ownership of the crops thereon, perpetual injunction and damages for trespass. 35

The plaintiff won in the trial court and the defendants appealed against the decision of the learned trial Judge to the Court of Appeal. That court set aside the decision. The plaintiff was dissatisfied with the decision of the court below and appealed to this court. He identified eight issues in his brief of

argument as arising for determination.

The basic issue in this appeal in my humble view is whether the plaintiff/appellant proved his case in the trial court having regard to his pleading, and evidence and whether the procedure adopted in the visit to the locus and the use made by the learned trial Judge of his observations at the scene affected the result of the trial. I will therefore set out the material averments in the statements of claim and defence along with the evidence adduced in their support.

10            Statement of Claim:

          “(6) *in the year 1960, the plaintiff was granted the possession of piece of land at a place called Imola on Aba Bolorunduro Road in Aisegba Ekiti by a tenancy agreement between the plaintiff and the chiefs of Aisegba Ekiti. The tenancy agreement will be tendered and is hereby pleaded.*

15            (7) *Soon after the grant, and in the same 1960, the plaintiff cleared the forest on the said land, cultivated the land and planted various crops thereon including, inter alia, Cocoa, kola nuts, and since 1960 the plaintiff has assiduously been tilling the said farm, and the above-mentioned crops have grown to adults and are now yielding seasonal fruits.*

20            (8) *The 1st defendant is a tenant on a vast piece of land adjacent to the farm of the plaintiff...*

          (9) *When in 1965 the 1st defendant saw the crops on the farm of the plaintiff had started to yield fruits, he became envious and he wanted to share out of the plaintiff's crops. And every year since 1965 and up till today, the 1st defendant's brother, namely the 2nd defendant, and the 1st defendant's servants including the 3rd defendant, have been entering the land in the possession of the plaintiff and harvesting any ripe crops therefrom without the consent of the plaintiff and on the instruction of the 1st defendant.*

30            (13) *In order that the land in respect of which the plaintiff is claiming possession and the farm in respect of which the plaintiff is claiming ownership may be clear to the defendants and for the avoidance of doubt in the mind of the court and all parties concerned the plaintiff engaged a surveyor who produced an original survey plan of the farm on the 25th October, 1974, and who has later produced some certified true copies of the original plan. A copy of the survey plan will be tendered in evidence and is hereby pleaded. A copy of the survey plan is attached to the statement of claim to be served on the defendants at the Olukare's palace, Ikare for reference.*

(14) By reason of the above premises the plaintiff claims as follows:-

(a) The declaration that the plaintiff is entitled to the possession of the land in dispute and the ownership of the crops thereon.

(b) The plaintiff seeks a perpetual injunction restraining the 1st defendant and or his agents, representatives or servants from further trespassing into the land in dispute and from harvesting any crops thereon. 5

(c) The plaintiff asks for general damages for trespass and special damages for unlawful harvests from the farm both amounting to one thousand three hundred naira (N1,300) only.”

Amended Statement of Defence: 10

“3. The defendants know nothing of the facts, if they are, contained in paragraphs 1,5,6 and 7, of the statement of claim and therefore put the plaintiff to the strictest proofs.

4. In reply to paragraph 8 of the statement of claim the defendants say that the late Olukare, Oba Amusa Momoh III, was granted an area of land which included the land in dispute in this case in the year 1956, by members of “BAISA” Family of Iluomoba in Ekiti; the said “BAISA” Family is the original owner of the land in dispute, which land is clearly shown in survey plan number FA 4952 and thereon edged red. 15

5. Further to paragraph 4 above, the land was a virgin forest when it was granted to the said late Olukare, Oba Amusa Momoh III, who thereafter went into immediate possession and cultivated a very large area of the land which he planted with various crops which included cocoa, coffee, kolanuts, cocoayams, citrus, plantain, wall nut and pineapple. 20

6. The grant to Oba Amusa was not a sale, it was a sale (sic) it was a free one, even through (sic) Oba Amusa gave his grantor plenty of kolanuts, drinks and a token sum of an equivalent of N100.00 and Oba Amusa’s name was entered on the Baisa Family’s Record of tenants. 25

12. It was about 1965, that the plaintiff entered the land in dispute and laid claim thereto saying that some chiefs at Aisegba had granted him possession of the land. 30

13. The land in dispute had never been the property of anyone at Aisegba, whereof the defendants will urge the court to dismiss the plaintiff’s claim with substantial costs.”

In his evidence in chief the plaintiff testified as follows:- 35

“About 18 years ago from Bolorunduro I went to Aisegba to one Aruwa. I asked him to grant me some land for farming. He granted me some land on which I planted cocoa ...About six years after I had been given the land Aruwa gave me a document of agreement. I signed the agreement. So too

did Aruwa. I was given the document. I have kept it since. Defendant's farm is adjacent to my farm. I instructed that the land be surveyed, I showed the surveyor round the farm and he drew a survey plan. He gave me a copy... My other boundary men are Sunday and Adamu.

I am claiming the farm not the land. I am ready to pay Isakole to the defendants if it happens that the land does not belong to Aruwa. (*Italics is mine for Emphasis only*).

The survey plan of the plaintiff was admitted in evidence as Identification 2. The tenancy agreement given to the plaintiff by Aruwa was rejected for non compliance with S.16 of the Land Instruments Registration Law Cap.56 Vol. III, Laws of Western Region of Nigeria, 1959.

Lasisi Adeyemi testified as P.W.1. He told the court that he knows the farm and that it belongs to the plaintiff. He and Yaya Bello P.W.2 assisted the plaintiff in clearing and cultivating the land. The evidence of Yaya Bello (P.W. 2) is a repetition of the evidence of P.W.1. One Clement Faloye testified as P.W.3 He is the son of Aruwa. He testified that there was a transaction between the plaintiff and Aruwa; that the plaintiff was given land by Aruwa and he went with the plaintiff to measure the land which is about 400ft. by 300ft. and that the land is Elekeum camp. He stated that the plaintiff cultivated it. This is the summary of the evidence produced by the plaintiff.

The 2nd defendant Musa Momoh testified that the land in dispute belong to Biasa at Ilu-Omoba. He planted cocoa, coffee, kolanuts and oil palm trees on the land. He did so on the instruction of late Olukare who was the 1st defendant in this proceeding and a full brother of the witness. He testified that the land was granted to Olukare by Biasa about 28 years ago and it was a thick bush at the time of the grant. He said that the land lies on the left hand side on the Iluomoba Ise the land bounded by a stream called Parinabe at the lower end and by the lands of Sunday Aiyekilogbon, Abegunde Orimope, Adamu Gambari and Olumpe Sunday Olemuja.

At the time the land was granted to Olukare, he gave colanuts and drinks worth about N100.00. He also paid Isakole nine years after.

D.W.1 and D.W.2 (Chief Ojo Baisa and Omogede Agbanigo) who are members of Baisa family gave evidence of the grant to the 1st defendant (late Olukare) by their family about 28 years at the time they testified. D.W.1 is the head of the family of the defendants' guarantors. D.W.3 and D.W.4 are boundary men. They also gave evidence in support of the case of the defendants.

The plaintiff in paragraph 6 of his statement of claim averred that he was granted possession of the land in dispute by the Chiefs of Aisegba Ekiti



and he entered into a tenancy agreement with the chiefs. The tenancy agreement was pleaded. In his evidence, he testified that one Aruwa granted the land to him and the said Aruwa gave him a document which both of them signed.

The evidence thus led by the plaintiff as to his root of title is in sharp conflict with his pleading. The case of the plaintiff has thus broken down having failed to make out the case he set out to make. His claim ought to have been dismissed by the learned trial Judge. See Mogaji v. Cadbury Nigeria Ltd. (1985) 2 NWLR (Pt. 7) 393.

It is a settled principle of practice that parties are bound by their pleadings and cannot be allowed to set up in court a case at variance with their pleadings. See Metalimpex v. A. G Leventis & Co. Nigeria Ltd. (1976) All NLR 79 at 88. Therefore the facts pleaded by the plaintiff as to his root of title are entirely without proof and the evidence on grant by Aruwa goes to no issue and the trial court ought to have disregarded it. See Igboim v. Obianke (1976) 9-10 SC. 179, Emegokwue v. Okadigbo (1973) 4 SC 113, Total (Nigeria) Ltd v. Nwako (1978) 5 SC.1 and Ohiaeri v. Akabeze (1992) 2 NWLR (Pt. 221) 1.

Another serious flaw in the case of the plaintiff is his failure to prove the identity of the land in respect of which he was claiming injunction. The land was not described in the statement of claim. He relied on a survey plan copy of which was admitted in evidence for identification purpose only. Having failed to prove the identity of the land, the claim for injunction should equally have been dismissed. His unpleaded evidence on the boundaries of the land were inadmissible and should have been expunged from the record by the learned trial Judge.

I therefore agree with the court below that from the pleading and the evidence, the respondents proved a stronger case than the appellant to the possession of the land in dispute which is admitted to be surrounded by their farm land.

As to the visit to the locus in quo, the learned appellant's counsel submitted that the learned trial Judge based his judgment principally on evidence which is a nullity and that the provisions of sections 77(d)(ii) of the Evidence Act were not complied with.

The learned trial Judge at page 68 lines 28-32 of the record of appeal observed as follows:-

*"It will be necessary to visit the locus as requested by both counsel for both parties. Visit to locus on 7:7:78. Case adjourn (sic) to 7:7:78. sgd.*

6;7:78.”

There is no other record of what transpired at the locus in quo except in the judgment dated 6th September, 1978 where the learned trial Judge made  
5 some findings of fact which are based on his observations at the locus.

At page 76 of the record, the learned trial Judge said:

*“After the address by both counsel, Mr. Adeoye urged the court to visit the locus. This was done on the 7th July, 1978.”*

At page 79 of the record the learned trial Judge further said:-

10 *“This judgment is based on the oral description of the land confirmed by the observations of the court at the locus in quo. Neither party tendered a survey plan inspite of the troubles they must have gone into preparing one. Plaintiff did not call any boundary men. This is probably because he is encircled by the land of Olukare and other Ikare men. I have  
15 no doubt that Adamu, the Hausa man sharing a common boundary with the farm in dispute is an agent or servant of Olukare. I do not believe him that he had never seen plaintiff in the farm in dispute. He told deliberate falsehood in spite of his calling “Allah” as his witness in answer to every question asked.*

20 *Plaintiff’s description of the farm in his evidence on oath corresponds with the features identified during the court’s visit.”*

The plaintiff’s evidence on oath as to the boundary was inadmissible. Section 77(d)(ii) of the Evidence Act Cap.112, Laws of the Federation of Nigeria, 1990 laid down two procedures for visit to locus in quo.

25 (a) The court may adjourn to the locus and continue sitting there in the normal way by hearing and taking evidence of witnesses; or

(b) The court may just move to the locus to inspect the subject matter in dispute and return to the court room for evidence.

See Chukunogor v. Obuora (1987) 3 NWLR (Pt.61) 454 at 473.

30 The learned trial Judge did not comply with either of the two procedures and compounded the matter by supporting some of his findings of fact with the observations he made at the locus as if they were evidence. An observation does not do away with the necessity for evidence. It is not in itself evidence. See Gold v. Evans (1951) 2 TLR 1189. Where a retrial Judge makes a visit to a  
35 locus in quo, it is not proper for him to treat his perception at the scene as a finding of fact without evidence of such a perception being given by a witness either at the locus or later in court after the inspection. See Seismograph Service Nigeria Ltd. v. Onokpasa (1972) 1 All NLR (Pt.1) 343 and Enigwe & Ors

v. Akaigwe & Ors. (1992) 2 NWLR (Pt.225) 505.

In Enigwe & Ors. v. Akaigwe & Ors. (supra), the visit to the locus in quo was done at the close of evidence and addresses of counsel as in this case. In that case, the only note of the visit to the locus in quo made by the learned trial Judge reads;

*“At the close of evidence learned counsel for both parties addressed the court extensively. After considering the evidence canvassed by both sides, had very little to choose between the evidence of both sides. I, therefore, decided to pay a visit to the locus in quo to see things for myself.” Uwais, J.S.C. who delivered the lead judgment in that case stated:-*

*‘First of all it is difficult to say that the proceedings at the locus in quo as recorded above conform with the general principles enunciated earlier. Some of the witnesses were not cross-examined and there is no explanation on the face of the record as to why they were not cross-examined. The questions that arise are: were the parties given the opportunity to cross-examine the witnesses and they declined to do so? Or were the parties denied the right? There are no answers to these vital questions. Secondly, there were no addresses by the parties on the additional evidence adduced at the locus in quo. With that state of the record of proceedings, it is not possible to say if the parties were given the opportunity to do so, by the trial Judge before he proceeded to deliver his judgment.’”*

This court made an order of non-suit in that case. A similar order of non-suit was made by this court in Seismograph Services Ltd. v. Onokpasa (supra). The facts of the above two cases are not exactly on all fours with the facts of this case.

In the appeal before us, the learned trial Judge did not express any difficulty with the evidence led by both parties. It is even difficult to determine at whose instance he decided to visit the locus in quo. On 6/7/78 when he adjourned to 7/7/78 to visit the locus, he recorded that he was doing so at the request of both counsel. At page 76 of the same record, the learned trial Judge stated:

*“After the address by both counsel, Mr. Adeoye urged the court to visit the locus. This was done on 7th July, 1978.”*

Mr. Adeoye is the plaintiff’s counsel.

The strange thing about this appeal is that the plaintiff who benefitted from the irregular procedure adopted by the learned trial Judge got judgment in his favour in that court. He did not complain of the irregularity when he won. Having lost in the Court of Appeal, he has now turned round to complain. Furthermore, those findings of the learned trial Judge which are based on the

court’s observations at the scene were all favourable to the plaintiff’s case.

Be that as it may, I am unable to find from the record any purpose for the visit to the locus in quo by the learned trial Judge. I agree that the procedure adopted by the learned trial Judge was highly irregular. The effect on the entire case therefore calls for consideration.

Whereas in *Enigwe v. Akaigwe* (supra), the learned trial Judge entered judgment for the plaintiffs. The defendants Were aggrieved by the decision and appealed to the Court of Appeal complaining, inter alia, that the visit to the conclusion in locus in quo which took place after final address by the parties and after judgment had been reserved was wrong. The Court of Appeal dismissed their appeal holding that what happened at the locus in quo did not occasion a miscarriage of justice to reverse the judgment. On further appeal to this court, it was held that as a result of the remark made by the learned trial Judge that he had “little to choose between the evidence of both sides”, he embarked on the visit to the locus and it was impossible for this court to determine on which side the scale of justice should tilt. In the circumstances of the case, an order of non-suit was made.

In the case of *Nwizuk & Ors. v. Eneyok & Ors.* (1953) 14 WACA. 354, the learned trial Judge after the evidence went to inspect the land in dispute- some islands in the case- in the presence of two plaintiffs and one defendant as representing the plaintiffs and defendants. At the locus, the defendant admitted that some of the evidence given for them was untrue and the two plaintiffs admitted that evidence given for them regarding some of the islands was false. In the judgment dismissing the plaintiff’s claim to the island the Judge gave account of the inspection and mentioned the said admission. The plaintiffs appealed arguing that it was a mistake of law to take into account statements made at the inspection, that the Judge ought to have recalled those concerned for further examination. It was held that the court did not cease to be a court when on inspection and that the statements were as much oral admissions by a party in courts as if they had been in a court-room, and could be taken into account as such and the absence of a record of the inspection was not fatal; statements by the judge in a solemn form must be taken as a correct account of what happened. See also *Maji v. Shati* (1965) NMLR 33.

In the present case, the issue is not on any oral admissions made by any of the parties nor absence of record of the inspection. The appellant is urging the court to declare the entire proceedings null and void for non-compliance with s.77(d) (ii) of the Evidence Act.

Having considered the above cases some of which are not on all fours

with the present case, I have come to the conclusion that from totality of the evidence before the trial court, the appellant had woefully failed to prove his case. He failed to prove his root of title; he failed to prove the boundaries of the land for which he sought an injunction and what is more, there is evidence that the land claimed by the plaintiff/appellant is completely encircled by the land of the defendants/respondents. There was therefore no need for any visit to the locus. The plaintiff's case ought to have been dismissed. The exercise by the learned trial Judge in visiting the locus was superfluous if not gratuitous. Sentiment has no place in judicial deliberations. See *Victor Ezeago & Co. v. Nelson Ohaneyere* (1978) 6-7 S.C 171 at 184. 5

The irregular procedure and the use of the observations made by the learned trial Judge in part of his findings though deprecated do not entitle the appellant to have a second bite at the cherry when his case in the court of trial failed completely. When it suited him, he did not complain of the irregularity. It is therefore my view that the provisions of sections 77(d)(ii) of the Evidence Act should not be called in aid by litigants whose cases are unsupportable as in this case. 10 15

For the reasons I have given in this judgment and for the fuller reasons in the judgment of my learned brother Onu, J.S.C., I will dismiss the appeal. I hereby dismiss the appeal and affirm the decision of the Court of Appeal. I also adopt the orders as to costs contained in the lead judgment. 20

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### ADIO JSC

I have had the privilege of reading, in advance, the judgment just delivered by my learned brother, Onu, J.S.C., and I agree that the appeal does not succeed. I too dismiss it and abide by the order for costs. 25

The appellant's case failed woefully before the learned trial judge but the learned trial Judge felt that the appellant had proved his case and tendered judgment in his favour. Dissatisfied with the judgment, the respondents appealed to the Court of Appeal which, rightly in my view, allowed the appeal, set aside the judgment of the learned trial Judge, and in its place substituted an order dismissing the appellant's claim. The Court of Appeal was justified because there were, inter alia, two fundamental defects in the appellant's case, as presented before the learned trial Judge, namely, failure of the appellant to prove the boundaries of the land said to be in dispute and the inability of the appellant to discharge the onus on him to prove that he was the owner of the land in dispute. Where a plaintiff fails to prove the boundaries or identity of the land in dispute, the proper order to make is one dismissing his claim for a declaration of title. See *Makanjuola v. Balogun*, (1989) 3 NWLR. (Pt.108) 192. 30 35

The Onus is on plaintiff claiming a declaration of title to satisfy the court that he is entitled, on the evidence brought by him, to the declaration that he has sought. If the onus is not discharged by the plaintiff his claim should be dismissed. See Kodilinye v. Odu, 2 WACA. 336.

It is for the foregoing reasons and for the fuller reasons given by my learned brother, Onu, J.S.C., in the lead judgment that I agree that the appeal should be dismissed.

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