

SUPREME COURT OF NIGERIA
6TH MAY, 1994. SC. 94/1992
CORAM:-M. L. UWAI, O. OLATAWURA,
M. E. OGUNDARE, S. U. ONU, Y. O. ADIO, JJSC

UMENNADOZEE OGBUOKWELU
& 10 OTHERS

..... DEFENDANTS/APPELLANTS

AND

JAMES UMEANAFUNKWA
& ANOTHER
(For themselves and on behalf
of the people of Iruama Village
Nkwukwo Quarter, Unubi Town)

..... PLAINTIFFS/RESPONDENTS

APPEALS - Retrial - Inhere findings based on inferences did not arise - Whether the Court of Appeal was fight in re-evaluating evidence, setting aside judgment and ordering a retrial - Proper time to order a retrial.

APPEALS - Wrongful finding - Land matters - Court of Appeal's finding that plaintiff's evidence on acts of possession were brushed aside unevaluated by trial court - Held not to be correct

LAND LAW - Title - Conflict in the evidence of both parties' traditional history - Need to apply Kojo II v . Bonsie principle.

LAND LAW - Title - Conflicting traditional history presented by both parties - Demeanour of witnesses is of little guide - Best way of resolving the conflict.

LAND LAW - Evidence - Trial Courts failure to apply Kojo II v. Bonsie principle - Where there is ample evidence upon which the plaintiffs' case was dismissed - Appellate court should apply the principle.

LAND LAW - Findings as to boundary - Where there is no dispute as to the identity of the land in dispute - Whether trial judge ought to make specific findings as to the boundary.

FACTS

The Plaintiffs/Respondents filed an action before the High Court Onitsha, against the Defendants/Appellants claiming N100,000.00 special and general damages for trespass and perpetual injunction. Both sides claimed ownership of the land in dispute thereby putting title in issue. The Appellants though sued in their individual capacities, by the nature of the defence appear to represent the eight families of Iruze village in Ekwulumili who claim ownership of the land in dispute. Each of the parties based their claim to the land in dispute on separate evidence of traditional history and pleaded acts of possession. There was no dispute as to the identity of the land save that each party called it a different name.

Although the trial Judge found there was conflicting evidence of traditional history, he failed to apply the principle enunciated in *Kojo II v. Bonsie*. He held that the Plaintiffs/Respondents failed to prove both title and exclusive possession and dismissed their suit. Respondents' appeal to the Court of Appeal was upheld and a retrial was ordered. The Appellants being dissatisfied have appealed to the Supreme Court to determine whether the Court of Appeal was right in embarking on a fresh appraisal and re-evaluation of evidence and in setting aside the trial court's judgment plus ordering a retrial. The Respondents cross appealed, urging that judgment be entered for them in view of the Court of Appeal's findings.

HELD (unanimously allowing the appeal)

1. As the learned trial Judge acknowledged that there was a conflict in the evidence given in respect of traditional history presented by both parties, he should have proceeded to apply the principle enunciated in *Kojo II v. Bonsie* to resolve it, but his failure to apply the principle is not fatal to the Appellant's case. (P. 90 L 26)
2. Where there is conflict of traditional histories as in this case, demeanour is little guide to the truth. The best way to test one traditional history against the other is by reference to the facts in recent years as established by evidence and by seeing which of the two competing histories is more probable. (P. 90 L 33)
3. Since there was a body of evidence upon which the trial court came to the view that the Plaintiffs/Respondents failed to prove their case, the Supreme Court would appropriately apply the principle in *Kojo II v. Bonsie*: Which states that where there are two competing histories relating to land in dispute and it is difficult to determine which is more probable, resort to demeanour of

the parties and their witnesses is not the best guide; the duty of the court is to test the two stories by reference to acts in recent times. (P. 91 L 26)

4. In substitution for the omission to apply the principle laid down in *Kojo II v. Bonsie* by the two lower courts, the Appellants' history as told is the more probable. (P. 91 L 12)

5. There is no dispute in the two lower courts as to the identity of the land in dispute and as such there was therefore, no need for the learned trial Judge to make specific findings as to the boundary which is explicit on Exhibit D. (P. 95 L 13)

6. The Plaintiffs/Respondents having failed to discharge the onus on them to prove their case, it was rightly dismissed and there was no basis for the Court of Appeal to have embarked on a re-evaluation or re-appraisal of the evidence adduced at the trial or for disturbing the findings of the trial court. (P. 95 L 20)

7. As what arose in the instant case did not involve findings based on inferences the lower court was wrong to embark on re-evaluation of evidence, also it was in error to have set aside the judgment of the learned trial Judge and to have ordered a retrial of the case. (P. 96 L 38)

8. The Court of Appeal's holding that the Plaintiffs (Appellants in that court) led evidence on acts of possession but that the learned trial Judge brushed them aside unevaluated, cannot be correct. (P. 99 L 17)

9. The Court below could not justifiably enter judgment for the Plaintiffs Appellants nor can the order for retrial as set out in their sole issue for determination be acceded to. This is because a retrial is ordered *inter alia*, where a trial Judge fails to take advantage of his seeing and hearing the witnesses, notwithstanding that the record showed ample evidence before him. (P. 100 L 16)

NOTABLE POINTS OF INTEREST

ONUJSC

1. No claim for declaration of title - When title is deemed to be put in issue
Now, in the trial court, the respondents claimed damages for trespass and injunction against the appellants and relied on their traditional history and acts of possession in proof of their case. In such a situation and even though

the respondents did not claim declaration of title, they had put their title in issue and were bound to prove their title to the land in dispute. (P. 89 L 21)

2. *Credibility of witnesses*

On the printed record alone therefore, P.W. 4, P. W. 5 and P.W. 6 had been depicted as not being witnesses of truth; hence the learned trial Judge was justified in his conclusion as to their credibility. When therefore the court below in its judgment held at page 205 of the Record that the learned trial judge failed to evaluate the evidence of acts of possession given on behalf of the respondents, it is with utmost due respect wrong. (P. 93 L 6)

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3. *Evidence of an event that took place before birth of witness - Deemed to be hearsay*

1st respondent who was 46 years old in November, 1986, testified as to the setting up of the western boundary of the land in dispute between the respondents and the appellants in 1926. Having been born in 1940 he could not possibly give evidence on the setting up of any purported boundary of the land in dispute in 1926. His evidence on the matter amounted to hearsay and so proved nothing. (P. 93 L 12)

20 4. *When Court of Appeal's intervention in altering lower court's finding will be justified.*

It is settled law that it is where a trial court has made improper use of the opportunity of seeing and hearing the witnesses i.e. where the finding of the lower court is not supported by the printed record or the finding is not the proper conclusion or inference to be drawn from the evidence, that the Court of Appeal will and must in the interest of justice, interfere by altering, reversing or setting aside such perverse findings of the lower court (P. 96 L 14)

30 5. *Whether Court of Appeal can interfere with trial court's finding on credibility of witnesses.*

"Further still, the learned trial Judge in his judgment had held at page 128 of the Record and in accordance with the evidence adduced before him that P.W. 4, P.W. 5 and P.W. 6 were not witnesses of truth. This is a finding touching on the credibility of these witnesses and yet the court below interfered with it. This, it was not justified in doing in view of the warning this court has given in *MOTUNWASE v. SORUNGBE (1988) 5 NWLR (Part 92) 90* to the effect that....." (P. 96 L. 23)

6. *When evidence of traditional history will be acceptable*

The law is that it is where evidence of traditional history is inconclusive that the trial court is estopped from accepting one set of evidence against other conflicting set of evidence. If the evidence of the traditional history is conclusive, a trial Judge is entitled to accept it as against evidence of traditional history which is in conflict and which is not supported by evidence of recent acts of possession. (P. 98 L 39) 5

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7. *Finding that trial court adopted a wrong approach - Duty of the appellate court* 10

"With profound respect to the learned Justices of the Court below, they went beyond what was required of them as an appellate court. Having held that the learned trial judge adopted the wrong approach the course open to them is to apply the right approach bearing in mind the findings of facts made by the trial court. Where however there are no such findings or sufficient findings to assist them in resolving the conflict in the evidence of traditional history adduced by the parties, the proper course is to remit the case to the trial court for a retrial. In my respectful view it is not open to the appellate court to fish through the record for pitfalls in the judgment of the learned trial judge...." (P. 111 L 24) 15 20

8. *Failure of plaintiff to show better title - Dismissal is proper*

"With the finding of the learned trial judge on acts of possession which finding, in my respectful view, is adequately supported by the evidence before him and applying the principle in Kojo II V. Bonsie (supra), the logical conclusion is that the traditional evidence adduced by the defendants is to be preferred. The Plaintiffs having failed therefore, to show better title to the land in dispute by traditional evidence or by proof of acts of ownership, the learned trial judge, in my respectful view, rightly dismissed their claim." (P. 113 L 39) 25 30

9. *When order for new trial should not be made*

Where an appellate court is in a position, after considering the evidence, to do complete justice between the parties an order for a new trial should not be made, the court should where the circumstances of the case permit, correct the decision appealed against. (P. 114 L 11) 35

10. Where the plaintiff has failed totally to prove his case and there is no substantial irregularity apparent on the record or shown to the court, an order

of retrial should not be made. (P. 114 L 36)

REPRBSENTATION;

G.R.I. Egonu SAN, with K.C Nwogu Esq. for the Defendants/Appellants.
Chief F.R.A. Williams SAN, with T.E. Williams Esq. for the Plaintiffs/Respon-
5 dents.

CASES REFERRED TO

- Ekpo v. Ita 11 N.L.R. 68
Abotche Kponuglo v. Adja Kodadja (1934-35) 2 W.AC.A 24
10 Qgunde v. Qjumu (1972) 4 S.C. 105 at 106
Idundun v. Okumagba (1976) 1 NMLR 200; (1976) 10 S.C. 227
Nwosu v. Udejaja (1990) 1 NWLR (Part 125) 188 at 218
Ladejobi v. Shodipe (1989) NWLR (Part 99) 596 at 606
Nwawuba v. Enemuo (19880 2 NLWR (Part 78) 581
15 Kojo II v. Bonsie (1957) 1 W.L.R. 1223, 1227
Ikpang v. Edoho (1978) 2 L.R.N. 29, 40
Balogun v. Akanji (1988) 1 NWLR (Part 70) 301 at 322-323
Agedegudu v. Ajanifuja (1963) 1 All NLR 109 at 115; (1963) 1 SCNLR 205
Ihiri v. Edurhobara & Anor. (1991) 2 N. W.L.R. (Part 173) 252
20 Ibuluya v. Dikibo (1976) S.C. 97 at 107
Akpagbue v. Ogu (1976) 6 S.C. 63 at 80
Matthew Akubueze & Ors. v. Ozonwanne Nwakuche (1954) 4 FSC 262
Asani Balogun & Ors. v. Alimi Agboola (1974) 1 N.L.R. (Part 2) 66 at 73
Fabunmi v. Agbe (1985) 1 NWLR (Part 2) 299
25 Kuforiji & Anor. v. V.Y.B (Nig) Ltd (1981) 6-7 S.C. 40 at 85
Motunwase v. Sorungbe (1988) 5 NWLR (Part 92) 90
Nnajiofor & 5 Ors. V.L. Ukonu & 2 Ors. (1985) 2 NWLR (Part 9) 686 at 688
Lawal v. Dawodu (1972) All NLR (Part 2) 270 at 286
Omoregbe v. Edo (1971) 1 All NLR 282 at 289-290
30 Olujebo of Ijebu v. Oso, The Eleda of Eda (1972) SC. 143 at 151
P.M. Alade v. Lawrence Awo (1975) 4 SC. 215 at 228
Jude Ezeoke & Sons v. Moses Nwagbo & Anor. (1988) 1 NAVLR (Part 72) 616
at 629
Total Nigeria Ltd v. Wilfred Nwako (1978) 5 S.C. 1 at 14
35 Chief James Opiri v. Chief Igoni Jonah & 4 Ors. (1972) 1 All NLR 226 at
131/2
Lokoyi v. Olojo (1983) 8 SC. 61 PP. 69-73
Amakor V. Obiefuna (1974) 3 SC. 67
Akinola v. Oluwo (1962) 1 All NLR 224 at 225

Ochonma v. Unosi (1965) NWLR 321

Joseph E. Aikuele & Ors. v. Eichie Oakhena (1980) 3 CA 54

Okeowo v. Migliore (1979) 11 Sc. 138, 201

Nader v. Customs and Excise (1965) 1 ANLR 33, 37

Shell BP v. Cole (1978) 3 SC 183, 194 - 195

Okpiri v. Jonah (1961) All NLR 102, 105 5

Ayoola v. Adebayo (1969) 1 All NLR 159, 162

LEAD JUDGMENT BY ONU JSC

This appeal is from the decision of the Court of Appeal sitting in Enugu dated 16th January, 1992 and which upset the judgment of Obiesie, J. sitting at the Anambra State High Court holden in Onitsha and delivered on October 13, 1989. 10

The reliefs sought by the plaintiffs, now respondents against the defendants, herein appellants in the trial Court were:- 15

(1) N100,000.00 special and general damages for trespass into a piece or parcel of land which the respondents called Abubo Land, the particulars of special damages having been specified and calculated to amount to N11,820.00. It arose from an alleged destruction of economic and seasonal crops by the use of a bull-dozer and a caterpillar by the appellants and 20

(2) Perpetual injunction.

As both sides in their pleadings (which were ordered, duly filed and exchanged) asserted ownership of the land in dispute which the appellants for their part said went by the name Oheba, title was perforce put in issue. The trial Judge in a considered judgment held that the respondents failed to prove both title and exclusive possession. He therefore dismissed the suit. The respondents' appeal from that decision to the Court of Appeal having succeeded, wherein an order of retrial was made, the appellants have appealed to this Court upon a Notice of Appeal containing four grounds. 25

The background facts of the case as presented by both parties in the two lower courts very ably set out by the Court of Appeal sitting in Enugu and upon which I can hardly improve, are as recapitulated briefly hereunder:- 30

The respondents as representatives of the people of Iruama Village in Unubi Town sued the appellants of Iruetze (Urueze) Village in Ekwulumili, though in their individual capacities. However, by the nature of the defence, the appellants appears by and large to represent the alleged eight families which they say own the land in dispute. 35

The respondents' case is that the land in dispute (Abubo Land) is in Iruama Village while the appellants who call it Oheba Land say that it is in

Urueze Village. It is the respondents' assertion in paragraph 5 of their Statement of Claim that they share a common boundary on the west with the appellant's Urueze Village and that this boundary is marked by "Abubo Stream and Njeaba Stream," and a valley connecting these streams" while "Along that valley are Ukpaka tree, dried Edo tree, Cheleku tree, Ube Okpoko tree and Egbu tree." The appellants first made some denials but in further answer in paragraph seven of their Further Amended Statement of Defence averred that their "Oheba land" now in dispute which forms part of a large portion of their land also called Oheba, is bounded to the North- West by Ubi Ada and Njeaba Streams across which is the land of defendants' people, to the East by the land of Unubi people, the plaintiffs, to the South by the Uku-Umuojima Stream across which is the land of the plaintiffs and to the West by the other portions of Oheba land but not in dispute." The two parties would by this seem to have clearly a common boundary between them.

The respondents relied on traditional history which goes thus:

The Unubi Village was founded by a hunter from Akuabuba Village in Ezinifite called Okweagu. That he settled in a farm hut from where he went hunting. That farm hut in their language is called "uno-ubi" and from it the name Unubi received its derivation. That Okweagu had five sons among whom was Nkwukwo, the eldest: Okweagu shared his land among his five sons and the land in dispute formed part of Nkwukwo's share. Nkwukwo had two sons one of whom was Ezeobosi, the elder of the two. That Nkwukwo shared his land between the two sons, and Ezeobosi's share which became known as Iruama Village encompasses the land in dispute. Ezeobosi had five sons, namely Ezeokana, Ezenobi, Onu, Ezeoha and Ezeanamelu. It is the descendants of these men who form Iruama Village today. Each of the men got a portion of Iruama Village where they inhabited but left some portion as communal land where they farm with the descendants of these families who now inhabit Iruama Village. Evidence was led along this traditional history.

The appellants on the other hand, in their pleading, relied on traditional history thus:

Ekwulu, a sheep rearer (or shepherd) and a farmer came from Agukwu Nri in Njikoka in search of green pasture. He settled in a place where there were seven streams and a great pond. He had four sons, among whom was Urueze who was the third in seniority. Ekwulu shared his land among his four sons. Oheba land which they called the land now in dispute formed part of Urueze's share. Urueze had eight children, namely, Nenugha, Umenwunne, Ezenwabachili, Umealor, Okpe, Umungwu, Ezengu and Amakom.

Urueze shared his land among his eight children each of whom got a share of Oheba land on which they have farmed from time immemorial and in respect of which each sub-family which sprang from each of those children exercised maximum acts of possession.

Each side led evidence in support of the traditional history pleaded and acts of possession. The learned trial Judge in a considered judgment dismissed the respondents' claims in their entirety. The respondents appealed to the Court of Appeal which held (per Uwaifo, J.C.A., and concurred in by Awogu and Oguntade, J.J.C.A) that the way the trial Judge dealt with the issues and evidence before him was inadequate and erroneous, adding that while the respondents gave evidence strictly in accordance with their pleadings, the appellants' left some holes to pick in the evidence of witnesses as well as in the consideration of the case by the trial Judge generally and specifically. The Court below therefore proceeded to allow the respondents' appeal and accordingly ordered a retrial of the suit.

Aggrieved by this decision the appellants have appealed to this court on a Notice of Appeal (See pages 233 - 236 of the Record) containing four grounds. The respondents cross-appealed. Briefs of argument were filed and exchanged pursuant to the rules of Court. Two issues were submitted on behalf of the appellants as arising for determination, namely:

1. Was the Court of Appeal right in this case to embark on a fresh appraisal and re-evaluation of the evidence adduced at the trial?

2. Was the Court of Appeal right to set aside the judgment of the trial court in this case and to order a retrial of the case.

Only one issue was formulated on behalf of the respondents cross-appellants to wit:

"Was the Court of Appeal right in this case to embark on a fresh appraisal and re-evaluation of the evidence adduced at the trial."

At the hearing of this appeal on 14th February, 1994, learned Senior Advocates who had pitched camps on either side adopted their respective briefs of argument. They each further expatiated on them. Although a cross-appeal was filed at the instance of the respondents in relation to the retrial order made by the court below, I will first of all deal with the appellants' appeal which deals with whether the Court of Appeal was right to embark on fresh appraisal or re-evaluation of the evidence adduced at the trial.

Mr. Egonu, S.A.N., after stating that in this appeal the defendants/appellants filed their brief dated 30th November, 1992 on 3rd December, 1992, pointed out that the same went for their respondents' brief to the cross-appeal

dated 30th November, 1992 and filed on 3rd December, 1992. He thereafter remarked that on 14 April, 1993 this court had granted to the appellants extension of time within which to file their brief and to deem same as duly filed. A similar extension having been granted to them as respondents to file their brief to the cross-appeal, learned Senior Advocate indicated that he adopted his arguments therein. The claim before the trial court being that for damages for trespass and injunction, learned Senior Advocate submitted, title was as a result put in issue, adding that it was therefore incumbent on the respondents to prove their exclusive possession. The respondents, he pointed out, based their claim on traditional history and acts of recent possession and at the end of the day, the learned trial Judge dismissed their case. Upon their appeal to the court below, that court allowed the respondents' appeal and ordered a retrial. After referring us to several passages in the Record of proceedings and how he dealt extensively with the issues contained in his brief, learned Senior Advocate indicated how the learned trial Judge disbelieved the evidence of P.W.3 and P.W.5 in his findings of fact. After pointing out how there was no conflict in the evidence of D.W.7 and 1st defendant/appellant in relation to Oheba land and Ekwulu and as to his (Ekwulu's) four sons to whom land was granted, he argued that these are brought out clearly in paragraph 3(a) and 3(b) of the Amended Statement of Defence at Page 30 of the Record. Hence, he contended, it was wrong of the court below to say that that piece of traditional evidence was not pleaded.

With regard to the cross-appeal, learned Senior Advocate after placing reliance on the brief of the respondents thereto, argued that the Court below could not and did not make findings of acts of recent possession. Here again, learned counsel submitted, that criticism by the court below that the evidence of witnesses was not properly evaluated by the trial court was wrong, moreso that such evaluation touched on matters of credibility over which an appellate court had no right to interfere. The criticism of the trial court by the court below for referring to the case *Ekpo v. Ita* (1932) 11 N.L.R. 68, he added, was misconceived in that there was no way the trial court should not have talked of acts of possession. Chief Williams, learned Senior Advocate for the respondents/cross-appellants who relied on their brief entirely, submitted that the first point to show that the court below was right to set aside the decision of the trial court, is to be found at Page 197, lines 18-26 and Page 128 lines 1-10 and line 15 to end of the page. After referring us to other passages to buttress his argument, he maintained that as that Court (the trial court) was using the wrong approach, the court below was right to order a retrial. Elaborating,

learned counsel stated that their criticism of the trial court's decision stems from the western boundary stream called Abubo Stream, adding that the land in dispute is the land to the North edged red. Their case, he asserted, is whether the trial court made the finding as they claimed it to be or as they (respondents) claimed it to be. The court below, he submitted, referred to the evidence proffered by witnesses, adding that on the question of boundary, only the respondents/cross-appellants rendered unchallenged evidence, and that significantly while the respondents/cross appellants talked of "igbandu" - peaceful settlement, the appellants denied its existence though capitulating by admitting it during the course of the case. After referring us to the evidence of D.W.1 at Pages 107-110, learned counsel submitted that the conflict between the evidence of D.W.1 and D. W.7 appeared clear. Reference was in conclusion made to paragraph 5(a) of the Statement of Claim which learned Senior Advocate said amounted to some admission.

Learned Senior Advocate for the appellants in reply said in respect of paragraph 5(a)(ibid) that it and their plan along with his submission thereon, was also explicit.

By the nature of the two sets of issues submitted for the determination of this court by both parties, I deem the consideration of the two submitted at the instance of the appellants together to effectually dispose of the appeal.

Now, in the trial court, the respondents claimed damages for trespass and injunction against the appellants and relied on their traditional history and acts of possession in proof of their case. In such a situation and even though the respondents did not claim declaration of title, they had put their title in issue and were bound to prove their title to the land in dispute. See *Abotche Kponuglo v. Adja Kodadja* (1934 - 35) 2 WACA. 24, *Ogunde v. Ojomu* (1972) 4 S.C. 105 at 106. It ought to be borne in mind from the onset that each of the five well-settled legal ways of proving title to land is independent of the other. See *D.O. Idundun & Ors. v. Daniel Okumagba & Ors.* (1976) 1 NMLR. 200; (1976) 10 S.C. 227; *Nwosu v. Udeaja* (1990) 1 NWLR (Pt. 125) 188 at 218 and *Ladejobi v. Shodipe* (1989) 1 NWLR (Pt. 99) 596 at 606.

The learned trial Judge, as transpired in the instant case, dealt with the issue of the traditional histories postulated by the parties in both their pleadings and evidence - for which see page 128, lines 5 to 31 and page 129, lines 1 to 26 of the Record of proceedings and resolved the same against the respondents. The learned trial Judge on the point had this to say, *inter alia*;

"Evidence given by the parties indicate that both relied on tradi-

tional history and acts of ownership, numerous and positive and extending over a long period of time. Evidence of traditional history given by them have already been summarised at the early part of this judgment. There is conflict in the evidence given in this aspect. On the plaintiffs' side, 1st plaintiff on record gave evidence of traditional history while on the defendants' side, Chief G.O. Umeanodi the Obi of Ekwubumili i.e. D.W.7 and the 1st defendant on record aged 85 years put across their own version of traditional history. In considering the two versions put across that of the defendants is lucid "straight as a pole" and very satisfactory while the plaintiffs' story is disjointed (sic), incomprehensible and improbable. In this aspect one has to bear in mind that old men and traditional rulers are by their status in the community not only in a position to know the truth but also find it difficult to twist the truth. D.W.7 and 1st defendant were unshaken during cross-examination. Vide *Nwawuba v. Enemuo* (1988) 2 NWLR (Pt.78) 581, Page 595 per Nnaemeka-Agu, J.S.C. As stated by Lord Denning in *Kojo II v. Bonsie* (1957) 1 W.L.R. 1223, 1227:-

"The best way to test the traditional history is by reference to the facts in recent years as established by evidence and is by seeing which of the two competing histories is more probable."

As observed by Anigololu, J.S.C., in *Ikpong v. Edoho* (1978) 2 L.R.N. 29,40.

"It is therefore for the trial court to determine,
(a) did his ancestors in fact tell him that story?
(b) is the story true?"

(italicised sentence above is mine)

In the italicised sentence, the learned trial Judge acknowledges that there was a conflict in that aspect of the case presented by both parties. What he should thereafter have proceeded to do was to apply the principle enunciated in *Kojo II v. Bonsie* (supra) to resolve it. That test or principle for which there was unfortunately non-application by him in the instant case but which I consider not fatal to the appellant's case as I shall seek to show hereunder, does not simply consist of a straight forward resort to belief or disbelief of witnesses. Rather, whereas in the instant case, there is admittedly conflict of traditional histories and one side or the other must be mistaken, yet both may be honest in their belief, demeanour is little guide to the truth. The best way to test one traditional history against the other is by reference to the facts in recent years as established by evidence and by seeing which of the two competing histories is more probable.

The learned trial Judge after what I may call glossing over the principle, thereupon considered at Page 129 lines 27 - 31 and Page 130, lines 1 - 26 the case of the respondents in relation to acts of possession which he correctly, in my view, resolved against them and went on to hold:

“From the above analysis, the defendants have established to my utmost satisfaction that they have been on this land right from the time Ekwulu entered the land in dispute followed by his children and now current defendants. They have been in possession and have exercised all rights of ownership of the land they call Oheba. In such circumstances, there is nothing to convince me that the plaintiffs have been in possession of the land in dispute for any period of time. Evidence adduced by the defendants outweigh that of the plaintiffs and the defendants have established that they are true owners of the land in dispute ...”

Thus, when the court below went on to hold, among others that -

“The learned judge was no doubt unfair to the plaintiffs. Having purported to prefer the traditional history of the defendants there was no basis upon which to apply the principle stated in Kojo II v. Bonsie (supra). He made a very unimpressive effort to do this by resorting to Ekpo v. Ita II (1932) NLR. 68 contrary to what was observed by the Supreme Court in Balogun v. Akanji (1988) 1 NWLR (Pt. 70) 301 at 322 - 323 ...”

Such observation cannot be said to be justified. It was while the learned trial Judge was considering the case of the respondents in relation to acts of possession vide Page 129, lines 31 and Page 130, lines 1 - 26 of the Record that he alluded to the case of Ekpo v. Ita (supra) and not as the court below says, in relation to their (respondents’) case based on traditional history.

That said and being of the firm view that there was a body of evidence upon which the trial court came to the view that the respondents failed to prove their case. This court sitting on appeal would appropriately apply the principle in Kojo II v. Bonsie (supra). The principle, properly stated is that whereas in the instant case, there are two competing histories relating to land in dispute and it is difficult to determine which is more probable, resort to the demeanour of the parties and their witnesses is not the best guide; the duty of court is to test the two stories by reference to acts in recent times. See Agedegudu v. Ajenifuja & Ors. (1963) 1 All NLR 109 at 115; (1963) 1 SCNLR 205 which is distinguishable from the case in hand in the sense that while in the Agedegudu case (supra) the trial Judge ran into difficulty about which story is worthy of credence and indeed confessed his inability to know which side to believe, in the instant case, the learned trial Judge having arrived at the

view that there was a conflict in the two competing traditional histories proffered in evidence, failed or omitted to say which of them in relation to the recent act of possession established from primary facts, was more probable.

5 The court below having equally failed to do the latter act but rather proceeded to order a retrial, this court sitting on appeal would and indeed should correct the omitted or non-applied principle. This is because the learned trial Judge having had no difficulty in the instant case in finding against the respondents or to use words of Olatawura, J.S.C., in *Oyiho Iriri v. Eseroraye Erhurhobara &*
10 *Anor.* (1991) 2 N.W.L.R. (Pt. 173) 252 that he (the learned trial Judge) not being “at cross-roads with conflicting traditional history,” his task of resolving whose story of the parties was more probable, became a foregone conclusion. Accordingly, I hold in substitution for the omission to apply the principle by the trial court, which the court below wrongly criticised and refused to correct, that the appellants’ history all told, is the more probable.

15 Furthermore, the learned trial Judge in what in my view amounted to his quest at testing the two stories (of traditional evidence) which one must realize constitute hearsay upon hearsay in not having the sanctity of truth although the witnesses may have been testifying truthfully about the information handed down to them, no doubt had at the forefront of his mind acts in
20 recent times performed and adduced by these witnesses in relation to the land in dispute, when he arrived at the following inescapable findings of facts:-

Firstly, the learned trial Judge in his judgment at Page 128 of the Record disbelieved the evidence of the respondents’ witnesses to wit: P.W.4, P.W.5 and P.W.6 and he gave his reasons for so doing.

25 Secondly, P.W.4, Ezembanasor Obi, who was from Umudiniala, Amife, Osumenyi testified at Page 75 of the Record that the family in Osumenyi having boundary with the land in dispute was the Umuoman family and this showed clearly that he had no land sharing a common boundary with the land in dispute. The cross-examination of this witness at Pages 75 - 76 depicted a
30 bundle of contradictions, thus proving him to be a liar.

Thirdly, P.W.5 Mark Okeke, a native of Akwa Ihre admitted under cross-examination at Page 77 of the Record that he had never been to another town in his life, forgetting that he had earlier in examination in chief said that
35 he worked on the land in dispute as a labourer and that he lived in the house of one Ume Uzeogbu Ihemeje on that land.

Fourthly, P.W.6, Ignatius Unokaeje, a School Teacher, though a native of Iruama Village, Nkwukwo, Unubi, was at the time of the alleged trespass

resident at Umunya. He testified at Page 78 of the Record as to how he returned to Unubi and was there on school days - Thursday and Friday the 25th and 26th September, 1981 respectively, because he was told his father's house was to be destroyed. Then came his made up story at Page 80 of the Record of the discussion he allegedly had with the grantee of the Iruenze family who was then preparing to erect a factory on the land in dispute. 5

On the printed record alone therefor, P.W. 4, P.W. 5 and P. W. 6 had been depicted as not being witnesses of truth; hence the learned trial Judge was justified in his conclusion as to their credibility. When therefore the court below in its judgment held at Page 205 of the Record that the learned trial Judge failed to evaluate the evidence of acts of possession given on behalf of the respondents, it is with utmost due respect wrong. 10

Fifthly, 1st respondent who was 46 years old in November, 1986, testified as to the setting up of the western boundary of the land in dispute between the respondents and the appellants in 1926. Having been born in 1940 he could not possibly give evidence on the setting up of any purported boundary of the land in dispute in 1926. His evidence on the matter amounted to hearsay and so proved nothing. The admission by P.W.2, Nwaokafor Okoli, that there was no dispute between the respondents and the appellants in 1926 also showed that the story about the setting up of the alleged western boundary was not true. 15 20

On the other side of the coin is the consideration of the appellants' case. The evidence of traditional history as given by the 1st appellant can be gleaned at Pages 102 and 103 of the Record. The passages of traditional history quoted by the court below at Pages 194 and 195 respectively are partly incorrect whereas portions of the traditional history given in evidence by D.W.7, Chief George Okoli Umeanodie, and the 1st appellant were also omitted. The court below at Pages 195 to 196 of its judgment set out what it described as deficiencies whereas there are no such deficiencies. For instance, it was not the evidence of D.W.7 that Ekwulu first came to Oheba. The sum total of his evidence showed that Ekwulu founded Ekwulu town -later called Ekwulu-Atulu and now Ekwulimili and that Oheba land is part of the said town. Paragraph 3, 3(a) and 3(e) of the Further Amended Statement of Defence constituting pleadings along which lines the appellants have evidence are explicit enough to invoke any doubt. They state:- 25 30 35

"3. The defendants expressly deny paragraphs 3 and 4 of the Statement of Claim and further aver that the area the plaintiffs are laying claim to is known as and called by the defendants from time immemorial Oheba in Uruenze Village, Ekwulimili and had ever since been occupied by the defen-

dants' ancestors and their successors in title as residential and farm lands and the ruins of these residential houses are still visible on the land and particularly shown in the Survey Plan No. NLS/AN/99/8e attached and filed with the Statement of Defence.

3(a) *The defendants' Oheba land now in dispute originally be-
5 longed to Ekwulu, the ancestor of the defendants who was a renowned Shep-
herd and farmer from Agukwu Nri in Njikoka and from whom the defendants
inherited the land*

3(e) *Before his death, Ekwulu shared his lands among his four
sons. The Oheba land now in dispute forms part of Urueze's share of Ekwulu's
10 land."*

D.W.7 testified that Ekwulu shared his land amongst his children who no doubt were his four sons referred to in the pleadings above. 1st appellant so testified, leaving no room for any discrepancy.

15 The Court below then went on to criticise the evidence of D.W.4 and
5 and the method the trial Judge adopted in its evaluation. It is pertinent to
point out that Exhibit 'D', the appellants' plan which lends support to the
evidence of D.W. 4, shows the ruins of the two houses erected by her hus-
band, Onyeachu Ezeagu; the latter and his first wife, were living in their house
20 on the Western boundary of the land in dispute. D.W. 4 had said she lived in
her mud house to the east for 12 years and after the death of her father-in-law
moved from that house with her husband to live in her father-in-law's com-
pound. This was long before the Nigerian Civil War (1967 - 70) since her
husband died during the Civil War.

25 It is pertinent to note that D.W.4 gave evidence in the trial court on
26th February, 1988 while Exhibit D was made on 20th January, 1983. It would
naturally not call for explanation why a mud house that had been occupied for
12 years and left vacant for more than 11 years will go into ruins. If D.W.4's
husband had lived in his house on the western boundary of the land in dis-
30 pute as depicted on Exhibit D long before he married her and the house built
on the eastern boundary for D.W.4 was built more than 21 years before the
institution of the Suit giving rise to this appeal, clearly the two houses consti-
tute evidence of ownership of the land in dispute by the appellants. More-
over, it was shown that it was Nkwukwo's portion to his eldest son, Ezeobosi'
35 s that is the land in dispute.

Furthermore, it was common ground between the parties that the
Army farmed on the land in dispute during the Nigerian Civil War. The only
point disputed was who donated the land to the Army. P.W.5 Edmund Ifeoku
provided the answer when in his testimony he said inter alia thus:

“As the war progressed we concentrated on Land Army. It means mobilisation of the town people to farm on any piece of land donated by the natives themselves

We had farms at Nnewi proper, Akpaukwu, Ekwulumili and Amechi. The Ekwulumili farm was at Oheba land donated by Urueme family. I know the names of two of them called Umenadozie and Umeorumili. These people are here in court. 1st defendant on record identified as U. Ogbuokwelu.”

While Exhibit A, the respondents’ plan shows ruins of wall fencing where late Onyeachu Ezeagwu allegedly was about to build a house but stopped because he went beyond the boundary on the west, to the east what one sees are three spots called *“Positions of Plaintiffs’ Farm Hut Scrapped out by (Defendants) (Cause of Action)”*.

As for the Ngwu Shrine, only Exhibit D depicting the Ngwu tree close to ruins of D.W.4’s husband’s mud wall fence to the east is clearly shown. There is besides, no dispute in the two lower courts as the identity of the land in dispute. See *Ibuluya v. Dikibo* (1976) 6 S.C. 97 at 107; *Akpagbue v. Ogu* (1976) 6 S.C. 63 at 80 and *Mathew Akubueze & Ors. v. Ozonwanne Nwakuche* (1959) 4 FSC 262. There was therefore no need for the learned trial Judge to make specific findings as to the boundary which is explicit on Exhibit D.

What should be borne in mind in this case is that the onus was throughout on the respondents to prove their case. This they failed to do and their case was, rightly in my view, dismissed. The court below as is evident from its judgment, in my respectful view, approached the appeal before it as if the onus was on the appellants to prove their defence. There was no basis for the court below to have embarked on a re-evaluation or re-appraisal of the evidence adduced at the trial or for disturbing the findings and conclusions of the learned trial court, short of what I have said on the misapplication of the principle in *Kojo II v. Bonsie* (supra). The learned trial Judge saw and heard the witnesses testify in the case and had the primary duty to make primary findings of fact on the evidence adduced before him. See *Asani Balogun & Ors. v. Alimi Agboola* (1974) 1 All NLR (Pt. 2) 66 at 73 and *Oyibo Iriri & Ors. v. Eseroraye Erhurhobara & Anor* (supra). In the latter case, where the situation considered is similar to the one in the instant case, my learned brother Belgore. J.S.C., cautioned at Page 273 of the Report as follows:-

“The line of authorities in this court on all this important point is inexhaustible and all tend to emphasise that an appellate court should be wary of interfering with the findings of fact by the trial court. This is in accord with common sense and common sense and justice must be insepa-

5 *able partners, in that the trial court has too many advantages that an appellate court does not have. The trial court hears the evidence of the parties and their witnesses. This opportunity allows the trial court to assess the witnesses whose evidence-in-chief, answer to cross-examination and re-examination give the court the opportunity to assess each witness for demeanour, truthfulness, credibility and reliability. No appellate court has this opportunity as that court sees only the written record. The appellate court can therefore not substitute its eyes, ears and mind for that of the trial court in assessing the evidence. Therefore, believing or disbelieving a witness or a piece of evidence is in the exclusive competence of the trial court and where such belief and disbelief is clearly supported by evidence on record, the appellate court should not interfere in such a finding. See Fabunmi v. Agbe (1985) 1 NWLR (Pt. 2) 299."*

15 It is settled law that it is where a trial court has made improper use of the opportunity of seeing and hearing the witnesses i.e., where the finding of the lower court is not supported by the printed record or the finding is not the proper conclusion or inference to be drawn from the evidence, that the Court of Appeal will and must in the interest of justice, interfere by altering, reversing or setting aside such perverse findings of the lower court. See Kuforiji & Anor. v. V.Y.B. (Nig.) Ltd. (1981) 6- 7 S.C. 40 at 85; Chief Frank Ebba v. Chief Warri Ogoto (1984) 1 SCNLR 372; (1984) 4 S.C. 84 at 98 - 112 and Fabunmi v. Agbe (supra).

25 Furtherstill, the learned trial Judge in his judgment had held at Page 128 of the Record and in accordance with the evidence adduced before him that P.W. 4, P.W. 5 and P.W. 6 were not witnesses of truth. This is a finding touching on the credibility of these witnesses and yet the court below interfered with it. This, it was not justified in doing in view of the warning this court has given in Motunwase v. Sorungbe (1988) 5 NWLR (Pt. 92) 90 to the effect
 30 that -

"In matters of credibility based on demeanour of witnesses, a Court of Appeal cannot and ought not interfere - as it did not have the advantage of seeing such witnesses testify. If what is involved are findings based on inferences which the learned trial Judge has drawn from the evidence, the Court of
 35 Appeal is in as good a position as the trial court and can make its own findings if in its view the findings made by the learned trial Judge are wrong." See also Nnajofofor & 5 Ors. v. L.Ukonu & 2 Ors. (1985) 2 NWLR (Pt.9) 686 at 688.

As what arose in the instant case did not involve findings based on

inferences the court below was wrong to embark on re-evaluation or re-appraisal of the evidence adduced at the trial. Hence, it was in error to have set aside the judgment of the learned trial Judge and to have ordered a retrial of the case. In the premises, this appeal must perforce succeed and it is allowed by me with costs assessed at N1,000.00 to the appellants. 5

I will now proceed to consider the cross-appeal of the respondents in which the sole issue submitted by learned Senior Advocate, Chief Williams, on their behalf for our determination, is:

“Was the Order ‘for a retrial’ by the Court of Appeal the proper Order to make having regard to its findings on the facts and circumstances of this case?” 10

Only one issue for determination too was formulated on behalf of the appellants by Mr. Egonu, S.A.N. It states:

“Even if the Court of Appeal was right in its criticism of the findings and conclusions of the learned trial Judge, could it on the facts and circumstances of this case have entered judgment for the plaintiffs/appellants in this case?” 15

The Claims of the respondents against the appellants were for damages for trespass and injunction as hereinbefore stated. The learned Senior Advocate, Chief Williams on respondents’ behalf has adopted the reasoning and conclusion arrived at by the court below with regard to evidence led at the trial of this case. After advertenting our attention to the passage in the judgment of the court below at Pages 205 and 206 and that the court below properly relied on the case of Lawal v. Dawodu (1972) 1 All NLR (Pt. 2) 270 at 286, where it was held inter alia- 20 25

“Nevertheless, the area is one in which the Court of Appeal is at least equally qualified and competent and indeed is often required to exercise jurisdiction in certain, albeit exceptional, circumstances. A trial judge, however learned, may draw mistaken conclusions from indisputable primary facts and may indeed wrongly arrange or present the facts on which the foundations of the case rest. In those circumstances, it would be completely invidious to suggest that a Court of Appeal should not intervene and do what justice requires but should abdicate its own responsibility and rubber stamp an error however glaring”. (italic is mine for emphasis). 30 35

It is therefore learned Senior Advocate’s submission that the respondents’ case does contain “exceptional circumstances” which, in the instant case, impose on the court below the duty to intervene and make its own inferences from the evidence led at the trial. In support of this proposition

learned counsel relied on the following portion of the judgment of the court below, to wit;

“The learned Judge in the present case failed to adopt this approach when he was faced with two conflicting traditional histories. He regarded the history narrated by the defendants as lucid and ‘straight’ as a pole’ to recall his very words which he himself put in quotes and that it described the plaintiffs’ story as disjointed, incomprehensible and most improbable. There was absolutely nothing to support these views. If anything, the defendants’ story as given by D.W.7 and 1st defendant lacked that straightness of a pole assigned to it by the learned Judge in at least three aspects”

10 The court then went on to hold *inter alia* that:

“In contrast, one cannot find any such deficiencies or any other in the plaintiffs’ traditional history. The learned Judge was no doubt unfair to the plaintiffs. Having purported to prefer the traditional history of the defendants there was no basis upon which to apply the principle stated in *Kojo II v. Bonsie* (supra). He made a very unimpressive effort to do this by resorting to *Ekpo v. Ita II* (1932) NLR 68 contrary to what was observed by the Supreme Court in *Balogun v. Akanji*.”

After demonstrating from the passage where the court below held that it was:

20 “satisfied that the learned Judge approached this case and the evidence adduced in a most erroneous and unsatisfactory manner. He failed to ascertain the common boundary between the two villages, an issue clearly apparent from the pleadings and evidence.”

The case of *Omoregbe v. Edo* (1971) 1 All NLR 282 at 289 - 290 was called in aid and we were urged to allow the appeal, the retrial order appealed from set aside and on order entering judgment for the respondents substituted therefore.

Now, the court below has held that the learned trial Judge, faced with two conflicting traditional histories, had failed to apply the test or principle enunciated in *Kojo II v. Bonsie* (supra) in order to determine as between the two conflicting traditional histories which was more probable. As pointed out elsewhere in this judgment, the learned trial Judge who saw and heard the witnesses for both parties testify, disbelieved the respondents. And as I went on to say, but for the omission by the learned trial Judge to apply the principle in *Kojo II v. Bonsie* (supra) and which I showed could be rectified by this court sitting on appeal, there was ample evidence adduced before the learned trial Judge from which to arrive at the view that of the two conflicting histories, one was more probable in fulfillment of the said principle.

The law is that it is where evidence of traditional history is inconclu-

sive that the trial court is estopped from accepting one set of evidence against other conflicting set of evidence. If the evidence of traditional history is conclusive, a trial judge is entitled to accept it as against evidence of traditional history which is in conflict and which is not supported by evidence of recent acts of possession. See *Olujebe of Ijebu v. Oso the Elede of Eda* (1972) 5 SC. 143 at 151 and *F. M. Alade v. Lawrence Awo* (1975) 4 SC. 215 at 228. Indeed a trial court is entitled to reject evidence of traditional history which is *ex facie* incredible. See *Iriri v. Erhurhobara* (supra) at Page 269. Where, as in the instant case, there was admittedly conflict of traditional histories, one side or the other must be mistaken, yet both may be honest in its belief. In such a case, demeanour is little guide to the truth. The best way to test the traditional history is by reference to the facts in recent years as established by evidence and by seeing which of the two competing histories is more probable. The principle having been hereinbefore stated and put in proper perspective, one is left to consider such facts in recent years as established by evidence and seeing which of the two competing histories is more probable. The court below held that the appellants led evidence on acts of possession but that “the learned trial Judge brushed all these aside unevaluated.” With utmost due respect this observation of the court below cannot be correct and a few instances, at the risk of repetition, will do to exemplify my stand on this.

P.W.4, who hailed from Umudiniala, Amife, Osumenyi testified at Page 75 that the family in Osumenyi having boundary with the land in dispute was the Umuomam family and this showed clearly that he had no land sharing a common boundary with the land in dispute. The ensuing cross-examination of this witness at Pages 75 and 76 showed a bundle of contradictions. Hence, he was a proven liar.

P.W.5, a native of Akwa Ihere, testified when cross-examined at Page 77 of the Record, that he had never been to another town in his life, forgetting that earlier in examination-in-chief, he stated that he worked on the land in dispute as a labourer and that he lived in the house of one Ume Uzoegbu Ihemeje on the land.

P.W.6, a School Teacher, though a native of Iruama Village Nkwukwo, Unubi, was at the time of the alleged trespass resident at Umunya. He testified at page 78 of the Record that he returned to Unubi and was there on School days, Thursday and Friday 25th and 26th September, 1981 because he was told his father’s house was to be destroyed. Then came his made-up story at Page 80 of the Record of the discussion he allegedly had with the grantee of the Iruze family who was preparing to erect a factory on the land in dispute.

Surely all these could not establish acts of possession in support of the respondents. Hence their case only merited to be dismissed and not a retrial order which can only be made where the trial court fails to resolve the conflict or contradiction in evidence. See *Jude Ezeoke & Sons v. Moses Nwagbo & Anor.* (1988) 2 NWLR (Pt. 72) 616 at 629 following *R. G. Okuwobi v. Jimoh Ishola* (1973) 3 S.C. 43 at 47 - 48 and *Total Nigeria Ltd. v. Wilfred Nwako* (1978) 5 S.C. 1 at 14. See also *Idika v. Erisi* (1988) 2 NWLR (Pt.78) 563 at 576,

While Exhibit D, the appellants' plan depicts clearly the two ruins of Onyeachu Ezeagwu's houses to the east and west respectively of the disputed land's boundary indicating exercise of ownership thereof, Exhibit A, the respondents' plan, is devoid of such features excepting that in two portions on the eastern part it depicts that appellants once had huts thereon though they (respondents) had established their farms in those places after scrapping the huts, thus symbolizing their act of trespass.

Despite the criticisms of the learned trial Judge set out elsewhere in this judgment by the court below, that court could not justifiably enter judgment for the appellants nor can the order for a retrial as set out in their sole issue for determination be acceded to. This is because a retrial is ordered *inter alia* where a trial Judge fails to take advantage of this seeing and hearing the witnesses, notwithstanding that the record showed there to be ample evidence before him. See *Chief James Okpiri v. Chief Igoni Jonah & 4 Ors.* (1961) 1 All NLR 102 at 105 and *Chief J.S. Ekpere & Ors. v. Chief Odaka Aforije & Ors.* (1972) 1 all NLR. (Pt.1) 220. In the instant case, the respondents cannot be said to have adduced such ample evidence through their witnesses to warrant a retrial order being made for failure to appraise the evidence of their witnesses. Hence their case failed.

In result, the cross-appeal of the respondents fails and it is accordingly dismissed with costs assessed at N1,000 in favour of the appellants.

30

UWAIS JSC

I have had the opportunity of reading in draft the judgment read by my learned brother Onu, J.S.C. I entirely agree that the appeal be allowed and the cross-appeal be dismissed.

Both the appellants, as plaintiffs and the respondents, as defendants, by their pleadings set up conflicting traditional history. The learned trial judge failed to apply the principle laid down in the case of *Kojo II v.*

Bonsie (1957) 1 W.L.R. 1223 at p.1227 to resolve the conflict in the traditional history of the parties. The evidence to rely on in resolving the conflict was available before the learned trial court. Consequently, the Court of Appeal was wrong to order a retrial since it was in a position to resolve the conflict. The respondents relied on acts of possession by pleading that they had ruins of houses on the land in dispute. They showed the ruins on the plan which they tendered in evidence and led evidence in support of the pleading. There was no similar averment by the appellants. Nor did the appellants establish any act of possession. By applying the test in *Kojo II v. Bonsie* (supra) the respondents were therefore entitled to succeed in the High Court. In my opinion, the Court of Appeal was wrong in setting aside the judgment of the learned trial judge and ordering a retrial in the High Court.

It is for these and the reasons in the judgment of any learned brother Onu, J.S.C., that I too will set aside the decision of the Court of Appeal and restore the decision of the High Court. I abide by the order contained in the said judgment.

OGUNDARE JSC

The plaintiffs, by paragraph 44 of their Statement of Claim, claimed a sum of N100,000.00 Special and General damages for trespass allegedly committed by the defendants on plaintiffs' land known as Ahubo and delineated on Plan No. EP/AN430 LD/82, and an injunction. It is evident from their pleadings that they relied for title to the land on settlement of the said land by one Okweagu their ancestor. Paragraphs 7 - 17 of their statement of claim set out the traditional history they relied upon. These paragraphs read as follows:

"7. The founder of the land in dispute, as well as the other lands making up Unubi town, was one Okweagu, who was a hunter from Akuabuba Village in Ezinifite town in what is now known as Ugwuochi Local Government Area.

8. Okweagu was the first man to settle in Unubi, which was so called from farm hut 'uno-ubi' from which he hunted in, and farmed, the surrounding lands, before settling there permanently.

9. Okweagu in his lifetime divided the lands of Unubi town among his sons, and gave to Nkwukwo, his eldest son, his obi (or compound) and the lands surrounding it up to Nkwukwo's boundary with Etitinabo to the east, Ekwulumili town to the west, Agbogwugwu village to the north, and Akwa Ihedi and Osumenyi towns to the south.

10. Okweagu married four wives. From the first wife he got two sons - Nkwukwa (who was his eldest son) and Etitinabo; from his second wife he got his third son, Akwueke; from his third wife he got his fourth son, Agbogwugwu; and from his fourth wife he got his last son, Isiokwe.

5 11. Okweagu had founded Unubi town, and his descendants were living where they are now living before the Ekwulumili people came to live on the site now called Ekwulumili town.

12. Ekwulumili people - the defendants' people - were first known as Ekwuluatulu. But about 1940 they changed 'Atulu' to 'Mili', and began
10 to call themselves Ekwulumili.

13. After the death of Okweagu his sons took possession of the lands allotted to them by him. Nkwukwo, his first son, entered into his inheritance which included 'Abubo' land, part of which is now in dispute.

14. Nkwukwo begat two sons, called Ezeebosi and Okene.

15 15. On Nkwukwo's death Ezeebosi and Okene divided their father's lands, and the whole of Abubo land was part of the share taken by Ezeebosi.

16. Where Ezeebosi and his descendants lived became known as 'Iruama' (or Mgbago), and where Okene and his descendants lived became known as 'Uruama' (or Mgbede). Iruama and Uruana lived close to themselves, their lands being contiguous. Uruama farmed towards the east, while
20 Iruama farmed towards the west, to their boundary with Ekwulumili.

17. The plaintiffs are Iruama."

According to paragraph 3 of their statement of claim the land now in dispute between the parties "is a portion of the plaintiffs larger area of land".
25 I need mention at this stage that plaintiffs instituted the action in a representative capacity, that is, as representing Iruama village in Nkwukwo quarter of Unubi town. The defendants who are of Urueze village in Ekwulumili town were sued in their personal capacities.

The defendants in their own pleadings also relied on the traditional
30 history of settlement of a larger area of land which included the land in dispute, by their own ancestor. They called the land in dispute Oheba. In paragraphs 3(a) - 3(1) of their further amended statement of defence, the defendants pleaded their traditional history. The paragraphs reads as follows:-

31 "3(a) The defendants' Oheba land now in dispute originally belonged to Ekwulu, the ancestor of the defendants who was a reknowned shepherd and farmer from Agukwu Uri in Njikoka and from whom the defendants inherited the land.

3(b) Ekwulu, the great sheep rearer moved around a lot looking for fresh green pasture for his sheep. In the cause of his travels he got to the

land of the seven streams and the great pond where he found rich green pasture for his sheep and discovered that the land was fertile for farming. As a result of the numerous sheep which he kept and reared people called him Ekwulu Atulu.

3(c) Because the land was rich in pasture and was fertile for farming, Ekwulu had enough pasture for his sheep and fertile land for farming. He occupied the land and settled down there. He became owner of the land by virtue of prior occupation and was the first person to deforest and farm the land.

3(d) Ekwulu had one wife. Mgbogoafor Olieji who had seven children for him, 4 sons (i) Owelengwu (ii) Isigwu (iii) Urueze and (iv) Dim and 3 daughters, (i) Ngboli, (ii) Nwakwo and (iii) Udumeje.

3(e) Before his death Ekwulu shared his lands among his four sons. The Oheba land now in dispute forms part of Urueze's share of Ekwulu's lands.

3(f) Urueze and his descendants were from time immemorial and before the Land Use Act 1978 owners in possession of the said land in dispute and as such owners exercised maximum acts of ownership over the same by farming thereon, collecting palm fruits, oranges, coco-nuts, kola-nuts, bread fruits, pears these being collected from economic trees planted by the defendants. Since the Land Use Act, the defendants have continued to remain in possession thereof and are entitled to customary right of occupancy in respect thereof.

3(g) Urueze on his part had eight children. (i) Nenugba, (ii) Umenwunne (iii) Ezenwabachili (iv) Umealor (v) Okpe (vi) Umugwu (vii) Ezengwu and (viii) Amakom and they now comprise the eight families of Urueze. Before his death Urueze also shared his lands among his eight children and each of them got a share of the said Oheba land which they have farmed from time immemorial and in respect of which each said subfamily has exercised maximum acts of possession.

3(h) The defendants fished from the big pond (lake) on the said land called 'Iyi Ojoo' and collected crabs from the pond.

3(i) The defendants have their Ngwu shrine on their land in dispute. This Ogwugwu Ngwu shrine is located in the ruins of the residence of Ogbuagu Ezeanochie.

3(j) In exercise of their rights of possession and ownership over their shares' of Oheba land the Amakom, Umungwu, Umumenwunne and Ezenwabachili granted portions of their shares of Oheba land to Mbamalu Industrial Complex Limited for running their Industry.

3(k) One of the eight families which comprise Urueze was not joined in the

suit even though its own share of Oheba forms part of the land in dispute and in respect of which the plaintiffs instituted their action.

3(L) *During the Nigerian Civil War the said eight families of Urueme made portions of their Oheba land available for food growing by an organised group under the supervision of Government functionaries in*
 5 *Onitsha Division. This groups was inelegantly called 'land army'.*

Following the close of pleadings, the action proceeded to trial at the conclusion of which the learned trial Judge found against the plaintiffs and dismissed their claims. Although the action was founded in trespass and injunction the learned trial Judge, quite rightly in my view, considered, as
 10 *between the parties, who had better title. He accepted the defendants' version of the traditional history and rejected plaintiffs version. The plaintiffs appealed to the Court of Appeal (Enugu Division) against this judgment. Three questions were placed before that Court by the parties. These are -*

“(i) *Whether the court below was correct in deciding that para-*
 15 *graph I of the Statement of Defence was an effective denial of paragraphs 41 - 44 of the Statement of Claim.*

(ii) Whether the court below was right in deciding that the traditional evidence of the defendants was to be preferred to that of the plaintiffs.

(iii) Whether the court below has properly evaluated the evidence
 20 *before it.”*

In a considered judgment, Uwaifo JCA in his lead judgment (with which Awogu and Oguntade JJCA agree) held (1) that “the learned trial Judge approached the case and the evidence adduced in a most erroneous and unsatisfactory manner,” and (2) that the learned trial Judge applied a wrong
 25 *method in considering evidence of traditional history. He then concluded that there had not been a proper resolution of the issues in the case. He proceeded to allow the appeal, set aside the judgment of the trial court and ordered a retrial. On question (i) put before the court below, it held that there was sufficient traverse by the defendants of essential facts in the plaintiffs Statement*
 30 *of Claim.*

Both parties are dissatisfied with the judgment and they both appealed to this Court, having sought and obtained leave to do so. The plaintiffs' grouse is against the order of retrial. They seek from this Court the following relief.

35 *“To set aside the portion of the judgment wherein the Court of Appeal ordered a retrial and to enter judgment for the plaintiffs.”*

And their grounds of appeal read:

“(1) The learned Justice of the Court of Appeal erred in law in directing a new trial instead of entering judgment for the plaintiffs.

Particulars

(a) *The court below found on page 6 of the said judgment that ‘...the plaintiffs gave evidence strictly in accordance with their pleading on traditional history ... ‘ and further on page 9 that’ ...If anything the defendants’ story as given by DW 7 and 1st defendant lacked that straightness of a pole assigned to it by the learned Judge ...’* 5

(b) *The court below also found on page 10 of the said judgment that’ ...in contrast one cannot find any of such deficiencies or any other in the plaintiffs’ traditional history’ and on page 16 that ‘The plaintiffs led evidence as to common boundary both as shown in their plan (Exhibit A) and orally. They also led evidence that both parties had earlier acknowledged the said common boundary and even swore an oath not to violate that boundary which was said to be constituted by Njeaba stream and Abudo stream.* 10

(c) *By reason of the foregoing findings the Court of Appeal’s failure to enter judgment for the plaintiffs is clearly one which is (with profound respect) unreasonable and must have been based on error of law.* 15

2. *The learned Justices of the Court of Appeal erred in law in failing to draw appropriate inferences from the facts after having properly reviewed same and made findings thereon.* 20

Particulars

On page 16 the court below found that ‘...The plaintiffs led evidence on acts of possession ... There is evidence of farming activities on the land by the plaintiffs’ people and on page 17 that ‘boundary men testified for the plaintiffs. The learned Judge brushed all of them aside unevaluated.’ 25

The defendants in their own appeal complain that the court below ought not to have interfered with the judgment of the trial High Court; they seek from this Court a restoration of that judgment. Their grounds of appeal read as follows:

“(1) That the Court of Appeal erred in law in setting aside the judgment of the High Court and in ordering a retrial of the case. 30

Particulars of Error

(i) *That it was the primary duty of the trial court that saw and heard the witnesses give evidence to make findings of fact in the case and that the Court of Appeal did not have that advantage.* 35

(ii) *That the trial court disbelieved the witnesses for the plaintiffs/respondents and it was not for the Court of Appeal to ascribe credibility to their evidence.*

(iii) *That the plaintiffs/respondents failed to establish their tradi-*

tional history and possession of the land in dispute,

2(a) *That the Court of Appeal misdirected itself in fact in holding that the trial court failed to apply the test in Kojo II v. Bonsie (1957) 3 WLR 1223 at 1227 in determining which of the conflicting traditional histories was more probable.*

Particulars of Error

(i) *That the trial court applied the test in Kojo II v. Bonsie (supra) in the case.*

(b) *That the Court of Appeal misdirected itself in fact as to what it held to be deficiencies in the evidence of traditional history of the defendants/appellants.*

Particulars of Misdirection

(i) *That the evidence of DW7 and the 1st defendant showed that Ekwulu founded the place now known as and called Ekwulu of which Oheba is a part.*

(ii) *That the evidence of DW7 and the 1st defendant was that there were seven streams at Ekwulu.*

(iii) *That both DW 7 and the 1st defendant named the four sons of Ekwulu to whom he shared his lands.*

(c) *That the Court of Appeal misdirected itself in fact and in law in the following passage of its judgment:*

'The learned Judge was no doubt unfair to the plaintiffs. Having purported to prefer the traditional history of the defendants there was no basis upon which to apply the principle stated in Kojo II v. Bonsie (supra). He made a very unimpressive effort to do this by resorting to Ekpo v. Ita II (1932) NLR 68 contrary to what was observed by the Supreme Court in Balogun v. Akanji (1988) 1 NWLR (Pt. 70) 301 at 322 - 323.

Particulars of Misdirection

(i) *That the learned trial Judge was not unfair to the plaintiffs.*

(ii) *That the plaintiffs pleaded two roots of title in support of their case and the learned trial Judge was bound to consider both of them.*

(iii) *That the learned trial Judge considered the plaintiff's case on the two roots of title pleaded by them and found against them.*

3. *That the Court of Appeal misdirected itself in law and in fact in the following passage of its judgment:*

'I regret to say that this line of reasoning and method of 'evaluation' of evidence can be quite agonising... it is difficult to twist the truth.

Particulars of Misdirection

(i) *That the Court of Appeal embarked on a fresh appraisal and re-*

evaluation of the evidence tendered on behalf of the defendants/appellants and purported to substitute its view for those of the trial Judge who had properly evaluated the said evidence.

(ii) *That Exhibit 'D' supported the evidence of DW 4 and besides the two houses erected by her husband on the land in dispute did not go into ruins in twelve years but much later after they vacated the said houses and were then resident at Obu Uno, Urueze village, Ekwulumili.* 5

(iii) *That the first house built by the husband of DW4 on the land in dispute was built some years before the second house occupied by DW4 and DW4 also gave other evidence of their acts of ownership and possession of the land in dispute.* 10

(iv) *That the Ngwu tree where the defendants/appellants have their Ogwugwu Ngwu shrine is shown in Exhibit 'D'.*

(v) *That DW5 was an independent witness; both parties agree that the 'land army' farmed on the land in dispute during the Nigerian Civil War and besides the learned trial Judge saw and heard DW5 give evidence.* 15

(vi) *That the learned trial Judge accepted the evidence of the defendants' witnesses for good reasons.*

(vii) *That DW7 and the first defendant were unshaken during cross-examination.*

4(a) *That the Court of Appeal misdirected itself in law and in fact in the following passage of its judgment:* 20

'He failed to ascertain the common boundary between the two villages, and issue clearly apparent from the pleadings and evidence. Had he done so, it would have helped in no small measure in resolving the dispute.'

Particulars of Misdirection 25

(i) *That it is not in every case where the boundary of two neighbouring villages is in issue that a finding must be made defining such boundary.*

(ii) *That the plaintiffs did not lead any credible or reliable evidence in proof of their boundary with the defendants/appellants.* 30

(iii) *That Exhibit 'B' contradicted Exhibit 'A' and the plaintiffs' oral evidence as to their land having boundary with the defendants/appellants 'land and as to what constituted the said boundary.*

(b) *That the Court of Appeal misdirected itself in fact in the following passage of its judgment:* 35

'It is clearly my view that the learned Judge was, with due respect, generally undiscerning in the evaluation of the evidence before him even when and if he did direct his attention to aspects of it, and I think it is right to say that the findings and conclusions made by him in the exercise are

unjustified.’

Particulars of Misdirection

(i) The learned trial Judge considered every aspect of the case of both parties.

(ii) That the learned trial Judge saw and heard the plaintiffs and their witnesses give evidence and disbelieved them.

(iii) That the findings and conclusion reached by the learned trial Judge flowed from the evidence before him.”

Parties filed and exchanged their respective Briefs of Argument in respect of the two appeals. The questions for determination emanating from the Briefs filed by the parties are, in my respectful view -

(1) Was the Court of Appeal right in this case to embark on a fresh appraisal and re-evaluation of the evidence at the trial?

(2) Was the order ‘for a retrial’ by the Court of Appeal the proper order to make having regard to its findings on the facts and circumstances of this case?

Since these two questions dovetail into each other. I shall consider them together.

The fact of the case run essentially on the pleadings that I set out in the earlier part of this judgment. Each party lays claim to title to the land in dispute and each accuses the other of committing acts of trespass. The learned trial judge reviewed the evidence adduced for each party. He observed:

“A claim for damages and injunction against further trespass as in this instant case postulates that the plaintiffs are either the owner of the land in dispute they call Abubo or in exclusive possession of the said land. See Nnajifor v. Ukonu (1986) 4 NWLR (Pt.36) 505 and Lokoyi v. Olojo (1983) 8 SC. 61. pp. 69 - 73. This is based on the proposition that a trespasser can maintain an action against all but the true owner of the property. Vide Amakor v. Obiefuna (1974) 3 SC. 67. In the case under consideration, defendants are asserting that the land they call Oheba belongs to them and this has now raised the question as to the true owner of the land which has to be determined, before the issue of trespass can be sustained. From evidence adduced by both parties. I am of the firm view that they are ad idem on the identity of the land in dispute. This is even confirmed by a mere glance of Exh. A and D tendered by plaintiffs and defendants respectively. The fact that different names are ascribed to it and features therein are irrelevant.”

He correctly, in my view, set out on whom lay the burden of proof when he said:

“...the plaintiffs must rely on the strength of his own case and not on the weakness of the defence which however is subject currently to two

exceptions:

(i) Where the facts in the defendants' case support the plaintiffs as recognised in *Akinola v. Oluwo* (1962) 1 SCNLR 352; (1962) 1 All NLR 224 at 225 and

(ii) Where the defendants in his pleadings admits that the plaintiff was the original owner, See *Ochonma v. Unosi* (1965) NMLR 321."

He considered the evidence before him and found as follows:

"From evidence given during the proceedings by 1st plaintiff, 1st defendant and witnesses, I find as a fact the existence of a shrine as stated by DW6 on the land in dispute and that issues i.e., scrapping of land and farming on the said land in dispute that led to this action have been adjudicated upon by the Igwe and Obi of both parties as well as their representatives and decision arrived at as embodied in Exh. C. Finally PW4, PW5 and PW6 are not witnesses of truth as can be discerned from the demeanour in the witness box and answers given during cross-examination."

It is clear from the above passage that the learned trial Judge rejected the evidence of PW4, PW5 and PW6 and having regard to the fact that the ascription of credibility is solely within the province of a trial Judge, I can find no ground for faulting the learned trial Judge in respect of the above passage.

The crux of the plaintiffs' complaint both in the court below and in this Court lies in the manner the learned trial Judge resolved the conflict in the evidence of traditional history proffered by the parties. The learned trial Judge said:

"Evidence given by the parties indicate that both relied on traditional history and acts of ownership numerous and positive and extending over a long period of time. Evidence of traditional history given by them have already been summarised at the early part of this judgment. There is conflict in the evidence given in this aspect. On the plaintiffs side, 1st plaintiff on record gave evidence of traditional history while on the defendants side, Chief G. O. Umeanade, the Obi of Ekwulumili i.e. DW7 and 1st defendant on record aged 85 years put across their own version of traditional history. In considering the two versions put across, that of the defendants is lucid 'straight as a pole' and very satisfactory while the plaintiffs' story is disjointed, incomprehensible and most improbable. In this aspect, one has to bear in mind that old men and traditional rulers are by their status in the community not only in a position to know the truth but also find it difficult to twist the truth. DW7 and 1st defendant were unshaken during cross-examination. Vide *Nwawuba v. Enemu* (1988) 2 NWLR (Pt. 78) 581, p. 595 per Nnaemeka-Agu JSC. As stated by Lord Denning in *Kojo II v. Bonsie* (1957)

1 WLR. 1223, 1227.

'The best way to test the traditional history is by reference to 'the facts in recent years as established by evidence and by seeing which of the two competing histories is more probable.'

As observed by Aniagolu JSC in *Ikpong v. Edoho* (1978) 2 LRN 29,
5 40.

'It is therefore for the trial court to determine:

(a) Did his ancestors in fact tell him that story?

(b) Is the story true?

Coming back to this historical evidence, it will be noted that the
10 defendants have been recognized by the plaintiffs as natives of Urueze vil-
lage vide paragraph 2 of the Statement of Claim. This same Urueze from
which the village got its name is one of the sons of Ekwulu the original
owner of Oheba land now in dispute as designated by defendants. It is now
of historical significance that defendants came from Urueze village and are
15 from Ekwulumili formerly Ekwuluatulu. This has fortified my view on the
evidence given by defendants with respect to 'traditional history and in
accordance with observations made by Lord Denning and Aniagalu JSC in
cases referred to' above (supra).

Elaborating further on my comments of plaintiff's evidence in rela-
20 tion to traditional history and putting in focus extracts of 1st plaintiff's
statement quoted above (supra), it will be noted that Okwuagu founded
Unubi town and gave his 1st son Nwakwo, the land in dispute. On Nwakwa's
death, his two sons shared the same land into two, Okene lived on the east
called Uruana and Ezeabasi on the west. The plaintiffs are from Uruana. He
25 stated further that Ezeabasi shared his land among his male issues on his
death. This story is incomprehensible and one cannot say for certain how
many times Abubo land was shared and its actual relationship to the land in
dispute and who precisely owned it. This in contrast to defendants' evidence
of traditional history which is simple and comprehensible when related to
30 facts and history in which name like 'Urueze', 'Ekwulu', 'Ekwuluatulu' and
'Ekwulumili originated as well as the shrine referred to by DW 6."

This passage came under severe attack by the plaintiffs in the Court
of Appeal which too derided the learned trial Judge for it. Uwaifo JCA in his
lead judgment observed, after quoting the above passage, that the learned
35 trial Judge failed to apply the principle in the two cases of *Kojo II v. Bonsie*
(supra) and *Ikpong v. Edodo* (supra). The learned Justice of Appeal said and I
quote:

*"It cannot be said that the learned Judge, with due respect, applied
any of the above principles to the evidence before him, or if he attempted to*

do so, that he appreciated their import that what he was expected to do was to decide on which of the competing histories is more probable or which of the stories is true. I think Aniagolu JSC intended that where a story is told by a witness which in itself has serious internal conflicts or is based, for instance, apparently on fiction and mysticism beyond the comprehension of the court and therefore incapable of being assigned any probability of truth, then the trial court must of necessity wonder whether the witness's ancestors in fact told that story and whether the story, if told, could possibly be true. Once the internal conflicts in the evidence destroy it or the answers posed above are in the negative and the traditional history breaks down on its own, the question of applying the principle in *Kojo II v. Bonsie* (supra) will not arise: See *Joseph E. Aikhuele & Ors. v. Eichie Oakhena* (1980) 3 CA 54 (Benin Division).

But where the traditional histories of both parties are merely in conflict, but each is a probable story on its own, then the best way to test which one is more probable is by reference to facts in recent years as established by evidence,”

I agree entirely with the views expressed in the above passage. After criticizing severely and I dare say, in a rather intemperate language, the learned trial judge's approach to resolving the conflict in traditional evidence of the parties, the learned Justice of Appeal went on to re-evaluate the evidence at the trial and to come to conclusions different from those arrived at by the learned trial Judge.

With profound respect to the learned Justices of the Court below, they went beyond what was required of them as an appellate court. Having held that the learned trial judge adopted the wrong approach the course open to them is to apply the right approach bearing in mind the findings of facts made by the trial court. Where however there are no such findings or sufficient findings to assist them in resolving the conflict in the evidence of traditional history adduced by the parties, the proper course is to remit the case to the trial court for a retrial. In my respectful view it is not open to the appellate court to fish through the record for pitfalls in the judgment of the learned trial Judge. For instance the issue of a common boundary between the parties was not one placed before them for consideration yet Uwaifo and Awogu JJCA made much heavy weather of this. Having concluded that the learned trial Judge made a wrong approach to the resolution of the conflict in the traditional evidence of the parties, what the court below ought to have done was to look at the findings of fact made by the learned trial Judge and resolve, where

possible, that conflict in the light of those findings. This it did not do but sought to pick holes in the judgment of the trial court. It is now open to this Court to look at the record and try to resolve the conflict where possible, by reference to events in recent times, as might have been done by the learned trial Judge.

This takes me to the learned trial Judge's findings on acts of possession or the land in dispute. The learned trial Judge considered the evidence led by both parties on acts of ownership. He found that:

10 *"..... the defendants have established to my utmost satisfaction that they have been on this land right from the time Ekwulu entered the land in dispute followed by his children and now current defendants. They have been in possession and have exercised all rights of ownership on the land they call Oheba."*

15 After a careful examination of the pleadings and the evidence led in support by each side. I am satisfied that there is sufficient support for the above findings of the learned trial Judge. The court below per Uwaifo JCA had observed:

20 *"The plaintiffs led evidence as to common boundary both as shown in their plan (Exhibit A) and orally. They also led evidence that both parties had earlier acknowledged the said common boundary and even swore an oath not to violate that boundary which was said to be constituted by Njeaba streams and Abudo stream. The defendants agreed in their pleading and evidence that they share a common boundary with the plaintiffs' but mentioned a different stream. They denied any oath-taking in respect of the established and agreed boundary. Unfortunately, the learned Judge made no findings on nor paid attention to this evidence, not even by way of a passing reference. The plaintiffs led evidence on acts of possession. The 1st plaintiff mentioned ruins of houses of his village people on the land and those houses being currently lived in. There is evidence of farming activities on the land by plaintiffs' people. Mark Okeke (P.W.5) said he lived and worked on the land from 1964 to 1979. Boundary men testified for the plaintiffs. The learned Judge brushed all these aside unevaluated."*

35 The issue of identity of the land, the bone of contention between the parties was never in dispute. I therefore do not see how a failure to make a pronouncement on which of the streams form the boundary could be fatal to the judgment of the learned trial judge. As rightly also observed by Uwaifo, JCA, the defendants denied plaintiffs' story about oath taking in respect of any agreed boundary. The learned trial Judge who saw and heard the parties

and their witnesses rejected the evidence for the plaintiffs and accepted that for the defendants. Since the question of credibility is essentially within the province of the trial court, I do not see how an appellate Court can justifiably interfere unless it is shown, and that is not the case here, that the trial court's belief or disbelief is unreasonable. On the question of ruins, I do not think that the plaintiffs are on a strong wicket. They neither pleaded nor show on their plan, any ruins of their houses on the land. The evidence of the 1st plaintiff on ruins of houses, therefore, went to no issue and could not form the basis of any finding. PW5 Mark Okeke who gave evidence of farming activities on the land was disbelieved by the learned trial Judge. These observations of mine dispose of the criticisms by the learned Justices of the Court of Appeal of the trial court Judge.

Uwaifo, JCA had cited the following dictum of Coker J.S.C in Lawal v. Dawodu (1972) 1 All NLR (Pt.2) 270, 286:

"In the evaluation of evidence we think it firmly established in our jurisprudence that a court of appeal ought not, except in exceptional circumstances to interfere with what must be considered the outcome of a dispassionate consideration of the evidence by a judge who saw and heard the witnesses give evidence. The ascription of probative values to evidence comes at a later stage of the whole process and it is also established that this is a matter for the judge who saw and heard those witnesses give evidence, Nevertheless the area is one in which the Court of Appeal is at least equally qualified and competent and Indeed is often required to exercise jurisdiction in certain, albeit exceptional, circumstances. A trial judge, however learned, may draw mistaken conclusions from indisputable primary facts and may indeed wrongly arrange or present the facts on which the foundations of the case rest. In those circumstances, it would be completely invidious to suggest that a court of appeal should not intervene and do what justice requires but should abdicate its own responsibility and rubber-stamp an error however glaring."

I regret to observe, however, that the court below did not adhere to the said dictum. On the contrary, it proceeded to do just what it should not do and that is reappraising and re-evaluating the evidence on record which appraisal and evaluation must necessarily depend on the credibility or reliability of witnesses.

With the finding of the learned trial Judge on acts of possession which finding, in my respectful view, is adequately supported by the evidence before him and applying the principle in *Kojo II v. Bonsie* (supra), the logical conclusion is that the traditional evidence adduced by the defendants is to be

preferred. The plaintiffs having failed therefore, to show better title to the land in dispute by traditional evidence or by proof of acts of ownership, the learned trial Judge, in my respectful view, rightly dismissed their claims.

Before I end this judgment I think, I need to say a few words on the plaintiffs' cross-appeal. Chief Williams has argued that on the findings of the court below, judgment ought to have been entered in favour of the plaintiffs. Ordinarily in view of the conclusions I have arrived at on the defendants' appeal, it would have been unnecessary to say anything further on the cross-appeal. However, submissions having been made before us on the issue of retrial, one must as well restate the law once again.

Where an appellate court is in a position, after considering the evidence, to do complete justice between the parties an order for a new trial should not be made - *Okeowo v. Migliore* (1979) 11 SC. 138, 201 (per Idigbe JSC); the court should where the circumstances of the case permit, correct the decision appealed against - *Nader v. Customs and Excise* (1965) 1 All NLR 33, 37 (per Bairamian J.S.C). Where however, a finding depends so much on the credibility or reliability of witnesses an appellate court should order a retrial- *Shell BP v. Cole* (1978) 3 SC. 183, 194 - 195 (per Bello, J.S.C (as he then was); *Total v. Nwako* (1978) 5 SC. 1, 14 where Obaseki JSC observed:

“Where it is established before a Court of Appeal that vital issues which depend much on the appraisal and evaluation of the evidence are left undermined, a case for a retrial is made out, if such a failure has occasioned a miscarriage of justice, i.e. miscarriage of justice which in this context means (as ably defined by Lord Thankerton in the case of *Bibhahati Devi v. Kumar Ramendra Narayan Roy* (1940) A.C. 508 at Page 521 such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all.”

See also *Okpiri v. Jonah* (1961) All NLR 102, 105 where Sir Ademola CJF (as he then was) said:

“Throughout his judgment the learned trial Judge avoided making specific findings of facts on issues before him, nor did he make attempt to draw inferences from facts before him. I am satisfied from the whole record that he has not taken proper advantage of having seen and heard the witnesses in the case, and in my view, this is a proper case to be sent back for a rehearing.”

Where the plaintiff has failed totally to prove his case and there is no substantial irregularity apparent on the record or shown to the court, an order of retrial should not be made. As Coker JSC put it in *Ayoola v. Adebayo* (1969) 1 All NLR 159, 162:

“An order for retrial inevitably implies that one of the parties, usually the plaintiff, is being” given another opportunity to relitigate the same matter and certainly before deciding to make such an order we think that an appellate tribunal should satisfy itself that the other party is not thereby being wronged to such an extent that there would be a miscarriage of justice.....an order for a retrial is not appropriate where it is manifest that the plaintiffs’ case has failed in toto and that no irregularity of a substantial nature is apparent on the records or shown to the court.”

Coming now to the case on hand, if the reasons given by the learned Justices of the court below valid, that is, that the trial court failed to make findings of facts on vital issues placed before it, such issues could not be resolved without reference to the credibility or reliability of witnesses. In the circumstances the court would be taking the proper course by ordering a retrial. Such order would accord with justice in the case. It would have been wrong for the court below to proceed to make those findings not having seen and heard the witnesses and to enter judgment for the plaintiffs, as is being urged on us by Chief Williams S.A.N.

For the reasons given by me in this judgment and the other reasons given by my learned brother Onu, J.S.C in his lead judgment, I allow the defendants’ appeal and dismiss the plaintiffs’ cross-appeal. I set aside the judgment of the court below and restore the judgment of the trial court dismissing the plaintiffs’ claim. I abide by the order for costs made in the lead judgment of my learned brother Onu, J.S.C.

ADIO JSC

I have had the privilege of reading, in draft, the judgment just delivered by my learned brother, Onu, J.S.C., and I agree with his reasoning and conclusion. I too allow the appeal and dismiss the cross-appeal. I abide by the consequential orders including the order for costs.

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