

SUPREME COURT OF NIGERIA
28TH JANUARY, 1994. SC. 258/1988
CORAM:- M. L. UWAIS, I. L. KUTIGI, M. E. OGUNDARE,
U. MOHAMMED, S. U. ONU, JJSC.

BENEDICT AGWUNEDU & OTHERS DEFENDANT/APPELLANT

AND

CHRISTOPHER ONWUMERE PLAINTIFF/RESPONDENT

EVIDENCE - Land Law - admissibility of documents - land instrument Registration law - unregistered document tendered in evidence -whether admissible

EVIDENCE - Registrable instruments under the law - document held not to be an instrument to warrant registration - when purpose of tendering a document will render it admissible - even if found to be an unregistered instrument

LAND LAW - Claim for declaration of title - failure to establish the claim -whether Plaintiff is entitled to succeed

PLEADINGS - Land law - Court of Appeal's finding that an averment by Plaintiff was not denied - where the records show a denial - Whether that finding can be correct

PLEADINGS - Declaration of title - Plaintiffs averred pledge of land denied by defendants - whether there is any element of surprise - or concealment of the nature of the defence

FACTS

The Plaintiff/Respondent in a representative action claimed against the Defendants/Appellants before the former East Central State High Court (now Imo State), declaration of title to a piece of land, damages for trespass and perpetual injunction. Plaintiff claimed that his ancestors have been owners

in possession of the land in dispute from time immemorial. The Defendants claimed ownership of the land and sought to establish that it was part of their family land in respect of which one Mbahaotu, a member of their family secretly received money from the Plaintiff towards selling the land to him without their consent. This was in denial of the Plaintiffs claim that the land was pledged to the said Mbahaotu and he merely redeemed it. But the agreement, document evidencing the transaction tendered as exhibit C, established a sale rather than a pledge.

The learned trial Judge found for the Defendants and dismissed the Plaintiffs claim. Plaintiffs appeal to the Court of Appeal, Enugu Division was upheld by that Court, which inter alia, held that the Defendants did not specifically deny the Plaintiffs plea of a pledge of the land to the said Mbahaotu. The Defendants being aggrieved have now applied to the Supreme Court to determine whether the Court of Appeal was right in its findings.

HELD (unanimously allowing the appeal)

1. It is abundantly clear from the records that the allegation made by the Respondent that part of the land in dispute was pledged to a certain fellow (Mbahaotu) was denied by the Appellants in their statement of defence. And the holding by the Court of Appeal that the Appellants did not plead that the transaction between Mbahaotu and the Respondent was a sale rather than a pledge cannot be correct (P. 46 L14)

2. Looking into the pleadings in this case, Appellants in their denial of the alleged pledge, without mentioning the word “sale” averred that Mbahaotu secretly received money from the Respondent and permitted him to build on their family land. It became clear that that transaction involves a sale of land known to the Respondent who signed the agreement. There is therefore, no element of surprise or concealment of the nature of the Appellants’ defence. (P. 47 L16)

3. Exhibit C (the agreement), which is evidence of sale of a piece of land tendered towards establishing a fact pleaded by the parties is not an instrument as defined under the Land Instrument Registration Law. And even if the said exhibit was a registrable instrument, it is admissible, since the purpose of producing it was only to establish evidence that the transaction between the Respondent and Mbahaotu was for the redemption of a pledge. (P.48 L39)

4. The Respondent and his family are not entitled to any of the declarations

sought. Consequently, the Court of Appeal's judgment is set aside whilst the judgment of the High Court is restored. (P. 51 L24)

REPRESENTATION

Chief F.R.A. Williams SAN, with Dr. E. O. Ume SAN,
T.E. Williams and J.U.K. Igwe for the Appellants.
Mrs. A.J. Offiah for the Respondent.

CASES REFERRED TO

1. Lewis and Peat (N.R.I) Ltd v. A.E. Akhimien (1976) 7 S.C. 157
2. Astrovlanis Comapania Naviera S.A. v. Linard (1972) 2 All E.R. 647
3. Lamidi Fakoya v. St Paul's Church Shagamu (1966) All NLR. page 68
4. Joseph Babalola Oni & Ors. v. Samuel Arimoro (1973) NSCC 108 at 113
5. Olayede Akingbade v. Oyeyipo Elemosho (1964) All NLR 146
6. Adenle v. Oyegbade (1967) NMLR 136, 138
7. Ikpan v. Edoho (1977) 6 - 7 SC 221
8. Thanni v. Saibu (1977) 2 SC 89
9. Kojo 11 v. Bonsie & Anor. (1957) 1 WLR 1223, 1227 (PC)
10. George Onobruhere & Anor v. Ivwromoebo Esegine & Anor (1986) 1 NWLR (part 19) 799
11. Mgaji v. Odofofin (1978) 4 SC. 91 at page 93
12. Blay v. Pollard (1930) 1 K. B. 628 at 633
13. Obonor v. Conservator (1959) W.R.N.L.R. 8
14. Asiyambi v. Adeniji (1967) All NLR 82; (1967) NMLR 238
15. Obiora v. Commissioner of Police (1990) 7 NWLR (Part 161) 222 at 230

STATUTES REFERRED TO

1. Land Instrument Registration Law of Eastern Nigeria ss 2 & 5
2. Evidence Act s. 90

LEAD JUDGMENT BY MOHAMMED JSC

In a representative action, instituted and filed in the High Court of East Central State of Nigeria, (now Imo State) the respondent, in the appeal, claimed against the appellant as follows:

"1. Declaration of title to that piece or parcel of land known as and called 'Ala EMENAUGHA' situate at Umuoke Owerre Nkwoji in Nkwerre

Division within the Orlu Judicial Division and more particularly shown and delineated on the plan No. E/GA834/76 verged pink and filed with the statement of claim with the annual value of N10.00 (ten naira).

2. N2,000.00 (two thousand naira) general damages for trespass into plaintiff's Ala Emenaugh.

3. Perpetual injunction to restrain the defendant's servants/agents from further acts of trespass to the said land."

Pleadings were called, filed and duly exchanged. Mr. Christopher Onwumere gave facts of his claim against the appellants, in his evidence in chief, before the trial High Court. He told the court that he and his ancestors have been owners in possession of the land in dispute from time immemorial. I may pause here to explain that there is no dispute between the parties over the identity of the entire land which is the subject of this litigation. The two survey plans, Exhibit A and B, D which were respectively produced by the respondents and the appellants agree on all essential details. The parties only differ in the names which each party described the land in dispute. The appellant gave the name of the land as "Ala Emenaugh".

The respondent told the court that the land in dispute is situate in Umuoke Owerre Nkwoji, in Nkwere/Isu Local Government Area. He called six witnesses to prove his claim. The appellants, who were defendants at the trial High Court, claimed that the land in dispute was founded by Dii their ancestors from whom they derived their name- Umudi meaning the children of Dii. They called the land in dispute "Ohia Ajimiri" meaning bush reserved for Ajimiri juju. The appellants claimed both the ownership of the land and the Ajimiri juju which was worshipped by all the neighbouring people in the area. It is their case that only people of Umudi descendant could become chief priest of the juju. They explained further, that in the olden days fugitive offenders who ran to and surrendered to Ajimiri juju were sacrificed to the juju and thereafter they became "Osu-free servants" of the juju and automatically were freed from punishment. Obinike village, near Eke market, was set aside for the settlement of such juju servants. Hence the occupation of the respondents' people of Obineke village.

Seven witnesses testified for the defence and, in a well considered judgment, the learned trial judge, Johnson J., found that the respondent had failed to prove his claim and it was accordingly dismissed. On appeal, the Court of Appeal, Enugu Division, allowed the appeal and, in an apparent contradiction, the court of appeal declared that the respondent was entitled to both customary and statutory right of occupancy over the land. Dissatisfied with that decision the defendant filed this appeal and supported it with

seven grounds of appeal. Chief Williams, SAN. formulated four issues for the determination of this appeal on behalf of the appellants. Those issues are as follows:

"(i) Whether the court below was correct in holding that"

5 *(a) the defendant did not deny the plaintiff's allegation that the land on which he now resides was one time pledged to one Mbahaotu of the defendants' people;*

(b) the defendant cannot rely on Exhibit in support of transaction of sale.

10 *(ii) Whether the trial court was precluded from accepting the evidence relating to sale of the aforementioned and;*

(iii) Whether the conclusions drawn by the court below from the areas within the dispute which are said to be occupied by the plaintiff's family are reasonable.

(iv) Whether the orders made by the court in favour of the plaintiff can be justified."

15 Chief A.O. Mogboh, SAN., gave a brief outline facts of the case of the plaintiff/respondent and pointed out that the appellants, as defendants, made far reaching admissions about the respondents' long possession of undefined portions of the land in dispute. The learned Senior Advocate submitted that the learned trial judge failed to consider the effect of appellants' admissions which supported the respondent's claim to exclusive possession. However,
20 the Court of Appeal found that the appellants admitted that the respondent and his people are in possession of the areas verged violet, pink and blue, in Exhibit B, and that as persons in actual possession of the land in dispute, the respondent's family are the persons entitled to the customary right of occupancy of the disputed land. The learned Senior Advocate, in the respondent's brief, submitted that the following issues arise for the determination of this
25 appeal:-

"1. Whether by considering Exhibit 'C' as evidence of sale without the consent and concurrence of members of the family, the trial court was not thereby formulating a fresh issue for the parties distinct from their pleadings of pledge.

30 *2. Whether Exhibit 'C' is admissible in evidence as a document conferring interest in land despite its non-compliance with the Land Instrument Registration law.*

3. Whether the respondent was not entitled to judgment in view of the admission by the appellants coupled with the concurrent findings of the lower courts on the numerous acts of possession by the respondent. "

Chief Williams, SAN., reviewed the decision of the Court of Appeal,

in his submission in support of the first issue which he formulated, over that the court's finding that appellants did not deny the respondent's allegation that the land where the respondent now lives was pledged to late Mbahaotu who was from the appellants family. The Court of Appeal also found that the appellant did not plead that the transaction between Mbahaotu and the respondent was a sale rather than a pledge nor did they plead the effect of the document, Exhibit C. 5

The learned Senior Advocate referred to paragraphs 12 and 12b of the respondent's statement of claim and paragraph 15 of the appellant's statement of defence in which the averment in paragraphs 12 and 12b were denied. Paragraphs 12 and 12b are produced below:

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"12. The area verged Yellow in Plan E/GA834/76 shows where Christopher Onwumere (the plaintiff) now lives. This portion of family land was being cultivated by the late Chinaka Obialo of Umuoke Owerre Nkwoji. By Owerre Nkwoji custom a member of a family can pledge a portion of the family land where he works to anybody if the members of the family are unable to provide him the necessary funds required for his needs. The pledgor or his descendants must redeem the land when the family lands have to be shared. 15

12(b) Some years ago, the late Chinaka Obialo pledged the area verged yellow to one late Mbahaotu of Umuaro Umudi for Nnu Ano (1,600 cowries) to enable him pay a fine, which the Okonke Society of Umuoke Owerre Nkwoji ordered him to pay. The late Mbahaotu was the son of a woman from the plaintiff's family named Agbaghasu who was married in Umuozu Umuaro, Umudi. The late Mbahaotu was a member of many associations in Umuoke including the Okonke Society. The land was not redeemed before the death of the pledgor and pledgee.'

The reply of the appellants to the averments above was given in paragraph 15 of the statement of Defence and it reads as follows:

"15. In answer to paragraph 12 of the statement of claim which is denied the defendants aver that Mbahaotu now deceased of the defendants' people who had possessory right over the piece of land verged blue in Defendant's plan, secretly received the sum of 500pounds from and allowed the plaintiff to build on the land. When plaintiff commenced building thereon the defendants challenged him and he the plaintiff showed to and gave the defendants a receipt which he prepared and which was signed by him and Mbahaotu evidencing his transaction with Mbahaotu about the land and 30

*begged the defendants to allow him build and remain thereon their tenants. The defendants thereafter permitted the plaintiff to build and live on the land as their tenant. The said receipt given to the defendants by the plaintiff will
5 be founded upon at the trial. The value of Nnu or (1,600 cowries) as stated by plaintiff is only N8. It is ridiculous that plaintiff will pay N500 for a pledge of the value of N8."*

(emphasis mine)

10 It is abundantly clear from the above allegation by the respondent in paragraph 12 and 12b that part of the land in dispute, verged yellow, in the respondent's plan, exhibit A, was pledged to Mbahaotu has been denied in paragraph 15 of the statement of defence. In the lead judgment of the Court of Appeal, per Nnaemeka-Agu, JCA, (as he then was), the learned justice held
15 that the appellants did not plead that the transaction between Mbahaotu and the respondent was a sale rather than a pledge. With respect to the learned Justice of Appeal, it cannot be correct that the transaction pleaded established a pledge rather than sale.

20 It has been explained, but without mentioning the word "sale", that the respondent paid Mbahaotu N500 for the land, and further in the same paragraph 15 of the Statement of Defence, the appellants pleaded that the said receipt given to them by the respondent would be founded upon at the trial. The appellants thereafter referred to the value of Nnu Ano (1,600 Cowries) and averred that it would be ridiculous for the respondent to pay N500 for a pledge of the value of N8. By this averment it is plain that the appellants
25 rejected the claim of the respondent that he paid N500 to redeem the land allegedly pledged to Mbahaotu by one Chinaka Obialo, a relation of the respondent.

Learned Senior Advocate for the respondent submitted that the appellants were bound to particularly plead what the transaction between the respondent and Mbahaotu was and if they wanted the court to find that the
30 transaction was a sale or tenancy agreement instead of a pledge, they should have clearly stated so in their pleading. The rules of pleadings do not allow the appellants to be hedgy or evasive in their reply to facts averred by the respondent. Once the appellants refused to meet the facts directly either by admitting or denying them and joining issues specifically on such denial they

Agwunedu v. Onwumere (1994) 2 KLR Mohammed JSC 47
are taken to have admitted the respondents plea. He referred to Lewis and Peat (N.R.I.) Ltd v. A.E. Akhimien (1976) 7 S.C. 157.

The Learned Senior Advocate is correct in stating the procedure in drafting pleadings, because in pleadings there is no difference in effect between denying and not admitting an allegation. A traverse may be made either by a denial or non-admission, and either expressly or by necessary implication. But whether a party denies or does not admit he must make it perfectly clear 5 how much he disputes and how much he admits. However where particulars given by a party are insufficient under the Civil Procedure Rules the court, or on the application of either party, may order particulars of any claim, defence or any matter pleaded to be given. The function of particulars is to carry into operation the overriding principle that litigation between the parties, and particularly between the trials should be conducted fairly, openly and without 10 surprises and incidentally to reduce costs. *Astrovlnais Campania Naviera S.A. v. Linard* (1972) 2 All E.R. 647.

Now it is pertinent to look into the pleadings in issue, in this case, and see if the respondents was taken by surprise or was not aware of the nature of the defence put up by the appellants. The relevant issue is that the appellants have denied the averment in the statement of claim that the land verged 15 yellow in Exhibit A was pledged to Mbahaotu. In a reply to that allegation, the appellants without specifically mentioning the word "sale" averred that Mbahaotu secretly received N500 from the respondent and permitted him to build on their family land. It became clear from the transaction between Mbahaotu and the respondent that the agreement involve a sale of land and the respondent knew about the deal since he signed the receipt of agreement. 20 There is therefore no element of surprise or concealment of the nature of the appellant's defence.

Chief Mogboh, Learned Senior Advocate for the respondent submitted that the agreement for sale, Exhibit C, is not admissible in evidence as a document conferring interest in land in view of its non-compliance with section 2 and 15 of the Land Instrument Registration Law. An objection can 25 be taken to the document's admissibility at any stage, even on appeal, notwithstanding that such objection was not taken at the court below. This right to take objection cannot be waived or compromised. Counsel then referred to the case of *Abawaha v. Adeshina* 12 WACA 20.

Now it is pertinent to ask, "*How did Exhibit C come to be admitted in evidence before trial court?*". The answer is clear from the following dialogue 30 during the cross-examination of the respondent:

"Q How old are you?"

Ans. 50 yrs. old. My father died in 1970. "

Q. Why didn't your father redeem this land?

Ans. When I redeemed the land my father accompanied me.

Q. Why didn't your father redeem it?

Ans. No answer. He accompanied me because of the importance of the land to me. When I redeemed the land I was given a receipt. This is the receipt. Agreement dated 6/6/69 entered into after the redemption. Tendered, admitted and marked Exh. C. I have witnesses to the transaction

Q. Why is it that your father's name is not in Exh. C as one of your witnesses. You have lied to the court that your father accompanied you.

Ans. It is not true. He did follow me."

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Exhibit C is therefore the respondent's document and it was tendered by the respondent in an attempt to prove that he redeemed part of the disputed land in which he built a house and lives in. Exhibit C is a receipt which the appellants said is clear evidence that the transaction between the respondent and Mbahaotu was a sale and not a pledge. The respondent on the other hand
15 argued that the receipt was given to him by Mbahaotu when he redeemed the land verged yellow in the Survey Plan, Exhibit A. It is therefore relevant to look at the Exhibit in order to give a decision one way or the other over the dispute between the parties. It reads as follows:

"AGREEMENT" made at Amoji, Umudi, Orlu, and dated 6th June, 1969, and contains the following:-

20 *"This is an agreement made between Mr. Nwanedo Mbahaotu of Amoji, Umudi, Orlu and Mr. Christopher Onwumere (plaintiff) of Umuoke, Owerre Nkwoji, Orlu, this 6th day of June, 1969.*

*I, Mr. Nwanedo Mbahaotu have today sold my piece of land known as Owerre Ibewuihe in Amoji, Umudi, Orlu to Mr. Christopher Onwumere at the agreed price of 500pounds (Five hundred pounds) which I have received
25 in full.*

It is agreed between Mr. Nwanedo Mbahaotu and Mr. Christopher Onwumere that I Mr. Nwanedo Mbahaotu should uproot any standing tree in the land which is possible for me, otherwise anyone I left is for Mr. Christopher Onwumere".

Signature of Buyer *Signature or marks of Seller".*

30 *(Italics mine).*

It is crystal clear from the wordings of Exhibit C that it is evidence of sale of piece of a land and from the proceedings the document had been tendered in evidence simply to establish a fact which the parties have pleaded. It is not and cannot be an instrument as defined in the Land Instrument Regis-

tration Law. Even if it was an estate contract and consequently an instrument registrable for the purposes of the Land Instrument Registration Law of Eastern Nigeria, since the purpose of producing it was only to establish that the transaction between the respondent and Mbahaotu was for the redemption of a pledge, the document is admissible. See *Lamidi Fakoya v. Paul's Church Shagamu* (1966) 1 All NLR page 68.

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In the case of *Joseph Babalola Oni & Ors. v. Samuel Arimoro* (1973) NSCC 108 at 113 *Fatai-Williams JSC.*(as he was then) dealt with similar situation when this court considered an appeal where the Western State Court of Appeal attacked the decision of Ibadan High Court on the admissibility of a purchase receipt for the land dispute, in that case. It was decided by this court in holding that trial court made improper use of document tendered (Exhibit E) by the defendants as purchase receipt of land in dispute and gave their reason thus:

"With respect to the attack to the Western State Court of Appeal on the admissibility of the document (Ex. 'E') and the use made by the learned trial judge of its contents, we will do no more than to refer to the observation of Farewell, L.J. in South Eastern Railway Co. v. Associated Portland Cement Manufacturers (1910) 1 ch.12 which reads:-

"But the fact that there is some connection with or reference to land does not make a personal contract by any less a personal contract binding on him, with all the remedies arising thereout, unless the court can by construction turn it from a personal contract into a limitation of land, and a limitation of land only."

This observation was referred to with approval in *Fakoya v. St. Paul's Church, Shagamu* (1966) 1 All NLR 74 at page 80 where Brett, JSC. who delivered the judgment of the court observed as follows:-

"The personal obligations created by a contract for sale of land are already known to the parties to the contract and neither party can maintain against the other party that he was taken by surprise because the contract was not registered. Third parties may on occasion enter into unprofitable negotiations, but the register of instruments, affecting land does not purport to record the personal obligations of those who have interest in land, and the purchaser for value and without notice will have no less protection in consequence of our decision in this case than he had before."

In the two cases I cited above, the documents were registerable but were held admissible because they were not tendered as "instruments affecting land" but as an evidence of an agreement or request for specific performance.

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In the case in hand, the document shows a simple customary agreement over the sale of a piece of land. It does not therefore fall within the definition of an instrument for the purpose of the Land Instrument Registration Law. See *Olayede Akingbade v. Oyeyipo Elemosho* (1964) All NLR. 146.

Chief Williams, SAN., submitted in support of the third issue which he formulated for the prosecution of this appeal that the Court of Appeal did not pay attention to the evidence on the record which the learned trial judge delivered as to how certain areas in the land in dispute came to be occupied by members of the respondent's family. The learned Senior Advocate referred to Exhibit C and argued that if it was evidence of sale, then it destroys the claim of the respondent's family that they are the owners of the land. Chief Mogboh, SAN., made a detailed submission on the pieces of evidence in which the appellants admitted that the respondent and his family had been in possession of some parts of the land in dispute.

The learned trial judge made a very helpful and accurate summary of the facts over the possession and occupation of the land in dispute and admissions made in the pleadings in his judgment. The summary gives a correct picture, in my view, of the position of the parties over the land in dispute. The learned trial judge's summary of the facts reads as follows:

"(a) the land in dispute as shown in the two survey plans Exhibits A and B is separate and distinct from the area of land now inhabited by plaintiff's member of Emenaughha family.

(b) The area the plaintiff and his relations are presently living is the area plaintiff called "ALA EMENAUGHA" whereas the area in dispute plaintiff called "Owerre Ibewuihe" as shown in Exh. C. (sic)

(c) Plaintiff's pleadings alleged that the land is at Umuoke, Owerre Nkwoji whereas his evidence, supported by Exh. C, said the land is in Amaoji, Umudi.

(d) The traditional evidence of plaintiff related specifically to "Ala Emenaughha" and not "Owerre Ibewuihe" which he is disputing with defendants.

(e) Paragraphs 3 and 4 of plaintiff's pleadings referred to the land in dispute as "Ala Emenaughha", not Owerre Ibewuihe".

(f) Paragraph 10 of defendants' pleadings alleged that defendants are not quarrelling with plaintiff and his relations over the area in which they are presently living; that is to say, the area the plaintiff described as "Ala Emenaughha". Rather, the quarrel is over the extension, the area plaintiff wants to erect his new building which is the bone of contention.

(g) Plaintiff produced no boundary men to support his claim.

(h) The traditional evidence of the defendants is more probable, that the founder of their town was one Dii from which the children derived their name of Umudi; and that "Ohia Ajimiri" meant "a bush reserved to Ajimiri juju".

(i) The graves of the deceased relations of plaintiff are shown conspicuously inside "Ala Emenaugha" where the family members are now living, none in the area in dispute. On the contrary, the graves of the deceased relations of the defendants are shown inside the land in dispute.

(j) The Ajimiru juju is on the land in dispute and not inside the residential area of plaintiff and his family, which they described as 'Ala Emenaugha'

(k) The evidence of DW2 that Ajimiri belongs to Umudi and not to Umuoke Owerre Nkwoji is very relevant here, and I accept this evidence."

I regard the order made by the court below that the respondent was entitled to both customary and statutory right of occupancy over the land in dispute as a mere slip. I take note that both learned Senior Counsel agree that the finding was a slip and as such I would not make any comment over it. In any event, by this judgment the respondent and his family are not entitled to any of the declarations.

In the result, this appeal succeeds and it is allowed. The judgment of the Court of Appeal, with any order of costs made therein, is hereby set aside. The judgment of Johnson, J., of Imo State High Court delivered on the 2nd February, 1983 is hereby restored and that shall be the judgment of that court. I award N500.00 costs in favour of the appellants at court of Appeal and N1,000.00 in this court.

UWAIS JSC

I have had the privilege of reading in draft the judgment read by my learned brother Mohammed, J.S.C. I entirely agree that the appeal has merit and that it should be allowed. Accordingly, the appeal is hereby allowed, the decision of the Court of Appeal is set aside and the judgment of the trial court is restored with N1,000.00 costs to the appellant.

KUTIGI JSC

5 I read before now the judgment just delivered by my learned brother Mohammed J.S.C. I agree with the conclusion that the appeal succeeds and it is allowed. I will also restore the judgment of Imo State High Court delivered by Johnson J. on the 2nd of February, 1983. The order for costs is endorsed by me.

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OGUNDARE JSC

I have had the advantage before now of reading in draft the judgment of my learned brother Mohammed J.S.C. I agree with the conclusion reached by him that the appeal be allowed. I wish however, to add a few words of my
15 own.

The facts have been fully setout in the judgment of my learned brother; I need not go over them again. It is sufficient to say that both parties laid conflicting claims to ownership of the land in dispute. It would appear from the pleadings and the evidence led however, that the resolution of the question as to who owned as between the parties, the land in dispute revolves
20 on the nature of the transaction between the respondent (who was plaintiff in the Court of first instance) on the one hand, and Mbahaotu a member of the appellants' family (who were defendants in this case) on the other hand. The respondent as plaintiff claimed that the land on which he built his house was at one time pledged to the said Mbahaotu by his family and he later redeemed the pledge by the payment of 500.00 pounds (now N1,000.00). The defendants
25 on the other hand claimed that the land on which the plaintiff has his house was a portion of their family land being cultivated by one Mbahaotu, now deceased, (a member of the family) was secretly sold by the said Mbahaotu to the plaintiff for the sum of 500.00 pounds and when the plaintiff commenced building on the land, they the defendants challenged him and he told them that the land was sold to him by Mbahaotu and showed the document evincing
30 the transaction between them. On plaintiff's appeal to be allowed to stay on the land, the defendants agreed. The learned trial Judge after a review of the evidence found that the transaction was a sale by Mbahaotu to the plaintiff and concluded that the land belonged to the defendants and not to the plaintiff; he dismissed plaintiff's claims. On appeal by the plaintiff to the Court of Appeal,

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the latter Court held that there was no denial of the averment in the plaintiff's statement of claim that the transaction was a pledge. It further held that as the defendants did not plead sale, any evidence to that effect was inadmissible as it went to no issue. It then allowed plaintiff's appeal and entered judgment in his favour. It is against this judgment that the defendants, with leave of court, have appealed to this Court.

Four issues are set out in the defendants' Brief as calling for determination and these are:

"(i) Whether the court below was correct in holding that -

(a) the defendants did not deny the plaintiff's allegation that the land on which he now resides was at one time pledged to one Mbahaotu of the defendants' people;

(b) the defendants cannot rely on Exhibit C in support of transaction of sale;

(ii) Whether the trial court was precluded from accepting the evidence relating to sale of the aforementioned land.

(iii) Whether the conclusion drawn by the court below from the areas within the land in dispute which are said to be occupied by the plaintiff's family are reasonable.

(iv) Whether the orders made by the court in favour of the plaintiff can be justified."

The plaintiff for his part set out three issues in his Respondent's Brief:

"1. Whether by considering exhibit 'C' as evidence of a sale without the consent and concurrence of members of the family, the trial court was not thereby formulating a fresh issue for the parties distinct from their pleadings of pledge.

2. Whether exhibit 'C' is admissible in evidence as a document conferring interest in land despite its non-compliance with the Land Instrument Registration law.

3. Whether the respondent was not entitled to judgment in view of the admissions by the appellants coupled with the concurrent findings of the two lower courts on the numerous acts of possession by the respondent."

Having regard to the formulation of issues (1) and (2) in the respondent's Brief and the grounds of appeal, I cannot but agree with Chief Williams, SAN that those issues do not arise out of the grounds of appeal before this Court. The two issues as formulated are not an attack on the judgment of the Court of Appeal but of the trial court. I am satisfied that having regard to the judgment of the Court of Appeal and the grounds of appeal the issues as formulated in the defendants/appellants' Brief are to be preferred and I would

adopt them in the consideration of this appeal.

As stated earlier on, the main issue relate to the nature of the transaction between the plaintiff and Mbahaotu in respect of a portion of the land in dispute built upon by the plaintiff. This being a case where each party relied on traditional history conflicting of each other, the best way to test the probability of each conflicting version is by reference to an event or events in recent times - see *Adenle v. Oyegbade* (1967) NMLR 136, *Ikpang v. Edoho* (1978) 6-7 SC 221; *Thanni v. Saibu* (1977) 2 SC 89; *Kojo II v. Bonsie & Anor.* (1957) 1 WLR and the event in recent times that could resolve the conflict in the two versions as given in case by the parties is the nature of the transaction over the portion of the land in dispute built upon by the plaintiff. The plaintiff's version of the nature of the transaction is contained in paragraphs 12 & 12(b) of the statement of claim which reads:

"The area verged yellow in the Plan E/GA834/76 shows where Christopher Onwumere (the plaintiff) now lives. This portion of the family land was being cultivated by the late Chinake Obialo of Umuoke Owerre Nkwoji. By Owerre Nkwoji custom a member of a family can pledge a portion of the family land where he works to any body if the members of the family are unable to provide him the necessary funds required for his needs. The pledgor or his descendants must redeem the land when the family lands have to be shared.

12(b) Some years ago, the late Chinaka Obialo pledged the area verged yellow to one late Mbahaotu of Umuozu Umuaro Umudi for Nnu Ano (1,600 cowries) to enable him pay a fine, which the Okonko Society of Umuoke Owerre Nkwoji ordered him to pay. The late Mbahaotu was the son of a woman from the plaintiff's family named Agbaghasu who was married in Umuaro, Umudi. The late Mbahaotu was a member of many associations in Umuoke including the Okonko Society. The land was not redeemed before the death of the pledgor and pledgee. Mr. Christopher Onwumere redeemed the land in 1969 from the son of Mbahaotu called Nwanedo for 500pounds (five hundred pounds) in "Biafra" currency notes and had since been in possession of the area verged yellow."

The defendants, on the other hand pleaded, in paragraph 15 of their statement of defence thus:

"15. In answer to paragraph 12 of the statement of claim which is denied, the defendants aver that Mbahaotu now deceased of the defendants' people who had possessory right over the piece of land verged blue in defendants' plan, secretly received the sum of 500 pounds from and allowed the plaintiff to build on the land. When plaintiff commenced building thereon

the defendants challenged him and he the plaintiff showed to and gave the defendants a receipt which he had prepared and which was signed by him and Mbahaotu evidencing his transaction with Mbahaotu about the land and begged the defendants to allow him to build and remain thereon as their tenant.

The defendants thereafter permitted the plaintiff to build and live 5 on the land as their tenant. The said receipt given to the defendants by the plaintiff will be founded upon at the trial. The value of Nnu Ano or (1,600 cowries) as stated by plaintiff is only N8. It is ridiculous that plaintiff will pay 500 pounds for a pledge of the value of N8."

Evidence was led by each party in support of his averment. At the 10 trial the plaintiff tendered a document signed by him and Mbahaotu as evidencing the transaction between him and Mbahaotu which according to him was redemption of pledge. The defendants relied on this document too. The document was admitted in evidence and marked Exhibit C. The learned trial Judge in making his finding that the transaction between the plaintiff and Mbahaotu was a sale and not a redemption of pledge, observed as follows: 15

"Regarding item 5, it is the law that where a transaction is reduced to writing, in the absence of fraud, oral evidence is not admissible to contradict or vary the writing, and the parties are bound by the terms of the document. I have been urged by the plaintiff to regard the transaction in Exh. C as relating to a pledge and not to a sale. This is a question of interpretation. What then is the content of the document? The document Exh. C is headed "AGREEMENT" 20 made at Amoji, Umudi, Orlu, and dated 6th June, 1969, and contains the following:-

This is an Agreement made between Mr. Nwanedo Mbahaotu of Amoji, Umudi Orlu and Mr. Christopher Onwumere (Plaintiff) of Umuoke, Owerre Nkoji, Orlu, this 6th day of June, 1969.

25

I Mr. Nwanedo Mbahaotu have today sold my piece of land known as Owerre Ibewuihe in Amoji, Umudi, Orlu agreed price 500 pounds (Five hundred pounds) which I have received in full.

It is agreed between Mr. Nwanedo Mbahaotu and Mr. Christopher Onwumere that I Mr. Nwanedo Mbahaotu should uproot any standing tree in the land which is possible for me, otherwise anyone I left is for Mr. Christopher 30 Onwumere."

Signature of Buyer Signature of mark of Seller

Four persons signed as witnesses each to the Buyer and the Seller. From the content of the above document Exh. C. it is not difficult to deduce that what the parties intended was a sale and not a pledge. On the face of Exh. C, it is difficult to believe the plaintiff that the transaction was a pledge and that he (plaintiff) agreed to execute Exh. C merely to recover his land because his opponent refused him the right to redeem the land. In answer to the question why he (plaintiff) did not use the defendants for the redemption of the land instead of paying the purchase price of 500 pounds (five hundred pounds), plaintiff said he considered it was a waste of time suing defendants to Court for title or for redemption. I consider this reason as irrational and indefensible. In the same vein, plaintiff was unable to say why his late father who accompanied him to the defendants for the redemption could not sign Exh. C. as one of his witnesses. Likewise, no member from five other branches of plaintiff's Emenaugh family which he is representing in this suit witnessed Exh. C for him (plaintiff). It is important to note that this Nwanedo Mbahaotu the Seller in Exh. C. hailed from defendants' side. On the other hand, plaintiff said that this deceased relation Chinaka Obialo pledged away the land the subject matter in Exh. C to late Mbahaotu for which he paid the 500pounds. I have disregarded the evidence of pledge and accept the story that the land in dispute was sold by defendants' relation late Mbahaotu to the plaintiff, as confirmed by the evidence of D.W.I."

And the Court of Appeal, for its part, per Nnaemeka-Agu J.C.A (as he then was) found as follows:

"Leaving those issues which deal with the possession of the land in dispute for a while, I shall consider issues Nos. (iv) - (vi) as framed by the appellants along the first issue as framed by the respondents first. Now, it was pleaded in paragraphs 12 and 12(b) of the statement of claim thus:

"The area verged Yellow in the Plan E/GA834/76 shows where Christopher Onwumere (the plaintiff) now lives. This portion of the family land was being cultivated by the late Chinaka Obialo of Umuoke Owerre Nkwoji. By Owerre Nkwoji custom, a member of a family can pledge a portion of the family land where he works to any body if the members of the family are unable to provide him the necessary funds required for this needs. The pledgor of his descendants must redeem the land when the family lands have to be shared.

12(b) Some years ago, the late Chinaka Obialo pleaded the area verged yellow to one late Mbahaotu of Umuozu Umuaro Umudi for Nnu Ano (1,600) cowries) to enable him pay a fine, which the Okonko Society of Umuoke

Owerre Nkwoji ordered him to pay. The late Mbahaotu was the son of a woman from the plaintiff's family named Agbagbasu who was married in Umuozu Umuaro, Umudi. The late Mbahaotu was a member of many associations in Umuoke including the Okonko Society. The land was not redeemed before the death of the pledgor and pledgee. Mr. Christopher Onuwumere redeemed the land in 1969 from the son of Mbahaotu called Nwanedo for 500pounds (five hundred pounds) in "Biafra" currency notes and had since been in possession of the area verged yellows."

In reply the respondents pleaded in paragraph 15 of their statement of defence thus:

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15. In answer to paragraph 12 of the statement of claim which is denied the defendants aver that Mbahaotu now deceased of the defendants' people who had possessory right over the piece of land verged blue in defendants' plan, secretly received the sum of 500 pounds from and allowed the plaintiff to build on the land. When plaintiff commenced building thereon the defendants challenged him and he the plaintiff showed to and gave the defendants a receipt which he had prepared and which was signed by him and Mbahaotu evidencing his transaction with Mbahaotu about the land and begged the defendants to allow him to build and remain thereon as their tenant. The defendant thereafter permitted the plaintiff to build and live on the land as their tenant. The said receipt given to the defendants by plaintiff will be founded upon at the trial. The value of Nnu Ano or (1,600 cowries) as stated by plaintiff is only N8. It is ridiculous that plaintiff will pay 500pounds for a pledge of the value of N8.91

It is thus clear that the respondents did not expressly deny the pledge pleaded. More importantly they did not plead that the transaction was a sale rather than a pledge as they should have done if it was their case that the land was sold to the appellant by Mbahaotu. By Order XXXIII rules 11 and 13 of the High Court Rules of Eastern Nigeria, applicable in Imo State, the respondents were obliged to deny the averment of a pledge expressly, and not evasively, and to answer any point of substance in the statement of claim. They should also plead any fact not stated in the statement of claim on which they wanted to rely in defence. It is noted that it was stated in the statement of defence that:-

The receipt given to the defendants by the plaintiff will be founded upon at the trial.

Considering the fact that no sale has been alleged by any body in

any of the pleadings, this cannot be taken to mean that the receipt was to be used to show a sale rather than a pledge. Indeed by the rules of pleadings in force in England on the 13th of September 1960 (See Order 19 rule 21 of the Annual Practice 1960) which apply by implication under section 16 of the High Court Law of Eastern Nigeria 1960, the respondents were bound to

5 plead the effect of the document (Exh. C) which they wanted to rely upon. See on this *Bristow v. Wright* (1879) 2 Dong. 665; *Derbyshire v. Leigh* (1986) 1 Q.B. 558, at p. 559; see also *Williamson v. L. & W. Railway* (179) 12 Ch. D. 787. The result of the rule and all the decided cases is that it is not sufficient to have just stated the document (Exh. C) would be relied upon without more particularly as there was no allegation of sale anywhere in the statement of

10 claim or the statement of defence. They were obliged to plead the effect of the document they wanted to rely upon (see *Supreme Court Practice*, 1985, para. 18/7/7.) If the respondents wanted to rely upon the document to show that the transaction between that parties was a sale rather than a pledge they should have said so in the pleading. But they did not.

There is therefore no basis for the learned Judge to consider the document, Exh. C, on the basis of a sale rather than a pledge. It is true that Exh. C ex-facie shows a sale. But the appellant explained it away in the following words:

15

"When I went to redeem that land the people claimed the land as theirs. I refused their claim. They then insisted I must buy the land hence I paid 500 pounds (N1,000). Then I bought the land for 500 pounds. I simply

20 *agreed signing the Exh. C in order to get back the land, rather I did not attach any importance to the name."*

The learned Senior Advocate for the appellant was therefore correct when he submitted that by going on the basis of a sale rather than a pledge the learned Judge embarked on an uncalled for voyage of discovery and set up for the respondents a case which they did not set up in their pleadings. He

25 was also right when he submitted that parties are bound by their pleadings and that evidence or findings which are at variance with the averments in the pleadings go to no issue and should be disregarded by the Court: see *African Continental Bank Ltd. v. A.G. of Northern Nigeria* (1967) NMLR 28, at p. 31; *Emegokwue v. Okadigbo* (1973) 4 S.C. 113; *George v. Dominion Flour Mills Ltd.* (1963) 1 All N.L.R. 71, p. 78 and *Orizu v. Anyaegbunam* 1 L.R.N. 26. I

30 am satisfied that the learned Judge was in error to have found a sale without the necessary consents rather than a pledge on Exh. C (and the evidence thereon).

Chief Williams SAN had attacked this finding of the Court of Appeal. Learned Senior Advocate after referring to pieces of evidence given by the plaintiff at the trial and the address of plaintiff's counsel at the trial as well as

the findings of the learned trial Judge and the fact that Exh. C was made by the plaintiff personally submitted that the transaction amounted to an admission by the plaintiff that he was not the owner of the land but that the defendants were. He further submitted that there was no justification for interfering with the findings of fact made by the learned trial Judge as the Court of Appeal had done in this case.

Mrs. Offiah for the plaintiff submitted that paragraph 15 of the statement of defence did not meet the pleadings in paragraphs 12 and 12(b) of the statement of claim in that paragraph 15 did not specifically deny the allegations in paragraphs 12 and 12(b) required by the rules of pleading. Learned counsel further submitted that the question of sale was not an issue properly raised before the trial court and therefore, all the evidence being relied on by the appellant will go to no issue. She submitted that the parties did not join issue on the question of sale. She finally submitted that the finding of the trial court was rightly set aside by the Court of Appeal.

Chief Williams in a short reply, submitted that Exh. C was put in evidence for the sole purpose of contradicting the case of pledge made by the plaintiff. It was not put in to establish title in anyone. Learned Senior Advocate further submitted that as the plaintiff admitted that he was a signatory to the document, Exh. C was admissible under S.91 of the Evidence Act. He referred to the address of plaintiff's counsel at the trial and observed that it was an invitation to the trial Judge to interpret Exh. C.

I have set out earlier in this judgment the pleadings of the parties as relevant to the issue now under consideration. With respect to learned counsel for the plaintiff, I think it is a misconception to say that paragraphs 12 and 12(b) of the statement of claim was not denied in paragraph 15 of the statement of defence. Of course it was. Paragraph 15, for ease of reference, reads as follows:

"15. In answer to paragraph 12 of the statement of claim which is denied the defendants aver that Mbahaotu now deceased of the defendants' people who had possessory right over the piece of land verged blue in defendants' plan, secretly received the sum of 500 pounds from and allowed the plaintiff to build on the land. When plaintiff commenced building thereon the defendants challenged him and he the plaintiff showed to and gave the defendants a receipt which he had prepared and which was signed by him and Mbahaotu evidencing his transaction with Mbahaotu about the land and begged the defendants to allow him to build and remain thereon as their tenant. The defendants thereafter permitted the plaintiff to build and live on the land as their tenant. The said receipt given to the defendants by the plaintiff will be founded upon at the trial. The value of Nnu Ano or (1,600 cowries) as stated by plaintiff is only N8. It is ridiculous that plaintiff will pay 500 pounds for

I do not see how one could better deny the averment in his opponent's pleadings as was done in the part of paragraph 15 underlined above. Having held therefore, that paragraph 12 was denied by the defendants in paragraph 5 15 of the statement of defence, I need to however add that reading the rest of paragraph 15 the inescapable question one would come to is that the defendants alleged in their pleadings that Mbahaotu sold to the plaintiff the portion of the land in dispute on which the plaintiff built, without the consent of his family, that is, the defendants' family and on the defendants seeing plaintiff on the land challenged him. The plaintiff begged to be allowed to remain on 10 the land and the defendants accepted his plea. The Court below therefore, was in serious error to hold that the parties did not join issue on sale.

The learned trial Judge painstakingly considered the evidence led by both sides and found, quite rightly in my view, that the transaction between Mbahaotu and the plaintiff was one of sale rather than of pledge. In the light of the finding therefore, the learned trial Judge, in my respectful view, was 15 perfectly justified to accept the defendants' version of the traditional history and to reject plaintiff's claim. The Court below was in error to reverse him.

The other issues raised in this appeal touch on findings of fact made by the learned trial Judge and reversed by the learned Justices of the Court of Appeal. The principles upon which an appellate court would interfere with the 20 findings of a trial court have been laid out in numerous cases. Simply put, an appellate court will not reverse a finding of fact made by a trial court which is supported by evidence and which is not perverse. The learned trial Judge made a number of findings of fact. He found that the identity of the land in dispute, the fact that the defendants entered the land and that the only juju shrine on the land is called "Ajimiri" are not in dispute. The correctness of 25 those findings has not been challenged by the plaintiff. He found also (a) that the ownership of the land in dispute is in the defendants; (b) that the land in dispute is in Umudi and not in Owerre, Nkwoji and the Ajimiri is inside the land; (c) that the transaction between the plaintiff and Mbahaotu was a sale of land and not a redemption of a pledge; (d) that Ohimeke village in Umudi where plaintiff once lived before joining his kith and kin in Owerre Nkwoji 30 was, on the abolition of the Osu caste system, renamed Amaoji and (e) that the only Eke market in the area was in Umudi. All these findings of fact are supported by credible evidence before the trial Judge. With respect to the Justices of the Court of Appeal, they were in serious error to have interfered with those findings.

The only other point remaining for me to consider is issue (iv) in his judgment in favour of the plaintiff. The Court per Nnaemeka-Agu J.C.A observed as follows:

"A right of occupancy is of course meant for an occupier. An occupier is defined in section 50 of the Act thus:

5

"Occupier" means any person lawfully occupying land under customary law and a person using or occupying land in accordance with customary law and includes the sublesses or sub-under- lessee of a holder.'

By this definition the appellant and his people would be entitled to a right of occupancy over the portion of the land in dispute which they occupy. And as there is no marked or proven boundary between those parts of the land in dispute proved or conceded to them and the rest of the land in dispute, an application of section 45 of the Evidence Act to the case will entitle him and his people to a customary right of occupancy over the whole land in dispute."

(Italics mine)

Making the declaration in favour of the plaintiff, Nnaemeka-Agu J.C.A. pronounced thus:

"I declare that the plaintiff/appellant is entitled to a statutory right of occupancy to 'Ala Emenaugha' land situate at Umuoke in Owerre Nkwoji in Nkwerre Local Government Area of Imo State which is shown and edged pink in Plan No. E/GA834/76 tendered as Exhibit A in this case

20

(Italics mine)

The contention here is that having talked of Customary Right of Occupancy the Court below was wrong to declare a Statutory Right of Occupancy. I have no doubt in my mind that reference to "Statutory Right" in the declaration made is an error that comes within the purview of the Slip Rule which this Court can correct. What the Court below meant to declare in the plaintiff was a Customary Right of Occupancy. Had the decision on the appeal been different, I would, in exercise of the power conferred on this Court, have amended the declaration accordingly to bring it in line with what the Court below meant to decide.

30

In conclusion, I can see no justification whatsoever for entering judgment in favour of the plaintiffs as was done by the Court below. For the reasons given in the lead judgment of my learned brother Mohammed J.S.C. and the reasons given herein, I allow this appeal and set aside the judgment

of the Court of Appeal and in its stead I restore the judgment of the learned trial Judge dismissing plaintiff's claim and I abide by the order for Costs made by my learned brother Mohammed J.S.C.

5 **ONU JSC**

By a writ of summons dated November 8, 1975 the plaintiff, herein respondent, for himself and as representing the members of Emenaugha family in Umuoke Owerre Nkwoji, sued the defendants herein appellants, personally and as representing their various families in Umudi in the High Court of the defunct East Central State, part of which is now Imo State, holden at Orlu, claiming the following reliefs:-

10 *"1. Declaration of title to that piece or parcel of land known as and called "Ala Emenaugha" situate at Umuoke Owerri Nkwoji, in Nkwerre Division within the Orlu Judicial Division more clearly delineated on the plan to be filed with the statement of claim with an annual value of N10.00 (ten*
 15 *naira).*

2. N2,000.00 (two thousand naira) general damages for trespass into the said land.

3. Perpetual Injunction to restrain the defendants, their servants and/or agents from further acts of trespass to the said land."

20 Pleadings having been ordered and filed, the case went to trial and in a well considered judgment dated 2nd February, 1983, the trial court dismissed the plaintiff/respondent's claims in their entirety with costs to the appellants. The parties are hereinafter re-characterized as plaintiff and defendants in the rest of this judgment.

25 Dissatisfied with the decision, the plaintiff appealed to the Court of Appeal holden at Enugu which on 30th of June, 1987, allowed the appeal and consequently reversed the decision of the trial court.

Aggrieved by the decision, the defendants have appealed to this court premised on a Notice of Appeal containing seven grounds (see pages 281-295 of the record of proceedings).

30 Parties through their counsel thereafter exchanged briefs of argument in accordance with the rules of this court. Learned Senior Advocate, Chief Williams, on behalf of the defendants, submitted four issues for our consideration, to wit:

(i) Whether the court below was correct in holding that -

(a) the defendants did not deny the plaintiffs allegation that the land on which he now resides was at one time pledged to one Mbahaotu of the defendants' people;

(b) the defendants cannot rely on Exhibit C in support of transaction of sale.

(ii) Whether the trial court was precluded from accepting the evidence relating to sale of the aforementioned land. 5

(iii) Whether the conclusions drawn by the court below from the areas within the land in dispute which are said to be occupied by the plaintiff's family are reasonable.

(iv) Whether the orders made by the court in favour of the plaintiff can be justified. 10

The three issues formulated on behalf of the plaintiff by Mrs. A. J. Offiah, of counsel from the chambers of Chief Mogboh S.A.N., which at a glance, in my view, bear no relevance to the case as fought in both the courts below by the parties, and which for purposes of clarity ought to be discounted, are set out below as follows:- 15

1. Whether by considering Exhibit 'C' as evidence of a sale without the consent and concurrence of members of the family, the trial court was not thereby formulating a fresh issue for the parties distinct from their pleadings.

2. Whether Exhibit 'C' is admissible in evidence as a document conferring interest in land despite its non-compliance with the Land Instrument Registration Law. 20

3. Whether the respondent was not entitled to judgment in view of the admission by the appellants coupled with the current findings of the two lower courts on the numerous acts of possession by the respondent.

In my consideration of this appeal which was argued on 1st November, 1993, I intend to stick to the defendants' issues as therein formulated. With regard to issue 1, I wish to advert to the plaintiff's pleading in his statement of claim at paragraph 12 thereof wherein he averred thus: 25

" The area verged yellow in the plan E/GA.834/76 shows where

Christopher Onwumere (the plaintiff) now lives. This portion of the family land was being cultivated by the late Chinaka Obialo of Umoke Owerre Nkwoji. By Owerre Nkwoji custom a member of a family can pledge a portion of the family land where he works to anybody if the members of the family are unable to provide him the necessary funds required for his needs. The pledgor or his descendants must redeem the land when the family lands have to be shared. 30

12(b) *Some years ago Chinaka Obialo pledged the area verged yellow to one late Mbahaotu of Umuoze Umuro Umudi for Nnu Ano (1,680 cowries) to enable him pay a fine, which the Okonko society of Umuoze Owerre Nkwoji ordered him to pay. The late Mbahaotu was the son of a woman from the plaintiff's family named Agbaghasu who was married in Umuoze Umuro, Umudi. The late Mbahaotu was a member of many associations in Umuoze including the Okonko Society. The land was not redeemed before the death of the pledgor and pledgee - Mr Christopher Onwumere redeemed the land in 1969 from the son of Mbahaotu called Nwanedo for 500.00 pounds (five hundred pounds) in "Biafra" currency notes and had since been in possession of the area verged yellow."*

10 (see page 13 and 14 of the record).

In answer to the above pleading, the defendants averred in paragraph 15 of their statement of defence at pages 23 and 24 of the record denying pledge thus:

15 *"15. In answer to paragraph 12 of the statement of claim which is denied, the defendants aver that Mbahaotu now deceased of the defendants' people who had possessory right over the piece of land verged blue in defendants' plan, secretly received the sum of 500.00 pounds from and allowed the plaintiff to build on the land. When plaintiff commenced building thereon the defendants challenged him and he the plaintiff showed to and gave the*

20 *defendants a receipt which he had prepared and which was signed by him and Mbahaotu evidencing his transaction with Mbahaotu about the land and begged the defendants to allow him to build and remain thereon as their tenants.*

The defendants thereafter permitted the plaintiff to build and live on the land as their tenant. The said receipt given to the defendants by the

25 *plaintiff will be founded upon at the trial. The value of Nnu Ano or (1,600 cowries) as stated by the plaintiff is only N8. It is ridiculous that plaintiff will pay 500 pounds for a pledge of the value of N8."*

From the pleadings and evidence adduced by the parties in support of their respective case, the plaintiff equivocated as if to say the transaction in relation to the piece of land in question as reflected in Exhibit C was either

30 a sale or a pledge while the defendants set up a sale simpliciter after denying pledge. Be that as it may, both sides addressed the trial court on Exhibit 'C', for which see page 80, lines 25-29 (Defence Counsel's Address) and page 84, lines 29 to page 85, lines 1-5 of the Record (Plaintiff Counsel's Address). Exhibit 'C' copied into page 107 of the Record and which speaks for itself reads:

"FREEHOLD LEASE
AGREEMENT

Amoji Umudi
Orlu
6th June, 1969.

THIS IS AN AGREEMENT MADE BETWEEN MR. NWANEDO
MBAHAOTU OF AMORJI UMUDI ORLU AND MR. CHRISTOPHER
ONWUMERE OF UMOKEOWERRE NKWOJI ORLU THIS 6TH DAY OF
JUNE, 1969. 5

I Mr. Nwanedo Mbahaotu have today sold my piece of land known
as Owerri Ibewuihe in Amoji Umudi Orlu to Mr. Christopher Onwumere
at the agreed price of 500 pounds (five hundred pounds) which I have
received in full. 10

It is agreed between Mr. Nwanedo Mbahaotu and Mr. Christo-
pher Onwumere that I Mr. Nwanedo Mbahaotu should uproot any standing
tree in the land which is possible for me, otherwise anyone I left is for Mr.
Christopher Onwumere. 15

(Sgd)	(Sgd)
Signature of buyer	Signature or mark of seller

Witness to buyer Witness to the seller

(1) (Sgd)	(1) (Sgd) 20
.....	

(2) (Sgd)	(2) (Sgd) 25
.....	

(3) (Sgd)	(3) (Sgd) 30
.....	

(4) (Sgd)	(4) (Sgd) 35
..... "	

It is clear from the totality of evidence adduced at the trial court
that pledge as pleaded by the plaintiff was denied by the defendants and
sale was set up. That this is so can best be gathered from the purport of
Exhibit C set out above and the issue raised about that document which
was put in at the trial firstly, to contradict plaintiff's case regarding pledge
but not to establish title in anyone person at pages 44 and 45 of the record. 30

Subjected to cross examination plaintiff stated as follows:-

Q. You brought this action in your personal capacity.

Ans. No, it was the entire family of Emenaugha who selected me. My elders were Aaron Egbundu, Isaiah Ugwoegbu, Ozuruigbo Ogwoegbu, Ogoke Ogwoegbu and Gabriel Okpara.

5 *Q. Why didn't these people follow you to sign Exh. 'C'*

Ans. These are the only people around when I bought the land.

Q. When the people insisted you should buy the land why did you not sue them for title or for redemption order?

Ans. Because I did not want to waste time with lawyer and court since I had the amount they wanted and demanded.

10 *Q. Have you a copy of Exhibit C?*

Ans. Yes.

Q. Did you show it to your lawyer?

Ans. I cannot remember whether or not I told my lawyer.

Q. Did you tell your lawyer you were forced to buy the land?

Ans. I did not remember.

15 *Q. You know the case will fail or succeed on Exhibit C hence you hid it from your lawyer?*

Ans. It is not true."

(The italics above are mine).

20 From the foregoing, it is palpable that the plaintiff was not consistent with the pledge he set up on his pleadings when in his testimony and in Exhibit C he was equally setting up sale, the latter fact which he had hidden from his counsel, thus depicting his duplicity. To highlight learned counsel for plaintiff's address alluded to above, he had this to say:

25 *"Refer to Exhibit C made between plaintiff and one Nwanedo Mbahaotu and draws court's attention to alterations contained therein; and that no explanation was given as to the alterations. Says the word 'sold' was cancelled in Exhibit C and urges court to disregard the document and believe the plaintiff that the document was made for the redemption of the pledge."*

Hence the learned trial Judge, in my view, was right in finding for the defence inter alia when he held:-

30 *"On the face of Exhibit C, it is difficult to believe the plaintiff that transaction was a pledge and that he (plaintiff) agreed to Exhibit C merely to recover his land because his opponent refused him the right to redeem the land ..."*

(see page 100, lines 1 to 5 of the record.)

It is in this wise that one is at a loss to decipher why the court below tended to overlook the evidence of the defendants in support of their own pleadings and the evidence adduced in the trial court when it held among others at page 264, lines 40 and 41 and page 265 of the records, lines 1-3 that"

"It is thus clear that the respondents did not expressly deny the pledge pleaded. More importantly they did not plead that the transaction was a sale rather than a pledge as they should have done if it was their case that the land was sold to the appellant by Mbahauotu"

There is clearly a misdirection, moreso since the parties agreed and the trial Judge found as a fact, that the defendants were the original owners of the land in dispute. The onus was therefore on the plaintiff to establish a change of ownership by pledge (or sale if Exhibit C to which he (plaintiff) was a signatory was to be meaningful).

There is in law in this regard no onus on the defendants herein to establish a pledge, having pleaded in paragraph 15 of the statement of defence (ibid) a sale. And since in the instant case, as it is the duty of the plaintiff to begin to adduce evidence, for it is he who would lose if no more evidence is adduced having regard to the state of the pleadings, (see *George Onobruhere & Anor v. Irwromoehe Esegine & Anor.* (1986) 1 NWLR (Pt.19) 799, he had not proved his case on the balance of probabilities to be entitled to judgment. See *Mogaji v. Odojin* (1978) 4 S.C.91 at page 93. The idea that a document (in this case Exhibit 'C') which talks of a sale can be adjudged in a court of law to be made on the occasion of a pledge, signed by the parties thereto as well as witnesses, is one which is not easily acceptable. In this wise, I bear in mind the dictum of Scrutton, LJ. in *Blay v. Pollard* (1930) 1 K.B. 628 at 633:-

"It would be very dangerous to allow a man over the age of legal infancy to escape from the legal effect of a document he has, after reading it, signed, in the absence of an express misrepresentation by the other party of that legal effect."

The court below, in my respectful view, therefore erred in treating Exhibit C otherwise than as evidence of a sale. If as Exhibit C clearly postulates it was evidence of a sale, then it destroys the claim of the plaintiff's family to be the owners of the land. It was clearly demonstrated in evidence before the trial court that the entire land in dispute is situated in Umudi and is owned by that community. Exhibit C was indeed put in to contradict the case of the plaintiff regarding pledge. Besides, Exhibit C of which plaintiff was a signatory was received pursuant to section 90 of the Evidence Act, sub-section (1)a(i) and (b) of which provides:

"90(1) In any Civil Proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be 'admissible in evidence of that fact if the following conditions are satisfied -

- 5 (a) *if the maker of the statement either*
(i) had personal knowledge of the matters dealt with by the statement; or
(ii) (Not applicable)
(b) if the maker of the statement is called as a witness in the proceedings."

10 Furthermore, Exhibit C as can be seen, is in itself an acknowledgment or admission by the plaintiff's predecessor that the land is owned by Umudi. See page 80 of the record wherein the plaintiff's counsel submitted that the document was made for the redemption of the pledge although he added "the plaintiff did not say why his father or others did not redeem the
 15 pledge" until in 1969 when he did so for 500pounds. The trial court, having rightly in my view, disbelieved and jettisoned that explanation, it is in that wise that the finding of the court below hereinbefore alluded to, is therefore palpably wrong and cannot be sustained. Issues (i), (ii) and (iii) are accordingly resolved in the defendant's favour.

I wish to remark in passing with regard to issue 2 proffered
 20 on the plaintiff's behalf and set out above, that learned counsel for him having at the hearing of this appeal on 1st November, 1993 conceded that it would not arise at all from the defendant's grounds of appeal as framed, it is accordingly discountenanced and struck out. Similarly, plaintiff's Issue 1 is wrongly laid in that it questions whether by considering Exhibit C as
 25 evidence of a sale without the consent and concurrence of members of the family, the trial court was not thereby formulating a fresh issue for the parties distinct from their pleadings of pledge. It is of paramount importance for one to bear in mind that this court is not sitting on appeal from the trial court's decision but that of the court below.

Coming to the defendants' Issue (iv) which learned counsel for the plaintiff strenuously argues overlaps their own Issue 3, since the totality
 30 of the evidence before the trial court pointed inexorably to the fact that the entire land in dispute is situated in Umudi and is owned by that community, the plaintiff could under no guise be entitled to judgment in pursuance of any purported admissions by the defendants, coupled with any concurrent findings of the two courts below on any numerous acts of possession by

the plaintiff. The court below surely drew wrong and erroneous inferences from the fact that some members of the plaintiff's family occupy certain areas within the land in dispute. Be that as it may, the orders made by the court below now impugned in Issue (iv) are those declared at pages 276 and 277 of the Record as follows:-

"A right of occupancy is of course meant for an occupier. An occupier is defined in section 50 of the Act (Land Use Act) thus:

"Occupier" means any person lawfully occupying land under customary law and a person using or occupying land in accordance with customary law and includes the sublessee or sub-underlessee of a holder.

By this definition the appellant and his people would be entitled to a right of occupancy over the portion of the land in dispute which they occupy. And as there is no marked or proven boundary between those parts of the land in dispute proved or conceded to them and the rest of the land in dispute, an application of section 45 of the Evidence Act to the case will entitle him and his people to a customary right of occupancy over the whole land in dispute."

(Italics mine)

Nnaemeka-Agu, J.C.A., as he then was, in his lead judgment proceeded to grant the declaration sought thus:-

"I declare that the plaintiff/appellant is entitled to a Statutory right of occupancy to 'Ala Emenaughu" land situate at Umuoke in Owerre Nkwoji in Nkwere Local Government Area of Imo State which is shown and edged pink in plan No. E/GA834/76 tendered as Exhibit A in this case."

(Italics also mine).

In view of what the court below in its judgment at page 277 lines 4 and 5 said to the effect that "will entitle his people to a customary right of occupancy over the whole land in dispute" the reflection of same in the enrolled order at page 279 of the Record inter alia "That the plaintiff/appellant is entitled to a declaration of a statutory right of occupancy", the error no doubt, must have constituted an accidental slip which in law is amenable to correction to give it its true meaning. See Obonor v. Conseruator (1959) WRNLR 8; Asiyanbi v. Adeniji (1967) 1 All NLR 82; (1967) NMLR 238 and Obiora v. Commissioner of Police (1990) 7 NWLR (Pt.161) 222 at 230. Be that as it may, since the plaintiff therefore failed to establish either ownership (e.g. by traditional evidence) or possession of the land in dispute, he was not entitled to the declaratory judgment he sought which

70 Agwunedu v. Onwumere (1994) 2 KLR Onu JSC
afterall is discretionary, and the trial court was right to have dismissed his
claims.

It is for the above reasons and the fuller ones contained in the
lead judgment of my learned brother, Uthman Mohammed, J.S.C with
which I entirely agree after having had a preview of same, that I allow this
5 appeal, set aside the decision of the court below and restore the decision of
the trial court which is accordingly affirmed by me. I make the same orders
for costs as contained in the lead judgment.

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