

SUPREME COURT OF NIGERIA
4TH FEBRUARY, 1994. SC.149/1987.
CORAM:- M. L. UWAIS, I. L. KUTIGI, M. E. OGUNDARE,
U. MOHAMMED, Y. O. ADIO, JJSC.

GBANIYI OSAFILE & ANOTHER PLAINTIFFS/APPELLANTS
(For themselves and on behalf
of Idumu Esegbana and Idumu-Ozoba
families of Umunede)

AND

PAUL ODI & ANOTHER DEFENDANTS/RESPONDENTS
(For themselves and on behalf of
Idumu-Obi and Idumu-Aban families
of Emuhu)

EVIDENCE - Land Law - Pleadings - Pleadings - Burden of Proof -
Claim for Declaration of Title - Plaintiff to lead cogent and credible evi-
dence - in proof of root of title

EVIDENCE - Documentary Evidence - where Documents relate to a
previous suit relied upon for res judicata - and the plea of res judicata fails
- whether those documents can be of any relevance

LAND LAW - Declaration of Title - Pleadings - what Plaintiff must prove
- in order to succeed

LAND LAW - Claim for Declaration of Title - whether it fails - whether
- plaintiffs can succeed - in their claim for damages for trespass and
injunction

PLEADINGS - Land Law - Averments in Statement of Claim - where
sufficiently traversed by defendants - burden of proof placed on the plain-
tiffs

FACTS

The Plaintiffs/Appellants claimed against the Defendants/Respon-
dents before the High Court of former Bendel State Agbor, declaration of
title, N400.00 damages for trespass and injunction in respect of the land

in dispute. The Plaintiffs established possession from time immemorial in respect of the land and trespass by the Defendants, who have been their customary yearly tenants paying kolanuts and palm wine homage. In 1963, the Defendants broke and entered into the land in dispute cutting down economic trees in order to farm thereon without permission of the Plaintiffs and without paying the customary homage. The Defendants denied the history set up by the Plaintiffs as to their ownership of the land, claimed ownership of the land and raised a plea of *res judicata* based on a previous judgment and tendered some documents related to the said previous suit.

The learned trial Judge rejected the Defendants' plea of *res judicata* and entered judgment for the Plaintiffs. The Defendants' appeal to the Court of Appeal was upheld by that court which dismissed the Plaintiffs' claim in its entirety. The Court of Appeal found that the facts of ownership by inheritance as averred by the Plaintiffs in their pleading are not sufficient to support a claim for declaration of title to land. The Plaintiffs being dissatisfied have now appealed to the Supreme Court to determine whether their pleading and evidence were insufficient to entitle them to a declaration of title and whether the Court of Appeal was right in finding for the Respondents on the question of acts of ownership and possession.

HELD (unanimously allowing the appeal in part)

1. The averments in the relevant paragraphs of the Amended Statement of Claim were sufficiently denied in the Amended Statement of Defence both by general and specific traverse, thereby placing the burden on the Plaintiffs to lead evidence that was sufficiently cogent and credible in proof of their root of title, if they are to succeed on their claim for declaration of title. (p.50 L28)

2. As the Plaintiffs' pleadings fell short of stating the persons that founded the land in dispute, how the founders came to be on the land and the original acts of possession exercised, no court could have judicially granted the Plaintiffs their claim of declaration of title to the land in dispute with this poor state of their case. (p.51 L21)

3. Once it was found by both lower courts that the judgment in the previous suit sought to be relied upon by the Defendants in raising a plea of *res judicata* was irrelevant, some documents being related to the said previous suit cannot apply to the facts of the present case since the

parties and land were held not to be identical in both cases. The Court of Appeal therefore, fell into error and a serious misdirection in finding that those documents were not properly considered by the learned trial Judge, and in seeking to rely on the said documents after rejecting the plea of res judicata, to establish acts of either ownership or possession of the land in dispute. (p.54 L14)

4. It is settled law that a plaintiff can succeed on a claim for damages for trespass and injunction even where his claim for declaration of title fails. The Plaintiffs having pleaded and proved exclusive possession and trespass by the Defendants, their claims for damages for trespass and perpetual injunction succeed, though their claim for declaration of title fails. (p.54 L28)

REPRESENTATION:

B. O. Ogundipe for the Appellants.

T. Oyetibo for the Respondent.

CASES REFERRED TO

1. Modupe v. State (1988) 4 N.W.L.R. (part 87) 130 at p. 138G
2. Olowosago v. Adebajo (1988) 4 N.W.L.R. (part 88) 275 at p. 283 D
3. Atolagbe v. Shorun (1985) 1 N.W.L.R. (part 2) 360
4. Akintola v. Solano (1986) N.W.L.R. (part 24) 598
5. Kalio v. Woluchem (1985) 1 N.W.L.R. 572 at p. 628
6. Maduga v. Bai (1987) 3 N.W.L.R. (part 62) 635 at 640
7. Olale v. Ekwelendu (1989) 4 N.W.L.R. (part 115) 326 at pp. 361 B - C and 362A
8. M.G.M. Ltd v. N.S.P. Ltd (1987) 1 N.W.L.R. (part 55) 110 at p. 124E
9. Piaro v. Tenalo (1976) 12 S.C. 41
10. Bello v. Eweka (1981) 1 S.C. 101 at pp. 101-2
11. Motunwase v. Sorungbe (1988) 5 N.W.L.R. (part 92) 90 at p. 101
12. Ekwealor v. Obasi (1990) 2 N.W.L.R. (part 131) 231 at p. 252
13. Ebba v. Ogodo (1984) 1 SCNLR 372 at pp. 378 - 379
14. Emonike v. Attorney-General of Bendel State (1992) 6 N.W.L.R. (part 248) 396 at pp. 409B - 410B
15. Lewis & Peat (N.I.R) Ltd v. Akhinmien (1976) 1 All N.L.R. 460
16. Mandilas and Karaberis Ltd v. Apena (1989) 1 All N.W.L.R. 390 at 392 - 393
17. Ace Jimona Ltd v. The Nigerian Electrical Contracting Co.Ltd SC. 586/64

18. Ekpo v. Ita 11 N.L.R. 68
19. Preson Holder v. Thomas 12 W.A.C.A. 78
20. Udo & Ors v. Obot & Ors (1989) 1 N.W.L.R. (part 95) 59 at pp. 83H-84C
21. Onwumere v. Agwunede (1987) 3 N.W.L.R. (part 62) 673 at p. 681
22. Ibang & Ors v. Usanga & Ors. (1982) 5 S.C. 103 at pp. 122 - 124
23. Akibu v. Opaleye (1974) 11 S.C. 189 at pp. 202 - 3
24. Oluwi v. Emiola (1967) N.M.L.R. 339 at p. 340
25. Adegbete v. Ogunfaolu (1990) 4 N.W.L.R. (part 146) 578 at p. 597A
26. Ojibah v. Ojibah (1991) 5 N.W.L.R. (part 191) 296 at p. 314

STATUTE REFERRED TO

Court of Appeal Act cap. 75 of the Laws of the Federation of Nigeria 1990, O.1 r. 21(3)

LEAD JUDGMENT UWAIS JSC

This is an appeal against the judgment of the Court of Appeal, Benin, which had on the 29th day of April, 1987 allowed an appeal by the defendants from the decision of Obi, J. sitting at Agbor in the High Court of former Bendel State.

The plaintiffs claim against the defendants, in the action which was brought in 1969, as per their amended Statement of Claim is as follows:-

“Whereupon the plaintiffs’ claim from the defendants jointly and severally are (sic) as follows:-

- (a) Declaration of title on the said land.*
- (b) N400.00 (four hundred naira) damages for trespass and*
- (c) injunction restraining the defendants their agents and or servants from further trespass on the plaintiffs land.”*

The case of the plaintiffs, who sued in a representative capacity, as revealed by their Amended Statement of Claim and supported by evidence may be stated as follows. The plaintiffs belong to two villages which are called Idumu-Esegbana and Idumu-Ozoba. Both villages are part of the town called Umenede which is made up of twelve villages. The plaintiffs who were respectively the heads of the two villages sued for themselves and on behalf of the people of the two villages.

According to the plaintiffs, each of the villages in question owns a portion of the land in dispute which is separated into two portions by the road from Agbor to Asaba. The northern portion which is marked (A) in the survey plan tendered by the plaintiffs as Exhibit “1” was said to

belong to Esegbana people while the southern portion was said to belong to Ozoba people. Both communities were said to be related in that they had a common ancestor and that they inherited the ownership of the land in dispute on the death of their respective fathers and forefathers. Their ownership of the land had therefore been from time immemorial from
5 whence they had been in undisputed possession, exercising maximum acts of ownership. Such acts include farming and planting of crops and were carried out by them without let or hindrance from the defendants or any person. In addition, the plaintiffs claim that they have ancient walls and shrines on the land in dispute.

10 The plaintiffs adduced evidence to show that the defendants' people and their (defendants') ancestors had been customary yearly tenants to them (plaintiffs). In respect of the tenancy, the defendants and their ancestors paid homage in kolanuts, palm wine, yam and tobacco. It
15 was on receipt of such homage that the plaintiffs would show to the defendants the portion of the land to farm during one farming season only.

 The defendants who belong to the villages of Idumu Obi and Idumu Aban, which are part of the villages that constitute the town of
20 Emuhu, share a common boundary with the people of Umenede that is the plaintiffs.

 In the month of February, 1963, as was alleged by the plaintiffs, the defendants or their agents broke and entered into the land in dispute, cutting down rubber trees, palm trees and cassava trees in order to farm
25 thereon. The defendants had neither permission from the plaintiffs to do so nor paid to the plaintiffs the customary homage. The plaintiffs appealed, protested and warned them to stop their acts of trespass but the defendants ignored them and continued with their acts of trespass. Hence the suit by the plaintiffs against the defendants.

30 On their part, the defendants in both their Amended Statement of Defence and evidence adduced denied the history set up by the plaintiffs as to their ownership of the land in dispute and their alleged yearly customary tenancy. The defendants stated that their two quarters of Idumu
35 Obi and Idumu Aban are part of the 7 quarters that make up Emuhu town. The land in dispute belongs to Emuhu people. ((The defendants had been exercising maximum acts of ownership and possession over the land from time immemorial without let or hindrance from the plaintiffs or any person.

The defendants pleaded res judicata in their defence and relied on the judgment in Suit No. W/37/1952 which awarded to their entire community a large area of land, including the land in dispute. The judgment was given in a dispute between the defendants and the people of the villages of Idumuile and Idumuile of Umunede town. The decision was said to have been confirmed by the former West African Court of Appeal 5 in Suit No. 200/1959. The defendants tendered further in evidence some documents and plans. Exhibit “13” which is plan No. AGC 25 is said to demarcate the boundary between the communities of Emuhu and Umuede towns as per the judgment in Suit No. W/37/1952.

In a considered judgment, the learned trial Judge held that the 10 plea of res judicata raised by the defendants did not succeed, because the defendants had failed to identify the land in the previous judgment with the land in dispute in the present case. Furthermore, the learned trial Judge held that the parties in the previous cases were not the same or privies to those in the instant case. The alternative plea of the doctrine of 15 standing-by, which was relied upon by the defendants was rejected by the learned trial Judge on the ground that the plaintiffs were not aware of the previous judgments. With regard to the evidence adduced by both parties in support of ownership and possession, which they pleaded the 20 learned trial Judge preferred the traditional history of the plaintiffs, which he accepted and rejected that of the defendants. Consequently, he entered judgment for the plaintiffs.

The defendants appealed to the Court of Appeal against the decision of the trial court. In his judgment, the Court of Appeal (Ikwecheg, 25 Musdapher and Ajose-Adeogun J.J.C.A.) held as follows per Ajose-Adeogun, J.C.A. -

“There is no doubt that the facts of ownership by inheritance as averred in the above-quoted paragraphs 5 and 7 of the respondents (plaintiffs’) pleading are not sufficient to support a claim for declaration of title 30 to land. As appellants’ (defendants’) counsel rightly put it, the respondents failed to plead the following -

- (a) Facts relating to the founding of the land.
- (b) The persons who founded the land and exercised original 35 acts of possession; and
- (c) The persons on whom the title in respect of the land has devolved since its founding.

I am in full agreement with the submission of the learned counsel for the appellants that the above facts are necessary to show in what

44 Osofile v. Odi (1994) 3 KLR Uwais JSC
communal capacity the land was being held by the respondents. Of course
since these facts were not pleaded, evidence in respect of them, if ad-
duced, would have gone to no issue.

.....

 In the judgment under review, the learned trial Judge accepted
5 the respondents evidence that they have been in effective possession of
the land in dispute and before then, their successive ancestors from time
out of human memory.” To begin with, no single act of effective posses-
sion, by any of the respondents ancestors was pleaded. Even the alleged
ownership by the said ancestors was not satisfactorily established either
10 in the respondents’ pleading or in their evidence supporting them.” (pa-
renthesis are mine)

 The Court of Appeal then held that the learned trial Judge was
wrong to have found in favour of the plaintiffs on both the issues of
ownership by inheritance and long possession. On the complaint by the
15 defendants that their case was not considered well by the learned trial
Judge, Ajose-Adeogun. J.C.A. observed as follows:-

*“I believe the said complaint was justified..... The learned trial Judge
rejected the evidence of the 1st and 2nd defendants which was described
20 as mere denial. It was said that the witnesses were not at home’ when the
incident leading to this action occurred’ and that they should have called
some other persons from their village to give evidence. Surely, that kind
of approach and the observation that the witness (Mr. Okoh - D.W. 2)
called by the appellants was from a different quarter in Emuhu missed
25 the point that the action was being defended in representative capacities
on behalf of the two villages from among those constituting Emuhu.....*

*After a careful consideration of the judgment in question and
the evidence, oral and documentary, put before the court by the appel-
lants. I have no doubt whatsoever that their case on the issues of owner-
30 ship and acts of possession as pleaded by them, was not properly consid-
ered and evaluated or even at all.”*

 The appeal by the defendants was allowed by the Court of Ap-
peal, which set aside the decision of the trial court and dismissed the
plaintiffs claim thereat in its entirety.

35 It then became the turn of the plaintiffs to appeal to this court. This
they have done. They formulated two questions for us to determine viz-

*“(i) Whether having regard to the plea in answer to para-
graphs 5 and 6 of the Statement of Claim the appellant’s (plaintiffs)
pleading and evidence were insufficient to entitle them to a declaration*

(ii) *Whether the Court of Appeal was right in finding in favour of the defendants on the question of acts of ownership and possession.*”

For their part the defendants drafted 3 questions for determination. These are:-

“1. *Whether the pleading of the appellants in this case sufficiently aver facts relating to the founding of the land in dispute, the persons who founded the land and exercise original acts of possession and the person on whom the title in respect of the land was devolved since its first founding, as necessary for determination of the issue in what communal capacity the land was being held by the appellants and their ancestors.*”

2. *Whether the Court of Appeal was right in evaluating by itself the documentary evidence tendered by the defendants but which were not at all or not properly evaluated by the trial Judge.*

3. *Whether the Court of Appeal was right in finding in favour of the defendants on the question of acts of ownership and possession.*”

Although the plaintiffs filed 3 grounds of appeal, their issues for determination relate to only the first and second grounds of appeal. Since there is no issue formulated by the plaintiffs on the third ground of appeal, the implication is that the ground has been abandoned by the plaintiff; for no argument is being or can be advanced in respect of the ground in the absence of an issue thereon for determination. Consequently, issue No.3 in the defendant’s brief which appears to be hinged on the third ground of the appeal cannot be sustained. It cannot be said to have arisen from a ground that has been abandoned - See *Modupe v. State* (1988) 4 NWLR (Pt.87) 130 at p. 138 G and *Olowosago v. Adebajo* (1988) 4 NWLR (Pt. 88) 275 at p. 283 D.

It seems that issues Nos. 1 and 2 in the defendants’ brief of argument are akin to the issues formulated by the plaintiffs and therefore all the issues should respectively be dealt with together. The appellants contend that the Court of Appeal failed to properly appraise the state of the pleadings in the case. They submitted that on the material averments in the defendants’ Amended Statement of Defence paragraphs 5 and 6 in their Amended Statement of Defence had not been properly denied by the defendants. In support of the submission, they cited the cases of *Atolagbe v. Shorun* (1985) 1 NWLR (Pt. 2) 360 and *Akintola v. Solano* (1986) 2 NWLR (Pt. 24) 598. It was further argued that had paragraph 5 and 6 of the Amended Statement of Claim been properly denied by the defendants in their averments in paragraphs 1, 2, 3, 5 and 9 of the Statement of

Defence, the decision in *Kalio v. Woluchem* (1985) 1 NWLR (Pt. 4) 610 which the Court of Appeal followed to hold that the claim by the plaintiffs for declaration of title had failed, would not have applied to the case. It was submitted further that as there was an admission by the defendants to the averments in paragraphs 5 and 6 of the Amended Statement of Claim, it was not necessary for the plaintiffs to either plead in detail their root of title or to lead evidence as such. Therefore, having regard to the admission of the said paragraphs 5 and 6 and the denial of paragraph 7 of the Amended Statement of Claim, by the defendants, judgment ought to be entered for the plaintiffs by us, it was argued, on the authority of the cases of *Maduga v. Bai* (1987) 3 NWLR (Pt. 62) 635 at 640 and *Olale v. Ekwelendu* (1989) 4 NWLR (Pt.115) 326 at Pp. 361 B - C and 362A.

In his oral argument, learned counsel for the plaintiffs, Mr. Ogunidipe, argued that in a claim for declaration of title to land it is necessary to establish the plaintiff's root of title. However, the response to the pleadings in the Statement of Defence, by the defendants, relieves the plaintiffs of the burden to prove title. This is the situation, he said, in the present case because the defendants stated in their pleadings that they are unable to admit or deny the averments on the root of title which are contained in paragraphs 1,5 and 6 of the Amended Statement of Claim. Learned counsel referred to paragraphs 2 and 3 of the Amended Statement of Defence and said that the latter paragraph denied the averment in paragraph 7 of the Amended Statement of Claim. He cited the case of *M.G.M. Ltd v. N.S.P. Ltd* (1987) 1 NWLR (Pt. 55) 110 at p.124 which he said supported his submission. He, therefore, contended that the Court of Appeal was in error to have overturned the decision of the trial Court.

Learned counsel argued that if the claim by the plaintiffs for the declaration of title fails, their claim for damages for trespass need not fail since it is a claim independent of the claim for the declaration, because it is not, in that case, necessary for the plaintiffs to establish title to the land in dispute. He argued that the defendants did not adduce evidence which showed that they had a better right of possession than that of the plaintiffs.

In their brief of argument, the defendants stated that the decision of this Court in the case of *Kalio v. Woluchem* (supra) restated, per Karibi- Whyte, J.S.C., the law as regards a party that relies on traditional

evidence in an action for a declaration of title. It was not therefore sufficient for the plaintiffs, in the present case, merely to aver, as they did in paragraphs 5 and 6 of their Amended Statement of Defence, that they both had a common ancestor and that they inherited the ownership of the land in dispute on the death of their respective fathers and forefathers. It is then submitted that the pleadings by the plaintiffs and their evidence of traditional history are incurably hollow and inconclusive that they failed to prove the claim for declaration of title. Further it was argued that on the authority of the case of *Piaro v. Tenalo* (1976) 12 S.C. 41, the trial Judge was in error when he came to the conclusion that the plaintiffs were the owners of the land in dispute when they failed to plead or give evidence of the particulars of their names and the acts of possession which they performed on the land in dispute. The Court of Appeal, it was submitted, was right to have allowed the appeal from the decision of the learned trial Judge.

In his oral argument, Mr. Oyetibo, learned counsel for the defendants, referred to paragraphs 1, 3 and 5 of the defendants' Amended Statement of Defence. He submitted that there was from the averments therein a clear dispute on the ownership of the land in question. The onus therefore fell on the plaintiffs to prove their root of title. He cited *Atolaghe's* case (*supra*) at p. 371 G-H to buttress the submission. He said the plaintiffs claim ought to have failed since they did not adduce evidence to establish their root of title. He argued further that although facts admitted in pleadings need not be proved, a party who, however, claims declaratory judgment must on the authority of *Bello v. Eweka* (1981) S.C. 101 at Pp. 102-2; *Motunwase v. Sorunghe* (1988) 5 NWLR (P1. 92) 90 at p. 101 and *Ekwealor v. Obasi* (1990) 2 NWLR (P1. 131) 231 at p. 252 lead strong, cogent and credible evidence to prove his root of title.

On the evaluation by the Court of Appeal of the documentary evidence tendered at the trial by the defendants, learned counsel cited in Section 16 of the Court of Appeal Act, Cap. 75 of the Laws of the Federation of Nigeria, 1990 and Order I rule 2 J (3) of the Court of Appeal Rules, Cap. 62 and submitted that the Court of Appeal was in the same position as the trial court to evaluate the documentary evidence since the issue of credibility of any witness was not involved. He cited in support of the submission *Ebba v. Ogodo* (1984) 1 SCNLR 372 at Pp. 378-379 and *Emonike v. Attorney-General of Bendel State* (1992) 6 NWLR (P1.248)

396 at Pp. 4098-4108. and contended that there was no reason whatever on the record of appeal for which the Court of Appeal could have remitted the case to the trial court to be heard de novo.

Now, in considering the contentions of the parties it is necessary to advert to the pleadings on which they rely. Paragraphs 5, 6 and 7 of the Amended Statement of Claim read thus:-

“5. Both plaintiffs are heads of their respective said villages and are related in that they had a common ancestor and they inherited the ownership of the land on the death of their respective fathers and forefathers.

6. The land in dispute is situate along both sides of Agbor - Asaba road, lying almost directly opposite each other: Idumu - Esegbana land on the right hand side of the said main road whilst Idumu Ozoba land lies on the left hand side of the said main road. It is more particularly described and delineated on the survey plan filed in Court; the area in dispute being verged PINK.

7. The said land in dispute is and has been the property of the plaintiffs from time immemorial.”

To meet these averments, the defendants pleaded in paragraphs 1, 2, 3 and 5 of their Amended Statement of Defence as follows:-

“1. Save and except as herein expressly admitted the defendants deny each and every allegation of fact set out in the Statement of Claim as though the same were set out seriatim and expressly traversed and will, at the trial of the suit, put the plaintiffs to the strictest proof of all such allegations of fact not herein admitted.

2. The defendants are not in a position to admit or deny paragraphs 1, 5 and 6 of the Statement of Claim.

3. The defendants deny paragraphs 3, 7, 8, 9, 10, 11, 12, 13 and 14 of the Statement of Claim.

4. The defendants state that Emuhu village, of which they are part is the owner in possession of the land in dispute and that Emuhu people have exercised from time immemorial maximum acts of ownership over same and have let same without let or hinderance from the defendants (sic) or anyone else.”

Now, the first point to be considered is whether the averments by the defendants in the aforementioned paragraphs have met the allegations in paragraphs 5, 6, and 7 of the Amended Statement of Claim to the extent that it could be said that the parties had thereby joined issues on the facts alleged by the plaintiffs. Learned counsel for the plaintiffs ar-

gued that the averments in paragraphs 5 and 6 of the Amended Statement of claim were not properly denied by the defendants. He cited the cases of Atolaghe v. Shorun (1985) 1 NWLR (Pt. 2) 360 and Akintola v. Solano (1986) 2 NWLR (Pt. 24) 598 and contended that a proper denial of the fact that the land in dispute had been the property of the plaintiffs ought to have read thus:-

“The defendants deny that the land in dispute is and has been the property of the plaintiffs from time immemorial or at all.”

Learned counsel for the plaintiffs is right in that the averment in paragraph 2 of the Amended Statement of defence which states that the defendants were not in a position to admit or deny the averments in paragraphs 1, 5 and 6 amounts to insufficient denial as was held in the cases of Atolaghe (supra) and Akintola (supra). In Lewis & Peat (NIR) Ltd v. Akhinmien (1976) 1 All NLR 460 Idigbe, J.S.C. stated as follows on P. 465 thereof -

“In order to raise an issue of fact in these circumstances there must be proper traverse; and a traverse must be made either by a denial or non-admission either expressly or by necessary implication. So that if a defendant refuses to admit a particular allegation in a Statement of Claim, he must state so specifically, and if he does not do this satisfactorily by pleading thus: ‘defendant is not in a position to admit or deny (the particular allegation in the Statement of Claim) and will at the trial put the plaintiff to proof.’ As was held in Harris v. Gamble (1978) 7 Ch. D. 877; ‘defendant puts the plaintiff to proof’ amounts to insufficient denial; equally a plea that ‘the defendant does not admit correctness’ (of a particular allegation in the statement of claim) is also an insufficient denial - See Rutter v. Tregant (1979) Ch. D. 758.”

However, this is not the end of the matter. Learned counsel for the defendants has drawn our attention to paragraph I of the Amended Statement of Defence (quoted above) which is a general traverse and cited Mandillas and Karaberis Ltd v. Apena (1969) NMLR 199 at Pp. 392-393. In Lewis & Peat’s case (supra) Idigbe, J.S.C. made the following remarks on P. 465 thereof in respect of general traverse-

“Nowadays almost every statement of defence contains such a general denial (see Warmer v. Sampson (1959) 1 Q.B. 287 at Pp. 310-311). However, in respect of essential and material allegations such a general denial ought not be adopted” essential allegations should be specifically traversed (see Wallersterin v. Moir (1974) 1 WLR 991 at

1002 per Denning M.R.)”

But in Mandila’s case (supra), Lewis, J.S.C. cited with approval the dictum of Denning M.R. in Warners case (supra) which had earlier been approved by the Supreme Court in Ace Jimona Ltd v. The Nigerian Electrical Contracting Co. Ltd SC.586/64 (unreported) judgment delivered on 20th May, 1966. Lord Denning said at p. 310 thereof:-

“Since so much effect has been given to this general denial, I would say a word about it. It is used in nearly every defence which goes out from the Temple. It comes at the end. The pleader had earlier gone through many of the allegations in the Statement of Claim and dealt with them. Some he admitted. Others he had denied. Whenever he knows there is a serious contest he takes the allegation separately and denies it specifically. But when he has no instruction on a particular allegation, he covers it by a general denial of this kind, so that he can, if need be put the plaintiff to proof of it at the trial. At one time the use of this general denial was said to be embarrassing: See British and Colonial Land Association Ltd v. Foster and Rohins (1888) 4 TLR 574, but since (1893) it has been recognised as convenient and permissible: See Adkins v. North Metropolitan Tramway Co. (1893) 10T.L. R. 173. Sometimes the pleader ‘denies’ sometimes he ‘does not admit’ each and every allegation; but whatever phrase is used it all comes back to the same thing. The allegation is to be regarded ‘as if it were specifically set out and traversed seriatim.’ In short, it is a traverse, no more no less. Now the effect of a traverse has been known to generations of pleaders. It ‘casts upon the plaintiff the burden of proving the allegations denied’: see Bullen and Leake on Precedents (3rd ed. P. 436). So this general denial does no more than put the plaintiff to proof.”

It follows that the plaintiffs’ averments in paragraphs 5, 6 and 7 of the Amended Statement of Claim have been denied by a general traverse. However, if this is not considered to be sufficient, but I think otherwise, there is the specific traverse, to satisfy the observation of Idigbe, J.S.C. in Lewis & Peat’s case (supra), in paragraph 4 of the Amended Statement of Defence quoted above. I, therefore, hold that the allegations in paragraphs 5, 6 and 7 of the Amended Statement of Claim were sufficiently denied in the Amended Statement of Defence. Consequently, the plaintiffs were put, at the trial in the High Court, to prove their claim. The burden of proving the claim did not shift to the defendants as was submitted by learned counsel to the plaintiffs. The burden which was on the plaintiffs to succeed on their claim for declaration of title was to lead evidence that was sufficiently cogent and credible in proof of their

root of title.

The next question is whether the plaintiffs had discharged the burden on them. To do so the plaintiffs were obliged, since they based their own on customary title, to give evidence of how they derived the title - see Ekpo v. Ita, All NLR 68 and Preston Holder v. Thomas 12 WACA 78. The difficulty which the plaintiffs ran into, as pointed out by the Court of Appeal, is that they omitted in their pleadings to aver fully the facts about their root of title. In the absence of such averment they did not and indeed could not have validly adduced evidence to establish the root of title. In the case of Kalio v. Woluchem (1985) 1 NWLR (Pt. 4) 572 at p. 628 Karibi-Whyte, J.S.C. made the following remarks:-

“Thus, where title is derived by grant or inheritance, the traditional history or evidence of acts of continuous exclusive possession should be given to justify the grant. See Alade v. Awo (1974) 5 S.C. In Piaro v. Tenalo & Ors (1976) 12 S.C. 31 at P. 41 this Court held that in such cases the pleading should aver facts relating to the founding of the land in dispute, the persons who founded the land and exercised original acts of possession and persons on whom the title in respect of the land was devolved since its first founding, as necessary for determination of the issue in what communal capacity the land was being held.”

In the present case the plaintiffs pleading fell short of stating the persons that founded the land in dispute and exercised the original acts of possession. Nor did they aver how the founders of the land in dispute came to be on the land. Surely, with this poor state of the plaintiffs’ case no court could have judicially exercised its discretion to grant them the claim of declaration of title to the land in dispute. Therefore, the trial court was in error to have granted the declaration sought and the Court of Appeal was right to have reversed that decision of the learned trial Judge as it was based on wrong principle and was consequently perverse.

I turn now to the claim for damages for trespass which the learned trial Judge found proved but the Court of Appeal set aside. The plaintiffs pleaded in paragraph 8 and 11 of their Amended Statement of Claim as follows:-

“8. The plaintiffs have exercised maximum acts of ownership and have been in undisturbed possession of the said land since living memory in that they have been farming on the said land and planting crops thereon without any let or hindrance from the defendants or any other persons. The plaintiffs shall lead evidence to prove their ancient

11. In the month of February, 1963 the defendants and their agents without their securing the necessary permission or paying the customary homage to secure the grant of the said land and in violation of the plaintiffs' right of ownership and possession broke and entered into
5 the said land in dispute cutting down rubber trees and cassava with a view to farming thereon."

Paragraph 3 of the defendants' Amended Statement of Defence denied these averments and joined issue with the plaintiffs in paragraph 7 thereon by raising the defence of res judicata.

10 The said paragraph reads:-

"7. The defendants in further answer to paragraph 13 of the Statement of Claim state that the whole of the land in dispute in this suit, now being claimed by the plaintiffs, forms part of a larger parcel of land awarded Emuhu village against Idumuile and Idumuileje villages of
15 Umunede in Suit No. W/37/1952 (WACA 200/1959) and the defendants will at the trial of this suit rely on the judgment in the said suit W/37/53 as constituting res judicata between the plaintiffs and the defendants in this suit."

20 The plaintiffs testified and called a number of witnesses who gave evidence on the plaintiffs' claim that they had been in possession of the land in dispute from time immemorial and had been planting economic trees and crops on the said land. The defendants also testified and called witnesses. The learned trial Judge held that he believed the evidence adduced by the plaintiffs and rejected the plea of res judicata by
25 the defendants on the ground that neither the plaintiffs nor their privies were parties to Suit No. W/37/1952: nor is the land in dispute thereat the same as the land in dispute in the present case. And that a plea of res judicata is not a defence to an action by the person in actual physical
30 possession as the plaintiffs are in the instant case.

The Court of Appeal (per Ajose-Adeogun J.C.A.) agreed with the learned trial judge that the plea of res judicata failed. In its words-

"In all, I see no reason, after a very careful consideration of the arguments from both parties herein, to warrant a reversal of the finding
35 in the lower court that the plea of res judicata was not available to the appellants."

However, the Court of Appeal parted ways with the findings of the trial judge on the issue of possession by the plaintiffs when it held (per Ajose - Adeogun, J.C.A.) thus -

“After a careful study of the judgment in question and the evidence, oral and documentary, put before the (trial) court by the appellants, I have no doubt whatsoever that their case on the issue of ownership and acts of possession as pleaded by them, was nowhere properly considered and evaluated or even at all. In particular, the appellants, apart from pleading a previous case in 1952 as constituting *res judicata*, also pleaded other documents being relied upon by them. They are set out in paragraph 8 of their pleading which reads thus-

‘8. The defendants will at the trial of this suit produce and rely on:-

(1) Plan No. A.G.C. 25 being judgment between Emuhu and Umunede in the aforementioned Suit No. W/37/52. 10

(2) Plan No. A.G.C. 30 filed by the defendants in this suit.

(3) Motion on notice filed on 18/07/67 by V.J.O. Chigbue Esq. solicitor for the defendants/appellants in Suit No. W.37.52 praying this Honourable court for an order to appoint an independent licensed surveyor to erect a concrete pillar on the boundary as per judgment in suit No. W/37/52. 15

(4) Ruling and order dated 08/06/72 made by the Honourable Mr. Justice M.A. Agboghobia in suit No. W/37/52.’

Although the learned trial Judge referred to the above plans and documents when considering the issue or *res judicata*, he failed completely to consider their relevance and importance to the issue of acts of ownership and possession of the land in dispute by the appellants (defendants).” (Parenthesis mine). 20

In addition, the Court of Appeal found fault with the rejection by the trial court of the testimony of Mr. David Okoh (D.W.2) which inter alia related to the aforementioned paragraph 8 of the Amended Statement of Defence. 25

In the appeal on hand the plaintiffs complained about the reversal by the Court of Appeal of the specific findings made by the trial court. They contended that the Court of Appeal was wrong to have done so, and further argued that even if the lower court were right the correct order to have been made by it was to send the case back to the High Court for retrial but not to dismiss it. The case of *Udo & Ors v. Obot & Ors.* (1989) 1 NWLR (Pt.95) 59 at pp. R3H - R4C per Agbaje, J.S.C. was cited in support. The plaintiffs argued also that the averment in paragraph 8 of the Amended Statement of Defence is an elaboration of paragraph 7 thereof on the plea of *res judicata*. It was, therefore, submitted 30 35

that the learned trial Judge was right in not considering the facts alleged in paragraph 8 since they were not pleaded in relation to the question of ownership and possession. The plaintiffs rely on Onwumere v. Agwunede (1987) 3 NWLR (Pt.62) 673 at p. 681 and Ibanga & Ors v. Usanga & Ors (1982) 5 S.C. 103 at pp. 122-124.

5 The defendants' reply to the plaintiffs contention is that there was no proper evaluation of the defence case by the learned trial Judge and on the authority of Ebba v. Ogoto (1984) 1 SCNLR 372 at 378-9 and Akibu v. Opaleye (1974) 11 S.C. 189 at pp. 202-3 and 204 -5 the Court
10 of Appeal was right in re-evaluating the defence evidence and reversing the decision of the trial court. Learned counsel for the defendant submitted that there were no valid reasons on which the Court of Appeal could have been expected to send the case back to the High Court to be retried.

 With respect, I am satisfied that the Court of Appeal fell into
15 error when it considered the documents pleaded in paragraph 8 of the Amended Statement of Defence as not properly considered or evaluated by the learned trial Judge. If the said paragraph 8 is carefully studied it will be observed that all the documents listed therein relate to Suit No. W/ 37 /1952 on which the plea of res judicata was vested. Once it was
20 found, as both lower courts did, that the judgment in suit No. W/37/1952 was irrelevant to the present suit, the documents mentioned in paragraph 8 cannot apply to the facts of the present case, since the parties in that case and the land in dispute thereat were held not to be identical with those in the case in hand. To rely on the documents, after rejecting the
25 plea of res judicata, to establish acts of either ownership or possession of the land herein in dispute is a serious misdirection, and that is the error which the Court of Appeal fell into.

 It is settled law that a plaintiff can succeed on a claim for damages for trespass and injunction even where his claim for a declaration of title fails
30 - See Oluwi v. Emiola (1967) NMLR 339 at p. 340; Adegbe v. Ogunfaolu (1990) 4NWLR (Pt.146) 578 at p. 597A and Ojibah v. Ojibah (1991) 5 NWLR (Pt.191) 296 at p. 314. In the present case, the plaintiffs pleaded in paragraph 8 of the Amended Statement of claim "undisturbed possession of the said land since living memory" and called evidence in support.
35 The learned trial Judge found this proved as well as the trespass allegedly committed by the defendants. The Court of Appeal, which neither saw the witnesses called nor heard their testimonies, could not simply reverse the findings of the trial court on the ground that the documentary evi-

dence pleaded by the defendants was not properly evaluated, when those documents have been found to be irrelevant to the case. The wrong yardstick was, therefore, applied by the Court of Appeal to reverse the decision of the learned trial Judge that the plaintiffs proved exclusive possession and trespass by the defendants on the land in dispute.

In the result the appeal succeeds. I hold that the plaintiff's claim for a declaration of title fails and the claims for damages for trespass and perpetual injunction succeed. The decision of the Court of Appeal is hereby set aside. N300.00 damages for trespass, as assessed by the trial court, are hereby awarded to the plaintiffs. The defendants, their agents or servants are hereby perpetually restrained from committing further acts of trespass on the land in dispute. Costs assessed at N1,000.00 are awarded against the defendants in favour of the plaintiffs.

KUTIGI JSC

I read in draft the judgment just delivered by my learned brother Uwais, J.S.C. I agree with his reasons and conclusions and will allow the appeal. The judgment of the Court of Appeal is set aside and that of the trial court restored in part. I agree with the order for costs made in the lead judgment.

OGUNDARE JSC

I have had the advantage of reading in draft the judgment of my learned brother Uwais JSC just delivered. I agree entirely with the conclusions reached by him and the reasonings leading thereto which I hereby adopt as mine too. I have nothing more to add.

I subscribe to the order for costs made by my learned brother in his lead judgment.

MOHAMMED JSC

I have had the advantage of reading the opinion of my learned brother, Uwais J.S.C. in the lead judgment, just read, and I agree with him that his appeal ought to succeed on the claims for trespass and injunction. I also agree that the plaintiffs claim for declaration of title to the land in dispute has not been specifically pleaded in the statement of claim and must therefore fail.

The necessary ingredients of averments for a claim for title, namely, facts relating to the founding of the land; the persons who founded the land and exercised original acts of possession and the person on whom the title in respect of the land has devolved since its first founding have not been given adequately by the plaintiffs in their statement of
5 claim. See *Piara v. Tenalo & Ors* (1976) 12 S.C. 31 at 41.

My contribution is mere emphasis of one of the issues considered by my learned brother in the lead judgment. I do not wish to add more to the judgment. I abide by all the consequential orders made in the
10 lead judgment, including the assessment and award of costs.

ADIO JSC

I have had the benefit of reading, in draft, the judgment just
15 delivered by my learned brother. Uwais, J.S.C. and I agree with his reasoning and conclusion. The appellants' claim for a declaration of title to the land in dispute fails but their claim for damages for trespass succeeds and they are awarded N300.00 damages. Their claim for perpetual injunction also succeeds and I grant them the order in the terms set out in
20 the lead judgment. I abide by the other consequential orders including the orders for costs.

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