

**SUPREME COURT OF NIGERIA**  
7TH APRIL, 1995. SC 291/1989  
**CORAM:- M.L. UWAI, I.L. KUTIGI, M.E. OGUNDARE,**  
**E.O. OGWUEGBU, U. MOHAMMED, JJSC**

ONYEBUCHI IROGBU

(For himself and as representing ..... DEFENDANT/APPELLANT  
the Chiefs and people of Avonkwu Ibeku)

AND

RICHARD OKWORDU & ANOTHER

For themselves and as representing ..... PLANTIFFS/RESPONDENTS  
the people of Eruete Ibeku)

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***EVIDENCE*** - Inconsistency - Whether there is any inconsistency in the evidence of the plaintiffs - In relation to their claim.

***LAND LAW*** - Identity of the land in dispute - Claimed by the plaintiffs - Whether established.

***LAND LAW*** - Laches - Where natural disasters delayed plaintiffs' action - resisting defendants' act of trespass - Whether plea of laches, acquiesce, and standing by avails.

***LAND LAW*** - Land Use Act - Customary right of occupancy grant thereunder - Whether defendants are entitled to it - When they were never in elusive lawful possession.

***LAND LAW*** - Traditional history evidence - Presented by the plaintiffs - Whether reliable - As concurrently found by the two lower courts.

**FACTS**

Before the High Court of the defunct East Central State of Nigeria Umuahia, plaintiffs/respondents instituted an action against the defendants/appellants. Plaintiffs claimed declaration of title to the land in dispute, N1,000 general pages for trespass and perpetual injunction. The action was filed and

defended in representative capacities. Plaintiffs proved that the land in dispute was founded by their ancestor one Eruete many years ago. Shortage of water, fear of enemy attack and massive death of members of plaintiffs' village were the natural disasters that made plaintiffs settle among the people of a near by village. But they continued to farm on their Eruete farmland Plaintiffs were so much afflicted by death that at a point there was no male adult of Eruete family living. The defendants took advantage of the misfortune, that befell the plaintiffs and started encroaching on the land in dispute and infact later claimed it as their own.

When male adults emerged in the Eruete family (who are now the plaintiffs), they demanded from the defendants the return of their land. They started fanning on the land, sold part of it and later sued the defendants who refused to stop encroaching on the land. The defendants denied the plaintiffs' claim and sought to establish that the land has been theirs from time. The trial court found in favour of the plaintiffs. Defendants' appeal Court of Appeal was dismissed. They have further appealed to the Supreme Court to determine inter alia, whether the Court of Appeal ought to hi dismissed the defendants' plea of laches, acquiescence and standing by.

**HELD** (Unanimously dismissing the appeal per lead judgment of **OGUNDARE JSC**)

***Laches - Where natural disasters delayed plaintiffs' action***

1. On the findings made by the learned trial judge and affirmed by the court below I have no reason to disagree with them that the plea of laches, acquiescence and standing-by does not avail the defendants in the circumstance of this case. The disability of the plaintiffs caused by the natural disasters that afflicted their family, handicapped them in resisting the defendants act of trespass on their (plaintiffs') land and the very moment they overcame this disability, they took prompt action to claim their land from the defendants'. It is the finding of the learned trial judge and by the Court below, that various actions relied upon by the defendant supporting their acts of ownership were not in respect of the land now in dispute. I agree with the two courts below and hold that their finding on the defendants' plea is correct (p. 885 F)

***Whether there is any inconsistency in plaintiffs' evidence***

2. I have examined Exhibit 'E' and the evidence of Nwakamalu in the 191 as to his boundary with Bendel people. I do not see anything in that evidence inconsistent with the claim of the plaintiffs in the present proceedings. The

defendants relied on Exhibit 'K' which the trial Judge had rejected as unsatisfactory and manipulated for the purpose of the proceedings. I think the learned trial Judge is right in his finding which, in any event, has not been challenged and in the face of that finding, we are left with only exhibit 'E', that is the plaintiffs' plan as to the identity of the land in dispute. Considering the features shown on Exhibit 'E' I can find no substance in the complaint of the defendants in respect of the evidence of Nwakatnalulu in the 1936 case. It is, therefore, not correct as contended by the defendants that Nwakamalu in his evidence in 1936 disclaimed the area now in dispute. (p. 887 A)

***Traditional history evidence***

3. I have carefully examined the evidence of these two witnesses. I do not see such material contradiction in the evidence as to render the traditional history of the plaintiffs unreliable. Both the trial court and the court below came to the same conclusion that the traditional history of the plaintiffs is to be preferred to the traditional history of the defendants. These are concurrent findings of the two courts below. This Court would not lightly reverse or disturb such concurrent findings of the two courts below unless their decision is shown to be perverse. I am not satisfied that the defendants have discharged this burden on them. (p. 887 E)

***Identity of the land in dispute***

4. If one takes account of the totality of the evidence of this witness, it cannot be right to say that the identity of the land claimed by the plaintiffs is not proved. It is clear from the totality of the evidence on record and having regard also to the evidence of Nwakamalu in the 1936 case that the people referred to as Inyang or Azu Inyang are the same people as Umuoche of Bendel and they are shown on Exhibit 'E' as boundary men. On the evidence before the trial judge, he accepted Exhibit 'E' as representing the land claimed by the plaintiffs. This finding was affirmed by the court below. I have no reason to disturb that finding and, therefore, I hold that the identity of the land claimed by the plaintiffs is established in Exhibit 'E'. (p. 888 A)

***Land Use Acts - Customary right of occupancy***

5. This action was instituted in 1973 long before the Land Use Act came into force in 1978. On the strength of the above findings, it is difficult to see how the customary right of occupancy could have been declared to be in the defendants. They were never in exclusive lawful possession of the land in

dispute. They, therefore, do not come under section 36(2) of the Land Use Act. In the light of the findings made by the trial and affirmed by the court below, the plaintiffs were rightly granted the customary right of occupancy to the land in dispute. (p. 888 E)

B

**REPRESENTATION**

T.E. Williams, for the Appellant

G. U. E. Peter-Okoye (Mrs.) for the Respondents

C

**CASES REFERRED TO**

Alli v. Akard 1967 FNLR page 216

Moreye v. Okiade WACA 46

**D STATUE REFERRED TO**

Land Use Act s. 36(2)

**LEAD JUDGMENT BY OGUNDARE JSC**

E

By order of the High Court of the now defunct East Central State of Nigeria, Umuahia Judicial Division, the Plaintiffs (now Respondents before us) instituted the action leading to this appeal in a representative capacity as representing themselves, the Chiefs and people of Eruete Ibeku. The defendant (now Appellant) was sued along with one Gilbert Nwachukwu who is now dead, as representing themselves, the chiefs and people of Avonkwu Ibekwu. Pleadings were ordered, filed and exchanged. With leave of the trial High Court the Plaintiffs filed and served an amended statement of claim by paragraph 14 of which they claimed -

F

*"1. Declaration of title to all that piece or parcel of land known as and called Okata Eruete land of the annual rental value of N10.00 situate at Eruete Ibeku in Umuahia Judicial Division;*

*2. N1,000.00 being general damages for trespass and*  
*3. Perpetual injunction to restrain the defendants their servants, workingmen and/or agents from further entry upon the said Okata Eruete land or in any way Interfering with the plaintiffs' ownership or possession of same."*

H

At the trial Plaintiffs called 9 witnesses in support their case while the Defendants called 3 witnesses. After addresses by learned counsel for the parties, the learned trial Judge, in a reserved judgment, found for the plaintiffs

and entered judgment in their favour for declaration of customary right of occupancy, N400.00 damages for trespass and an injunction. Being dissatisfied with the said judgment, the Defendants appealed unsuccessfully to the Court of Appeal coram-Phil-Ebosie, JCA, Belgore and Olatawura JJCA, (as they were then). They have now further appealed to this Court. By their amended notice of appeal they rely on the following 6 grounds of appeal: B

“(i) *The Court of Appeal erred in law and came to the wrong conclusion on the facts in failing to appreciate the fact that Exhibit ‘D’ was pleaded and tendered for the purpose of establishing that as far back as 1936, and to the knowledge of the Chiefs and people of Eruete the Appellants of Avonkwu Ibeku successfully asserted their claim to the title to the land in dispute or portion thereof The Court of Appeal erroneously considered that the said Exhibit ‘D’ was proved to support a plea of estoppel per rem judicatam.* C

(ii) *The Court below erred in law in failing to uphold the defendants plea of laches, acquiescence and standing up (sic).* D

(iii) *The Court of Appeal was wrong to have upheld the judgment of the judgment of High Court particularly where the latter judgment resulted in the boundary 0/ land awarded to the plaintiff being clearly inconsistent with the evidence given by Nwakamalu in Exhibit ‘D’*

(iv) *The’ Court of Appeal misdirected itself in law and on the facts E in accepting the traditional evidence to the effect that the defendants forcibly entered the land in dispute when there were no grown up members Eruete family to stop them after the death of Nwakamalu.*

(v) *The Court of Appeal was wrong in failing to observe that the evidence of boundary given by the Plaintiffs witnesses were at variance with F their plan Exhibit ‘E’*

(vi) *The Court of Appeal was wrong in law in failing to observe that on the evidence before the court, the Chiefs and people of Avonkwu Ibeku were persons deemed to be holders of customary rights of occupancy in or over the land in dispute since they were the person in possession off the G said land.”*

(Particulars are omitted)

And in their Brief of Argument they set out six questions as calling H for determination, to wit:

“(i) Whether, in the light of pleadings and evidence before it, the court below was correct in holding that the land in dispute in this case is not

the same as the land covered by Exhibit D.

(ii) *If the answer to the first question is in the affirmative, whether the court below ought to have dismissed the defendants' plea of acquiescence and standing by.*

(iii) *Whether the court below was correct in its conclusion that B Nwakamu's evidence in Exhibit D was of no assistance to the defendants in this case.*

(iv) *Whether the finding of the court below on traditional evidence can be supported.*

(v) *Whether the plaintiffs succeeded in proving the identity of the C land in dispute.*

(vi) *Who is entitled to the customary right of occupancy in or over the land in dispute."*

The Plaintiffs also filed a Brief of Argument in which they set out 3 issues for determination, O do not think these issues meet adequately all the D complainants in the grounds of appeal. Consequently, the questions as posed by the Defendants are being adopted for the purpose of determining this appeal. The plaintiffs also filed a Notice of intention to rely upon a preliminary objection. The objection contained in the notice to the effect that question (i) set out in the Appellants' Brief is incompetent and ought to be struck out E because the said question is not based on any ground of appeal.

At the oral hearing considered and sustained. Question (i) in the Defendants' Brief was accordingly struck out. We also heard arguments on an application brought by the Defendants to amend their Brief by substituting a new Brief for the original Brief. We refused the application and proceeded to F the hearing of the appeal on the original Briefs filed by the parties.

The facts briefly are as follows: The land in dispute was founded by one Eruete many years ago. He settled on the land his settlement was known as Eruete village. His boundary men at the time were the people of Ajata G Okwuru village, Amazu Oro village, both of Ibeku and Umuoche village of Bende. Eruete lived on the settlement and had children. On his death, he was buried there. Afetr his death, his children experienced shortage of water because the nearby streams used to dry up during the dry season; they also feared enemy attack as their settlements were far from other Ibeku village. For H these two reasons they moved away from the first settlement and settled in a second place all on the land in dispute. Eruete's children had their own children too in the course of time, there was an outbreak of smallbox epidemic in this second settlement. Nearly all the inhabitations of the second Eruete village died as a result of the epidemic. The few that remained moved to Ajata

Okwuru village in Ibeku and lived among the people of that village but continued to farm on their Eruete farmland. At their new abode at Ajata Okwuru, they were further afflicted with death to the extent that at one time, the only male adult living was one Nwakamalu. On his death, there was no adult male of Eruete family living. The defendants took advantage of the misfortune that befell the plaintiffs' family and started encroaching on the land in dispute and infact later claimed it as their own. All along, the people of Umuoche village however, reminded the defendants that they were not the owners of the land that they the Umuoches had boundary with them (the Defendants) but with Eruetes. When adults emerged in the Eruete family Who are now plaintiffs in this case, they, under the leadership of the first plaintiff demanded from the defendants the return of their land growing adult members of the Eruete family went on the land and started farming thereon. In 1960, they sold part of the land to one John Enyim Nwosu who in turn went to the land sold to him and cultivated crops thereon. When the defendants would not desist from encroaching on the land the plaintiffs took the action leading to this appeal.

The plaintiffs are still living in Ajata Okwuru village but farm on parts of the land in dispute.

The case for the defendants on the other hand is that there is no village known as Ibeku. The land in dispute belongs to the defendants and has been their ancestral land in their possession from time immemorial. They have extensive plantation on the land which they cultivated over 25 years ago. In 1936 they had a case in Bende Native Court against the Umuoche people of Bende over the land in dispute. The Bende Native Court that decided the case was presided over by one Mr. Ennel Assistant Divisional Officer who fixed the boundary between the defendants and the Bende people at a point known as Ogbugbandu. The defendants were unhappy with the judgment and appealed to the Resident who fixed the boundary between them (Avonkwu) and Bende at Inyang River "where there is a bridge along Umuahia/Bende Road." In the said action (suit) No. 115/36 the people of Ajata gave evidence for the Bende people but their evidence was disbelieved by both the Native Court and the Resident In 1955 the government of the then Eastern Nigeria acquired a part of the land in dispute. The people of Amuzoro laid claim to the land acquired by the by the government and sued the defendants in suit No. 388/195 at Ibeku Native Court. The Native Court awarded the land to the Avonkwu people, (that is, the defendants). Appeals by the Amuzoro people to the District Officer, the Resident and the Governor failed and on the strength of the Victory of the defendants, compensation in respect of the land acquired by the Gov-

ernment of Eastern Nigeria was paid to the defendants. In 1961 the Amuzoro people again instituted in respect of the same piece of land, suit No. HU/73/1961 in the Umuahia High Court against the defendants but lost on the defendants' plea of *res judicata*. Neither the people of Ajata nor the plaintiffs intervened in the disputes between the defendants and Amuzoro. Again in suit No. B U/108/1960 in the Umuahia Chief Magistrate Court the defendants sued some members of Amuzoro for harvesting their cocoa over a part of the land in dispute which was being acquired by the Cocoa Research Institute Ibadan. Again the defendants won the case. It is the case of the defendants that they have no boundary with the plaintiffs' village, which is a non existing village or C land owning unit but that they have boundary "with the Ajata people on the Northern portion of the land in dispute and also with Iyenye people". On the Southern portion of the land in dispute the defendants have boundary with Umuhute people. It is part of the claim of the defendants that they had their first homestead on the land in dispute where they also have their Ihuala shrine D worshipped by their ancestor ancestors later moved westward to another portion of the land. Yet again the defendants moved from this second settlement to their present abode shown on their plan. They claim that their land stretches from their present abode to Ibeinyang River. That the whole area is one contiguous parcel of land which had belonged to them from time immemorial. E rial.

I now proceed to consider the questions formulated by the Appellants for determination in this appeal. I have already stated that question (1) out by us as not having been predicated on any ground of appeal. I, therefore, proceed to question (ii). Although question (ii) is made subject to question (i) F being answered in the affirmative, I shall non-the-less consider it as it questions the right of the Court below to dismiss the defendants' plea of laches, acquiescence and standing by. This pleas was considered by the learned trial Judge in his judgment wherein he observed:

*"The defendants pleaded laches and acquiescence. From the evidence before me I do not think that this is properly founded. Plaintiffs have not stood and allowed the defendants to take their land. According to the evidence, until the death of Nwakamalu the Eruete people were farming on the land in dispute and harvest the economic trees even while living at Ajata Okwuru. After Nwakamalu and when the present plaintiffs grew up and H knew about their right to the land in dispute they immediately made demand for the return of it and also started to farm on portions of the land in dispute. The plaintiffs have never abandoned their right over the land in dispute. See the case of Ali v. Akard 1967 FNLr page 216.*

*The defendants also pleaded that the plaintiffs are estopped from disputing*



*the defendants possession in view of the judgments which they pleaded in respect of the land in dispute and which were in their favour. The first point*

*I would like to make is that the plaintiffs were no parties to the cases. There is evidence by P.W. 4 which I believe that Ajata Okwuru people warned the defendants that they were encroaching on Eruete land. I am convinced that the Avonkwu people were aware of this fact because there was no grown up men to challenge their acts of trespass on the land in dispute they continued to encroach. Even when they were having cases in court with other people, I hold the opinion that they had the constructive notice of the plaintiffs title to the land in dispute. In the case of Moreye v. Okiade and other 8 WACA page 46 the West African Court of Appeal held that acquiescence on the part of the appellants does not operate as estoppel where the respondents had constructive notice of the appellants title. It is my view that laches, acquiescence and estoppel do not apply in this case in view of the evidence before me which I accept."*

The court below, that is the Court of Appela in its own judgment per Olatawuru JCA (as he then was) held:

*"I accept the submissions of Chief Onyiuke, SAN on these grounds that neither a trespasser nor his successor in title who knowingly and unlawfully take possession of another person's land can avail himself the defence of laches."*

After quoting with approval the portions of the judgment of the learned trial Judge which I have just above, the judgment wenron-

*"The conduct of the appellants leaves much to be desired. They took advantage of a situation where they ought to have shown sympathy. I think the judge was right in describing them as land grabbers."*

On the findings made by the learned trial judge and affirmed by the Court below I have no reason to disagree with them that the plea of laches, acquiescence and standing-by does not avail the defendants in the circumstance of this case. The disability of the plaintiffs caused by the natural disasters that afflicted their family, handicapped them in resisting the defendants act of trespass on their (plaintiffs') land and the very moment they overcame this disability, they took prompt action to claim their land from the defendant. It is the finding of the learned trial judge and affirmed by the Court below, that various action relied upon by the defendants as supporting their acts of ownership were not in respect of the land now in dispute. I agree with two courts below and hold that their finding on the defendants' plea is correct.

Question (iii) deals with the evidence of plaintiffs' ancestral Nwakamalu in the 1936 case between the defendants and the people of Umuoche in bende.

It is the contention of learned counsel for the defendants in his Brief and oral argument that the plaintiffs in the present proceedings could not claim a boundary other than the one claimed by Nwakamalu in his evidence in the 1936 case. Relying on the defendants' plea Exhibit 'K' in the proceedings, B it is learned counsel's submission that Nwakamalu disclaimed ownership to the land starching from Inyang River to Upata stream.

I must observe that the defendants' plea exhibit 'K' was found by the learned trial judge to be unsatisfactory and manipulated for the purpose of this case". There has bee no appeal against this specific finding. The Court of C Appeal in its lead judgment, per Olatawura JCA observed:

*"Much fuss was made of the evidence of Nwakamalu the ancestor of the respondents. Exhibit D was a case between Avonkwu people and the people of Bende. It is clear from page 216 of Exhibit D that Nwakamalu was merely called as a boundaryman. Part of his evidence in exhibit D reads:*  
D *I am a native of Erotu, I have a boundary with Azuiyang at upata stream, it is necessary to see where I lived and also where the people of Avonkwu lived and dispute over this land. The people of Avonkwu passed through my land to this disputed land. In the old days I farmed as far as the Upata stream and Azuiyang farmed up to their....*  
E *.....*

*By court: with whom do you have boundary on the right at your old site?*

*Answer: The people of Amuzu I have boundary with.*

*By Court: Have you Ogbugbandu with Avonkwu?*

*Answer: No*

F *By Court: What was the name of Azuiyang man whom you had boundary with?*

*Answer: Ajawaranta and Esumorah.'*

The above quoted passage was the substantial part of the evidence of Nwakamalu in Exhibit D.

G *It is not correct as submitted by Mr. Ofodile, SAN, that there was admission against interest by Nwakamalu. He merely gave evidence as a boundary man. When one looks at paragraph 3 of the amended Statement of Claim it is clear from the description of the land that the plaintiffs are not Bende people who were the defendants in Exhibit D. The attempt to link*  
H *Exhibit D with the landed property described in the plaintiffs/respondents amended plan in Exhibit E is to divert court's attention from the real issue litigated upon in this case on appeal. Nwakamalu's evidence in exhibit D with respect to boundary is not in any way different from the amended plan No. VE400/78 tendered as Exhibit E."*

I have examined Exhibit 'E' and the evidence of Nwakamalu in the 1936 case as to his boundary with Bende people. I do not see anything in that evidence inconsistent with the claim of the plaintiffs in the present proceedings. The defendants relied on Exhibit 'K' which the trial Judge had rejected as unsatisfactory and manipulated for the purpose of the proceedings. I think the learned trial Judge is right in his finding Which, in any event, has not been challenged and in the face of that finding, we are left with only exhibit 'E', that is the plaintiffs' plan as to the identity of the land in dispute. Considering the features shown on Exhibit 'E' I can find no substance in the complaint of the defendants in respect of the evidence of Nwakamalu in the 1936 case. On the Eastern boundary of the land in dispute as shown in Exhibit 'E', there is a stream named Isi Urata which perhaps is what Nwakamanu referred to in 1936 evidence as Upata stream. Even going by Exhibit 'K' this plan shows that the homes of the plaintiffs are closer to the land in dispute than the homes of the defendants which again goes to confirm the evidence of Nwakamalu that "the people of Avonkwu passed through my land to this disputed land". It is, therefore, not correctl as contended by the defendants that Nwakamalu in his evidence in 1936 claimed the area now in dispute.

**Question (iv)** The main criticism of the defendants on the acceptance by the trial court and affirmed by the court below of the traditional evidence adduced by the plaintiffs centres on what has been referred to as contradiction in the evidence of PW1 and PW4. I have carefully examined the evidence of these two witnesses. I do not see such material contradiction in the evidence as to render the traditional history of the plaintiffs unreliable. Both the trial court and the court below came to the same conclusion that the traditional history of the plaintiffs is to be preferred to the traditional history of the defendants. These are concurrent findings of the two courts below. This Court would not lightly reverse or such concurrent findings of the two courts below unless their decision is shown to be perverse. I am not satisfied that the defendants have this burden on them. There is abundant evidence on record to support findings of the two courts below on the issue. I resolve question (iv) in favour of the plaintiffs. All the boundarymen claimed by both sides testified in favour of the plaintiffs and there was non to support defendants' case. In such a situation I cannot see how I can justify setting aside or disturbing The concurrent findings of the two courts below.

**Question (v):** The defendants contend that the evidence of boundary given by plaintiffs' witness was at variance with plaintiffs' plan Exhibit 'E'. This submission is predicated on a portion of the evidence of PW 4 under cross-examination wherein the witness testified thus: "the Eru stream is the

boundary between the land of the plaintiffs and that of the defendants". If one takes account of the totality of the evidence of this witness, it cannot be right to say that the identity of the land claimed by the plaintiffs is not proved. It is clear from the totality of the evidence on record and having regard also to the evidence of Nwakamalu in the 1936 case that the people referred to as Inyang or B Azul Inyang are the same people as Umuoche of Bende and they are shown on Exhibit 'E' as boundarymen. On the evidence before the trial judge, he accepted Exhibit 'E' as representing the land claimed by the plaintiffs. This finding was affirmed by the court below. I have no reason to disturb that finding and, therefore, I hold that the identity of the land claimed by the C plaintiffs is established in Exhibit 'E'

Question (vi): The contention of the defendants is to the effect that as the evidence of the parties affirmed that the defendants were in possession before and at the time plaintiffs instituted this action, they were the ones entitled to the customary right of occupancy under the Land Use Act. This contention D overlooks -

(1) that the plaintiffs claimed that the defendants were trespassers and that they were the owners of the land;

(2) there was evidence that the plaintiffs sold a part of the land to Nwosu in 1960 clear evidence of act of ownership:

E (3) that the plaintiffs were also farming on portions of the land: and  
(4) that the trial judge and the court below found that the plaintiffs are owners of the land.

This action was instituted in 1973 long before the Land Use Act came into force in 1978. On the strength of the above findings, it is difficult to see F how the customary right of occupancy could have been declared to be defendants. They were never in exclusive lawful possession of the land in dispute. They, therefore, do not come under section 36(2) of the Land Use Act which provides: provides:

G *"Any occupier or holder of such land, whether under customary rights or otherwise howsoever, shall if that land was on the commencement of this Act being used for agricultural purposes, continue to be entitled to possession of the land for use for agricultural purposes as if a customary right of occupancy had been granted to the occupier or holder thereof by the appropriate Local Government and the reference in this subsection to H land being used for agricultural purposes includes land which is, in accordance with the customary law of the locality concerned, allowed to lie fallow for purposes of recuperation of the soil."*

(under linings are mine)

in that they were never occupier nor holder of the land in dispute.

The words “occupier” and “holder” are defined in section 51 (1) of the Act as meaning:

*“any person lawfully occupying land under customary law and a person using or occupying land in accordance with customary law and includes the sub-lessee or sub-underlessee of a holder;”*

and

*“a person entitled to a right of occupancy and includes any person to whom a right of Occupancy has been validly assigned or has validly passed on the death of a holder but does not include any person to whom a right of Occupancy has been sold or transferred Without a valid assignment, nor a mortgagee, sub-lessee or sub-underlessee;”*

respectively. In the light of the findings made by the trial and affirmed by the court below, the plaintiffs were rightly granted the customary right of occupancy to the land in dispute.

Having disposed of all the issues raised in this appeal the conclusion I reach is that I find no merit in it and I accordingly dismiss it with N1, 000.00 costs to plaintiff/Respondents.

#### UWAIS JSC

I have had the opportunity of reading in draft the judgment of my learned Ogundare, J.S.C. For the reasons contained therein, I too find no merit in this appeal, Consequently, it is hereby dismissed with N1,000.00 costs to the Respondents

#### KUTIGI JSC

I agree with the judgment just delivered by my learned brother Ogundare J.S.C. which I read before now. The appeal is dismissed with costs as assessed.

#### OGWUEGBU JSC

I have read the judgment of my learned brother Ogundare, J. S. C. and I am in entire agreement with his reasoning and conclusions.

There is no doubt whatsoever as to the identity of the land in dispute in Exhibit “E”. The plaintiffs and their witnesses testified as to the boundaries shown in “E”. In paragraph 3 of their amended statement of claim, the plaintiffs pleaded Exhibit “E” which they filed with their statement of claim.

They also pleaded the boundaries of the land in dispute:

1. North East by Isi Upata Stream, land of Umuoche in Bende and Amzu-Ozo Ibeku in the North East:

2. West by Uzo Erue foot path and land of Ajata Okwuru Ibeku;

B 3. North by Inyang Amafor and Ohakwu streams and land of Ajata Okwuru Ibeku;

4. South by land of Amuzu-Ozo.

P.W.2; P.W.3; P.W.4, P.W. 7 and P.W.8 each gave evidence of the boundaries of their lands with the land in dispute, as shown in Exhibit “E”.

C The defendants called none of their boundary men to testify.

In their brief of argument, the appellants submitted that P. W.4 in his evidence testified that Eruo stream is the boundary between the plaintiffs and the defendants and if there is such a common boundary as testified by P.W 4, the defendants had no need to pass through the land of other people before getting to the land in dispute. The appellants (defendants) appear to have forgotten the averment in paragraph 27 of their statement of defence which reads:

D “27 *The Defendants say that they have no boundary whatsoever with the plaintiffs which is a non existing village or land owning unit but that they have boundary with Ajata people as shown in the northern portion of the defendants’ Plan ....*

(Underlining is for emphasis)

Having averred as above, they cannot turn round to capitalise on a slip of the evidence of this witness who unequivocally stated that the defendants land has no boundary with the land in dispute and for defendants’ people to get to the land in dispute, they would pass Ajata Okwuru Ibeku land.

Both the trial court and the Court of Appeal held that the plaintiffs identified the land in dispute as shown in Exhibit “E”. The learned trial judge said:

G “*It is also my view that the plaintiffs have been able to establish the identity of the land in dispute. Both in their pleadings and their evidence in court, the plaintiffs and their witnesses were able to give clear evidence identity of the land in dispute. They called the boundary owners whose evidence were not discredited. The defendants on the other hand called not even a single witness who has boundary with them on any side of the land which they claimed in Exhibit K as the land in dispute..... I find Exhibit K unsatisfactory and manipulated for the purpose of this case.*”

H The plaintiffs, in my view, established the boundaries of the land they claimed in ‘Exhibit “E” and the defendants did not discredit their evidence on the said boundaries.

There are other findings of the learned trial judge which the court below

affirmed. These are the traditional evidence led by the plaintiffs. Nwakamalu's evidence in relation to Exhibit "D", acts of possession by the plaintiffs and the defence of laches and acquiescence.

The courts below found against the appellants on each of the above vital issues. On the evidence of Nwakamalu on Exhibit "D", the court below found that Exhibit "D" was a case between the people of Avonkwu (defendants') and the people of Umuoche in Bende, that Nwakamalu gave evidence in that case as a boundary man and that the subject matter in Exhibit "D" is different from the land now in dispute which is shown in Exhibit "E". Both courts held that the defence of laches and acquiescence did not avail the appellants.

There is evidence of acts of ownership on the part of the respondents which the courts below accepted. In addition to farming on the land, there was evidence of planting and reaping of economic trees on the land in dispute by the respondents coupled with the evidence of P.W. 6 who was leased part of the land in dispute by the plaintiffs in 1960. He has cocoa plantation on it and he has not been challenged by the appellants since he established the plantation.

There is also the evidence of P.W. 4, a native of Okwuru Ajata who testified that his people warned the defendants to desist from taking over the land of the plaintiffs.

The denial of the defendants of the very existence of the plaintiffs- (Eruete people) was found to be untrue by the courts below. The first defendant's witness (Gilbert Onuegbu Nwakamalu) who is the 2<sup>nd</sup> defendant in the present proceedings testified under cross examination that he was present in court in 1936 when Nwakamalu testified that he was from Eruete. D.W.1 further testified that Eruete and bende people conspired to take the land.

The learned trial judge found that there was sufficient evidence on record to support the issue of the existence of Eruete people and none of the witnesses who testified for the plaintiffs testified without mentioning Eruete as one of the seven villages of Amaojoro clan in Ibeku. It was also found that the appellants' failed to establish that there were no people known as Eruete.

All by credible evidence. The boundaries of the land in dispute were positively identified by the pleading and the evidence led by the respondents. They therefore satisfied the court that they are entitled to the declaration they claimed. I am in total agreement with the Court of Appeal that the appellants took advantage of the misfortunes of the respondents through deaths and grabbed their lands.

The appellants failed to address themselves to the issues raised in the pleadings of the respondents. Instead, they based their defence on the

non-existence of the respondents' village (Eruete), acts of possession based on Exhibit "D" and the equitable doctrines of laches and acquiescence.

It should also be remembered that the findings of the learned trial judge were affirmed by the Court of Appeal are concurrent findings. The appellants are therefore faced with an uphill task since this court will not normally disturb or upset concurrent findings. The appellants failed to show that these findings are perverse or not supported by the pleadings and the evidence.

Finally, the appellants contended that the evidence before the court showed clearly that the defendants were the persons entitled to the customary right of occupancy in or over the land in dispute and that the defendant were in possession before and after the plaintiffs instituted the present action. It must be remembered that the appellants were found to be trespassers. The court below agreed with the learned Senior Counsel who appeared for the respondents in that court that neither a trespasser nor his successor in title who knowingly and unlawfully took possession of another persons's land can avail himself of the defence of laches. By the same token, such possession by the trespasser like the appellants in the present proceedings, cannot elevate them as occupiers or holders under customary rights. They cannot benefit from the provision of section 36(2) of the Land Use Act which states:

"36(2) Any occupier or holder of such land, whether under customary rights or otherwise howsoever, shall if the land was on the commencement of this Decree being used for agricultural purposes continue to be entitled to possession of the land for use for agricultural purposes as if a customary right of occupancy had been granted to the occupier or holder thereof by the appropriate Local Government ....."

The appellants were not lawfully occupying the land in dispute knew this. They cannot therefore invoke the provisions of the Act.

I find no substance in the appeal. I also dismiss it with costs assessed at N1,000.00 in favour of the respondents.

#### MOHAMMED JSC

I have had the preview of the opinion of my learned brother, Ogundare, J.S.C., in the judgment just read and I agree with his reasoning and conclusions. My learned brother has fully considered and dealt with all the issues canvassed before us in this appeal and I have nothing more to add. The appeal is dismissed with costs as assessed in the lead judgment.