

**SUPREME COURT OF NIGERIA**  
12TH DECEMBER, 1995. SC. 103/1992  
**CORAM: - S. M. A. BELGORE, A. B. WALI, I. L. KUTIGI.**  
**E. O. OGWUEGBU, Y. O. ADIO, JJSC.**

SIMON OJIAKO & ANOR .....APPELLANTS/APPELLANTS  
(FOR THEMSELVES AND AS  
REPRESENTING THE OTHER MEMBERS OF  
UMUEZEMKPU FAMILY)  
AND  
OBIAWUCHI EWURU & 2 ORS  
(FOR THEMSELVES AND AS .....DEFENDANTS/RESPONDENTS  
REPRESENTING THE OTHER  
MEMBERS OF UMUEZEGBUWA FAMILY)

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**APPEALS** - Findings of fact - Though not to be easily disturbed - Will be questioned - Where not supported by the credible evidence of witnesses.

**APPEALS** - Grounds of appeal - Duty of court to confine itself to the issues - Raised in the grounds of appeal before it.

**LAND LAW** - Resjudicta - Sameness of issue and subject matter - Whether resjudicata is established - In respect of any portion of the land in dispute.

**LAND LAW** - Injunction - And declaration of title - Cannot be granted - Where the boundaries are not definite.

**LOCUS IN QUO** - Existence of a structure - As testified by plaintiffs - Where not found during visit to the locus - Plaintiffs' case ought to have been dismissed.

**FACTS**

The plaintiffs/appellants filed an action against the defendants/respondents claiming declaration of title, injunction and damages for trespass in respect of the land in dispute. Plaintiffs alleged that they have over several generations exercised maximum acts of ownership and possession over the land in dispute, and that the land is surrounded by an ancient Ekpe wall. Plaintiffs claimed they allowed the defendants' family to live as customary tenants upon payment of yearly, tribute in a part of the land. But the defendants went outside the area allotted to them thereby giving rise to

the present suit. Defendants denied the claim alleging that they are in exclusive possession.

The trial judge visited the locus in quo where he found no Ekpe wall in existence as claimed by the plaintiffs. The Court found in the plaintiffs' favour in respect of part of the land. Defendants' appeal to the Court of Appeal was allowed. Being dissatisfied, plaintiffs have now appealed to the Supreme Court and 3 issues for determination were identified by the apex court.

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

***Land law - Res judicata***

1. The area trespassed upon in 1941 was not even marked out in the Plaintiffs' Plan (Exhibit A). In addition, none of the witnesses called by the Plaintiffs, particularly P.W.s 5 & 9, attempted anywhere to describe the area of land subject matter of the 1941 arbitration between the parties. It is settled that to sustain a plea of res judicata, the party pleading it must satisfy amongst others not only that the parties (or their privies as the case may be) are the same in the present suit as in the previous suit, but also that the issue and subject matter are the same in the previous suit as in the present suit. In short, res judicata was not established in respect of any portion of the land now in dispute, and the learned trial judge did not so find. (p. 2204 B)

***Grounds of appeal***

2. So that even if the learned trial judge was wrong in his handling of the customary arbitration which he was not, the Court of Appeal can only correct such error if a ground of appeal complaining about that error was filed and argued before it. The Court of Appeal had not only the duty but was bound to have confined itself to the issues raised in the grounds of appeal before it and nothing else. Consequently, issue (1) must be resolved against the Plaintiffs. (p. 2204 F)

***Evidence which was not pleaded***

3. The Court of Appeal was therefore strictly right when it held that that evidence which was not pleaded went to no issue since the parties in fact did not make it an issue on the pleadings. I think it is quite elementary to say that material facts (and not the evidence by which to prove material facts) ought to be pleaded and that evidence led on any matter not pleaded goes to no issue and ought to be disregarded. The evidence therefore that Ekpe wall separated compounds was clearly not material to the proof that the

Ekpe wall in fact existed. One must first show that the wall existed before looking at what it did. (p. 2206 C)

***Locus in quo - Existence of a structure***

4. I think I agree with Mr. Egonu for the Defendants that there was nothing on record to show that an Ekpe Wall three or four feet high as testified to by P.Ws 1 & 8. was seen during the inspection of the locus. And the learned trial judge could not have supplied the missing evidence to arrive at his conclusion. It was not for the learned trial judge to explain how a wall changed into a ridge. It was certainly never the case of the Plaintiffs that the Ekpe wall had been reduced by action of weather to a longitudinal ridge. The judgment of the high court having exhibited that no Ekpe wall existed plaintiffs' case ought to have been dismissed. (p. 2207 F)

***Injunction - And declaration of title***

5. It is settled that before a declaration of title is given, the land to which it relates must be ascertained with certainty. In other words there must be definite and precise boundary of the land. I need hardly say that this requirement also equally applies with full force before an order of injunction could be granted. It was not enough for the learned trial judge to have said simply that the Defendants are "restrained perpetually from crossing the Western boundary of the area verged PINK .....", because they are free to cross from any other side except from the Western boundary only. The purpose of the order for injunction is thus completely defeated. The Court of Appeal therefore was in my view, right when it dismissed Plaintiffs' case. (p. 2208 C)

***Appeals - Findings of fact***

6. Although a Court of Appeal should not easily disturb the findings of fact of a trial judge who had the singular opportunity of listening to the witnesses and watching their demeanour, it is settled law, however, that such findings of fact or inferences drawn from them may be questioned in certain circumstances as in this case where the findings of fact are not reasonably justified or supported by the credible evidence given in the case by the witnesses. (p. 2208 F)

***NOTABLE POINTS OF INTEREST***

***OGWUEGBU JSC***

***1. Visit to locus - Judge not to act as a witness thereafter***

Having visited the locus in quo, the learned trial judge placed himself in the

position of a witness and arrived at conclusions based on his personal observations of which there is no evidence on record. There is no evidence from anybody that the Ekpe wall was reduced to a longitudinal ridge by the action of weather. On the contrary, there is evidence from P.W.1 and P.W.8 to the effect that the Ekpe wall was three feet and four feet high respectively.

B (p. 2212 G)

*2. When claim for injunction will fail*

It is the law that a claim for injunction is not necessarily bound to fail after a claim for a declaration of title fails. However, it must fail in this case where the learned trial judge even refused to grant the declaration sought by the plaintiffs over the area verged pink in Exhibit "A" because of the uncertainty of its eastern boundary. The claim for damages for trespass should also fail because the plaintiffs failed to establish that they were in actual possession of the land verged pink in Exhibit "A". (p. 2213 G)

D

**REPRESENTATION**

Chief G. O. K. Ajayi, SAN, with A. A. Oriola for Plaintiffs/Appellants  
G.R.I. Egonu, SAN with J.U. Obiora for Defendants/Respondents

E **CASES REFERRED TO**

Okagbu v. Romaine (1982) 13 NSCC 130

African Continental Seaway Ltd. v. Nigerian Dredging, Road & General Works Ltd (1977) 5 SC. 235

George v. Dominion Flour Mills Ltd (1963) 1 All NLR 71

F Enjegokwe v. Okadigbo (1973) 4 SC. 113

Kwadzo v. Adjei 10 WACA 274

Arade v. Asanlu (1980) 5-7 SC 78

Bello v. Eweka (1981) 1 SC. 101

Akintola v. Oluwo (1962) All NLR 244

G Balogun v. Agboola (1974) All NLR (pt. 2) 66

Ejidike v. Obiora (1951) 13 W.A.C.A. 270 at 274

Chukwuogor v. Obuora (1987) 3 N.W.L.R. (Pt. 61) 454

Oluwi v. Eniola (1967) N.M.L.R. 339

Abeki v. Amboro (1961) 1 All N.L.R. (Pt.2) 368

H Elike v. Nwankwo (1984) 1 S.C. 301 at 325

Okafor v. Idigo III (1984) 1 S.C.N.L.R.

**LEAD JUDGMENT BY KUTIGI JSC**

In paragraph 29 of the Further Amended Statement of Claim, the

Plaintiffs claimed against the defendants jointly and severally as follows:

*“29(a) A declaration of title to all that piece and parcel of land verged PINK in Plan No. MEC/129A/72 filed with the original Statement of Claim, known as and called “Abo” land or “Ala Abo”, situate at Oshina, within jurisdiction.*

*(b) an injunction restraining the defendants, their servants or agents, B from further acts of trespass on the said land verged PINK, which is outside the portion allotted to them as customary tenants.*

*(c) General Damages of N200.00 for trespass.”*

After the filing and exchange of pleadings the case proceeded to trial at the trial the plaintiffs called a total of ten witnesses in support of C their case while nine witnesses testified for the defendants.

Briefly stated the relevant facts are that the Plaintiffs claim ownership of a large area of land shown and verged PINK in their plan Exhibit A. The same land in dispute is also verged PINK in the defendant's plan, Exhibit K. The plaintiffs claim that the land in dispute is surrounded by an D ancient EKPE WALL and EKPE NKORO (trench) and that they have over several generations exercised maximum acts of ownership and possession over the same. They claimed that it was during the life time of their ancestor Ezemkpu that some members of the Defendants' family were allowed to live as customary tenants in the area verged yellow in Exhibit A on E payment of yearly tribute. When a member of the Defendants' family went outside the area allotted to them and built a house, the plaintiffs' family had the same demolished. In 1941 when the defendants' people again trespassed on the plaintiffs land, a native arbitration held by elders declared plaintiffs as owners of the land. In 1969 the Defendants again broke F and entered on the Plaintiffs' land verged PINK in Exhibit A, thereby giving rise to the present suit.

The Defendants on their part claimed that the land verged GREEN in their plan Exhibit K including the area in dispute verged PINK, descended unto them by inheritance from one OSINA in accordance with native law G and custom, and that they have from generation 'to generation been exercising maximum acts of ownership and possession over the said land. That they were and still are in exclusive possession of the area verged YELLOW in Exhibit A adjoining the area in dispute verged PINK in the same exhibit. They said no member of the Plaintiffs family had ever lived H on any part of the land in dispute.

At the conclusion of evidence on both sides, the learned trial Judge decided to visit the locus in quo, apparently to see for himself the existence or non-existence of the EKPE WALL which the Plaintiffs had claimed sur-

rounded the land in dispute and which formed the boundary between the Plaintiff land and defendants land and which would be crucial to the resolution of the dispute.

After the visit to the locus in quo and taking addresses, of counsel on both sides, the learned trial Judge in a reserved judgment declined to award title to the Plaintiffs over the land claimed and verged PINK in their Plan (Exhibit A) for uncertainty of its Eastern boundary. He however, gave judgment in their favour for injunction and restrained the Defendants perpetually *“from crossing the Western boundary of the area verged PINK to enter upon the PINK area which is outside the portion allotted them as customary tenants”*.

The Plaintiffs were also awarded N150.00 as damages for trespass.

Being dissatisfied with the judgment of the High Court, the Defendants appealed to the Court of Appeal in a reserved judgment delivered on 12th July 1991 carefully considered all the issues submitted to it for resolution and allowed the appeal. The judgment of the High Court was set aside and an order dismissing Plaintiffs' claim was entered.

Being aggrieved by the decision of the Court of Appeal the Plaintiffs have now appealed to this Court. Both sides filed and exchanged briefs of argument.

Chief Ajayi learned Senior Counsel for the Plaintiffs did not anywhere in his brief list or assemble together the issues for determination in the appeal. They were left at large. But reading through the brief and being conscious of the fact that this can only be an appeal against the judgment of the Court of Appeal and certainly not the judgment of the High Court. I easily identified the following issues as arising for determination-

1. Is a Court of Appeal entitled to allow an appeal against a judgment where the decision of the court below is based on several distinct grounds but the appellant has not appealed against one of those grounds?

2. Was the Court of Appeal entitled to reject as inadmissible the evidence that the “Ekpe Wall” passed between and separated the houses of some of the Defendants on the ground that the same was not pleaded?

3. Was the Court of Appeal justified in the circumstances of this case, in interfering with the findings of fact made by the learned trial Judge?

Mr. Egonu, learned Senior Counsel for the Defendants I feel, rightly in my view summarised the issues when he submitted in his brief the following long issues for determination-

*“1. Was the court of Appeal right having regard to the pleadings and the evidence in the case and the course of the trial, in setting aside the judgment of the trial court and in dismissing the appellants' case”!*

This question I believe, will be answered only after considering the Plaintiffs' complaint above.

On the issue (1) above, it was the contention of Chief Ajayi that since the learned trial Judge based his decision on a number of findings including amongst others:

"That a native arbitration conducted by Chief Igwilo and his Elders as a result of a dispute between the Plaintiffs and the Defendants over a portion of the land in dispute in 1941. declared in favour of the Plaintiffs' family and that none of the parties rejected the decision and that the same constituted RES JUDICTA as between the parties"; and that since the Defendants did not appeal against the above finding, the Court of Appeal could not have allowed the Defendants' appeal against the said judgment and dismissed Plaintiffs' claims. B C

Mr. Egonu on the other hand submitted that the Plaintiffs never pleaded in their Further Amended Statement of Claim that the land in dispute in this case was the subject of arbitration by Chief Igwilo and his elders in 1941. He said if the learned trial judge had based his judgment on the decision of any arbitration in the case, he could not have declined or refused to award title to the Plaintiffs over the area claimed and verged PINK in Exhibit A. He stressed that the Plaintiffs themselves did not appeal to the Court of Appeal against the decision of the High Court. He referred to the evidence of P.W.5 and P.W.9 and stated that the conflict in their evidence on the arbitration was never resolved by the trial court. D E

The Plaintiffs in their Further Amended Statement of Claim pleaded in paragraph 18 as follows:-

*"18. Then in 1941 the Defendants' people unlawfully entered a portion of Ala Abo not included in the area shown to their fathers. The Plaintiffs' family immediately took the matter before Chief Igwilo of Osina and the elders. The Chief and the elders heard the parties and decided that the Plaintiffs' family owned the whole area of Ala Abo, and that the Defendants' people should restrict themselves to the area allotted them. The Plaintiffs will rely on this arbitration decision as res judicata."* F G

The learned trial Judge in his judgment on page 181 of the record found thus:-

*"I accept the evidence of the Plaintiffs that the arbitration over land in 1941 which Chief Igwilo and his Elders sat over was the one in which the Plaintiffs were complainants against the Defendants when the defendants crossed the boundary limiting the grant made to Onyeagu and Elere and entered upon the land in dispute to brush where the Plaintiffs were brushing. I am satisfied that the decision was that the defendants should withdraw and confine themselves to the area granted to their ances-* H

tors. I accept the evidence of the Plaintiffs that they did withdraw.”

It is by now very clear that by their pleadings and finding of the trial court, the arbitration of Chief Igwilo and his elders was only in respect of a portion, an unidentified portion for that matter, of the land now in dispute in this case. I repeat and stress the word “unidentified”, because  
 B the area trespassed upon in 1941 was not even marked out in the Plaintiffs’ Plan (Exhibit A). In addition, none of the witnesses called by the Plaintiffs, particularly P.W.s 5 & 9, attempted anywhere to describe the area of land subject matter of the 1941 arbitration between the parties. It is settled that to sustain a plea of res judicata, the party pleading it must satisfy amongst  
 C others not only that the parties (or their privies as the case may be) are the same in the present suit as in the previous suit, but also that the issue and subject matter are the same in the previous suit as in the present suit.

In short, resjudicata was not established in respect of any portion of the land now in dispute, and the learned trial Judge did not so find. If he  
 D did he would have at least given the Plaintiffs a declaration to that smaller portion of the land in dispute only. But as rightly submitted by Mr. Egonu, if anybody was to have appealed on the arbitration, that party ought to have been the Plaintiffs herein. They did not. This Court has said it many times that:

E “The Court of Appeal cannot like Christopher Columbus gratuitously embark on a voyage of discovery to discover and deal with all errors in the judgment of the court of first instance. It will have no jurisdiction to do that *Obajimi v. Attorney-General & Ors* (1968) NMLR 96. Its appellate jurisdiction is confined only to the issues raised in the grounds of appeal  
 F filed.” (See *Management Enterprises Ltd & On v. Jonathan Otusanya* (1987) 2 NWLR (Pt. 55) 179 at 193 per Oputa JSC.

So that even if the learned trial Judge was wrong in his handling of the customary arbitration which he was not, the Court of Appeal can only correct such error if a ground of appeal complaining about that error was  
 G filed and argued before it. The Court of Appeal had not only the duty but was bound to have confined itself to the issues raised in the grounds of appeal before it and nothing else. Consequently, issue (1) must be resolved against the Plaintiffs.

On issue (2), Plaintiffs’ counsel said the Court of Appeal was wrong  
 H to have rejected as inadmissible the evidence that “*Ekpe Wall*” passed between and separated the houses of some of the Defendants on the ground that same was not pleaded, It was contended that the evidence was not a material fact within the meaning of the decision in *Okagbue v Romaine*



(1982) 13 NSCC 130. Counsel referred to the judgment of the Court of Appeal on page 394 of the record lines 24-29 and said that in so holding the Court of Appeal was reversing the finding of fact by the trial court who saw and heard the witnesses, and that it could not have done so. The following cases were cited- Omoregbe v. Edo (1971) 1 All NLR 282 at 282 Lawal v. Dawodu (1972) 1 All NLR (Pt.2) 270 at 287; Fabunmi v. Agbe B (1985) NWLR (pt.2) 299; Odiase v. Agho (1972) 1 All NLR (Pt. 1) 170 at 175 - 176.

Now, paragraph 4 of the Plaintiff's Further Amended Statement of Claim reads:-

*"4. The Plaintiffs are the owners in possession under native law C and custom of a large area of land called "Ala Abo" or Abo land, situate in Ofeke village, Osina, within jurisdiction. It is shown verged BLUE in Plaintiffs' plan No. MEC/129A/72 filed with the original Statement of Claim. The Plaintiffs have been in possession of this Ala Abo from time immemorial through generations of their ancestors. An ancient "Ekpe" Wall and D "Ekpe trench (Nkoro) surround the entire land of Ala Abo, built by the Plaintiffs' ancestors."*

The Defendants on their part pleaded in paragraphs 3 and 13 of their Amended Statement of Defence thus-

*"3. The Defendants emphatically deny paragraphs 4 and 5 of the E Plaintiffs' Amended Statement of Claim and will put the Plaintiffs to the strictest proof of the allegations contained therein.*

*"13. The Defendants further assert that no member of the Defendants' family paid or pay tribute to the Plaintiffs or their ancestors or lived as a tenant to anyone in Osina. The Defendants aver that NO EKPE WALLS F on the boundary or any part of the portion of the land verged yellow on the Plaintiffs' plan or on the northern and southern parts of the land in dispute as in the Plaintiffs' Plan. The Defendants plead for an inspection of these alleged Ekpe Walls to expose the lies of the Plaintiffs".*

As expected there were contradictory and conflicting evidence on the exist- G ence or otherwise of the Ekpe Wall at the trial. The learned trial Judge therefore rightly in my view, decided to resolve the conflict by a visit to the locus in quo.

And on page 171 of the record he stated as follows-

*"I went in the company of the parties, their witnesses and their H counsel. P. W. 2 showed the Court, to the view of all, the Ekpe Wall which separated Ala Abo from the land of Uhaulla people, the defendants. We followed this Ekpe Wall and saw that it separated the compound of D.W.3*

*from that of Eze Ewuru, separates that of Onyebeke Okafor from that of Onyelonu Ewuru, and separates that of D.W.4 from that of Ekeze Eewuru."*

The Court of Appeal on page 390 of the record actually remarked that the Plaintiffs did not plead that the so-called Ekpe Wall separated compounds of individuals and that evidence went to no issue. I have read throughout the pleadings and unable to see anywhere where it was pleaded that "Ekpe" wall or any wall for that matter, separated any compounds or houses. But to me the issue is not really whether or not the Ekpe wall separated compounds, it is more than that. It is whether in fact the Ekpe wall existed at all as will soon be seen under the next issue to be considered. The Court of Appeal was therefore strictly right when it held that the evidence which was not pleaded went to no issue since the parties in fact did not make it an issue on the pleadings. I think it is quite elementary to say that material facts (and not the evidence by which to prove material facts) ought to be pleaded and that evidence led on any matter not pleaded goes to no issue and ought to be disregarded (see *African Continental Seaway Ltd v. Nigerian Dredging, Road & General Works Ltd* (1977) 5 SC 235, *George & Ors v. Dominion Flour Mills Ltd* (1963) 1 All NLR 71, *Emegokwue v. Okadigbo* (1973) 4 SC 113, *Okagbue & Ors v. Romaine* (supra). The Evidence therefore that Ekpe wall separated compounds was clearly not material to the proof that the Ekpe wall in fact existed. One must first show that the wall existed before looking at what it did. Enough of that!

Issue (3) concerned the existence or non-existence of "Ekpe" wall which according to paragraph 4 of the Further Amended Statement of Claim above, the Plaintiffs said formed the boundary between their land and the Defendants' land. The parties on their pleadings joined issue on this fact and because of the contradictory evidence thereon, the court had to visit the locus in quo.

In his judgment at page 171 the learned trial Judge observed as follows:

"PW.2 showed the court, to the view of all the EKPE WALL which separates ALA ABO from land of Uhualla people. the defendants. We followed this EKPE WALL and saw that it separates the compound of D.W.3 from that of Eze Ewuru separates that of Onyebeke Okafor from that of Onyelonu Ewuru, and separates that of D.W.4 from that of Ekezu Ewuwu. The Ekpe Wall by action of weather is now more or less a longitudinal ridge clearly indicating boundary still maintain its name in knowledge of the plaintiffs and anybody who sees it. As the Plaintiffs successfully established this physical fact the conclusion I can draw is that Onyeagu and Elere crossed this EKPE WALL into ALA ABO and obtained a grant of the portion verged YELLOW in Exhibit A as a grant from Ezenkpu. If there

*were not this EKPE WALL I should have resolved the conflict as to this grant in favour of the defendants. In their evidence and in Exhibit K they said there is not this EKPE WALL. The Court by inspecting the land has found there is the EKPE WALL."*

The Court of Appeal found and I agree with it, that the passage above shows clearly that the trial court resolved the conflicting evidence as to the existence of the Ekpe Wall in Exhibit A. by reason of his visit to the locus in quo. It then goes on to state on page 391 of the judgment thus-

*"With respect to the learned trial Judge a longitudinal ridge can hardly be an Ekpe Wall. That it was affected by action of weather was neither pleaded nor given in evidence. It is important to bear in mind that he made the above findings after the visit to the locus."*

The Court of Appeal then referred to the addresses of counsel in the High Court on page 157, lines 27-32 and on page 160 lines 25-27, section 76 of the Evidence Act and to a number of decided authorities and concluded as follows on page 394 of the record- .

*"In view of all that I have been saying and in addition to the cases referred to by me, it cannot be said that the learned trial Judge was right in holding that there was an Ekpe Wall forming the boundary between the respondents and the appellants' land as pleaded by the former."*

It is the above finding that was the pivot of attack by Chief Ajayi. He relied on the evidence of P.W. 1 (the Surveyor) 2, 5, 6, 8, & 10. He said the reason given by the Court of Appeal to the effect that-

*"a longitudinal ridge can hardly be an Ekpe Wall"*  
did not fall within the category of any of the possible grounds which entitled the Court of Appeal to interfere with a finding of fact made by the trial court. He relied on the case of Ejidike v. Obiora (1951) 13WACA 270 at 274.

I think I agree with Mr. Egonu for the Defendants that there was nothing on record to show that an Ekpe Wall three or four feet high as testified to by P.W.1 & 8 was seen during the inspection of the locus. The Plaintiffs never amended their pleadings to reflect the fact that the three to four feet high "Ekpe" wall, had changed due to the weather to a mere longitudinal ridge. The Plaintiffs also never led evidence to that effect even after the inspection. And the learned trial Judge could not have supplied the missing evidence to arrive at his conclusion. It was not for the learned trial judge to explain how a wall changed into a ridge. It was certainly never the case of Plaintiffs that the Ekpe Wall had been reduced by action of weather to a longitudinal ridge. The judgment of the high court having exhibited that no Ekpe wall existed. Plaintiffs' case ought to have been

dismissed. Addresses of counsel to the court after the visit to the locus in quo was very glaring in this respect also. On page 160 Mr. Okafor learned counsel for the Plaintiffs said inter alia

*"The Court should take it that the traces of the Ekpe Wall were shown by the Plaintiffs during the inspection"* while Chief Umeadi SAN for the Defendants said on page 157 thus

*"We saw no Ekpe and Nkoro in the place.*

*We saw no Ekpe or Nkoro separating other lands of Uku Ezegbuwa....."*

It was not surprising therefore when the learned trial Judge on page 187 of the judgment said-

*"I shall decline to award title over the area verged PINK for uncertainty of its Eastern boundary"*

It is settled that before a declaration of title is given, the land to which it relates must be ascertained with certainty. In other words there must be definite and precise boundary of the land. (See for example Kwadzo v. Adjei 10 WACA 274, Araba v. Asanlu 91980) 8-7 SC. 78; Bello v. Eweka (1981) 1 SC.101). I need hardly say that this requirement also equally applies with full force before an order of injunction could be granted. It was not enough for the learned trial Judge to have said simply that the Defendants are *"restrained perpetually from crossing the Western boundary of the area verged PINK....."*, because they are free to cross from any other side except from the Western boundary only. The purpose of the order for injunction is thus completely defeated. The Court of Appeal therefore was in my view right when it dismissed plaintiffs' case.

Although a Court of Appeal should not easily disturb the findings of fact of a trial Judge who had the singular opportunity of listening to the witnesses and watching their demeanour, it is settled law. However, that such findings of fact or inferences drawn from them may be questioned in certain circumstances as in this case where the findings of fact are not reasonably justified or supported by the credible evidence given in the case by the witness (see Akintola v. Fatoyinbo & Ors (1962) All NLR 244, Balogun & Ors v. Agboola (1974) 1 All NLR (Pt.2) 66).

Issue (3) is therefore resolved against the Plaintiffs.

All the issues having been resolved against the plaintiffs, the appeal fails. It is accordingly dismissed with one thousand (N 1,000.00 Naira costs to the Defendants.

**BELGORE JSC**

I have read in advance the judgment of my learned brother. Kutigi. J.S.C., in which all the issues have thoroughly been dealt with. I agree with his reasons and conclusions therein and I have nothing more to add in dismissing this appeal. I make the same order as to costs.

B

**WALI JSC**

I have had a preview of the lead judgment of my learned brother Kutigi and with which I agree.

For the same reason ably stated by him in the lead judgment. I C also hereby dismiss this appeal and affirm the judgment of the court below with N 1,000.00 costs to the respondents.

**OGWUEGBU JSC**

D

The Plaintiffs who are appellants in this court instituted an action against the defendants/respondents herein claiming against them jointly and severally the following reliefs:

*“(a) A declaration of title to all that piece or parcel of land verged PINK in plan No. MEC/129A/72 filed with the original statement of claim, E known as and called “Aba” land or “Ala Abo” situate at Osina within jurisdiction.*

*(b) An injunction restraining the defendants, their servants or agents, from further acts of trespass on the land verged PINK which is outside the portion allotted to them as customary tenants, F (c) General damages of N200.00 for trespass.”*

The Plaintiffs filed a further amended statement of claim and the defendants filed an amended statement of defence. The Plaintiffs sued for themselves and as representing other members of Umuezemkpu family. The defendants were also sued for themselves and as representing G Umuezebuwa family, both parties have a common ancestor called Osina.

The following paragraphs of the pleadings are relevant to the issues in contention between the parties. namely. paragraphs 3, 4, 6, 7 and 11 of the further amended statement of claim and paragraphs 3, 4, 5, 7, 13 and 25 of the amended statement of defence.

H

Further amended statement of claim:

*“4. The Plaintiffs are the owners in possession under native law and custom of a large area of land called “Ala Abo” or Abo land, situate in Ofeke village Osina, within jurisdiction. It is shown verged BLUE in Plain-*

tiffs' Plan No, MEC/129A/72 filed with the original Statement of Claim. The Plaintiffs have been in possession of this Ala Abo from time immemorial through generations of their ancestors. An ancient "ekpe" wall and "ekpe" trench (nkoro) surrounds the entire land of Ala Abo, built by plaintiffs' ancestors.

B 6. The original owner of this Ala Abo was Ezejesu of Okwu kindred, who inherited same from his own ancestors, Ezejesu transmitted the land by way of inheritance to his descendants from generation to generation until it reached the present generation, the plaintiffs.

C 7. Ezejesu begat Ezeukwu and Ezeukwu begat Okoma, Okoma begat Ezemkpu from whom the present generation took their family name.

D 11. In the lifetime of Ezemkpu, while he was in possession of the land - Ala Abo - he saw the death of many of his relations. He became the only surviving descendant of Ezejesu. In his loneliness he agreed to show a portion of Ala Abo to two members of the Defendants' family, called Onyeagu and Elere, He allowed them to live with him. These two men left their home at Uhualla and came over to live with Ezemkpu at Ala Abo. They came over the "Ekpe" Wall which formed the ancient boundary between the Plaintiff's land and Uhualla village. The area of Ala Abo shown to these two men to live as customary tenants of Ezemkpu on payment of E yearly tribute of four yams, four kola nuts a pot of wine, and a cock is shown on the plaintiffs' plan with a YELLOW verge." (Italics for emphasis only).

Amended Statement of Defence:

F "3. The Defendants emphatically deny paragraphs 4 and 5 of the Plaintiffs Amended Statement of Claim and will put the plaintiffs to the strictest proof of all the allegations therein contained.

G 4. The Defendants further aver that Osina was their great ancestor and he had four male issues namely; Eluama, Uhuala, Ofoke and Durunaegbu, and before Osina died he divided his land amongst his four children, and the land in dispute is a very small portion of the land inherited by Uhualla, the Defendants ancestor from Osina.

H 5. Uhuala the ancestor of the Defendants had two male issues namely; Ajobi and Ezegbuwa who shared the land and property of Uhuala on his death. The land in dispute forms a very small portion of Ezegbuwa's share, which he inherited from his father; Uhuala according to Osina custom.

7. In further answer to paragraph 4 and 5 of the Plaintiffs, amended statement of claim the defendants state that the land in dispute which situates at Uhuala in Osina includes portions of Ihumachi land, Ihuofo land and Ihu Anunobi land as shown in the Defendants' plan No. ECIS

337/80 already filed by the Defendants in this case.....

13. The Defendants further assert that no member of the Defendant's family paid or pay tribute to the Plaintiffs or their ancestor or lived as a tenant to anyone in Osina.

*FURTHERMORE the defendants aver that there are NO EKPE WALLS on the boundary or any part of the portion of the land verged yellow on the Plaintiffs' plan or on the northern and southern parts of the land in dispute as in the Plaintiffs' plan. The Defendants plead for an inspection of these alleged Ekpe walls to expose the lies of the Plaintiffs.*

25. The Defendants further add and assert that no Ekpe walls separate the other land belonging to the defendants' family and where the defendants live as verged yellow in the Plaintiffs' plan. It is contrary to Osina custom for families to separate their lands with Ekpe."

(Italics is for emphasis only).

From the above pleadings it is clear that the parties joined issues on whether Ezejesu was the original owner of the land in dispute, the alleged grant to Onyeagu and Elere, the payment of tribute and the customary tenancy. Issue was also joined on the existence of EKPE WALLS on the boundary or any part of the portion verged yellow in Exhibit "A" or on the northern and southern parts of the land in dispute.

Evidence was led by the parties during the trial. The court visited the locus in quo and delivered its judgment after addresses by counsel. Claims (b) and (c) succeeded. Claim (a) was dismissed. On appeal to the Court of Appeal, Port Harcourt Division, the appeal of the defendants was allowed and the Plaintiffs' claims were dismissed in their entirety hence they appealed to this court.

A dominant issue in this case is the existence or non existence of Ekpe wall and Ekpe trench or Nkoro on some of the boundaries of the land verged Blue in Exhibit "A" and particularly, on the western boundary of the portion verged yellow in the said Exhibit "A". The defendants maintained in their pleadings and evidence that no Ekpe wall separated the area verged yellow in Exhibit "A". The Defendants maintained in their pleadings and evidence that no Ekpe wall separated the area verged yellow in Exhibit "A" from the other lands. They went further to invite the trial court to inspect the land in order to prove that the plaintiffs were lying when they alleged that there were Ekpe walls.

The Learned trial Judge visited the locus in quo. He did not adjourn the proceedings to the locus in quo and continue at that place. He nevertheless took evidence from P.W.2 and D.W.1 in the court after the visit. In his judgment he held as follows:

*"P. W. 2 showed the court, to the view of all the EKPE WALL which separates ALA ABO from the land of Uhualla people, the defen-*

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*dants. We followed the Ekpe wall and found that it separates the compound of D.W.3 from that of Eze Ewuru, separates that of Onyebeke Okafor from that of Onyeloru Ewuru, and separates that of D.W.4 from that of Ezeku Ewuru ..... The EKPE WALL by action of weather is now more or less a longitudinal ridge clearly indicating boundary still maintains its name in the knowledge of the plaintiffs and anybody who sees it. As the Plaintiffs successfully established this physical fact the conclusion I can draw is that Onyeagu and Eleri crossed this EKPE WALL in ALA ABO and obtained a grant of the portion verged YELLOW in Exhibit A as a grant from Ezenkpu. If there were not this Ekpe Wall I should have resolved the conflict as to this grant in favour of Defendants*

C (Italics is for emphasis only).

On the findings of the learned trial Judge on Ekpe walls, the court below said:

*“In the instant case the proceedings at the locus were not recorded.*

D *However, the absence of a record of inspection is not necessarily fatal to the case and that statements by the Judge in the solemn judgment should be taken as a correct account of what occurred . ..... Be that as it may, the problem posed here is whether the statements of the learned trial Judge in the passage already reproduced were made in solemn judgment. I do not think so in the circumstances of this case. In the first*

E *place there was no evidence as to any action of weather on what he considered to be Ekpe Wall. Certainly a longitudinal ridge can hardly be an Ekpe wall. In my view they are statements in the nature of evidence which he ought not to have supplied in arriving at his conclusion. In view of all that I have been saying, and in addition to the cases referred to by me, it cannot*

F *be said that the learned trial Judge was right in holding that there was an Ekpe wall forming boundary between the respondents’ and the appellants’ land as pleaded by the former.”*

I entirely agree with the above conclusion of the court below. In this case, there are conflicting pleadings and evidence was adduced by the parties on a very vital issue the existence or non-existence of Ekpe wall. The visit to the locus in quo was a necessity, more so, when the defendants specifically prayed the court to do so in their pleading.

Having visited the locus in quo, the learned trial Judge placed himself in the position of a witness and arrived at conclusions based on his personal observations of which there is no evidence on record: See Ejidike & Ors. v. Obiora (1951) 13 WACA 270 at 274 and Chukwuogor v. Obiora (1987)3 NWLR (Pt.61) 454. There is no evidence from any body that the Ekpe wall was reduced to a longitudinal ridge by the action of weather. On the contrary, there is evidence from P.W.1 and P.W.8 to the effect that the



Ekpe wall was three feet and four feet high respectively. In answer to cross-examination, P.W.8 stated:

*"It is custom in Osina that Ekpe wall must separate the land of one Village from that of the other. The Ekpe wall which separates the land of village is called Ekpe Nkoro; but the one which separates family land from family land is called Ekpe wall not NKORO (trench)."*

B

Going by the above evidence of P.W.8 Ekpe Nkoro should separate the other lands of the defendants on the western side of the area verged yellow in Exhibit "A" which was alleged to have been granted to them by the Plaintiffs since they are from two different villages. P.W.1 in addition, testified that there is no NKORO (trench) throughout the area verged blue C in Exhibit "A". This piece of evidence contradicted that of P.W.8.

As rightly urged by Mr. Egonu. S. A. N. for the respondents such an "Ekpe Nkoro" should have been four feet deep and not four feet high.

If the Ekpe wall was reduced to a ridge by the action of weather one would have expected the Plaintiffs to plead the same and lead evidence on D it. The existence or non-existence of Ekpe wall is very crucial to the case. The learned trial Judge proceeded to resolve the conflict by substituting the result of his own observation of the Ekpe wall which had been reduced to a longitudinal ridge in the absence of any sworn testimony to the effect. He thereby reached a wrong conclusion.

E

From the conclusion he reached on the Ekpe wall, he erroneously proceeded to hold that the Defendants crossed the Ekpe wall into Ala Abo verged yellow in Exhibit "A" which the Plaintiffs granted them when the said Plaintiffs failed to prove the alleged grant.

The court below was right in rejecting the findings of the learned F trial Judge on the Ekpe wall as well as on the grant of the portion verged yellow in Exhibit "A" by Ezejesu of the Plaintiffs' family to Onyeagu and Elere of the Defendants' family. The claims of the appellants were rightly dismissed by the court below as there was no basis for giving them judgment for damages for trespass and injunction since the payment of tribute, G possession and the grant were not proved.

It is the law that a claim for injunction is not necessarily bound to fail after a claim for a declaration of title fails. However, it must fail in this case where the learned trial judge even refused to grant the declaration sought by the Plaintiffs over the area verged pink in Exhibit "A" because of H the uncertainty of its eastern boundary. The claim for damages for trespass should also fail because the Plaintiffs failed to establish that they were in actual possession of the land verged pink in Exhibit "A". See Oluwi v. Eniola (1967) NMLR 339.

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In the light of the above conclusions, the finding of the learned trial Judge on the alleged arbitration by Chief Igwilo does not call for my consideration. The finding purported to be in respect of the same parcel of land verged yellow in Exhibit "A" and which its eastern boundary was found to be uncertain by the learned trial Judge.

B Interference by an appellate court on findings of fact by a trial court is by law confined within very narrow and limited dimension. It will do so if there is compelling evidence indicating erroneous appraisal of facts and erroneous conclusions.

See Abeki v. Amboro (1961) 1 All NLR (Pt.2) 365, Elike v. Nwankwo C (1984) 1 SC. 301 at 325 and Okafor & Ors. v. Idigo III & Ors. (1984) 1 SCNLR.

For these and fuller reasons contained in the lead judgment of my learned brother Kutigi. J.S.C. which I read before now, I too dismiss the appeal with N 1,000.00 costs to the defendant.

D \_\_\_\_\_

**ADIO JSC**

I have had a preview of the judgment just read by my learned brother. Kutigi. J.S.C. and I agree that this appeal fails. I too dismiss it and E abide by the order for costs.

F

G

H