

SUPREME COURT OF NIGERIA
 12TH DECEMBER 1995, SC. 214/1989
CORAM:- S.M.A. BELGORE, A.B. WALI, I.L. KUTIGI,
E.O. OGWUEGBU, Y.O. ADIO, JJSC.

JASON UMESIE & 5 OTHERS
 (FOR THEMSELVES AND ON BEHALF OF
 UMUOME COMMUNITY INYI) APPELLANTS

AND

HYDEEKPENYONGONUAGULUCHI
 & 7 OTHERS
 (FOR THEMSELVES AND ON BEHALF RESPONDENTS
 OF LATE EKPENYONG
 ONUAGULUCHI FAMILY OF IHEACHI)

APPEALS - Findings of trial court - Where not supported by totality of the evidence - Appellate court will interfere.

APPEALS - Error of Lower Court - Must be substantial - In order to warrant reversal of its decision.

EVIDENCE - Discredit - Where plaintiff's evidence was completely discredited - By the defendant's evidence - The claim will be dismissed

EVIDENCE - Burden of proof - Possession - Burden of proving that person in possession is not owner - Rests on the person who affirms the contrary.

LAND LAW - Boundaries - To which the declaration of title sought can be tied - Whether unknown or vague.

LAND LAW - Trespass - Exclusive possession - Must be proved plaintiff - So that defendants that have been in possession for a long time - Cannot be liable in trespass.

LAND LAW - Injunction - And damages for trespass - Should not be granted - Where the boundaries of the land were uncertain.

LAND LAW - Title - Declaration of title - Cannot be based on admission in the

pleadings - Plaintiff is bound to prove his case

LAND LAW - Title - Burden of proof - Is on the plaintiff - Who must not rely on the weakness of the defence.

LAND LAW - Possession - Sufficient acts of possession established by the defendants - Judgment of the trial court to the contrary is perverse.

PLEADINGS - Traverse - Joinder of issues - In respect of appellants' plea of traditional history - Whether there was sufficient traverse.

PLEADINGS - General traverse - Contained in a statement of defence - Casts burden of proving denied allegation on the plaintiff.

FACTS

The plaintiffs/appellants before the Enugu High Court claimed against defendants/respondents declaration of title, N500, 000 damages for trespass and perpetual injunction in respect of the land in dispute. Appellants alleged that a portion of the land was given by them to the respondents' father. That the respondents have trespassed upon an area of land not being part of the one granted to their father. They relied on traditional history. The respondents denied appellants' claim and presented strong evidence of acts of ownership and possession over a long period of time.

The trial court found in favour of the plaintiffs, holding that the respondents did not join issue in respect of appellants' plea of traditional history. Respondents' appeal to the Court of Appeal was allowed as that court reversed the trial court's judgment, holding that its findings of fact were perverse. Being dissatisfied, Appellants have now appealed to the Supreme Court raising 7 issues.

ISSUES FOR DETERMINATION

"(i) Whether the Court of Appeal was right in holding that there was joinder of issues the pleadings regarding the plaintiff's traditional history?

(ii) Whether on that pleading and the evidence adduced in support, the Court of Appeal was right in refusing to confirm the trial Court judgment declaration sought?

(iii) Whether the Court of Appeal was right in holding that the grants made to the defendants were uncertain and consequently the area to which a declaration could be tied, vague? OR whether the boundaries of the land over which the trial court had granted the declaration sought, were too vague

and indefinite to warrant or sustain, the award of the declaration made?

(iv) *Whether the Court of Appeal was justified in disturbing the well established findings of fact reached by the trial Court on the totality of the evidence?*

(v) *Whether the defences of Laches and Acquiescence were available to the defence on their pleading and sufficient evidence led to sustain the plea in their favour?*

(vi) *Whether the Court of Appeal was right in dismissing the plaintiff's claims for trespass and injunction?*

(vii) *Having accepted the issues for determination as formulated by the defendants/appellants, on the appeal, whether the Court of Appeal was right in failing to state their decisions on some of those issues, so found to be joined?"*

HELD (Unanimously dismissing the appeal per Lead Judgment of **ADIO JSC**)

Traverse - Joinder of issues - General Traverse

1. Paragraph 6 of the Amended Statement of Defence and the whole tenor of other averments contained allegations which, if proved, clearly contradicted and showed that the evidence of traditional history led by appellants could not be true or be probable. There were allegations in the Amended Statement of Defence that the members of respondents' family had several houses scattered all over the land in dispute and that for a long time they have been living there whereas members of the appellants' family were not living on the land in dispute. The foregoing averments were significant in that they crucially affected the question whether the evidence of traditional history led by the appellants was true or false. A general traverse contained in a Statement of Defence has been recognized as convenient and permissible. It is a traverse and its effect is that it casts on a plaintiff the burden of proving the allegation denied. (p. 2176 A)

Title - Declaration of title

2. The law is that a declaration of title or of right cannot legally be based on admission in the pleadings of a defendant. Further, in a case for a declaration of title the burden is clearly on the plaintiff to lead strong and positive evidence to establish his case for such a declaration. Even an evasive averment such as "the defendant is not in a position to deny or admit paragraph and will put the plaintiffs to the strictest proof" does not remove the burden on the plaintiff. The answer to the question raised under

the first issue is in the affirmation. (p. 2176 E)

Title - Burden of proof

3. The first thing that comes to mind is the nature of the burden on the appellants who were the plaintiffs claiming to be the persons entitled to the grant of customary right of occupancy over the land in dispute. In a claim TM for a declaration of title, the onus is on the plaintiff to satisfy the court that he is entitled on the evidence adduced by him to the declaration claimed. He must rely on his own case, and not on the weakness of the defendant's case. If the plaintiff fails to discharge the onus, not even the weakness in the defendant's case will help the plaintiff and the proper judgment will be one in favour of the defendant. (p. 2177 A)

Sufficient acts of possession

4. There was abundant evidence before the learned trial Judge which clearly established the fact that members of the respondents' family had several houses in which they were living scattered all over the land in dispute and that the aforesaid houses and plantations belonging to Chief Onuaguluchi had been on the land in dispute for a long time. Clearly, the presence of the aforesaid houses and plantations on the land in dispute showed that the respondents had been in possession of the land in dispute for along time. The respondents were, therefore, right when they contended and the court below was perfectly in order when it upheld the contention, that the learned trial judge did not avert his mind to the overwhelming evidence before him of acts of possession and of ownership of the land in dispute by the respondents, coming to the conclusion that the evidence of traditional history adduced appellants was more probable. The position then was that the learned Judge did not take into consideration the established facts before him or, if he took them into consideration in the evaluation of the evidence, he came to a wrong conclusion with the result that his judgment was perverse. (p.2179 B)

Findings of trial court

5. The findings which the learned trial Judge made in favour of the appellants were not supported by the totality of the evidence before him. In the circumstance, the court below was right to disturb the findings. Where findings of fact made by a trial Judge are supported by evidence, there is no legal basis for the interference of the appellate court with such findings of fact. An appellate court will only interfere with and reverse a finding of fact if the finding of a lower court is not supported by evidence. (p. 2179 G)

Evidence - Discredit

6. With particular reference to the acceptance of the evidence led by the appellants on traditional history, the learned trial Judge did so in obvious disregard of the fact that the evidence had been completely discredited by the evidence of acts of possession and of ownership led by the respondents. If a defendant is able to discredit by evidence, oral or documentary, the evidence of the plaintiff, then the plaintiff's claim to a declaration of title will be dismissed. (p. 2180 A)

Burden of proving that person in possession is not owner

7. Above all, if the question is whether any person is the owner of anything which he is shown to be in possession, the burden of proving that he is the owner is, by virtue of the provision of section 145 of the Evidence Act, on the person who affirms that he is not the owner. That presumption, which is rebuttable, was not rebutted by the appellants. The conclusion of the learned trial Judge that the evidence of traditional history led by the appellants was more probable could, therefore, not be supported and the court below was right in setting it aside. (p. 2180 C)

Boundaries - To which declaration can be tied

8. As the dwelling houses of the members of the respondents' family occupied by them and other things such as plantations belonging to the respondents which were on the land in dispute could not, in the present circumstances be ignored or be properly included in the land in respect of which a declaration might be granted to the appellants, the extent and the boundaries of remaining land, if any, in respect of which a declaration might be granted were unknown or vague. (p. 2183 A)

Trespass - Exclusive possession must be proved

9. Trespass is an unjustifiable interference upon a parcel of land possession of another. It is, therefore, the duty of a plaintiff suing for damn trespass to prove that he was in exclusive possession of the land in at the time of the alleged trespass. Bearing in mind the evidence and the circumstances of this case, which had been mentioned earlier in this judgment, it could not be reasonably said that the appellants were in possession of the land in dispute at the time of the alleged trespass. Consequently, the learned trial Judge erred in holding that the respondents committed trespass by going to or being on the land in dispute. It was clear from the evidence in this case, that the respondents were in possession bearing in mind the positive and numerous acts of possession of

ownership exercised by them in relation to the land in dispute extending over a long period. The foregoing constitute some of the ways of proving ownership. (p. 2184C)

Injunction - And damages for trespass

10. The learned trial Judge, therefore, erred in this case in granting it. The court below was consequently right in reversing or interfering with the award of damages for trespass and the granting of the injunction when the boundaries of the land to which the injunction related was uncertain and not clearly defined. The answer to the question raised under the 6th issue is in the affirmative. (p. 2184H)

Error of lower court

11. The error that will warrant the reversal of the decision of a lower court by an appellate court is an error that substantially affects the decision. In a claim for a declaration of title, ascertainable boundaries must be established. The plaintiff's first duty is to prove, with certainty, the area over which he claims. Above all, the respondents in this case did not counterclaim or claim anything. The onus was, therefore, on the appellants to prove their case. (p. 2186 H)

NOTABLE POINTS OF INTEREST

ADIOJSC

1. Putting evidence on an imaginary scale

The principle enunciated in *Mogaji v. Odojin*. (1978) S.C. 91 at p. 93 is applicable in this case in which the parties led oral evidence reflecting conflict in their positions as to their entitlement to the right of occupancy of the land in dispute. In case of conflict in the evidence led by the parties, the court has a legal duty to consider the totality of the evidence led by both parties to determine which has weight and which has no weight by putting them on an imaginary scale. (p. 2178F)

OGWUEGBUJSC

2. Need for certainty of boundaries - Function of appeal court

Where boundaries are not sufficiently demarcated so as to enable the surveyor "pinpoint" the area claimed, the court will not grant a declaration of title. Having failed to establish clearly the area of land to which their claim relates and this is their first duty, the claim should have been dismissed. The function appeal court is to determine whether error had been committed. It must then decide whether such error is of such a gravity and magnitude to necessitate the reversal

of the judgment of the trial court. The findings of the learned trial judge in this case will invariably and inevitably lead to a miscarriage of justice if allowed to stand. (p. 2189 E)

REPRESENTATION

- B J. H. C. Okolo Esq. SAN with Mr. C. Ude for the appellants
O. C. Obi Esq. for the respondents

CASES REFERRED TO

- Mandilas Karaberis Ltd v. Apena (1969) N.M.L.R. 199 at p. 201
C Bello v. Eweka (1981) 1 S.C. 101 at p. 102
Motunwase v. Sorungbe (1988) 5 N.W.L.R. (Pt. 92) 90
Saliu v. Egeibon (1994) 6 N.W.L.R. (Pt. 349) 157
Kodilinye v. Odu (1935) 2 W.A.C.A. 336,
Eholor v. Osanyande (1992) 6 N.W.L.R. (Pt. 249) 524
D Mogaji v. Odojin (1978) S.C. 91 at p. 93
Ejabulor v. Osha (1990) 5 N.W.L.R. (Pt. 148) 1
Lengbe v. Imale (1959) W.R.N.L.R. 325
Elf (Nig.) Ltd v. Sillo (1994) 6 N.W.L.R. (Pt. 350) 285
Awomuti v. Salami (1978) 3 S.C. 105 at pp. 115 & 116
E Amakor v. Obiefuna (1974) 3 S.C. 67 (1974) 1 All N.L.R. (Pt. 1) 119
Ezeokeke v. Uga (1962) All N.L.R. (pt. 1) 477 (Reprint)
Bakuwa v. Ogunsola 4 W.A.C.A. 159
Oke v. Eke (1982) 12 SC. 218
Ekpa v. Utong (1991) 6 N.W.L.R. (Pt. 197) 258
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LEAD JUDGMENT BY ADIO JSC

- In the High Court of the former Anambra State of Nigeria, Enugu Judicial Division, the appellant for themselves and on behalf of Umuome Community of Inyi sued the respondents. For themselves and on behalf of the late
G Ekpenyong Onuaguluchi family of Achi. The reliefs claimed by the appellants against the respondents were as follows:-

- “1. A declaration that the plaintiffs are the people entitled to the grant of customary right of occupancy over a piece and parcel of land known as and called Azu Agu Umuome Community land situated at Inyi in Oji River
H Local Government Area within the jurisdiction of this Honourable Court. The value of the land is N2,000,000.00.*

2. N500,000 damages for trespass, committed by the defendants when the defendants, their servants and or agents bulldozed and destroyed the plaintiffs’ farms and economic trees at Alli Agu Umuome Community land

and erected structures on the plaintiffs land without the permission of the plaintiffs.

3. A perpetual injunction restraining the defendants their servants, agents and privies or otherwise howsoever from entering Azu Agu Umuome Community land or in any way interfering with the plaintiffs use and enjoyment of their land.”

Pleadings were duly filed and exchanged by the parties. The allegation of the appellants was that the land in dispute situated at Umuome Inyi was traversed by Achi-Inyi tarred road. It was known and called Azuagu Umuome Communal Land. The extent of the land in dispute was according to the appellant delineated and verged red on Plan No. NLS/AN/654/X3 filed with the statement of claim. An old dispensary built by the Colonial Administrators was on the land in dispute. Evidence was also led about what they considered to be the boundaries of the land.

The appellants alleged further that as owners in possession, they were cultivating the land in dispute by planting economic trees on it. A portion of the land in dispute was allegedly given by the appellants to the father of the respondents called Chief Ekpenyong Onuaguluchi when the said Chief Onuaguluchi returned from slavery and had no place to settle in his native village. The portion allegedly granted by the appellants to the said Chief Ekpenyong Onuaguluchi who was the father of the respondents was verged blue in the appellants’ survey plan.

The respondents and their agents, it was further alleged by the appellants, bulldozed and erected new houses on the parts of the appellants’ land which were not the land granted to their (respondents) ancestor, Chief Onuaguluchi, without the permission of the appellants.

The respondents too filed a survey plan and showed, in it, the land which, in their own view, was the land in dispute. They did not agree with the description of the land in dispute given by the appellants.

The respondents’ stand was that it was not true that the appellants’ ancestor gave land to their own ancestor, Chief Onuaguluchi, to build a house or for any other purpose. The D.W. 5, Aaron Onuaguluchi, gave evidence of how the land in dispute came to belong to their ancestor, Chief Ekpenyong Onuaguluchi. He alleged that there were, among other things, houses of members of Onuaguluchi family on both sides of the road that traversed the land in dispute. He alleged that the land in dispute was the exclusive property of the late Chief Onuaguluchi. He denied that the houses of members of his family on the land in dispute were new houses; they had been there for many years. He pointed out that there was a dispensary opposite the house of Chief Onuaguluchi but not at Inyi.

- 2174 Umesie v. Onuaguluchi (1995) 12 KLR Adio JSC
The learned trial Judge, after consideration of the evidence before him and the submissions made by the learned counsel for the parties, entered judgment for the appellants and granted the reliefs claimed by them. In the view of the learned trial Judge, the traditional history alleged by the appellants in their pleading was not denied or sufficiently denied in the respondents' pleading. He came to the conclusion that the evidence of traditional
- B *history led by the appellants was more probable whereas the evidence of traditional history led by the respondents, under cross-examination of one of their witnesses, was not and, in any case, it was not pleaded. The respondents, not satisfied with the judgment of the learned trial Judge, lodged an appeal to the Court of Appeal against the judgment. The Court of Appeal*
- C *allowed the respondents' appeal. It set aside the judgment of the learned trial Judge and made an order dismissing the appellants' claim. In allowing the appeal, the Court of Appeal pointed out that the evaluation of the learned trial Judge of the evidence before him was defective in that in certain cases the learned trial Judge did not advert his mind to the evidence before him on*
- D *some relevant matters while in cases where he took such matters into consideration he came to wrong conclusions with the result that some findings of fact which he made on some relevant matters were not supported by evidence. The appellants, not satisfied with the judgment of the Court of Appeal, have lodged an appeal to this court.*
- E *The parties duly filed and exchanged briefs. The appellants filed an appellants' brief and the respondents filed a respondents' brief. The appellants identified seven issues, in their brief, for determination while the respondents too identified seven issues, in their brief for determination, I think that it is sufficient, for the determination of this appeal, to make use of*
- F *the issues for determination identified in the appellants' brief, they covered the relevant matters dealt with in the issues for determination in the respondents' brief. The issues for determination in the appellants' brief are as follows:- (i) Whether the Court of Appeal was right in holding that there was joinder of issues on the pleadings regarding the plaintiffs traditional history?*
- G *tory?*
- (ii) Whether on that pleading and the evidence adduced in support, the Court of Appeal was right in refusing to confirm the trial Court judgment granting the declaration sought?*
- (iii) Whether the Court of Appeal was right in holding that the grants made to the*
- H *defendants were uncertain and consequently the area to which a declaration could be tied, vague'? Or Whether the boundaries of the land over which the trial court had granted the declaration sought, were too vague and indefinite to warrant or sustain, the award of the declaration made?*
- (iv) Whether the Court of Appeal was justified in disturbing the*

well established findings of fact reached by the trial Court on the totality of the evidence?

(v) *Whether the defences of laches and acquiescence were available to the defence on their pleading and sufficient evidence led to sustain the plea in their favour?*

(vi) *Whether the Court of Appeal was right in dismissing the B plaintiff's claims for trespass and injunction?*

(vii) *Having accepted the issues for determination as formulated by the defendants/appellants, on the appeal, whether the Court of Appeal was right in failing to state their decisions on some of those issues, so found to be joined?"*

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I deal with the question raised under the first issue which was whether the Court of Appeal was right in holding that there was joinder of issues on the pleadings regarding the appellants' traditional history. The court below in dealing with that aspect of this case, was of the view that the learned trial Judge was in error in holding that the respondents' pleading did not join any issue on the appellants' traditional history. The court below accepted the submission of the learned counsel for the respondents that paragraph 8 of the further amended statement of claim was traversed by paragraph 17 and the averment in paragraph 6 of the amended statement of defence. Kolawole, J.C.A., who read the leading judgment, concluded, on the point, as follows:-

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"I think the learned counsel is right; once issues have been joined, the plaintiffs have the burden of proof thrust on them."

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It was argued in the appellants' brief and in the oral argument of the learned counsel for the appellants that there was no specific denial of the averment, in paragraph 8 of the Further Amended Statement of Claim, concerning the traditional history of the appellants, in paragraph 6 of the Amended Statement of Defence nor was the averment in paragraph 8 of the Further Amended Statement of Claim denied anywhere specifically in the Amended Statement of Defence. In the appellants' view, a general traverse such as the one contained in paragraph 17 of the Amended Statement of Defence, was not enough and, in the circumstance, the respondents must be taken as having admitted the averment in paragraph 8 of the Further Amended Statement of Claim. It was submitted for the respondents that paragraph 8 of the Further Amended Statement of Claim was denied and traversed by the general traverse in paragraph 17 of the Amended Statement of Defence and by the averments in paragraph 6 of the amended statement of defence as well as and by the whole tenor of the respondents' pleading. *Mundilas and Kuraberis Ltd. v. Apenu* (1969) 1 NMLR 199 at p. 20 I was cited. There is substance in the contention of the learned counsel for the respondents, having regard to the general traverse

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contained in paragraph 17 of the Amended Statement of Defence. Paragraph 6 or the Amended Statement of Defence and the whole tenor of other averments contained allegations which, if proved, clearly contradicted and showed that the evidence of traditional history led by the appellants could not be true or be probable. There were allegations in the Amended Statement of Defence that the members of respondents' family had several houses scattered all over the land in dispute and that for a long time they have been living there whereas members of the appellants' family were not living on the land in dispute. Members of the respondents' family, it was further alleged, have extensive cashew, rubber and palm plantations on the land in dispute upon which P.W.5, a member of the appellants' family, was working as a farm labourer without protest though the alleged grant made to Chief Ekpeyong Onuaguluchi was to enable him to build a house to live in. The foregoing averments were very significant in that they crucially affected the question whether the evidence of traditional history led by the appellants was true or false. A general traverse contained in a statement of defence has been recognised as convenient and permissible. It is a traverse and its effect is that it casts on a plaintiff the burden of proving the allegation denied. See: *Mandillas and Karaberis Ltd. v. Apena supra* and *Osafire v. Odi* (1994) 2 NWLR (Pt.325) 125.

Further, the law is that a declaration of title or of right cannot legally be based on admission in the pleadings of a defendant. See: *Bello v. Eweka* (1981) 1 SC 101 at p. 102 in which this court, per Obaseki, J.S.C. stated, inter alia as follows:-

"It is true as was contended, before us by the appellant's counsel that the rules of court and evidence relieve a party of the need to prove what is admitted but where the court is called upon to make a declaration of right, if is incumbent on the party claiming to be entitled to the declaration to satisfy the court by evidence, not by admission in the pleadings of the defendant that he is entitled. The necessity for this arises from the fact that the court has a discretion to grant or refuse the declaration and the success of a claimant in such an action depends entirely on the strength of his own case and not on the weakness of the defence."

Further, in a case for a declaration of title the burden is clearly on the plaintiff to lead strong and positive evidence to establish his case for such a declaration. Even an evasive averment such as "the defendant is not in a position to deny or admit paragraph and will put the plaintiffs to the strictest proof thereof does not remove the burden on the plaintiff. See: *Motunwase v. Sorungbe* (1988) 5 NWLR (Pt. 92) 90; *Salu v.*

Egeibon (1994) 6 NWLR (Pt. 348) 23; and *Okedare v. Adehara* (1994) 6 NWLR

(Pt. 349) 157. The answer to the question raised under the first issue is in the affirmation.

The questions raised under the 2nd, 3rd and the 4th issues will be dealt with together. The first thing that comes to mind is the nature of the burden on the appellants who were the plaintiffs claiming to be the persons entitled to the grant of customary right of occupancy over the land in dispute. B In a claim for a declaration of title, the onus is on the plaintiff to satisfy the court that he is entitled on the evidence adduced by him to the declaration claimed. He must rely on his own case, and not on the weakness of the defendant's case. If the plaintiff fails to discharge the onus, not even the weakness in the defendant's case will help the plaintiff and the proper judgment will be one in favour of the defendant. See: Kodilinye v. Odu (1935) 2 C WACA 336 and Eholor v. Osanyade (1992) 6 NWLR (Pt. 249) 524,

The learned trial Judge was of the view that the traditional evidence, upon which the appellants relied primarily for the purpose of proving their claim for a declaration of customary right of occupancy to the land in dispute, D was more probable, he accepted it and held that the appellants proved their case in relation to the declaration. He also held that the appellants, were in possession of the land in dispute and that the respondents were liable to pay damages to the appellants because by going on the land in dispute without the permission of the appellants, the respondents committed trespass. As I E have pointed out above, the learned trial Judge granted the appellants the reliefs claimed by them and entered judgment in their favour. On appeal to the Court of Appeal, the court below reversed the judgment of the learned trial Judge and set it aside. It substituted an order dismissing the appellants' claim. I have already dealt with the question whether, in the circumstances of the F case, the claim of the appellants could be sustained by the traditional evidence led by the appellants alone. I came to the conclusion that a declaration of customary right of occupancy could not be based on the alleged implied admissions, in the respondents pleading, of the averments, in the appellants' G pleading. I also expressed the view that having regard to the circumstances of this case the respondents did not admit the allegations made by the appellants in relation to traditional evidence. The view of the court below generally, on the point, was, inter alia, as follow:-

"Further, the treatment which the learned trial Judge gave to the competing traditional history of the parties is contrary to the principles H enunciated by Lord Denning in Kojo II v. Bonsie & Anor (1957) 1WLR 1223 at p. 1226.

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What the learned Judge should have done when the dispute was all as to traditional history was to test the conflicting traditional history by reference to facts in recent years as established by evidence and by seeking which of the two competing histories is the more probable. In the appeal in hand, those facts as established by evidence show that the defendants live on the land in dispute and they have lived thereon for the past 19 years. P.W. 5, B a member of the plaintiffs' family admitted that the defendants family have extensive cashew, rubber and palm plantations on the land in dispute upon which he, a member of claimants' family, worked as a farm labourer for late Chief Daniel Onuaguluchi before the latter's death in 1964 and these plantations have been in existence for about 17 or 18 years.

C *In this case demeanour is little guide to the truth. Consequently, when the competing traditional history is tested by reference to the facts in recent years as have been established by evidence the traditional history of the defendants is the more probable which the learned trial Judge should have believed."*

The appellants, apart from the technical point pertaining to the alleged admission made by the respondents, which contention was rejected, submitted that their evidence on traditional history was conclusive in their favour. For that reason, it was unnecessary to apply the principle enunciated in *Kojo II v. Bonsie* (supra) and the court below erred in law in not upholding the judgment of the learned trial Judge. It was argued for the respondents that E having regard to the numerous admissions made by the appellants, the appellants failed woefully to prove exclusive ownership or possession. It was pointed out that the learned trial Judge, without evaluating the evidence properly, bearing in mind the onus on the appellants to prove their case, the learned trial Judge just came to the conclusion that the evidence led, on the point, was F more convincing without considering the fact that a good deal of the evidence given by the appellants supported the respondents' case.

The principle enunciated in *Mogaji v. Odofin* (1978) 4 SC 91 at p. 93 is applicable in this case in which the parties led oral evidence reflecting conflict in their positions as to their entitlement to the right of occupancy of the land G in dispute. In case of conflict in the evidence led by the parties, the court has a legal duty to consider the totality of the evidence led by both parties to determine which has weight and which has no weight by putting them on an imaginary scale. The evidence led by the respondents, which was admitted by the appellants, was that the respondents had many houses in which they were H living on the land in dispute. The appellants' allegation was that they (appellants) were farming and not living by where on the land in dispute. In particular, there was evidence from the 1st P.W. that the respondents had been living on the land in dispute for a long time, at least for the past 19 years. P.W. 5. a member of the appellants' family, was a servant of the respondents' father, and

he admitted that the plantation of the respondents' father on which he (P.W.5) was working for the said father of the respondents had been in existence for 17 or 18 years. The respondents led evidence which was not contradicted, that members of their family had houses, in which they were living scattered all over the land in dispute on both sides of the road which runs through the land in dispute. The houses of Gilbert, Aaron and Late Daniel, all members of Onuaguluchi family had been on the land in dispute for 35, 20 and 47 years respectively.

There was abundant evidence before the learned trial Judge which clearly established the fact that members of the respondents' family had several houses in which they were living scattered all over the land in dispute and that the aforesaid houses and plantations belonging to Chief Onuaguluchi had been on the land in dispute for a long time. Clearly, the presence of the aforesaid houses and plantations on the land in dispute showed that the respondents had been in possession of the land in dispute for a long time. The respondents were, therefore, right when they contended and the court below was perfectly in order when it upheld the contention, that the learned trial Judge did not advert his mind to the overwhelming evidence before him of acts of possession and of ownership of the land in dispute by the respondents, in coming to the conclusion that the evidence of traditional history adduced by the appellants was more probable.

The position then was that the learned trial Judge did not take into consideration the established facts before him or, if he took them into consideration in the evaluation of the evidence, he came to a wrong conclusion with the result that his judgment was perverse. If a trial court failed to consider and evaluate, the totality of the evidence adduced by the parties, the appellate court has a duty to consider and evaluate such evidence and make proper findings as long as the findings of fact do not depend on credibility of witnesses. See: *Ogunleye v. Oni* (1990) 2 NWLR (Pt.135) 745. Even if the trial court evaluated the evidence but came to a wrong conclusion on the established facts, the appellate court may interfere. See: *Ejabulor v. Osha* (1990) 5 NWLR (Pt.148) 1. The findings which the learned trial Judge made in favour of the appellants were not supported by the totality of the evidence before him. In the circumstance, the court below was right to disturb the findings. Where findings of fact made by a trial Judge are supported by evidence, there is no legal basis for the interference of the appellate court with such findings of fact. An appellate court will only interfere with and reverse a finding of fact if the finding of a lower court is not supported by evidence. See: *Lengbe v. Imale*

2180 Umesie v. Onuaguluchi (1995) 12 KLR Adio JSC
(1959) WRNLR 325: *Fatuade v. Onwoamanam* (1990) 2 NWLR (Pt. 132) 322:
and *Elf' (Nigeria) Ltd. v. Sillo* (1994) 6 NWLR (Pt. 350) 258.

With particular reference to the acceptance of the evidence led by the appellants on traditional history the learned trial Judge did so in obvious disregard the fact that the evidence had been completely discredited by the evidence of acts of possession and of ownership led by the respondents. If a defendant is able to discredit by evidence, oral or documentary, the evidence of the plaintiff, then the plaintiff's claim to a declaration of title will be dismissed. See: *Ogundairo v. Okanlawon & Ors.* (1963) 1 All NLR 358 cited with approval in *Awomuti v. Salami* (1978) 3SC 105 at Pp.115 & 116. Above all, if the question is whether any person is the owner of anything which he is shown to be in possession, the burden of proving that he is not the owner is, by virtue of the provision of Section 145 of the Evidence Act, on the person who affirms that he is not the owner. See: *Laguro Toku* (1992) 2 NWLR (Pt.223) 278. That presumption, which is rebuttable, was not rebutted by the appellants. The conclusion of the learned trial Judge that the evidence of traditional history led by the appellants was more probable could, therefore, not be supported and the court below was right in setting it aside.

The foregoing was not all. The respondents contended that the appellants did not lead evidence which clearly defined the boundaries of the land in dispute. At times, the appellants alleged that the land in dispute included the land allegedly granted to the Late Chief Onuaguluchi to build a house to live in when he (the Chief) returned from slavery. If the Late Onuaguluchi was granted a parcel of land to build a house to live in why was it that the appellants did not for a long time protest in relation to the extensive cashew and rubber plantations established by him and on which a member of the appellants' family was working for him as a labourer? If a parcel of land was, as the appellants alleged, granted to the late father of the respondents to build a house to live in, what about the several members of the respondents' family who had houses scattered all over the land in dispute in which they have been living for a long time without protest from the appellants' family? If no claim was being made to the plantations of Chief Onuaguluchi, his house and the houses of the members of the respondents' family on the land in dispute, how could the said plantations and houses, which had been on the land in dispute for a long time, be excised from the land in dispute when there was no evidence defining the boundaries of each of them. The situation, as regards boundaries becomes more complicated if it is remembered that the boundaries of the entire land in dispute, within which were the plantations and several houses of the members of the respondents' family, were not clearly defined. The court below after making reference to the issues set out above in

relation to the boundaries of the land in dispute stated, inter alia, as follows:-

"The boundaries of the land over which the learned trial Judge had granted declaration are in my view too vague and indefinite to warrant a declaration of title being made in favour of the respondents. (See: Ezeokeke & Ors. v. Uga & Ors. (1962) 1 All NLR 482, 484. The remaining land after excising the plantation, the houses of Gilbert and Aaron is undefined and uncertain that the court ought not to have granted a declaration of title in favour of the plaintiffs....."

Now the first duty of a plaintiff who comes to court to claim a declaration of title is to show the court clearly the area of land to which his claim relates. In this case the plaintiff have failed to discharge this first duty."

It was contended in the appellants' brief that the boundaries in the land in dispute were elaborately and meticulously pleaded in the Further Amended Statement of Claim especially in paragraphs 3, 4, 5, 6, 7, 8 and 10 thereof. It was argued that none of the paragraphs 2, 3, 4, 5, 6 and 7 of the Amended Statement of Defence specifically put in issues either the boundaries as pleaded or the identity or extent of the land in dispute.

The true position was that practically all the relevant paragraphs in the pleading of the appellants were specifically denied by the respondents in their pleading. In particular, the averments in paragraphs 2 and 3 of the Amended Statement of Defence are as follows:-

"2. The defendants deny paragraphs 3 and 7 of the Statement of Claim and state that the land in dispute is clearly and correctly set out on the defendants' plan No.MG/AN.700/83 dated 8th November, 1983 and filed with this statement of defence and therein verged red.....On the defendants' plan could be seen homes of the members of the defendants family scattered on both sides of the Achi-Inyi tarred road plantation of long standing freely established by the defendants late father Chief Daniel Onuaguluchi....."

3. The defendant deny paragraph 4 of the Statement of Claim and state that.....continuation of defendants family land."

It is obvious from the averments in paragraphs 2 and 3 of the Amended Statement of Defence quoted above that some of the averments in the Further Amended Statement of Claim concerning the description, and extent of the land in dispute were specifically denied in the Amended Statement of Defence. That was not all. The respondents averred inter alia in paragraph 6 of

the Amended Statement of Defence that the land in dispute, including “*Ugwu Nkwo*” land had been the property of the respondents and they had over the years exercised all known acts of ownership and possession over same such as residing thereon and cultivating various economic crops thereon unchallenged by the appellants. The survey plan, Exhibit “G”, tendered by the respondents showed that within the land in dispute were many things belonging to the members of the respondents’ family, including dwelling or residential buildings, cashew and rubber plantations scattered all over the land in dispute. The vocations and the extent of the aforesaid residential or dwelling houses and the plantations together with their sizes, extent and measurements were not shown in the survey plan, Exhibit “F”, tendered by the appellants. The houses shown on the survey plan Exhibit “G” included the houses of Walter, Hyde, Emmanuel, Ogochukwu, Aaron, Daniel, Sydney, Pastor Professor Onuaguluchi and Chief Onuaguluchi. The respondents alleged that the aforesaid things had been on the land in dispute for a long time while the appellants alleged that they were new. The evidence of the P.W.4 the appellants’ surveyor contradicted the appellants’ allegation and confirmed the respondents’ allegation. He (the P.W. 4) stated, under cross-examination, inter alia as follows:-

“*I saw some old buildings along the road that traverses the land in dispute. Some of them are as old as Professor Onuaguluchi’s house.*”

The presence of the aforesaid things on the land in dispute for a long time has its own legal effect which could not be ignored. The court below, in dealing with this aspect of the matter, rightly stated, inter alia, as follows:-

“*It is settled law that, where long possession is established in evidence the court will not normally, exercise its discretionary right (sic) of granting declaration of title in favour of a party not in possession. (See Akibu v. Opaleye (1974) 1 All NLR (Pt.2) 344, 356.*”

The Court below then set out the evidence of the P.W.1. who was one of the principal witnesses for the appellants, which was as follows:-

“*The defendants live on both sides of the road within the land in dispute. The defendants have been living there for a long time. They have been living there for the past 19 years i.e. on both sides of the road the 1st defendant has a borehole in his house. The Sabbath Church is on the land in dispute.*”

The Court below stated further as follows:

“*Long possession has thus been established in evidence on the testimony of the plaintiffs’ witnesses in favour of the defendants. It is therefore inequitable to oust the defendants from their lawful possession. The learned Judge was therefore in error to have granted declaration in favour of the plaintiffs.*”

As the dwelling houses of the members of the respondents' family occupied by them and other things such as plantation belonging to the respondents which were on the land in dispute could not in the present circumstances, be ignored or be properly included in the land in respect of which a declaration might be granted to the appellants, the extent and the boundaries of the remaining land, if any. In respect of which a declaration might be granted were unknown or vague. Further, a witness for the appellants testified that the land in dispute included the land which the appellants claimed their family granted to the respondents' father. In view of the foregoing, the court below concluded as follows:-

"Although the learned, judge excluded the area granted to Professor Gilbert Onuaguluchi and Aaron Onuaguluchi from the declaration. I am of the view that on the evidence the land claimed by the plaintiffs as Azuagu land and said to be in dispute includes the land alleged granted to the defendants' father which the plaintiffs claimed is now in dispute, the extensive plantation and the houses which are not demarcated to enable a surveyor to pin-point the area..... the boundaries of the land over which the learned Judge had granted declaration are in my view too vague and indefinite to warrant a declaration of title being made in favour of the respondents."

Further, the boundary of the land in dispute was not demarcated where one of the dispensaries on the land in dispute was situated because, according to the appellants. Chief Onuaguluchi could not go beyond the dispensary. The answer to the question raised under each of the 2nd and 3rd issues is in the affirmative. With reference to the question raised under the 4th issue, the court below was justified in disturbing the findings of fact purportedly made by the learned trial Judge. In the case of the question raised under the 5th issue, it is sufficient, for the present purpose, to say that the respondents did not raise the defence of laches or the defence of acquiescence and the court below did not deal with it in its judgment.

The question raised under the 6th issue is whether the Court of Appeal was right in dismissing the appellants' claim for trespass and injunction. The learned trial Judge was of the view that the respondents' buildings on the land in dispute, except of those of Professor Onuaguluchi and Aaron Onuaguluchi, were acts of trespass by the respondents on the land in dispute. The court below held that the aforesaid view of the learned trial Judge was perverse and reversed it. The court below stated further, as follows:-

"With regard to the claim for damages for trespass and injunction, the learned trial Judge failed to advert his mind to the admissions by P.W.1 and P.W. 5 that the defendants have been living on the land in dispute and been cultivating it for upwards of 17 to 19 years. In such circumstance the

defendants were before the institution of the action in effective possession of the land in dispute The learned Judge was therefore in error in awarding damages for trespass against the defendants who on the plaintiffs admission have been in possession of the land in dispute. On the same ground an Older for injunction.”

B The submission made for the respondents was that as it was not shown that the appellants were in exclusive possession of the land in dispute at the material time, they should not have been awarded damages for trespass. With reference to the injunction granted by the learned trial Judge to the appellants, it was argued for the respondents that, apart from other things the
C land in respect of which an injunction was granted was not clearly defined.

There is substance in the contention of the respondents. Trespass is an unjustifiable interference upon a parcel of land in possession of another. See: Ogunbiyi v. Adewunmi (1988) 5 NWLR (Pt.93) 215 at p. 221. It is, therefore, the duty of a plaintiff suing for damages for trespass to prove that he was
D in exclusive possession of the land in dispute at the time of the alleged trespass. See: Adelaja v. Fanoiki (1990) 2 NWLR (Pt. 131) 137. Bearing in mind the evidence and the circumstances of this case, which had been mentioned earlier in this judgment, it could not be reasonably said that the appellants were in exclusive possession of the land in dispute at the time of the alleged trespass. Consequently, the learned trial Judge erred in holding that the respondents committed trespass by going to or being on the land in dispute. It was clear, from the evidence in this case, that the respondents were in effective possession bearing in mind the positive and numerous acts of possession and of ownership exercised by them in relation to the land in dispute extending over a long period. The foregoing constitutes some of the ways of proving ownership. See: Ekpo v. Ita (1932) 11 NLR 68 and Idundun v. Okumagba (1976) 1 NMLR 200 at Pp. 210 & 211. That was one of the strategies adopted by the respondents but which the appellant mistakenly referred to as defence of laches and acquiescence in relation to the 5th issue formulated by them. Be
G that as it may, the appellants could not be rightly said to be in exclusive possession of the land in dispute at the same time or during the same period with the respondents as there can be no such thing as concurrent possession by two persons claiming adversely to each other. See: Amakor v. Obiefuna (1974) 3 SC 67: (1974) 1 All NLR (Pt.1) 119. In the case of the order of injunction,
H it can only be binding when the boundaries of the land in question are ascertained, well-known and properly described. See: Elias v. Omo-Bare (1982) 5 SC 25. The learned trial Judge, therefore, erred in this case in granting it. The court below was consequently right in reversing or interfering with the award of damages for trespass and the granting of the injunction when the boundaries

of the land to which the injunction related was uncertain and not clearly defined. The answer to the question raised under the 6th issue is in the affirmative.

The question raised under the 7th issue was whether having accepted the issues for determination as formulated by the defendants/appellants, on the appeal, the Court of Appeal was right in failing to state its decisions on some of those issues, so found to be joined. One of such issues was whether the grants allegedly made by the appellants to the respondents' predecessors-in-title in relation to the land in dispute were proved. It was the contention of the appellants that the failure of the court below to consider the issue, which in their view was crucial, occasioned a miscarriage of justice. The other issue was in relation to certain documents which could have shown the location of the dispensary on the land. Once that was known all the land West of the dispensary would have been held to be the land of the appellants. The contention of the respondents was, inter alia, that since the appellants' case could not be improved with the identity of the land in dispute remaining undefined and uncertain, it was unnecessary to proceed to determine issue of hearsay and the admissibility of documents which would not have altered the decision of the court below.

The appellants, in relation to the alleged grant of parts of the land in dispute, referred to the evidence of the P.W. 6 who was alleged to be a member of the respondent's family. I really can't see how it can reasonably be said that the evidence of the alleged grant, particularly by the P.W. 6, could have crucially affected the decision of the court below. He told the court that he knew the

respondents and their father Chief Onuaguluchi. He formerly lived in Calabar and on his return his maternal ancestors, the appellants, granted him a parcel of land on which he built his house. Under Cross-examination by the learned counsel for the respondents the 6th P.W. stated, inter alia as follows:-

"A member of Onuaguluchi family is a plaintiff in a case against me in this court....."

I know that late Chief Onuaguluchi had plantations i.e. palm and cashew plantations. He had rubber trees around his compound. The cashew plantation is on the same side as the dispensary. My father was older than Chief Onuaguluchi. I am 56 years old. The cashew plantation was there before the Civil War. The rubber was much older than the cashew. The palm plantation was there before the war. I cannot estimate the acreage of the plantations.....I know Prof. Onuaguluchi's house. He had built his house before the Civil War. It was a new house in 1964.

I do not know the house of Aaron Onuaguluchi. I do not know the God Sabbath Mission at the Achi or on the land in dispute.....I do not know the exact area granted to Chief Onuaguluchi."

One cannot really see the significant difference between the evidence of the 6th P.W. and the evidence of the other appellants' witnesses which had been referred to in this judgment. Like some of the other appellants' witnesses, he alleged that the appellants family granted a parcel of land to Chief Onuaguluchi to build a house to live in. None of them was able to give any reasonable explanation about the old houses of members of the respondents' family scattered here and there on the right and on the left of the road that traversed the land in dispute. They claimed that a parcel of land was granted to Chief Onuaguluchi to build a house to live in but could not explain the palm plantation, rubber plantations and cashew plantations in the land in dispute which were established by Chief Onuaguluchi and which had been there for many years without protest by the appellants. Indeed, a member of the appellants' family worked on one of the plantations as a labourer of Chief Onuaguluchi for many years without protest. The totality of the evidence before the court had to be considered and, if that was done, the evidence of the alleged grant of a parcel of land to Chief Onuaguluchi could not in the circumstances of this case have had a crucial effect on the decision of the court below.

With reference to the alleged documents, they were not, apart from other things, crucial to the determination of the fundamental issues in this case. The appellants themselves did not define the boundary of the land in the area where the dispensary was situated because, according to them. Chief Onuaguluchi could not go beyond the dispensary. At times, the land in dispute, as stated by the appellants, included the land allegedly granted to Chief Onuaguluchi, Aaron Onuaguluchi and Gilbert Onuaguluchi. There was also the question of the size, extent and the boundaries of the land, if any, that remained after excluding the old houses that the members of the respondents' family had built and occupied for a long time on the land in dispute without protest from the appellants. The location of the dispensary by means of the alleged documents could not, in the circumstances of this case, assist the appellants in resolving the problems which they had in proving their case.

The error that will warrant the reversal of the decision of a lower court by an appellate court is an error that substantially affects the decision. See: *Olubode v. Salami* (1985) 2 NWLR (Pt.7) 282 and *Oseni v. Dawodu* (1994) 4 NWLR (Pt. 339) 390 in a claim for a declaration of title, ascertainable bound-

aries must be established. The plaintiff's first duty is to prove, with certainty, the area over which he claims. See: Imah v. Okogbe (1993) 9 NWLR (Pt. 316) 159. Above all the respondents in this case did not counter-claim or claim anything. The onus was, therefore, on the appellants to prove their case.

See: Kodilinye v. Odu (supra)

The appeal has no merit. It is hereby dismissed with N1,000 costs to B the respondents. The judgment of the court below is affirmed.

BELGORE.JSC

As the appellants as plaintiffs never discharged the onus of proving C their case and it is for this reason and other reasons fully explained in the judgment of my learned brother. Adio, J.S.C. that I see no merit in this appeal and I dismiss it. I order N1,000.00 as costs to the respondents against the appellants.

WALI.JSC

I have been privileged to read before now the lead judgment of my learned brother Adio. J.S.C. I entirely agree with the reasons he advanced for dismissing the appeal and I adopt same as mine. E

The appeal lacks merit and I also dismiss it with N1,000.00 costs to respondents. The judgment of the court below is hereby affirmed.

KUTIGI.JSC

I agree with the lead judgment just read by my learned brother Adio, J.S.C. The appeal is dismissed with N1,000.00 costs to the respondents. F

OGWUEGBU.JSC

I agree entirely with the judgment just delivered by my learned brother Adio. J.S.C. a preview of which I had the privilege of. I agree that the appeal be dismissed in the terms set out in the said judgment. G

My brother, Adio, J.S.C. has set out the facts of the case in full. I do not intend to repeat them here. I would only like to deal with the evaluation of H the evidence by the learned trial Judge, his findings after the exercise and the interference by the court below with those findings of fact.

The plaintiffs tendered Exhibit "G" and showed the area verged Red as the portion of their Azu-Agu Umuome land forcibly claimed by the defen-

dants. The said portion was similarly verged Red in Exhibit “H”, tendered by the defendants. But the plaintiffs in their evidence testified that the entire Azu-Agu Umuome land is in dispute and this includes the portion edged blue in Exhibit “A” which they alleged was granted to Chief Onuaguluchi, the father of the defendants by their ancestors.

B The plaintiffs/appellants based their claim on traditional history, acts of possession and use of the area verged Red in Exhibit “G” and the adjoining lands forming part-of Azu-Agu Umuome land.

C The learned trial Judge believed the evidence of traditional history adduced by P.W.7 and disbelieved that given by D.W. 5 on behalf of the defendants. On acts of ownership and possession, he found the evidence of the plaintiffs more convincing and entered judgment for the plaintiffs. On appeal to the court below by the defendants, the judgment of the learned trial Judge was reversed and the plaintiffs’ claim was dismissed.

D The learned trial Judge did not follow the fundamental procedure laid down by this court in *Mogaji & Ors v. Odofin* (1978) 4 SC 91 at 93-94 before he arrived at his conclusions in respect of the evidence led by the parties in support of their leadings on traditional history and acts of ownership and user. In this case, it is clear that the learned trial Judge did not put the case of the parties on that imaginary scale weigh one against the other and decide E upon the preponderance of credible evidence which weighs more, accept it in preference to the other and apply the appropriate law to it bearing in mind the cause of action.

F The defendants led evidence that they have exercised numerous and positive acts of ownership and possession over many years by residing on the land in dispute, cultivating various economic crops such as palm, cashew and rubber trees unchallenged by the plaintiffs.

G There was evidence from the plaintiffs that the defendants have been living on the land in dispute for at least nineteen years. P.W.5 (Linus Nwigbe) of the plaintiffs’ village testified that he was a servant of the defendants’ father - late Chief Onuaguluchi and that the said defendants’ father had cashew, palm and other rubber plantations behind his house and that the cashew plantation had been in existence for seventeen to eighteen years. He worked in the plantation when he served late Chief Onuaguluchi.

H In his evidence D.W.1 - the surveyor engaged by the defendants to survey the land tendered Exhibit “H”. He testified as follows:

“I saw the palm plantation verged green in Exhibit “H” and north of the land in dispute. It is about 20 hectares. I estimate the age at between 20 and 30 years. I also saw a cashew plantation within the land in dispute. It is about 55 hectares. I also saw an old oil mill in the land in

dispute.....I also saw all the house, on both sides of the road traversing the land in dispute. I saw Professor Onuaguluchi's house which was about 20 to 25 years old. The houses along the road within the land in dispute would be about 8 or 9 years old."

If the learned trial Judge had evaluated the evidence as he ought to have done, he would have come to the conclusion that the defendants established by evidence, long possession of the land in dispute which was unchallenged by the plaintiffs. The plantation and houses which are scattered on both sides of the road which traversed the land have existed for many years. Even on the evidence of the plaintiffs, the defendants established long possession of the land in dispute. The only inference therefore is that the defendants are in possession of the land to the knowledge of the plaintiffs' family. The plaintiffs could not claim possession let alone exclusive possession of the land in dispute in view of the evidence. C

It is equally true that the plaintiffs failed to show the area they claimed with any certainty. The areas covered by plantations are twenty and fifty five hectares respectively. The portions granted to Professor Gilbert Onuaguluchi and Aaron Onyegbuchi were not demarcated. Therefore, the boundaries of the land over which the declaration was granted are indefinite and vague to warrant the declaration made in favour of the plaintiffs. See: Ezeokeke & Ors. v. Uga & Ors (1962) All NLR (Pt.1) 477 (Reprint) (1962) 1 All NLR 482 D E

Where the boundaries are not sufficiently demarcated so as to enable a surveyor to "pin point" the area claimed, the court will not grant a declaration of title. Having failed to establish clearly the area of land to which their claim relates and this is their first duty, the claim should have been dismissed. See: Bakuwa v. Ogunsola (1938) 4 WACA 159. F

The function of an appeal court is to determine whether error had been committed. It must then decide whether such error is of such a gravity and magnitude to necessitate the reversal of the judgment of the trial court. The findings of the learned trial Judge in this case will invariably and inevitably lead to a miscarriage of justice if allowed to stand. G

The court below was right to have reversed the said findings. The findings did not depend on the credibility of witnesses. See: Okuwobi v. Ishola (1973) 3 SC 43; Oke v. Eke (1982) 12 SC 218 and Ekpa v. Utong (1991) 6 NWLR (Pt.197) 358.

As to the traditional history pleaded by the plaintiffs in paragraph 8 of their further amended statement of claim, it cannot be true that this was not traversed by the defendants in their amended statement of defence. Even though paragraph 17 of the amended statement of defence contains a general traverse, the tenor of that paragraph and paragraph 6 thereof are sufficient traverse or denial of paragraph 8 of the further amended statement of claim. H

The learned trial Judge was clearly in error when he held that:

“The evidence of traditional history given by the plaintiffs does not seem to have been serious ly challenged by the defence”

The evidence was challenged and there was a conflict of traditional history. He should have adopted the principles enunciated in *Kojo v. Bonsie B & Ors.* (1957) 1 WLR 1223 at 1226. Had he tested the conflicting traditional history by reference to facts in recent years established by evidence, he would have found from the evidence of the defendants that they have lived on the land for the past nineteen years and that they have extensive cashew, palm and rubber plantations on the land in dispute which were cultivated over forty C years ago unchallenged.

There was therefore no basis for the findings made by the learned trial Judge and the reversal of that decision by the court below was proper and legitimate. I entirely agree with my learned brother Adio, J.S.C. that the appeal has no merit. Accordingly, I too will dismiss it and affirm the decision of the D Court of Appeal with N1,000.00 costs to the defendants.

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