

SUPREME COURT OF NIGERIA

11TH JULY, 1995. SC. 132/1989

**CORAM:- S.M.A. BELGORE, U. MOHAMMED, S.U. ONU,
Y.OADIO, A.I. IGUH, JJSC.**

JOHN EZE & 2 OTHERSDEFENDANTS/APPELLANTS
AND
MATTHAIAS OBIEFUNA & 2 OTHERS
(For themselves and on behalf of all others
of Ogwulugwuani Village, Nimo)PLAINTIFFS/RESPONDENTS

DAMAGES - *Trespass to land - Meritorious award of damages - Where set aside on technical ground - Whether respondent's claim for damages for trespass is still meritorious.*

JUDGMENTS - *Reversal of Judgment - Mistakes which can lead to reversal of a judgment - Must be substantial.*

LAND LAW - *Trespass - Action of appellants - When held to tie a clear case of trespass to land of respondents.*

PRACTICE & PROCEDURE - *Setting aside judgment - Proper procedure - Is by cross appeal and not respondent's notice.*

FACTS

The plaintiffs sued the defendants in the High Court of Anambra State, Awka for declaration of title to a piece of land under native law and custom. They also claimed damages for trespass on the said land and injunction. The case went to trial at the end of which, the trial Judge found in favour of the Plaintiffs, but dismissed their claim for damages for trespass.

Dissatisfied with the judgment, the defendants appealed to the Court of Appeal Enugu Division. At that court, the Plaintiffs now Respondents, by way of respondents notice, prayed that judgment be entered in their favour for the claim of damages for trespass dismissed by the trial court. The Court of Appeal affirmed the judgment of the trial court and also granted the plaintiffs (now respondents) prayer in respect of the claim of N200.00 damages for trespass brought by way of respondent's notice. Being dissatisfied, the appellants have further appealed to the Supreme Court raising three issues.

ISSUES FOR DETERMINATION

“(i) Whether the Court of Appeal had jurisdiction to set aside the judgment of the High Court dismissing the plaintiffs’ claim for damages for trespass and to substitute therefore an order entering judgment in favour of the said’ plaintiff for N200.00 as general damages.

(ii) Whether, having regard to the judgment of the High Court as confirmed by the Court of Appeal, coupled with the fact that the claim for injunction ought to be dismissed, the order for perpetual injunction ought not to have been set aside also.

(iii) Whether the Court of Appeal ought to have upheld the order of the High Court declaring that “the plaintiffs are the holders of the customary certificate of occupancy of the piece and parcel of land as shown verged yellow in Plan No. EC401/73 within the area verged pink and purple. “

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

Setting aside a judgment

1. In the case in hand the respondents applied to the Court of Appeal to set aside the dismissal of the claim for N200.00 damages for trespass and enter judgment for the same amount in favour of the respondents. This could only be attended to by the Court of Appeal through a substantive cross-appeal. The Court of Appeal was therefore in error to set aside the judgment of the trial High Court through a request by the respondents in a respondents notice and award to the respondents N200.00 general damages for trespass. The appeal in respect of this issue succeeds and I resolve the issue in favour of the appellants. (p. 1399 D)

Meritorious award of damages

2. Now since the learned trial judge had declared the disputed land for the respondents it is very clear that the respondents claim for damages for trespass against the appellants is meritorious. The appeal which I have allowed earlier in this judgment succeeded on technical ground only because a wrong procedure was followed in bringing the matter before the Court of Appeal. The learned trial judge was quite right, therefore, to grant an order of perpetual injunction against the appellants. And since they have admitted to have destroyed a building in the disputed land they have to be restrained from further acts of trespass. (p. 1400 F)

Reversal of judgment

3. The mistake which the learned trial judge made in making a declaration in favour of the respondents over the land in dispute is where he said, “the

plaintiffs are holders of the customary certificate of occupancy” instead of saying that the plaintiffs are entitled to a customary right of occupancy. The Court of Appeal did not observe the mistake and affirmed the decision of the trial High Court. If its attention had been drawn to the mistake the Court would have corrected it. It is not every slip in a judgment that can result in the judgment being upset. A mistake or omission which can lead to a reversal in of a decision must be substantial in the sense that it affected the decision appealed against. (p. 1401 D)

Trespass to land

4. The only issue which has succeeded in this appeal is where the Court of Appeal reversed the decision of the learned trial judge on damages for trespass through a Respondent’s Notice. I allowed that appeal on technical grounds only because the appellants had admitted, in their pleadings, entering the land of the respondents and destroying the foundation of the building of one of the respondents. The action of the appellants is a clear case of trespass. (p. 1401 F)

NOTABLE POINTS OF INTEREST

MOHAMMED JSC

1. Respondent’s Notice and cross-appeal distinguished

There is difference between variation of a judgment and a cross-appeal. In a Respondents’ Notice a party seeks to retain the judgment appealed from but at the same time wants it varied. It cannot be used where a party wants a reversal of the judgment of the lower court, as this can only be done by way of an appeal or cross-appeal. (p. 1399 A)

ONU JSC

2. When to file a cross appeal

In several decisions of this court, the principle has invariably been laid down that a respondent seeking to set aside or vary a finding which is crucial or fundamental to a case, can only do so through a substantive cross-appeal and not through a Respondent’s Notice to affirm or vary the judgment on other grounds. In other words, where a Respondent wants a complete reversal of the decision of the lower court, he ought to file a cross-appeal, instead of a Respondent’s Notice. (p. 1402 F)

3. Trespass - Whether injunction was rightly granted

The cumulative effect of the above findings constitutes the Appellants as trespassers to the Respondents’ land - namely, the land in dispute. That being

the case, the conclusion arrived at by the trial court and affirmed by the court below that trespass to land in law constitutes the slightest disturbance to the possession of land by a person who cannot show a better right to possession, the learned trial Judge, in my respectful view, was justified in granting an order of perpetual injunction against the Appellants, having earlier granted the declaratory relief sought vide *Okolo v. Uzoka* (1978) 4 S.C. 77, 89. (p. 1404 G)

IGUJSC

4. Procedural irregularity and need to do justice

No doubt, a procedural irregularity ought not to stand between the Supreme Court and doing justice between the parties. The issue under consideration, however, is clearly fundamental and jurisdictional to a certain extent that it may not readily be dismissed with a wave of the hand as a mere procedural irregularity. (p. 1406 E)

5. Respondent's notice or cross appeal - Which is applicable

It must therefore be stressed, that a respondent to an appeal, where he desires to contest an issue different from the one raised by the appeal served on him or where he seeks a reversal of an adverse finding in the decision appealed against, may only do so by a notice of appeal or a cross appeal and not by a mere respondent's notice of intention to vary the judgment. A respondent's notice of intention to vary a judgment is only available where the party complaining while in principle accepting and retaining the judgment appealed against, merely seeks its variation. It is not available for a complete reversal of such a judgment. (p. 1406 F)

6. Inaccurate description of a right cannot invalidate Judgment

There can be no doubt that the appropriate declaration which the trial court ought to have made, having regard to the main issue in controversy between the parties and all its findings thereupon is the respondents' entitlement to a Customary right of occupancy in respect of the land in dispute. It seems to me clear however that the error complained of on the part of the learned trial Judge is a mere clerical mistake or, at the worst, a sheer misdescription of the plain right in issue between the parties in the suit. This right, both from the pleadings of the parties and their evidence before the trial court, is that of entitlement to a customary right of occupancy in respect of the land in dispute. The misdescription of this right by the learned trial Judge at the tail end of his judgment is by no stretch of the imagination capable of deceiving or misleading either the appellants or anyone else for that matter. It has prejudiced no one and has occasioned no miscarriage of justice in the cast. It is, in

my view, a straight forward case of a mere inaccurate description an obvious right in dispute between the parties which under the principle, falsa demonstratio non nocet cum de corpore constat may not invalidate this judgment of the court complained of. (p. 1408 E)

B REPRESENTATION

Mrs. A. Williams for the appellants
N.I.N. Egwuonwu Esq. for the respondents

C CASES REFERRED TO

- B.E.E. Industries (Nig.) Ltd. v. Maduakoh (1975) 12 S.C. 91
Dumbo v. Chief Idugboe (1983) NSCC 22 at 39
Enang v. Adu (1981) 11-12 S.C. 25 at 45
Umunna v. Okwuraiwe (1978) 6-7 S.C. 1 at page 9
Ezeoke v. Nwagbo (1988) 1 N.S.C.C. 414 at 422
D Lagos City Council v. Ajayi (1970) 1 All N.L.R. 291 at 296-297
Oyekan v. B.P. Nigeria Ltd (1972) 1 All NLR 45 at pages 47/48
Sunmonu v. Ashote (1975) 1 NMLR 16
Chief Williams v. Daily Times of Nigeria (1990) 1 NWLR (Part 124) at pp. 21-22 and 62-63
E African Continental Seaways v. Nigeria Dredgin Roads and General Work (1977) 5 S.C. 235 at 24
Nwadike v. Ibekwe (1987) 1 N.W.L.R. (Part. 67) 718
Western Steel Works v. Iron & Steel Workers (1987) 1 N.W.L.R. (Part 49) 284
Nwuzoke v. The State (1988) 2 S.C.N.J. 344
F Adimora v. Ajufo (1988) 1 NSCC 1005 at 1016
Solomon v. Mogaji (1982) 11 S.C. 1 at 37
Amakor v. Obiefuna (1974) 3 S.C. 67 at 75, 76
Okolo v. Uzoka (1978) 4 S.C. 77, 89

G LEAD JUDGMENT BY MOHAMMED JSC

The plaintiffs sued the defendants at the Awka High Court, now in Anambra State, for a declaration of title to a piece of land under native law and custom. They also claimed damages for trespass and injunction.

- H The trial was opened on 23rd January, 1979, and at the close of the proceedings the learned trial Judge, Umezina, J., in a well considered judgment, found in favour of the plaintiffs against the defendants jointly and severally as follows:-

“(1) A declaration that the plaintiffs are the holders of the customary certificate of occupancy of the piece and parcel of land as shown verged Yellow in Plan No. EC401/73 within which is the area verged Pink and Purple, admitted in evidence in this proceeding as Exhibit ‘A’.

(2) Perpetual injunction restraining the defendants, their servants or agents from further acts of trespass on the said land. The claim for N200.00 damages for trespass is dismissed.” B

Dissatisfied with the judgment of the High Court the defendants filed an appeal against the decision at the Enugu Division of the court of Appeal. The plaintiffs also being not satisfied with the dismissal of their claim for N200.00 damages for trespass filed a respondent’s notice contending that the judgment of the trial High Court be varied. In the respondent’s notice, they prayed the court of Appeal to enter judgment in favour of their claim for N200.00 damages for trespass. C

This appeal is brought by the defendants, who will hereafter be referred to as the appellant. Three grounds of appeal were filed by the appellants for the prosecution of this appeal. The grounds read as follows:- D

“(1) The Court of Appeal erred in law in reversing the judgment of the High Court dismissing the plaintiffs’ claim for damages.

Particulars of Error

(i) The respondents did not appeal against the said decision. E

(ii) The respondent’s Notice filed in respect of the said decision cannot operate as a Notice of Appeal.

(2) The Court of Appeal erred in law in affirming the grant by the High Court of a declaration that “the plaintiffs are the holders of the customary certificate of occupancy of the piece and parcel of land as shown verged yellow in Plan No. EC401/73 within the area verged pink and purple.” F

Particulars Of Error

(i) There is no such title known to the law as “customary certificate of title.”

(ii) There is absolutely no evidence that the plaintiffs held any certificate whatsoever in respect of the land aforesaid. G

(3) The Court of Appeal has no jurisdiction to set aside the judgment of the High Court dismissing the plaintiffs’ claim for damages for trespass and making consequential orders in the absence of a substantive appeal by the said plaintiffs against the judgment of the High Court.” H

Three issues have been raised from the above grounds by the learned counsel, for the appellants as questions for the determination of this appeal. The issues are:-

“(i) Whether the court of Appeal had jurisdiction to set aside the

judgment of the High Court dismissing the plaintiffs' claim for damages for trespass and to substitute therefore an order entering judgment in favour of the said plaintiff for N200.00 as general damages.

(ii) *Whether, having regard to the judgment of the High Court as confirmed by the Court of Appeal, coupled with the fact that the claim for injunction ought not to be dismissed, the order for perpetual injunction ought not to have been set aside also.*

(iii) *Whether the Court of Appeal ought to have upheld the order of the High Court declaring that "the plaintiffs are the holders of the customary Certificate of occupancy of the piece and parcel of land as shown verged yellow in Plan No. EC401/73 within the area verged pink and purple."*

Learned counsel for the respondents submitted, in the respondents' brief that the only issues which call for determination in this appeal are, Firstly, whether the perceived errors in the judgment of the Court of Appeal are substantial enough to warrant the setting aside of that Court's judgment and, Secondly, whether the judgment of the Court of Appeal affirming the judgment of the High Court, Awka, on the issue of that Court's declaration that the plaintiffs are holders of customary certificate of occupancy of the land in dispute ought to be allowed to stand.

Learned counsel for the appellants submitted in support of the first issue that if the respondents wish to have the judgment of the trial High Court dismissing their claim for damages for trespass set aside and an order substituting a judgment in their favour substituted, they can only do so by filing a substantive (cross) appeal. They cannot do so via a respondent's notice of intention to vary the judgment. The exact wordings of the respondent's Notice read:-, "*TAKE NOTICE that upon the hearing of the above appeal the respondents herein intend to contend that the decision of the Court below dated the 30th day of July, shall be varied as follows:*

That the dismissal of the claim for trespass be set aside and judgment entered for the plaintiffs/respondents for N200.00 being general damages for trespass."

The procedure under Order 8 Rule 3, of the Supreme Court Rules 1985 is available to a party only where, although as a respondent, he intends to retain the judgment appealed from by the opposite party, at the same time he wants the judgment varied or affirmed on other grounds. The procedure was deleted from the Supreme Court Rules through a Legal Notice No. 111/1991 because it created much problem in identifying whether a decision sought to be set aside should be by either a cross appeal or a respondents' Notice. The provision is however still available in the Court of Appeal Rules - see

Order 3 Rule 14(1) of Court of Appeal Rules 1981.

There is difference between variation of a judgment and a cross-appeal. In a respondents' Notice a party seeks to retain the judgment appealed from but at the same time wants it varied. It cannot be used where a party wants a reversal of the judgment of the lower court, as this can only be done by way of an appeal or cross appeal. See *B.E.O.O. industries (Nigeria) Ltd. V. Maduakoh* (1975) 12 SC 91. A simple example of a request for variation of a judgment through a respondents notice is where the respondent has been awarded some amount as damages and through proper evaluation of the evidence and conclusion of the court below he would be entitled to a higher award. See *Maurine Dumbo and Ors. V. Chief Stephen Idugboe* (1983) NSCC 22 at 39 (1983) 1 SCNLR 29. The procedure could also be used where the variation tends to deal with an accidental slip or changes in the terms of the judgment if that be the only way he could be enabled to retain the judgment - *Etowa Enang and Ors v. Fidelis Ikor Adu and Ors* (1981) 11-12 SC 25 at 45.

In the case in hand the respondents applied to the Court of Appeal to set aside the dismissal of the claim for N200.00 damages for trespass and enter judgment for the same amount in favour of the respondents. This could only be attended to by the Court of Appeal through a substantive cross-appeal. The Court of Appeal was therefore in error to set aside the judgment of the trial High Court through a request by the respondents in a respondents notice and award to the respondents N200.00 general damages for trespass. The appeal in respect of this issue succeeds and I resolve the issue in favour of the appellants.

In the second issue, learned counsel for the appellants submitted that since the learned trial High Court Judge had dismissed the claim for trespass it was unreasonable for him to grant an order for perpetual injunction and the Court of Appeal was also in error to affirm such award. The appellant, in their brief emphasized the phrase "*from further acts of trespass*" and submitted that the order for perpetual injunction ought to have been set aside by the Court of Appeal.

Learned counsel for the respondent replied that the purport of the order for injunction made by the High Court, and confirmed by the Court of Appeal was to protect the land found to belong to the respondents. The judgment of dismissal of the claim for damages might justify one of the acts to wit, surveying the land in dispute, but it did not wipe out the acts of trespass found on the record - for example, demolition of the foundation of a building and unlawful entry on the land. Learned counsel also relied on the opinion expressed in the judgment of the Court of Appeal on the issue of the grant of perpetual injunction.

The Court of Appeal per Kolawole J.C.A ., held quite correctly, that proof of ownership is prima facie proof of possession unless there is evidence that another person is in possession.

B The learned justice went further and said that the learned trial Judge having granted the declaration sought for by the respondents was justified in granting an order of perpetual injunction. He referred to the case of Christo-
C pher Okolo v. Eunice Uzoka (1978) 4 SC 77 at 89. In that case (a consolidated suit) Eunice Uzoka sued Christopher Okolo and claimed N2,000.00 general damages for trespass to land in her possession and perpetual injunction restraining Mr. Okolo, his servants or agents from further trespass to the said
D land. The learned trial Judge, Aseme J., (as he then was) entered judgment for Eunice Uzoka and awarded N300.00 damages for trespass against Mr. Okolo. In addition he also granted perpetual injunction to restrain Christopher Okolo, his servants and or agents from further interference and trespass to the land in possession of Eunice Uzoka.

D On appeal to this Court it was established that part of Eunice Uzoka's land had been leased to Ibru Sea Foods Ltd. It was therefore held that Eunice Uzoka could not claim damages for trespass to the land in respect of which Ibru Sea Foods Ltd. was in possession. This Court agreed with the submission and allowed the appeal against the award of damages for trespass. But
E the appeal against perpetual injunction was dismissed.

In the case in hand, the facts are clear that the learned trial Judge had made a finding that the land in dispute was in possession of the respondents as of right. The respondents pleaded in paragraph 8 of their statement of claim that a member of their family, one Ikejideaku Ezeteaka, attempted to build a
F house in the land in dispute and the appellants trespassed into the land and demolished the foundation of the building. The appellants admitted in paragraph 11 of the amended statement of defence that they destroyed the building because Mr. Ezeteaka had failed to heed the warning given to him to stop the building. Now since the learned trial Judge had declared the disputed land
G for the respondents it is very clear that the respondents' claim for damages for trespass against the appellants is meritorious. The appeal which I have allowed earlier in this judgment succeeded on technical ground only because a wrong procedure was followed in bringing the matter before the Court of Appeal. The learned trial Judge was quite right, therefore, to grant an order of
H perpetual injunction against the appellants. And since they have admitted to have destroyed a building in the disputed land they have to be restrained from further acts of trespass.

The third issue is based on a mistake in the judgment of the trial High Court in which it declared that the respondents are the holders of the custom-

any certificate of occupancy of the piece and parcel of land as shown verged yellow in plan No. EC401/73 within the area verged pink and purple. The appellants in the particulars to ground two in this appeal submitted that there was no such title known to law as “*customary certificate of title (sic)*”. I do not see the wisdom in making this issue a ground for the prosecution of this appeal. It is an obvious oversight of the provisions of section 40 of the Land Use Act 1978 which reads as follows:-

“40. Where on the commencement of this Decree proceedings had been commenced or were pending in any court or tribunal (whether at first instance or on appeal) in respect of any question concerning or pertaining to title to any land and or interest therein such proceedings may be continued and be finally disposed of by the court concerned but any order or decision of the court shall only be as respects the entitlement of either of the parties to the proceedings to a right of occupancy. Whether statutory or customary in respect of such land as provided in this Decree.”

The mistake which the learned trial Judge made in making a declaration in favour of the respondents over the land in dispute is where he said ... the plaintiffs are holders of the customary certificate of occupancy” instead of saying that the plaintiffs are entitled to a customary right of occupancy. The Court of Appeal did not observe the mistake and affirmed the decision of the trial High Court. If its attention had been drawn to the mistake the Court would have corrected it. This Court had made several decisions pointing out that every court had power at any time to correct accidental slips, mistakes or omissions. It is not every slip in a judgment that can result in the judgment being upset. A mistake or omission which can lead to a reversal or a decision must be substantial in the sense that it affected the decision appealed against. See *Umunna and Ors. V. Ors. Okwuraiwe and Ors. (1978) 6-7 SC 1* at page 9 and; *Jude Ezeoke & Ors v. Nwagbo & Ors. (1988) 1 NSCC. 414* at 422; (1988) 1 NWLR (Pt. 72) 616.

In the result, the only issue which has succeeded in this appeal is where the Court of Appeal reversed the decision of the learned trial Judge on damages for trespass through a Respondent’s Notice. I allowed that appeal on technical grounds only because the appellants had admitted, in their pleadings, entering the land of the respondents and destroying the foundation of the building of one of the respondents. The action of the appellants is a clear case of trespass. Otherwise, this appeal has failed and it is dismissed. The respondents are entitled to the costs of this appeal which I assess at N1,000.00.

BELGORE JSC

I read in advance the judgment of Mohammed, J.S.C. and I agree with

his reasoning and conclusions which I adopt as mine and in dismissing this appeal and making consequential orders which I also abide with.

ONUJSC

B I have had the advantage to read before now, in draft the judgment of my learned brother Mohammed, J.S.C. and with which I am in entire agreement. I desire however to comment on the case as follows:-

C By virtue of former Order 8 rule 3 of the Supreme Court Rules 1985 (now deleted by Government Notice 11/1991 with effect from 1/10/91) a respondent who, not having appealed from the decision of the Court of Appeal, desired to contend on appeal that the decision of that court should be varied, either in any event or in the event of the appeal being allowed in whole or in part, must give notice to that effect, specifying the grounds of that contention and the precise form of the order which he proposes to ask the Court to make.

D This phenomenon, however, is still retained in the Court of Appeal rules in Order 3 rule 14 thereof. In the appeal herein, quite apart from the Notice and Grounds of Appeal in which the appellants filed four grounds to assail the decision of the court below, the respondents also, for their part, filed a notice pursuant to Order 3 rule 14 (ibid). At the hearing of the appeal, the court below

E acceded to the respondents' supplication that -

“the judgment be varied by entering judgment for the plaintiffs for the sum of N200 as general damages for trespass.”

The issue formulated by the appellants in this Court sequel to their appeal to this Court in this regard, is issue 1. Their complaint therein is whether

F the Court of Appeal had jurisdiction to set aside the judgment of the High Court dismissing the plaintiffs' claim for damages for trespass and to substitute therefore an order of entering judgment in favour of the said plaintiffs for N200.00 as general damages. In several decisions of this court commencing from Lagos City Council v. Ajayi (1970) 1 All NLR 291 at 296-297; Oyekan v. BP.

G Nigeria Ltd. (1972) 1 All NLR 45 at pages 47/48; Sunmonu v. Ashorota (1975) 1 NMLR 16; Eliochin (Nigeria) Ltd. V. Mbadiwe (1986) 1 NWLR (Pt. 14)47; Chief Adedapo Adekeyn. Chief O.B. Akin Olugbade (1987) 3 NWLR (Pt. 60) 214 at 226-227; Oguma v. I. B. W.A. (1988) 1 NWLR (Pt. 73) 658 to Chief F.R..A. Williams v. Daily Times of Nigeria (1990) 1 NWLR (Pt. 124) 1 at pp. 21-22 and

H 62-63, to mention but a few, the principle has invariably been laid down that a respondent seeking to set aside or vary a finding which is crucial or fundamental to a case, can only do so through a substantive cross-appeal and not through a Respondent's Notice to affirm or vary the judgment on other grounds. In other words, where a respondent wants a complete reversal of the

decision of the lower court, he ought to file a cross-appeal instead of a Respondent's Notice. Thus, in the case of Eliochin Nigeria Ltd. V. Mbadiwe (supra) where circumstances similar to those in the instant case existed (although premised on Order 8 rule 3 of the old deleted Supreme Court Rules) this Court (per Kazeem, J.S.C) quoted with approval its earlier decision (founded on repealed Order 7 rule 1:) of the Rules of the Supreme Court, 1960) in African Continental Seaways v. Nigeria Dredging Roads and General Works (1977) 5 SC 235 at 247 thus:

"We would like to say that a party seeking to set aside a finding which is crucial and fundamental to a case can only do so through a substantive cross-appeal and not by an application to vary."

And in Lagos City Council v. Ajayi (supra) this Court observed at pages 296-297 as follows:-

"The Notice (Respondents' Notice) postulates that the approach of the learned Trial Judge to the case was correct but that his conclusions had adversely affected the respondent who thereby contends that by the same reasoning of the learned trial Judge he should have received a greater award." (Italics is mine for emphasis)

See also National Society for the Distribution of Electricity etc v. Gibbs (1900) 2 AC 280 at 287.

From the foregoing it is clear that the court below was in error to have acceded to the respondents' request by entering judgment for them in the sum of N200.00 as general damages. The issue, technical though it is, is accordingly resolved in appellants' favour and the appeal in that regard succeeds. The award of N200.00 general damages is set aside.

Coming to Issue 2 which asks whether, having regard to the judgment of the High Court as confirmed by the Court of Appeal, coupled with the fact that the claim for injunction ought to be dismissed, the order for perpetual injunction ought to have been set aside also, in answering this poser, I deem it pertinent to set out paragraph 8 of the Amended Statement of Claim and paragraph 11 of the Amended statement of Defence wherein the parties joined issues. Pleaded the respondents:

"8. Sometimes in 1971 one Ikejideaku Ezeteaka, a member of the plaintiffs' village attempted to build a house on which was his father's land within the land in dispute as a member of the village.

The defendants, without just cause, trespassed into the land in dispute and demolished the foundations of the building of the said Ezeteaka. Ezeteaka took action against them for trespass, declaration of title and injunction in Suit No. AA/33171 in the High Court of Amawbia/Awka."

Said the appellants in reply -

“11. The defendants admit that about the year 1971 one Thomas Ikejideaku Ezeteaka trespassed into their land and the defendants in defence of their rights as owners of the land demolished the wall fence of the said Thomas. This was after the said Thomas Ezeteaka had failed to heed the warning of the police to stop building the said wall fence.”

B On the above pleadings and the findings of the trial court the court below came, inter alia, to the following conclusions:-

‘The learned Judge found as a fact that all the members of the respondents’ village who live or lived on the land in dispute live there as of right and not as appellants’ tenants. The learned Judge also found further at page 75 as follows:-

Now from the admission of the appellants and the finding of the learned Judge certain crucial facts emerge namely:-

(1) The land in dispute is the family land of the respondents called OGWULUGWUANI where they live and farm.

D (2) The land in dispute is in possession of the respondents

(3) The land in dispute is verged Yellow on the respondents’ plan Exhibit A and includes the areas verged Pink and Purple therein.

(4) The appellants conceded a large portion of the land in dispute as belonging to the respondents’ within the area verged Yellow but excluding the E area verged Pink and Purple.

The end result of the findings above, which along with the trial court’s, constitute concurrent findings of facts. They have in no way, in this appeal, been successfully impeached such as that they have either led to a miscarriage of justice, or amount to a serious violation of some principles of law or F procedure or that they constitute erroneous or perverse findings, to enable me interfere therewith. See *Fatoyinbo v. Williams* (1956) SCNLR 274; *Nwadike v. Ibekwe* (1987) 4 NWLR (Pt. 67) 718; *Western Steel Works v. Iron & Steel Workers* (1987) 1 NWLR (Pt. 49) 284; *Nwuzoke v. The State* (1988) 2 SCNJ 344; (1988) 1 NWLR (Pt. 72) 529 and *Adimora v. Ajufo* (1988) 3 NWLR (Pt. 80) 1 G (1988) 1 NSCC 1005 at 1016, to enumerate but a few of such cases to exemplify this settled principle of law.

The cumulative effect of the above findings constitutes the appellants as trespassers to the respondents’ land - namely, the land in dispute. That being the case, the conclusion arrived at by the trial court and affirmed H by the court below that trespass to land in law constitutes the slightest disturbance to the possession of land by a person who cannot show a better right to possession, See *O. Solomon & Ors. V. Mogaji & Ors.* (1982) 11 SC 1 at 37 and *Amakor v. Obiefuna* (1974) 3 S.C. 67 at 75, 76, the learned trial Judge, in my respectful view, was justified in granting an order of perpetual injunction

against the appellants, having earlier granted the declaratory relief sought vide *Okolo v. Uzoka* (1978) 4 Sc. 77. 89.

In relation to issue 3 which asks whether the court below ought to have upheld the order of the trial court declaring that “the plaintiffs are the holders of the customary certificate of occupancy of the piece and parcel of land as shown verged yellow in Plan No. EC. 401/73 within the area verged pink and purple,” it ought to be borne in mind that at the time the respondents took out the Writ of Summons against the appellants, the Land Use Act was barely five months old. Thus, counsel’s use of the words “*customary certificate of Occupancy*” in place of “*customary right of occupancy*” cannot, without more, be said to have occasioned a miscarriage of justice. See *Ehoh v. Akpotu* (1968) 1 All NLR 220 at 224; *Anla v. Ayanbola* (1977) 4 SC 63 at 69 and *Ojiegbe v. Okwaranyia* (1962) All NLR 605 at 608. It is a mere slip to assign an incorrect nomenclature in place of a relief claimed. It is the law that it is not every slip of the Court of Appeal that will result in the judgment being overturned by the Supreme Court. See *Udeze v. Chidebe* (1990) 1 NWLR (Pt. 125) 141. The law allows the correction of typographical errors or slips or omissions such as the one under consideration. See *Asiyanbi v. Adeniji* (1967) 1 All NLR 82; (1967) NMLR 238. Besides, the provisions of section 40 of the Land Use Act amply take care of situations like the one precipitated herein.

Issue 3 is accordingly resolved against the appellants. It is for the above reasons as well as those ably and fuller set out in the judgment of my learned brother Mohammed, J.S.C. that I, too, dismiss this appeal. I adopt the consequential orders as to costs made therein.

ADIO JSC

I have had a preview of the judgment delivered by my learned brother, Mohammed, J.S.C., and I agree that the appeal has, to the extent stated in the judgment, failed. I abide by the consequential order, including the order for costs.

IGUHJSC

I have had the privilege of reading, in draft, the lead judgment just delivered by my learned brother, Mohammed J.S.C and I am in entire agreement with him that this appeal is devoid of substance and should be dismissed.

The first issue raised in this appeal poses the question whether the

Court of Appeal was entitled under the law to set aside the judgment of the High Court dismissing the plaintiffs' claim for damages for trespass and to substitute therefore an order entering judgment in favour of the plaintiffs for N200.00 as general damages. The argument of learned counsel for the defendants is that the court below erred in law by setting aside the trial court's order of dismissal of the plaintiffs' claim for damages for trespass and substituting therefore an award of N200.00 as general damages in the absence of a cross-appeal by the said plaintiffs/respondents on the issue.

For the plaintiffs/respondents, it was contended that the decision of the Court below was covered in law by the respondents' notice filed in the appeal for the reversal of the judgment of the trial court on the issue.

It cannot be over-emphasized that a respondent to an appeal who seeks to set aside a decision or finding which is fundamental to a cause can only do so through a substantive cross-appeal and not by an application to vary the judgment of the court below. See *African Continental Seaways Ltd. V. Nigerian Dredging Roads and General Works Ltd.* (1977) 5 SC 235 at 247, *Etowa Enang and others v. Fidelis Adu* (1981) 11-12 Sc. 25 at pages 38-46. *Sunmoun v. Ashorate* (1975) 1 NMLR 16 at page 23. *Adekeye v. Akin-Olugbade* (1987) 3 NWLR (Pt. 60) 214 at pages 266-227 and *Oguma Associated Companies Nigeria Ltd v. International Bank for West Africa Ltd* (1988) 1 NWLR (Pt. 73) 658 no doubt, a procedural irregularity ought not to stand between the Supreme Court and doing justice between the parties. See *Surakatu v. Nigerian Housing Development Authority Ltd* (1981) 4 SC 26 and *Etowa Enang and others v. Fidelis Adu*, *supra* at page 38-46. The issue under consideration, however, is clearly fundamental and jurisdictional to a certain extent that it may not readily be dismissed with a wave of the hand as a mere procedural irregularity. It must therefore be stressed, that a respondent to an appeal, where he desires to contest an issue different from the one raised by the appeal served on him or where he seeks a reversal of an adverse finding in the decision appealed against, may only do so by a notice of appeal or a cross appeal and not by a mere respondent's notice of intention to vary the judgment. See too *National Society for the Distribution of Electricity etc v. Gibbs* (1900) 2 A.C. 280 at 287. A respondent's notice of intention to vary a judgment is only available where the party complaining while in principle accepting and retaining the judgment appealed against, merely seeks its variation. It is not available for a complete reversal of such a judgment. See *Western Steel Works Ltd and others v. Iron and Steel Workers* (1987) 1 NWLR (Pt. 49) 284.

In the present case, the trial court dismissed outright the respon

dents' claim in respect of N200.00 general damages for trespass. This decision of the trial court was not appealed against by the respondents. All they did was to file respondents' notice of intention to vary the trial court's judgment in respect of the dismissal of their claim for damages for trespass. With profound respect, it is plain to me that the court below was in gross error when pursuant to the said notice, it proceeded to reverse the dismissal of the respondents' claim for trespass and entered judgment for the respondents in the sum of N200.00 general damages as claimed. The answer to issue number one must therefore be in the negative. B

The contention of the appellants on the second issue is that the order of a perpetual injunction granted by the trial court was to restrain the appellants, their servants and/or agents from further acts of trespass on the land in dispute. They submitted that since the claim for trespass was dismissed, it was unreasonable to have granted the order for perpetual injunction to restrain the appellants from further acts of trespass on the land. It is their argument that the court below ought to have set aside the said order of injunction. C D

It is on record that the trial court dismissed the respondents claim for trespass in just one single sentence as follows:-

"I accept the submission of the learned defence counsel that going on the land in dispute on a court's order to have the land surveyed does not constitute an act of trespass." E

With great respect, I think that the learned trial Judge was clearly in error when he pinned the acts of trespass alleged against the appellants to only their entry upon the land in dispute pursuant to the order of court for the survey of the land. The respondents in paragraph 8 of their amended Statement of Claim pleaded as follows:- F

"Sometime in 1971 one Ikejideaku Ezeteaka, a member of the plaintiffs' village, attempted to build a house on land which was his father's land within the land in dispute as a member of the village. The defendants, without just cause, trespassed into the land in dispute and demolished the foundations of the building of the said Ezeteaka Ezeteaka took action against them for trespass." (Italics supplied for emphasis) G

The appellants in paragraph 11 of their amended Statement of Defence admitted the said destruction but claimed that the land on which the structure was erected was their land. H

The learned trial Judge would seem to have amply appreciated what the real dispute in the case was when he observed as follows:-

"All the parties are agreed as to the cause of this dispute. The

dispute arose when PW2 went to build on the area verged purple in Exhibit A and green Exhibit D” (Italics supplied for emphasis)

In the circumstance, and with profound respect to the learned trial Judge, it cannot be right to suggest that the sole cause of dispute in the present action is the appellants’ entry on the land in dispute on the court’s order to have the land surveyed.

It is the finding of the trial court as affirmed by the court below that the land in dispute is the family property of the respondents in which they live and farm and are in exclusive possession thereof. This land is verged yellow in the respondents’ plan, Exhibit A and includes the area verged pink and purple therein. In my view, the learned trial Judge, having declared the respondents the owners in possession of the land in dispute, was perfectly entitled to make an order of perpetual injunction against the appellants to restrain them from further acts of trespass on the land in dispute. Issue number two must therefore be resolved against the appellants.

The appellants’ complaint on the third issue is that the trial court erroneously declared that the respondents are the holders of the customary certificate of occupancy of the land in dispute. They contended that what the trial court infact declared in favour of the respondents was an interest unknown to the law and that the court below ought not to have affirmed such an erroneous judgment.

There can be no doubt that the appropriate declaration which the trial court ought to have made, having regard to the main issue in controversy between the parties and all its findings thereupon is the respondents’ entitlement to a customary right of occupancy in respect of the land in dispute. It seems to me clear however that the error complained of on the part of the learned trial Judge is a mere clerical mistake or at the worst, a sheer misdescription of the plain right in issue between the parties in the suit. This right, both from the pleadings of the parties and their evidence before the trial court, is that of entitlement to a customary right of occupancy in respect of the land in dispute. The misdescription of this right by the learned trial Judge at the tail end of his judgment is by no stretch of the imagination capable of deceiving or misleading either the appellants or anyone else for that matter. It has prejudiced no one and has occasioned no miscarriage of justice in the case. It is, in my view, a straight forward case of a mere inaccurate description of an obvious right in dispute between the parties which under the principle, *falsa demonstratio non nocet cum de corpore constat* may not invalidate this judgment of the court complained of.

I think it right to reiterate that it is not every mistake or error in a judgment that will result in an appeal being allowed. It is only when the error

is substantial in that it has occasioned a miscarriage of justice that an appellate court is bound to interfere. See *Onajobi v. Olanipekun* (1985) 4 SC (Pt. 2) 156 at page 163, *Oje v. Babalola* (1991) 4 NWLR (Pt. 185) 267 at page 282. *Ukejianya. V. Uchendu* (1950) 13 WACA 45 at page 46. *Azuetonma* etc.

In the present case, the error complained of is neither substantial nor B has it occasioned a miscarriage of justice. Accordingly issue number three must again be resolved against the appellants.

It is for the above and the fuller reasons contained in the lead judgment of my learned brother, Mohammed, J.S.C, that I, too, dismiss this appeal. The award of N200.00 general damages for trespass by the court below is C however hereby set aside. I abide by the order for costs contained in the lead judgment.

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