

SUPREME COURT OF NIGERIA
 18TH JULY, 1995. SC, 76/1992
CORAM: M.L. UWAI, M.E. OGUNDARE, U. MOHAMMED,
Y.O. ADIO, A.I. IGUH, JJSC.

1. LAWRENCE NWANKPU & ANOTHER
 (For themselves and on behalf of ... PLAINTIFFS/APPELLANTS
 Utele Kindred of Ofeke Village, Osina)
 AND
 DENNIS EWULU & 2 OTHERS
 (For themselves and on behalf of
 Umuezegbuwa Kindred of DEFENDANTS/RESPONDENTS
 Uhuala Village, Osina)

APPEALS - Findings of fact - Circumstances under which an appeal court - Will interfere therewith.

APPEALS - Findings of fact - Reasons for interfering therewith - Whether justifiable.

EVIDENCE - Conflict - Evidence correctly evaluated - By trial court - Whether there is any conflict - To warrant interference.

EVIDENCE - Evaluation of evidence - Whether trial court properly evaluated evidence of witnesses - So as to make the evaluation faultless.

JUDGMENTS - Court's decision - Wrong Decision of a court - That did not occasion miscarriage of justice - Whether sufficient to set aside a judgment.

JUDGMENTS - Issue - Resolution of issues - Must be based on evaluation of evidence.

JUDGMENTS - Writing of judgment - Whether course adopted by trial judge in writing judgment - Occasioned miscarriage of justice.

LOCUS IN QUO - Visit to locus in quo - Court's discretion not to Visit locus - When properly exercised - Whether on appeal court should interfere therewith.

LOCUS IN QUO - Visit to locus in quo - Duty of court to visit locus - Where

there is conflict in evidence - For the resolution thereof.

PLEADINGS - Details - Root of title in land dispute - Whether plaintiffs' pleading as to traditional history - Did not disclose details of their root of title.

PLEADINGS - Misconception - Land dispute - Court of Appeal's finding that plaintiffs admitted that defendants were in possession - Is a misconception of the pleadings

FACTS

The appellants as plaintiffs sued the respondents as defendants claiming -Declaration of title to land under Native Law and Custom, £50 general damages for trespass to land and injunction restraining the defendants from further trespass. The action which was commenced in the High Court of the defunct Eastern Nigeria, Okigwe was concluded in the High Court of the former Imo State, Orlu. The trial judge on the evidence led by both sides, found for the plaintiffs as per their writ.

Aggrieved by the decision, the defendants appealed to the Court of Appeal Port Harcourt Division, which court allowed the appeal, set aside the trial court's judgment and dismissed the plaintiffs claim. Against that judgment of the Court of Appeal, the appellants have appealed to the Supreme Court raising five issues.

ISSUES FOR DETERMINATION

"(1) Whether the Court below was right when it held that in arriving at its judgment in this case the course adopted by the learned trial Judge occasioned a miscarriage of justice such as warranted the setting aside of the judgment and ordering a dismissal of the appellants' claims.

(2) Whether the court below was right when it held that the learned trial Judge rejected the evidence of D. W. 2, 3, 5, 6 and 7 that he was therefore in error in so doing.

(3) Whether the Court below was right when it held that the learned trial Judge was in error in refusing to visit the locus in quo, and for that reason setting aside the judgment of the High Court, and making an order of dismissal of the Appellants' claims.

(4) Whether the Court below was right in holding that the learned trial Judge was in error when he found that some aspects of the Respondents' evidence gave support to the case made by the Appellants.

(5) Whether the Court below was right in setting aside the judg

ment of the learned trial Judge on the grounds that the evidence led by the Appellants was not sufficient to justify the learned trial Judge entering judgment for the Appellants."

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

Resolution of Issues

1. The complaint made by the Defendants in the court below is that the learned trial Judge considered the case for the defence and rejected it before considering the case for the Plaintiffs. In my respectful view, that act is entirely correct. The learned trial Judge considered certain issues raised the pleadings and considered them first before deciding the main issue of title before him. He made his findings of fact on these issues which, in the main, were findings against the Defendants. All the authorities that have been referred to deal with the question of evaluation of evidence rather resolution of issues. In the resolution of issues, there must of course be evaluation of evidence and it is in the resolution of each issue that the evidence on that issue ought to be evaluated on the line of the guidelines suggested in the cases above.

(p. 1587 C)

Writing of judgment

2. In my respectful view, the court below came to a wrong conclusion when it held that the course adopted by the learned trial Judge in writing his judgment occasioned a miscarriage of justice. All that the trial Judge was trying to do was to resolve some preliminary issues he considered necessary for determination of the main question before him and that is, whether on preponderance of the evidence adduced by the parties the Plaintiffs had discharged the burden on them to prove their case to ownership of the land in dispute. At no time did he put on the Defendants the burden of disproving this primary issue.

(p. 1589 B)

Proper Evaluation of Evidence - Whether proper

3. I have considered the evidence of D.W.3 and D.W.5, I have no reason whatsoever to disagree with the learned trial Judge when he declined to ascribe credibility to the evidence of these two witnesses. I, therefore find it difficult to subscribe to the view of the court below that the learned trial Judge was in error not to have accepted and acted on the evidence of these witnesses. In my respectful view the learned trial Judge properly evaluate the evidence of the witnesses and rightly rejected their evidence for the reasons given by him. (p. 1590 F)

Findings of Fact - Circumstances

4. The principle under which an appeal court would interfere with the findings of a lower court have been laid down in several cases. It is now settled that if there has been a proper appraisal of evidence by a trial court a court of appeal ought not to embark on a fresh appraisal of the same evidence in order merely to arrive at a different conclusion from that reached by the trial court. The circumstances under which an appeal court would interfere with findings of fact made by a trial court do not exist, in my respectful view, in this case. (p. 1591 B)

Visit to Locus in Quo - Duty of court

5. It is the duty of a court to visit a locus in quo where there is conflict of evidence as to the existence or otherwise of something material to the case and such a visit would resolve the conflict in evidence or would clear a doubt as to the accuracy of any piece of evidence on the subject. It is clearly at the discretion of the trial Judge to determine whether in the light of the evidence before him, there is need to resolve, by a visit to the locus in quo, the conflict of evidence or clear a doubt as to the accuracy of a piece of evidence when there is such conflict of evidence. (p. 1594 G)

Visit to Locus in quo - Court's Discretion

6. I am satisfied that there was copious evidence before the learned trial Judge from which he could make his findings on the existence or otherwise of ekpe wall on part of the boundaries of the land in dispute without the necessity of a visit to the land in dispute. Indeed, not only the Plaintiffs' surveyor and other witnesses for the Plaintiffs testified that there was ekpe wall on part of the boundaries of the land in dispute, some defence witnesses also admitted that there was ekpe wall on boundaries of the land in dispute. In my respectful view the learned trial Judge, from the evidence before him, acted properly in declining to visit the land in dispute. The court below was clearly in error to have interfered with the learned trial Judge's exercise of his discretion in this respect. (p. 1595 C)

Wrong Holding of Trial Court

7. The learned trial Judge was however, wrong in holding that the evidence for the defence supported the case made by the Plaintiffs that the land in dispute was in Ofeke village. Having so concluded however, what is the effect of this on the judgment of the learned trial Judge? At the end of the day the learned trial Judge found that the land in dispute belonged to the Plaintiffs. On the strength of this finding, therefore, it must necessarily follow that the land

would be in Ofeke village. What was in dispute was its ownership. Therefore, the error of the learned trial Judge that the evidence for the defence supported the Plaintiffs as to the issue of the situs of the land in dispute has not occasioned any miscarriage of justice. Although I have held that Question 4 is to be answered in the affirmative, as the error complained of has not occasioned any miscarriage of justice, I hold error made by the learned trial Judge is of no consequence and cannot lead to the setting aside of his judgment.
(p. 1596 G)

C Pleadings - Details

8. The Defendants did not plead any traditional history as relating to their ownership of the land in dispute. Not only that, the evidence in their case was completely at variance with their pleadings. On the other hand, the Plaintiff traced their root of title to Utele the original founder of the land. I find it difficult to agree with the Court below that the traditional history pleaded by the Plaintiffs did not disclose in full detail the title. With profound respect, I think the Court of Appeal was in error. (p. 1598 D)

E Evidence - Conflict

9. It is argued that the evidence of P.W.3 and P.W.5 is at variance Plaintiffs' pleading and is contradictory to the evidence of P.W.2. With profound respect to learned leading counsel for the Defendants, I do not share his views. There is nothing in the pleadings as to the number of children left by Utele. Not only that, these two witnesses, that is P.W.3 and P.W.5 are not from Utele family. It has not been shown either their evidence contradicted that of P.W.2. I can see no justification ever for the court below interfering with the evaluation and appraisal evidence by the learned trial Judge. (p. 1599 G)

G Misconception of Plaintiffs Pleadings

10. The Court below also faulted the learned trial Judge's finding on possession. With respect to the Court below, it laboured under a complete misconception of the Plaintiffs' pleadings and evidence in support. Learned trial Judge accepted the evidence of these witnesses. It is strange to see how the court below could have found that the plaintiffs admitted that the Defendants were in possession of the land in dispute (p. 1599 H)

Findings of fact - Reasons for interfering

11. Having considered the reasons given by the court below for interfering with the findings of the learned trial Judge, I find myself unable to agree with them. It would appear that what that court did was to reevaluate the evidence so as to arrive at a conclusion different from that of the trial court. Bearing in mind the pleadings of the parties, the apparent weaknesses in the case for the defence and the findings of the trial court based, as it were, on the credible evidence before it, I have come to the inevitable conclusion that Question 5 must be answered in the negative. (p. 1602 D) B

NOTABLE POINTS OF INTEREST

OGUNDARE JSC C

1. No particular scheme for writing judgment

It is not in dispute that there is no particular scheme for the writing of judgments. All that a trial Judge is expected to do is to constantly bear in mind the case as presented by each party, the onus of proof and to weigh the case for each party on that imaginary scale suggested in Mogaji v. Odofin (p. 1583 B) D

IGUH JSC

2. Judgment - Whether trial court's method occasioned miscarriage of justice

In the present case, it is true that the learned trial Judge reviewed some aspects of the evidence led by the defendants before turning to the evidence led by the plaintiffs. It is equally clear that he exhaustively reviewed and evaluated the entire evidence led by both parties on all the issues canvassed before the court before he reached his final decision. Under such circumstances, I do not think it can be seriously suggested that the method adopted by the learned trial Judge in his consideration of the case led to any miscarriage of justice or that it was prejudicial to either of the parties. With profound respect, I find myself unable to associate myself with the observation of the court below to the effect that the trial court's consideration of certain aspects of the defendants' evidence before dealing with the plaintiffs' evidence occasioned any miscarriage of justice or shifted the primary onus of proof in the case on the defendants. (p. 1604 D) E
F
G

REPRESENTATION

Kehinde Sofola, SAN with H.S. Umar, (Miss) for the Appellants
G.R.I. Egonu, SAN with P.U. Onwuakpa for the Respondents H

CASES REFERRED TO

- Erri v. Uperi (1974) 1 NMLR 22
Woluchem v. Gudi (1981) 5SC. 291
Mogaji v. Odofin (1978) 4SC. 91
Aromite v. Awoyemi (1972) All NLR 105, 115 (Reprint)
- B Duru v. Nwosu (1989) 4 NWLR 24, 55
Emegokwu v. Okadigbo (1973) 4SC. 113, 117
George v. Dominion Flour Mills Ltd. (1973) 1 All NLR 71, 77
African Continental Sewage Ltd. v. Nigerian Dredging Roads and General Works Ltd. (177) 5 SC. 235, 248
- C NIPC Ltd. v. Thompson Organisation (1969) NMLR 104
Akinloye v. Eyiola (1968) NMLR 92 95
Omadide v. Adajero (1976) 12 SC. 87, 96
Resident Ibadan Province v. Lagunju 14 W.A.C.A. 549, 552

D STATUTE REFERRED TO

Evidence Act, Cap. 112 L.F.N. 1990, s. 77(d)

LEAD JUDGMENT BY OGUNDARE JSC

The plaintiffs (who are now appellants) sued the defendants (now respondents) claiming:

1. Declaration of Title under Native Law and Custom to the piece or parcel of land called Ukabi Utele situate in Ofeke Village, Osina Nkwere Division, within jurisdiction;
2. 50 pounds being general damages for the defendants trespass to the said land on or about 10th November, 1969;
3. An injunction restraining the defendants, their servants or agents from further trespass to the said land. There were originally three plaintiffs but the first plaintiff, Lazarus Anudu, died in the course of the proceedings at the trial and his name was struck off. The action which was instituted in the Okigwe Judicial Division of the High Court of the then East Central State of Nigeria, was heard and concluded in the Orlu Judicial Division of the High Court of the former Imo State. Pleadings were ordered, filed and exchanged. Evidence was led on both sides at the trial. In a reserved judgment the learned trial Judge (Ugoagwu J.), found for the plaintiffs and entered judgment in their favour in terms of their writ. Being dissatisfied with that judgment the defendants appealed to the Court of Appeal which latter court (Port-Harcourt Judicial Division) allowed the appeal, set aside the judgment of the learned trial judge and dismissed plaintiff's claims. It is against that judgment that the

The appeal having been entered in this Court, the parties filed and exchanged their respective briefs of argument; the plaintiffs also filed a Reply Brief. At the oral hearing of the appeal before us 15/5/95 learned leading counsel for the parties proffered oral arguments in further elucidation of arguments raised in their respective Briefs.

Five questions are set out in the appellants' brief as calling for determination in this appeal. These questions are not dissimilar to the five issues raised in the respondents' brief by the defendants. The five questions as set out in the appellants' Brief are as follows -

"(1) Whether the Court below was right when it held that in arriving at its judgment in this case the course adopted by the learned trial Judge occasioned a miscarriage of justice such as warranted the setting aside of the judgment and ordering a dismissal of the Appellants' claims.

(2) Whether the Court below was right when it held that the learned trial Judge rejected the evidence of D.W. 2, 3, 5, 6 and 7 that he was therefore in error in so doing.

(3) Whether the Court below was right when it held that the learned trial Judge was in error in refusing to visit the locus in quo, and for that reason setting aside the judgment of the High Court, and making an order of dismissal of the Appellants' claims.

(4) Whether the Court below was right in holding that the learned trial Judge was in error when he found that some aspects of the respondents' evidence gave support to the case made by the appellants.

(5) Whether the Court below was right in setting aside the judgment of the learned trial Judge on the grounds that the evidence led by the appellants was not sufficient to justify the learned trial Judge entering judgment for the appellants."

Before going into the issues raised by the parties, it is pertinent at this stage to state, how-be-it briefly, the case of each party.

The plaintiffs pleaded, inter alia, as follows:

"1. The Plaintiffs are farmers and reside in Ofeke Village, Osina, and bring this action for themselves and on behalf of the other members of Utele Kindred Ofeke Village.

2. The defendants are farmers and reside in Uhuala Village, Osina, and are sued for themselves and as representing all others the people of Umuezegbuwa Kindred of Uhuala Village, Osina.

3. The land in dispute is a piece or parcel of land on the northern portion of the plaintiffs' land known as Ukabi Utele (or farmland of Utele) situate in Ofeke Village Osina, within jurisdiction. It is shown edged Pink on

1578 Nwankpu v. Ewulu (1995) 7 KLR Ogundare JSC
the Plaintiffs' Plan No. EC. 304/72 made by Chief Ejike Chidolue, licensed
Surveyor, filed herein.

5. The land in dispute is the property of the plaintiffs from time immemorial. As owners in possession the plaintiffs have exercised maximum acts of ownership over the land by farming it living on parts of it, and by taking the fruits of the land without let, or hindrance from anyone. The
B plaintiffs' ancestors constructed an Ekpe wall round the whole Ukabi Utele including the land in dispute and this Ekpe has been maintained by plaintiffs.

6. The land in dispute forms part of Ukabi Utele. The whole of Ukabi Utele (shown on Plaintiffs plan) was the property of the plaintiffs' remote ancestor called Utele, he was the first man to occupy the land and died there, (including the land in dispute).
C

7. When Utele died his son Ezeofa succeeded to the ownership and possession of the land, and he in turn succeeded in the ownership and possession of the land by his own son. Ohaebo, who was succeeded by his son Ebipuo, the recent ancestor of the plaintiffs, Ebipuo himself lived and died on this land called Ukabi Utele.
D

8. The present plaintiffs succeeded to the ownership and possession of the said land from their immediate ancestors and have been in continuous and quiet enjoyment of same ever since without any interference.
E

9. In 1969 between February and November, the defendants, taking advantage of the war situation in the country, for the first time went into Ukabi Utele, in the northern part of it (now the land in dispute) and brushed it and cultivated crops thereon without the consent and against the will of the plaintiffs.
F

10. The plaintiffs protested vehemently to the defendants, and as part of their protest inter planted their own crops with the defendants' crops."

Evidence was led in support of the above averments and the plan of the land in dispute prepared on behalf of the plaintiffs was tendered in evidence by their Surveyor, P.W. 1.
G

The defendants in their Statement of Defence denied vehemently the essential part of the facts pleaded by the plaintiffs. They went on to further plead as hereunder -
H

"2. The defendants do not admit paragraphs One and Two of the Statement of Claim and put the plaintiffs to their strictest proof. Save that defendants admit they are farmers, they aver that they have no authority of their family to defend this action on their behalf.

3. The defendants vigorously deny paragraph 3 of the Statement of Claim and put the plaintiffs to their strictest proof at the trial.

4. In further answer, defendant aver that the land in dispute cannot

be Ukabi Utele or Utele farmland as it is habited by the defendants' family and some of the houses and ruins are as shown on Plan No. E/GA273/73 filed with this Statement of Defence and further also aver that the land in dispute is not in Ofeke Village by 'Uhuala.

6. The defendants aver still that the plaintiffs have no boundary whatsoever with Onwuachumba and that there are no Ekpe walls on any side of the land in dispute. The defendants further aver that it is ridiculous that the defendants should have an Ekpe separating their building North of the land in dispute and the buildings (now ruins) of their kin within and south of the land in dispute. 8. In further answer, the defendants aver that there is no Ekpe wall around any, part of the land in dispute and Plaintiffs' plan shows no buildings or ruins in the land in dispute. According to Osina Native Law and Custom, no Umuezegbuwa man will make an Ekpe within his next door kin neighbour or put a stretch of Ekpe across his own land.

10. The land in dispute is as more particularly delineated in Plan No. E/GA273/73 verged pink and filed with this Statement of Defence and shows the extent of the defendants family land all surrounding the land in dispute which is part of the Umuezegbuwa family land called Ala Ihuofo.

11. The defendants stoutly deny paragraph 6 of the Statement of Claim and put the plaintiffs to their strictest proof at the trial. The defendants aver that Utele the plaintiffs' ancestor is from Eluama Village in Osina, the boundary between Eluama Village and Uhuala is about 3 miles away from the land in dispute.

12. The defendants further aver that Utele ran away as a fugitive offender to Ofeke people for protection. There are 8 kindreds in Ofeke each with its own Udo Ngwo stream or swamp but the plaintiff, have none as they are strangers in Ofeke.

14. The defendants in exercise of their proprietary rights over the land in dispute have always defended their interests in the adjoining portion of their land known as Ihu Amachu in Suit No. 57/62 between Ekezu Ewuru (elder brother of 1st defendant in this suit) versus Lawrence Nwankpu of Utele (2nd Plaintiff in this suit).

15. The defendants in further answer aver that the matter in issue in Suit No. 57/62 was settled out of Court and the defendants surrendered the land then in dispute to the plaintiffs (in Suit No. 57/62). The decision of the Court and record of settlement by Osina elders which was made part of the Order of Court will be founded upon. The area and extent of the aforesaid Ihu Amachu is shown verged violet in Plan No. E/GA273/73 filed with this statement of defence and also pleaded the statement of claim filed by the plaintiffs

Question (1)

The learned trial Judge commenced his judgment by giving a resume of the history of the case. He then considered some aspects of the issues raised in the pleadings of the defendants and posed the following two questions:-

B “(a) Have the defendants proved their averment that Utele the plaintiffs’ ancestor was a fugitive offender?

(b) Have the defendants proved their averment that Utele was a Native of Eluama and not of Ofeke?”

C He reviewed the evidence adduced by the defendants on these two issues and found:-

(a) That Utele the ancestor of the plaintiffs was not a fugitive offender;

(b) That Utele lived in Ofeke as a native and not as a stranger from Eluama.

After resolving these two questions he posed yet another question to himself, that is:-

D “Does the land in dispute with land south of it situate at Ofeke as pleaded by the plaintiffs or does it situate at Uhuala along with its surrounding land as pleaded by the defendants?”

E He considered the evidence brought by each party on this issue and came to the conclusion “that the land in dispute and the land south of it claimed by the plaintiffs is situate at Ofeke Village in Osina and not in Uhuala Village.” After resolving this third issue the learned trial Judge proceeded to ask yet another question. In asking that question he stated:-

F “Another point that calls for determination before considering the case as a whole is: Have the defendants by evidence shown that they are the owners of the land in dispute or, in other words, have the defendants in their evidence supported their pleadings?”

G He considered the pleadings of the Defendants and the evidence led by them and came to the conclusion that the Defendants failed to prove “by admissible evidence that the land in dispute with the land south of it is Umllezegbuwa family land called Ala, Ihu Ofor.”

After making the above four findings of fact the learned trial Judge now proceeded to state:-

H “Having regard to the above summary of my findings of facts on the main grounds of the defendants’ defence to this action, it is my view that it is unnecessary to go into details of the case for the plaintiffs who, on the authority of *Sunday Piaro v. Chief Wopnu Tenalo & Anor.*, *supra*, are entitled to take advantage of the said findings of facts based on the defence case which tend to establish their title and support their case, I will now summarise and

consider the plaintiffs' case bearing in mind submissions made mainly on facts by learned counsel for the parties."

He considered the case made by the Plaintiffs after which he concluded as follows:

"Having regard to the findings of fact I have made in this judgment relating to the case of the defendants, I consider it unnecessary to summarise defendants' case all over again except that I shall refer, as the occasion requires, to the evidence adduced by the defendants as I assess and evaluate the plaintiffs evidence in support of their case."

He evaluated the evidence on both sides and made the following findings of fact:-

- (i) that the identity of the land in dispute is not in dispute;
- (ii) that the plaintiffs *"have proved the boundaries of the land in dispute,"* and
- (iii) that the plaintiffs *"have proved the capacity under which they instituted and prosecuted this case."*

After a further evaluation and consideration of the case made by each of the parties the learned trial Judge found *"that the Plaintiffs have proved ownership of Ukabi Utele by traditional evidence."* He concluded thus:

"On a calm examination and evaluation of the totality of the evidence before me and in the application of the relevant authorities. I am satisfied that the plaintiffs have proved that they have better title to the land called Ukabi Utele than the defendants and that they are entitled to the judgment of this court in all their claims."

The approach to the case made by the trial Judge in considering, and making findings on, certain aspects of the case of the defendants before considering the case for the plaintiffs, was one of the major complaints made by the defendants in their appeal to the Court of Appeal. The court below found that this complaint was well founded. Onu, J.C.A. (as he then was) in his lead judgment observed:-

"I agree with the appellants' submission that the learned trial Judge's approach to the entire case was completely wrong. As transpired, the learned trial Judge transferred the onus unto the appellants and required them to prove their defence, failing which, judgment would be entered for the respondents. It was on the basis of the wrong approach that the learned trial Judge adopted that he first considered piece-meal: the appellants' defence and having wrongly rejected the same, he proceeded to enter judgment for the respondents. It is therefore a far cry to say that the learned trial Judge painstakingly and carefully dealt with each contention on both the facts and the applicable law before arriving at his finding."

This conclusion was seriously challenged by the Plaintiffs in the appeal now before us.

Mr. Kehinde Sofola, S.A.N., learned leading counsel for the Plaintiffs both in the appellants brief and in oral argument contends that the Court below was wrong in setting aside the judgment of the trial court on the ground that the trial Judge considered first, the case for the defence and the findings thereon. Learned Senior Advocate submits that there is no unalterable scheme for the writing of judgment: all that a trial Judge is expected to do is to keep in mind the case of the parties as pleaded including the rules of evidence relating to the onus of proof and so on and also to review the evidence led by the parties. Learned Senior Advocate contends that sometimes it may be most convenient for the trial Judge to look at and review the evidence led by the plaintiff first before doing the same to the evidence led by the defendants but that the trial Judge has, however a discretion to start his judgment by reviewing the evidence led by the defendants first. He submits that all, that is required is that a trial Judge should review and evaluate all the admissible evidence led by all sides before him and that having given a dispassionate consideration to such evidence and having come to a decision on the facts as so considered, the court of Appeal has no business to interfere in such a decision. He cites before us *Egri v. Uperi* (1973) 1 NMLR 22. He particularly commends to us the decision of this Court in *Victor Woluchem & Ors. V. Simon Gudi & Ors.* (1981) 5 S.C. 291 where Idigbe J.S.C. explained the decision of this Court in *Mogaji v. Rabiatsu Odofin* (197R) 4 S.C. 91. He contends that the learned trial Judge was all the time aware that the onus was on the plaintiffs to prove their case. In learned counsel's view, the approach made by the trial Judge in writing his judgment does not occasion a miscarriage of Justice in that the findings of fact made by him are justified on the evidence and pleadings.

Mr. Sofola submits, in the alternative, that given that the court below was right in its conclusion that the method adopted by the learned trial Judge in writing his judgment occasioned a miscarriage of justice, the proper order to make is one of a retrial and not a dismissal of plaintiffs' claims. He refers us to a number of authorities in support of his submission.

Mr.Egonu, S.A.N., learned leading Counsel for the defendants, on the other hand, contends both in the respondents' Brief and oral arguments that the court below came to the right conclusion that the course adopted by the learned trial Judge in writing his judgment occasioned a miscarriage of justice. Learned Senior Advocate concedes it that "*judges may differ in their styles of writing Judgments but whatever style that is adopted by a judge in a particular case depends on the pleadings, the evidence and the circum*

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stances of that case.” He refers to a number of decisions where guidelines
have been suggested as to how to write judgments.

In respect of the alternative submission made by Mr. Sofola, it is Mr. Egonu’s submission that as the court below found, rightly in learned counsel’s view, that the Plaintiffs failed to prove their case, their claims were rightly dismissed.

It is not in dispute that there is no particular scheme for the writing of judgments. All that a trial Judge is expected to do is to constantly bear in mind the case as presented by each party, the onus of proof and to weigh the case for each party on that imaginary scale suggested in Mogaii v. Odofine . (supra). In that case, the learned trial Judge in writing his judgment considered the evidence for the Plaintiffs and found for them before considering the case for the Defendants and rejecting the evidence given by them in support of their case. It was contended by the Defendants/Appellants that the learned trial Judge had already prejudged the issue before he ever considered their case, let alone the weight to be attached to it. This Court per J Fatayi-Williams JSC (as he then was) at pages 93-95 of the Report observed:

..... the totality of the evidence should be considered in order to determine which has weight and which has no weight at all. Therefore, in deciding whether a certain set of facts given in evidence by one party in a civil case before a court in which both parties appear is preferable to another set of facts given in evidence by the other party, the trial judge, after a summary of all the facts, must put the two sets of facts on an imaginary scale, weigh one against the other, then decide upon the preponderance of credible evidence which weighs more, accept it in preference to the other, and then apply the appropriate law to it; if that law supports it bearing in mind the cause of action, he will then find for the plaintiff. If not, the plaintiff’s claim will be dismissed. In certain circumstances, however, the claim is either struck out or the plaintiff is non-suited. Incidentally, in deciding which evidence has more weight than the other, a trial judge sometimes seeks the aid of admissions made by one party to add more to the weight of the evidence adduced by the other party. This is precisely why the totality of the evidence must be considered and why a trial judge must weigh the conflicting evidence adduced by both parties and then draw his own conclusions. Of course, the procedure set out above will be unnecessary if the plaintiff’s case is so patently bad that no reasonable tribunal could possibly act upon it. In such a case, the trial judge will dismiss the plaintiff’s claim without calling upon the defence.

In short before a judge before whom evidence is adduced by the parties before him in a civil case comes to a decision as to which evidence he believes

or accepts and which evidence he rejects, he should first of all put the totality of the testimony adduced by both parties on that imaginary scale; he will put the evidence adduced by the plaintiff on one side of the scale and that of the defendant on the other side and weigh them together.

He will then see which is heavier not by the number of witnesses

B called by each party, but by the quality or the probative value of the testimony of those witnesses. This is what is meant when it is said that a civil case is decided on the balance of probabilities. Therefore, in determining which is heavier, the Judge will naturally have regard to the following:-

- (a) Whether the evidence is admissible;
- C (b) Whether it is relevant;
- (c) Whether it is credible;
- (d) Whether it is conclusive; and
- (e) Whether it is more probable than that given by the other party.

Finally, after invoking the law, if any, that is applicable to the case,

D the trial Judge will then come to his final conclusion based on the evidence which he has accepted."

Earlier in *Aromire v. Awoyemi* (1972) 1 All NLR 101, 115 (Reprint)

Coker J.S.C. delivering the Judgment of this Court cited with approval a passage from another judgment of the Court in *Godwin Egwuh v. Duro Ogunkehin*

E S.C. 529/66/ (unreported) decided on the 28th February 1969, wherein this Court had said:

"We are in no doubt that on the pleadings the case of the plaintiff postulates that she had a better title to the land than the defendant who admittedly was at the time of the institution of the proceedings, rightly or

F wrongly, in possession of the land The learned trial Judge rejected the defendant's case and passed severe strictures on the defendant's witnesses and their conduct; but with respect, a consideration of the defendant's case and the weakness of it did not arise until the plaintiff had led evidence

G this and it is inconceivable that she should be allowed to succeed on her claims when, as indeed it is, the defendant is in possession and maintains that he is entitled so to remain. If it be alleged that some one in possession of land is a trespasser the person so alleging has the onus of showing that he

H has a better right to the possession which was disturbed and unless that onus is discharged, the person so alleging cannot defeat the rival party.

Such is the case here and we are of the view that the plaintiff's case had failed and it should have been dismissed."

It is the misconception of the above passage that led the learned trial

Judge in Mogaji v. Odojin into the error which he fell. It would appear also that there is a misconception of the guide given by this Court in Mogaji v. Odojin. For in Woluchem and Ors. v. Simon Gudi & Ors. (1981) 5 S.C. 291; (1979 - 1981) 12 NSCC 214, this Court had yet to explain its decision in that case. Nnamani J.S.C. delivering the leading Judgment of the Court at Pages 220 - 221 observed:-

“Beginning with ground 2 of the additional grounds of appeal argued in this Court, it seems to me that the proper procedure or approach in considering the evidence is first that the trial Judge ought to start (again, the background of the issues between the parties) by considering the evidence led by the plaintiff and then proceed to consider that led by the defendants. Unless the evidence led by the plaintiffs is so patently unsatisfactory, in which case he does not have to consider the case of the defence at all, he will take the evidence led by both sides and put it on that imaginary scale, weigh it and decide upon the preponderance of credible evidence which has more weight. If the judge decides the issue after considering the evidence led by the plaintiffs and before proceeding to examine the evidence led by the defence he would clearly be in error. He would have prejudged the issues before he ever considers the case of the defence, His decision must be based on his consideration of the totality of the evidence put before him.”

Further at Page 222, the learned Justice of this Court after referring to the passage in Mogaji v. Odojin that I have earlier cited went on to say:

“These views were recently endorsed by this Court in Magnus Eweka and v. Bello Sc. 90/1970 unreported, and delivered on 30th January, 1981, (per Kayode Eso, J.S.C.), Mogaji and Eweka were both cases of declaration of title to land as is the instant suit. It seems to me that there is no approach to the consideration of the evidence peculiar to declaration of title suits and so different from the general outlines set down above. It has been settled law for many years now that in a suit for declaration of title the onus of proof lies on the plaintiff and he must, succeed on the strength of his case and not on the weakness of the defendant’s case Kodilinye v. Odu (1935) 2 WACA 336 at 337 - 338: Obisanya v. Nwoko and Anor. (1974) 6 S.C. 33.

This burden of proof on the plaintiff does not discharge the trial Judge from his duty to consider the evidence of both the plaintiff and the defendant and ascribe relative weight to each of them. All it means is that at the weighing of the evidence of both sides, the plaintiff should succeed because the evidence in his favour tips the balance in that imaginary scale. He would have led more credible and admissible evidence to secure a declaration in his favour. His success must not be because the defence has offered weak evidence. In considering the weight of the plaintiff’s case, the trial

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judge will be entitled to take into account those weaknesses in the defence case which tend to strengthen the plaintiff's case. He will also add to the weight of the plaintiff's case those parts of the defendant's case that support his, case or such evidence in the defendant's on which the plaintiff is entitled to rely. (See *Akunwata Nwagbogbu v. Chief M. O. Ibeziako* (1972) Vol 2 (Pt. 1) ECSLR 335 at 338; *Akinola & Anor. v. Oluwo & Ors.* (1962) 1 All NLR (Pt. 2224 - 227); (1962) SCNLR 352.)

Idigbe J.S.C. in his own judgment observed thus at Pages 231 - 232.

"It seems to me that the decision of this Court in Mogaji v. Rabiatsu Odojin (1978) 4 SC. 91 has been misunderstood. What this Court said in that case on the, procedure to be followed in assessing the evidence of rival parties (Per Fatai-Williams, J.S.C. - as he then was) is intended to be taken as a guide to trial Courts. Judges, naturally, must differ in the procedure and manner in which they approach their consideration of the entire evidence in any given case; some may prefer to begin with a consideration of the plaintiff's case. Whichever course is adopted, what is necessary is that they must always bear in mind that the plaintiff has to succeed, on a preponderance of evidence, on the strength of his own case not on the weakness of the defence; sometimes however, the weakness of the case for the defence tends to strengthen the case for the plaintiff.

The principal question, at the end of the day, is which party's case on a preponderance of credible evidence, has more weight?"

In *Adeyeye & Anor. v. Ajiboye & Ors.* (1987) 2 NWLR (Pt. 61) 432, 451 Oputa J.S.C. had cause once again to comment on a proper approach to judgment writing. He observed:-

"The proper approach for any trial Court is to first set out the Claim or Claims; then the pleadings; then the Issues arising from those pleadings. Having decided on the issues in dispute the trial judge, will then consider the evidence in proof of each issue then decide on which side to believe and this has got to be a belief based on the preponderance of credible evidence and the probabilities of the case. After this the trial Judge will record his logical and consequential findings of fact. It is after such findings, that the trial Court can then discuss the applicable law against the background of his findings of fact."

Still on this point I need also refer to the views expressed by Nnaemeka-Agu J.S.C. in *Duru & Anor v. Nwosu* (1989)4 NWLR (Pt. 113) 24, 55 wherein he gave a guide as to proper method of writing judgments. He said:-

"Every good judgment begins with an introduction of the parties and the nature of the action, states the issues in controversy, sums up the evidence called by each party, resolves the issues in controversy, and, based

upon such resolution of, issues, reaches a verdict and makes consequential orders. More relevantly, it is now settled that the only method of evaluating evidence called by both sides in a civil case is to put each set of evidence on either side of an imaginary, balance and weigh them together. Whichever outweighs the other in terms of probative value ought to be accepted. I wish to seize this opportunity to emphasize that this is the only proper method of evaluating evidence in a civil case. In the process, if on an issue one of the parties fails to call evidence, the evidence called by the other side on the issue ought normally to be accepted unless it is of such a nature and quality that no reasonable tribunal will accept it. The onus of proof in such a case is discharged on a, minimal of proof: See Nwahuoku v. Ottih (1961) 1 All N.L.R. 487; (1961)2 SCNLR 232.”

The complaint made by the defendants in the court below is that the learned trial Judge considered the case for the defence and rejected it before considering the case for the Plaintiffs. In my respectful view, that is not entirely correct. The learned trial Judge considered certain issues raised in the pleadings and considered them first before deciding the main issue of title before him. He made his findings of fact on these issues which, in the main, were findings against the defendants. All the authorities, that have been referred to deal with the question of evaluation of evidence rather than resolution of issues. In the resolution of issues, there must of course be evaluation of evidence and it is in the resolution of each issue that the evidence on that issue ought to be evaluated on the line of guidelines suggested in the cases above.

Considering the pleadings in the instant case on hand the existence at a time in the remote past of one Utele was not in dispute. What was in dispute was as to whether Utele hailed from Ofeke Village as contended by the plaintiffs or was a fugitive offender in that Village having fled from his own native Village of Eluama, as pleaded by the defendants. The learned trial Judge thought this issue ought to be resolved at an early stage of the consideration of the whole case. For if Utele was a fugitive offender in Ofeke Village that would be the end of the traditional history of the plaintiffs. In paragraph 6 of the plaintiffs statement of claim they pleaded thus -

The land in dispute forms part of Ukabi Utele. The whole of Ukabi Utele (shown on plaintiffs plan) was the property of the plaintiffs' remote ancestor called Utele; he was the first man to occupy the land and died there. (including the land in dispute).”

The defendants' answer to this averment as contained in Paragraphs 11 and 12 of the Statement of Defence ran as follows:

“11. The defendants stoutly deny paragraph 6 of the Statement of Claim and put the plaintiffs to their strictest proof at the trial. The defen-

dants aver that Utele the plaintiffs' ancestor is from Eluama Village in Osina the boundary between Eluama Village and Uhuala is about 3 miles away from the land in dispute.

12. *The defendants further aver that Utele ran away as a fugitive offender to Ofeke people for protection. There are 8 kindreds in Ofeke each with its own Udo Ngwo stream or swamp but the plaintiffs have none as they are strangers in Ofeke.*"

At the trial P.W. 2 Lawrence Nwankwo, that is the 1st plaintiff, gave clear evidence that the original owner of the land in dispute was Utele. He denied that Utele was a fugitive offender in Ofeke. He contended that Utele was from Ofeke Village and not from Eluama Village. As rightly observed by the learned trial judge, the evidence led by the defendants in support of Paragraphs 11 and 12 of their statement of defence was inconsistent with those paragraphs. Their star witness is the 1st defendant who as D.W. 2 testified as follows:-

"*The Plaintiffs are not from Ofeke Osina as they testified. There are some Utele people who live at Ofeke Osina. In the olden days members of Utele family shot dead the first son of Ezeakari from Uhuala and the whole Osina people looted their property and drove them away. The Utele people scattered and took refuge with people either their in-laws or their friends, that is how some Utele people come to live at Ofeke,*"

The evidence of D.W. 6 is to the same effect that Utele people sometime in the past killed somebody as a result of which they were dispersed by Eluama people D.W. 7 who in his evidence testified that it was the father of Utele people that killed somebody, went on to say that the man that was killed came from Uhuala and not from Eluama as deposed to by other defence witnesses who testified on the issue.

It is in the light of these conflicting pieces of evidence that the learned trial Judge made his finding that Utele the ancestor of the Plaintiffs was not a fugitive offender as contended by the defendants in their statement of defence. I cannot see how anyone can fault this finding. And having regard to this finding and the evidence for the plaintiffs he was right also to find, as he did, that Utele lived in Ofeke as a native of that village and not as a stranger from Eluama. It is the same consideration that the learned trial Judge gave to the other three issues he raised as preliminary issues. He correctly in my view evaluated the evidence in support of these preliminary issues and came to his findings which having regards to the statement of defence and the evidence led for the defence, I would say are faultless, except as to his finding on the situs of the land in dispute. I shall come to this later.

There are copious passages in the judgment of the learned trial Judge that lead one to the conclusion that he was all along aware of where the burden of proof lay, that is, on the plaintiffs. The learned trial Judge had only a set of traditional history before him and that was the one put forward by the plaintiffs as to the founding by Utele of the land in dispute. The defendants did not plead how they came to own the land in dispute. Having rejected their claim that Utele was a fugitive offender in Ofeke and being satisfied of the evidence of traditional history given by the Plaintiffs, it follows that he was perfectly justified in reaching the decision he did. In my respectful view, the court below came to a wrong conclusion when it held that the course adopted by the learned trial Judge in writing his judgment occasioned a miscarriage of justice. All that the trial Judge did was to resolve some preliminary issues he considered necessary for the determination of the main question before him and that is, whether on the preponderance of the evidence adduced by the parties the plaintiffs had discharged the burden on them to prove their case to ownership of the land in dispute. At no time did he put on the defendants the burden of disproving this primary issue.

I, therefore, answer the first question in the negative and in view of this I do not consider it necessary to determine the alternative submission made by Mr. Kehinde Sofola, S.A.N.

Question 2:

The learned trial Judge for various reasons rejected the evidence of D.Ws 2, 3,5,6 and 7. The reasons given were that either the evidence of these witnesses was at variance with the pleadings of the defendants or that the evidence was on fact not pleaded by the defendants. An example of evidence of these witnesses which the trial Judge held was at variance with the pleadings is in respect of the defendants' averments in Paragraphs 11 and 12 of their Statement of Defence to the effect that Utele was a fugitive offender who fled to Ofeke from his native Eluama. These witnesses testified that it was the Utelehi people that killed someone leading to their dispersal by the Eluama people. The learned trial Judge found that this evidence was at variance with the pleadings and on that ground rejected the evidence of D.W. 2, D.W. 6 and D.W. 7.

Again the defendants in Paragraph 10 of their Statement of Defence claimed that the land in dispute belonged to Umuezegbuwa family. But the evidence led was clearly at variance with this averment. D.W. 2, Eze Ewulu testified as follows:

"My name is Eze Ewulu (1st defendant). I live at Osina. My village in Osina is Vhualla and my kindred is Umuezegbuwa while my family is Elere. I know 2nd defendant who is senior brother of mine from Elere. The 3rd is from Umuonyeagu in Umuezegbuwa kindred.

They are of Utelehi kindred. I know the land in dispute. Umuonyeagu family owns the land in dispute i.e., family of the 3rd defendant. The land does not belong to Elere family or to the plaintiffs of Utelehi. The Plaintiffs have no land there. I don't farm on the land. No member of Elere family farms on the land in dispute. The reason for this is that land had been shared and
B *each farms on his share. Umuonyeagu call the land in dispute Ala Ihu Ofo. I know the land that surrounds the one in dispute. The owners are Umuonyeagu people and they call it Ala Ihu Ofo. Elere family has no land near the one in dispute. My Elere family has land that has boundary with Ala Ihu Ofo and it is called Ihu Amachi."*

C D. W. 6 in his own evidence deposed as follows:

"I live at Umuezegbuwa in Uhuala Osina. My family in Umuezegbuwa is Umuonyeagu. I am a farmer. I know the defendants who come from Umuezegbuwa Village in Uhuala Osina. 1st and 2nd defendants are from Elere family in Umuezegbuwa Village while the 3rd defendant is
D *from Umuonyeagu family in Umuezegbuwa. I know the land in dispute. It is owned by Umuonyeagu family. The original owner of the land in dispute was Osina. The land in dispute is called Ihu Ofor. All the land surrounding the land in dispute is called Ihu Ofor which belongs to Umuonyeagu and Ihu ofor land is situate in Umuezegbuwa Village."*

E The penultimate paragraphs of the statement of defence filed by the defendants are already quoted in this judgment, I need not quote them again. The learned trial Judge found that the evidence of D.W. 2 and D.W. 6 was at variance with the defendants pleadings and that the traditional history contained in the, evidence of D. W. 6 was never pleaded.

F I do not see how anyone reading the statement of defence and the evidence of these witnesses could fault the finding of the learned trial Judge that their evidence must be rejected on those issues.

I have considered the evidence of D.W. 3 and D.W. 5, I have no reason whatsoever to disagree with the learned trial Judge when he declined
G to ascribe credibility to the evidence of these two witnesses. I, therefore, find it difficult to subscribe to the view of the court below that the learned trial Judge was in error not to have accepted and acted on the evidence of these witnesses. In my respectful view the learned trial Judge properly evaluated the evidence of the witnesses and rightly rejected their evidence for the reasons given by him.

H I have considered the submissions of learned leading counsel for the parties in respect of the question under consideration. I find myself unable to accept the submission of Mr. Egonu S.A.N. supporting the finding of the court below. It is trite law that parties are bound by their pleadings and any

evidence which is at variance with the averments in the pleadings goes to no issue and should be disregarded by the court. The court should concern itself only with evidence of those matters which have been included in the pleadings. See *Emegokwue v. Okadigbo* (1973) 4 Sc. 113, 117, *George & Ors. V. Dominion Flour Mills Ltd.* (1963) 1 SCNLR 117; (1963) 1 All NLR 71, 77; *African Continental A.C.B. Ltd. V. Nigerian Dredging Roads and General Works Ltd.* B (1977) 5 SC 235, 248 and *NIPC Ltd.v. Thompson Organisation* (1969) NMLR 99. The principle under which an appeal court would interfere with the findings of a lower court have been laid down in several cases. It is now settled that if there has been a proper appraisal of evidence by a trial court a Court of Appeal ought not to embark on a fresh appraisal of the same evidence in order C merely to arrive at a different conclusion from that reached by the trial court. See *Akinloye v. Eyiola & Ors.* (1968) NMLR B 92. 95. The circumstances under which an appeal court would interfere with findings of fact made by a trial court do not exist, in my respectful view in this case. Furthermore, the trial judge is in a better position than the appeal court to decide the issue of D credibility of the witnesses. This is so because the trial judge has the singular advantage of seeing and observing the witnesses. He watches their demeanour, candour or partisanship, their integrity and manners. These advantages are not normally enjoyed by an appellate court which only has the cold printed evidence to contend with. E

Unless a wrong reason is given by trial judge for believing or disbelieving a witness an appellate court will seldom interfere with his ascription of credibility to witnesses. It is only where the appellate court. Either because the reasons given by the trial Judge are not satisfactory or because it unmistakably so appears from the evidence is satisfied that the trial Judge has not F taken proper advantage of his having seen and heard the witnesses that it could properly interfere and in such a case the matter will then become at large in the appellate court. See *Watts (or Thomas) v. Thomas* (1947) 1 All E.R. 582. I do not see any justification whatsoever for interfering with the ascription of G credibility by the learned trial Judge to the witnesses in this case, particularly his rejection of the evidence of D.W. 2, 3, 5, 6 and 7 on the main issues they testified on. I therefore, answer Question 2 in the negative.

Question 3:

In the course of the trial the defence counsel moved the Court to visit the land in dispute for “*a proper determination of the controversy between H the parties.*” Learned counsel for the Plaintiffs objected on the ground that no reason was given for the visit. He opined that the case could be determined on the evidence and pleadings before the court and that, therefore, the re

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quest for a visit to the land in dispute was unnecessary. Mr. Erinne for the defendants in his reply made mention of the controversy between the parties as to the existence of an Ekpe wall along the western, northern and eastern boundaries of the land in dispute. He also mentioned that there was on the land in dispute the ruin of a house once lived in by a relation of the defendants. The learned trial Judge ruled as follows:-

B *"I do not think that a visit to the land in dispute in order to see whether there is 'Ekpe' wall along the western, northern and eastern boundaries in existence or not and whether there is ruin of the habitat of a relation of the Defendants is necessary for the proper determination of the dispute between the parties having regard to Exhs. 'A' and 'B' and the evidence and*
C *pleadings before the court. The application is therefore refused."*

This refusal by the trial Judge was one of the complaints in the defendants' appeal to the court below. That court held that the learned trial Judge was in error in refusing to conduct a visit to the land in dispute. Onu J.C.A. (as he then was) in his lead judgment, gave the following reasons for so
D holding:-

"The questions whether or not there were 'Ekpe' walls on the western and northern boundaries of the land in dispute and whether or not there were ruins within and south of the land in dispute could not be resolved by merely watching the witnesses giving evidence. In *Briggs v. Briggs* (1986) 5
E NWLR (Pt. 41) 362, following *Seismograph Service v. Esiso Akporuovo* (1974) 1 AII NLR (Pt. 1) 104 at 114 - 115, 117 - 118 it was held by the Supreme Court, allowing the appeal, that where there was conflicting evidence from the plaintiffs and the defendants (as in the case in hand) relating to the existence or non-existence of a building on the land in dispute. The trial Judge should visit
F the land. In *Ezeokeke & Ors. V. Uga & Ors.* (1962) 1 AII NLR 482 at 486: (1962) 2 SCNLR 199 the Supreme Court (per Taylor, FJ.) held:

"Whether a trial Judge will visit the locus in civil proceedings is a matter within his own discretion. If of course, he feels that such a visit will enable him to get a better grasp of the evidence that has been adduced before him, he should visit the scene. To me I cannot but agree with the trial
G *Judge that such a visit would not have been of any assistance.*

While in the above case a visit to the locus in quo was found not to be essential, in the instant case, I take the firm view that it was most essential as enjoined in Section 76(d)(ii) of the Evidence Act. Be it noted that under the
H *provision of Section 76(d)(ii) (ibid), it is only where the inspection is material for the proper determination of the question in dispute that the court may carry out inspection of immovable property. So held the Supreme Court in Emmanuel M. O. Chukwuogor v. Richard Obidigbo Obuora (1987)3 NWLR*

In their evidence at the trial, the parties stressed that a visit to the land in dispute would confirm the truth of their testimony. To make it more obvious and overriding, counsel for the appellants expressly applied at Page 67 lines 11 - 15 for a visit to the locus in quo to wit:

‘Mr. Erinne: Applies to the court for a visit to the land in dispute for proper determination of the controversy between the parties and says it is in the interest of justice that the proposed visit is very important.’ B

A proper determination of the issues of the Ekpe walls and the ruins raised in the case was therefore of fundamental importance in determining the whole case. See Seismograph Service (Nigeria) Ltd. v. Robinson Kwaibe Ogbeni (1976) 1 All NLR (Pt. 1) 198 at 217 - 219 and Seismograph Service v. Akporuovo (supra). A visit to the locus in quo in the instant case if there were no ‘Ekpe’ walls as contended by respondents, then their (respondents’) claim that the land in dispute was not the same stretch of land with the land north and south of it would have failed and their whole case would be unreliable. Conversely, if the ruins as contended by the appellants were found on the visit, that would have confirmed their whole case and would have brought into operation the provisions of Sections 45 and 145 of the Evidence Act. Be it noted that it is now an established principle of law that there are certain matters that must be resolved by a visit to the locus in quo, such that at the locus in quo, the trial Judge will not avail himself of the mere belief but of what he sees there. See Umar v. Bayero University (1988) 4 NWLR (Pt. 86) at 93; Kenon v. Tekam (1989) 5 NWLR (Pt. 121) 366 at 373. In the case in hand, there was an overriding need to see the ‘Ekpe’ walls and the ruins to arrive at a fair and just determination of the case. It is for this reason therefore that I hold that the failure of the learned trial Judge to visit the land in dispute to resolve the conflicting issues has occasioned a miscarriage of Justice. See Yesufu Dele v. Adelabu (1966) NMLR 105 and Nnaji for v. Ukonu (1986) 4 NWLR (Pt. 36) 505 at 517. C D E F

As there is nothing to show that the appellants acquiesced in the approach adopted by the learned trial Judge in pursuing the course he adopted in this case, his decision not to visit the locus in quo, the appellants can on appeal contend that he (the trial Judge) did not comply with the principles of procedure laid down to be followed by the Supreme Court in Ojiegbe & Ors. V. Okwaranya & Ors. (1962) 1 All NLR (Pt. 4) 605; (1962) 2 SCNLR 358. That the appellants did not acquiesce can be gleaned from the address of learned counsel for the appellants at Pages 70 and 71 of the Record where following his earlier formal application for a visit to the locus in quo he submitted thus: G H

‘Says defendants pressed for a visit to the locus in quo but the

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plaintiffs opposed it. The inference is that the alleged 'Ekpe' walls alleged by plaintiffs to have been in existence are nowhere in existence on the boundaries of the land in dispute. Says that the plaintiffs did not want the court to see the ruins of the house of Onyekaba Chukwuka as shown in Exhibit' B'. That could have buttressed the case for the defendants that one of their relations had lived and died on the land in dispute...'

B The failure of the learned trial Judge to visit the locus in quo has left undecided the issues as to whether the 'Ekpe' walls or the ruins existed on the land in dispute. Hence, he had failed to evaluate the evidence properly and the appellants who did not counterclaim against the respondents were not liable to the respondents whose action ought to have been dismissed. See Akpruovo's Case (supra)."

C This decision of the court below is one of the complaints of the Plaintiffs in their appeal now before us.

D The court below correctly stated the law on the subject when Onu, J.C.A. in his lead judgment (with which the other Justices agreed) observed:-
"It is the law and admittedly a well established one at that, that a visit to the locus in quo is entirely at the discretion of the court and is primarily undertaken if such visit would help the court to resolve an issue which could not otherwise be resolved."

E But with profound respect to them they, in my view, wrongly applied the law to the facts of the case before them.

Proviso (ii) to Section 77(d) of the Evidence Act, Cap. 112 permits of a visit to a locus in quo. It reads:

F "(ii) If oral evidence refers to the existence or condition of any material thing other than a document, the court may, if it thinks fit. Require the production of such material thing for its inspection, or may inspect or may order or permit a jury to inspect any movable or immovable property, the inspection of which may be material the proper determination of the question in dispute."

G Thus, it is the duty of a court to visit a locus in quo where there is conflict of evidence as to the existence or otherwise of something material to the case and such a visit would resolve the conflict in evidence or would clear a doubt as to the accuracy of any piece of evidence on the subject. See Seismograph Service (Nigeria) Ltd. v. Akporuovo (1974) 6 SC. 119, 128; Seismograph Service (Nigeria) Ltd. v. Ogbeni (1976) 4 Sc. R5, 104 - 105. It is clearly
H at the discretion of the trial Judge to determine whether in the light of the evidence before him, there is need to resolve, by a visit to the locus in quo, the conflict of evidence or clear a doubt as to the accuracy of a piece of evidence when there is such conflict of evidence. The appeal court does not normally

interfere with the exercise of discretion of a trial Judge unless in exercising his discretion, the trial Judge has acted under a mistake of law or in disregard of principle or under a misapprehension of the fact or has taken into consideration irrelevant matters or on the ground that injustice could arise. See Awani v. Erejuwa II (1976) 11 Sc. 307,315; State v. Gali (1974) 5 SC. 67, 73 -74; Okoiko v. Esedalue (1974) 3 Sc. 15 and Omadide v. Adajero (1976) 12 Sc. 87, 96. B

I have examined the reasons given by the learned trial Judge for refusing to visit the land in dispute as requested by defence counsel. I have also considered the evidence adduced by the witnesses both for the plaintiffs and the defence. I am satisfied that there was copious evidence before the learned trial Judge from which he could make his findings on the existence or otherwise of Ekpe wall on part of the boundaries of the land in dispute without the necessity of a visit to the land in dispute. Indeed, not only the plaintiffs' surveyor and other witnesses for the plaintiffs testified that there was Ekpe wall on part of the boundaries of the land in dispute, some defence witnesses also admitted that there was Ekpe wall on boundaries of the land in dispute. In my respectful view the learned trial Judge, from the evidence before him, acted properly in declining to visit the land in dispute. The defendants' pleading is to the effect that there was no Ekpe wall at all, but some of their witnesses admitted that there was Ekpe wall in part of the boundaries. On the issue of the one ruin mentioned by the defendants, I do not think that this is sufficient reason for the Judge to visit the land in dispute. C D E

The court below was clearly in error to have interfered with the learned trial Judge's exercise of his discretion in this respect. It might be that had that court been trying the case it would have exercised its discretion in favour of visiting the land in dispute: that however, is no reason for its interfering with the exercise, by the learned trial Judge, of his discretion in the way it did. See Jammal Engineering Co. Ltd. v. M.I.S.L (Nigeria) Ltd. (1972) 1 All NLR (Pt. 1) 322; Samson Awoyale v. Joshua Ogunbiyi (1985) 10 SC 35; (1985) 2 NWLR (Pt. 10) 861; Enckehe v. Enekebe (1964) 1 All NLR 102 and Resident Ibadan Province v. Lagunji (1954) 14 WACA 549, 552. Consequently I answer Question 3 in the negative. F G

Question 4:

This question concerns primarily the issue of the situs or location of the land in dispute that is whether it is in Ofeke or Uhuala. The learned trial Judge had said: H

"On the issue of the situs of the land in dispute and the land south of it claimed by the plaintiffs I am satisfied that not only have the plaintiffs

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given credible evidence in support of their pleading which I accept but also they can properly take advantage of the evidence adduced by the defence in support of their case. I therefore, on the evidence before me and on the authority of Sunday Piaro v. Chief Wopnu Tenalo & Anor. Supra, find as a fact that the land in dispute and the land south of it claimed by the plaintiffs is situate at Ofeke village in Osina and not in Uhuala Village.”

B The evidence adduced by the defence which the learned trial Judge found that the Plaintiffs could take proper advantage of, is to be found in the evidence of D. W. 2 and D. W. 7. In respect of the evidence of these two witnesses, that is, parts of their evidence relied on by the learned trial Judge, he observed:-

C *“The defence evidence shows that the plaintiffs come from Utelehi where they live in Ofeke Village and some named members of Utelehi are Ozo title men. According to Osina custom no stranger takes Ozo title in the Village in which he is a stranger. It follows naturally that Utelehi people are no strangers in Ofeke. I have already found that Utele, the ancestor of the*
D *plaintiffs and, therefore, of Utelehi people is from Ofeke Village - one of the four villages in Osina. If the plaintiffs from Utele in Ofeke are not strangers there, then the land on which they live cannot but be situate in Ofeke as pleaded and given in evidence by the plaintiffs and as supported by the*
E *evidence of the defendants examined and evaluated above.”*

The court below, per Onu, J.C.A. found:-

“The learned SAN contends in his brief after referring us to several passages in the trial court’s record, that none of the evidence of the appellants indicated, supported the respondents’ case that the land in dispute is at Ofeke.
F *I agree with the appellants submission that this point is well grounded. “*

I think the court below is right in its conclusion. Mr. Sofola has sought to show that the court below was wrong. With respect to the learned counsel, I do not agree with him. While the court below may be right in holding that on the totality of the evidence on both sides, the plaintiffs are natives
G of Ofeke Village, the learned trial Judge was however, wrong in holding that the evidence for the defence supported the case made by the plaintiffs that the land in dispute was in Ofeke Village. The contention of the defendants throughout was that the land did not belong to the plaintiffs. If that contention was right then the land would be situate in their village Uhuala. Nowhere
H in their evidence did they admit that the land was in Ofeke . I must, therefore, answer Question 4 in the affirmative.

Having so concluded however, what is the effect of this on the Judgment of the learned trial Judge? At the end of the day the learned trial Judge

found that the land in dispute belonged to the plaintiffs. On the strength of this finding. Therefore, it must necessarily follow that the land would be in Ofeke Village. What was in dispute was its ownership. Therefore, the error of the learned trial Judge that the evidence for the defence supported the plaintiffs as to the issue of the situs of the land in dispute has not occasioned any miscarriage of justice. Although I have held that Question 4 is to be answered in the affirmative, as the error complained of has not occasioned any miscarriage of Justice. I hold that the error made by the learned trial Judge is of no consequence and cannot lead to the setting aside of his Judgment. B

Question 5:

The learned trial Judge after a painstaking review and evaluation of the evidence adduced by the parties came to the conclusion that the plaintiffs owned the land in dispute. The court below interfered with this finding. It has been laid down in a long line of cases that the findings of fact by a trial court supported by evidence rightly accepted by the court should not be disturbed on appeal by an appellate court on the ground that it would have come to a different conclusion on the facts. In the matter before us, the court below proceeded to re-evaluate the evidence and came to a conclusion different from that of the learned trial Judge. It held:- C D

- (i) that the trial Judge wrongly placed the onus of proof on the defendants;
- (ii) that his approach to the writing of his judgment occasioned a miscarriage of justice and E
- (iii) that the evidence for the plaintiffs was at variance with their pleadings.

I have earlier in this judgment held that the court below was wrong in respect of (i) and (ii) above. I shall, therefore, in this part of the judgment confine myself to (iii). In his lead judgment Onu, J.C.A. (as he then was) had this to say: F

"I will now consider specific issues treated under this issue.

(i) Traditional History

As exemplified elsewhere in this judgment, in paragraph 6 of the statement of claim the respondents at Page 16 of the Record pleaded that the land in dispute belonged to their ancestor, Utele, and that he (Utele) was the first person to occupy the land. G

However, in their evidence, the respondents in one breath testified that the land in dispute was part of the share of the land which their village got when the descendants of Osina shared Osina's lands and that what they called 'Ukabi Utele' including the land, in dispute was the only land they owned. In another breath the respondents testified that 'Ukabi Utele' including the H

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land in dispute was given to their ancestor, Utele by his father. Both versions of their testimony were at variance with paragraph 60 f the statement of claim: yet the learned trial Judge at Page 112, lines 35 - 36 of the Record stated that he accepted what he regarded as the unchallenged, traditional evidence of the respondents.

B Not only was the traditional history of the respondents challenged, I hold that more significantly, the traditional history set out in paragraph 7 of the statement of claim discloses no full pleading of the root of title. A pleading that Ohaebo who was succeeded by his son Ebipuo, the recent ancestor of the plaintiffs Ebipuo himself lived and died on the land called
C 'Ukabi Utele' without more, still leaves the base of their root of title unsupported, unproved and still hanging in the air. See: *Odojin v. Ayoola (1984) II SC 72; Mogaji v. Cadbury (Nigeria) Ltd. (1985) 2 NWLR (Pt. 7) 393 and Ajani v. Ladebo (1986) 3 NWLR (Pt.28) 276.*

D Besides, in their testimony the respondents as plaintiffs contradicted themselves in the traditional evidence they rendered. Where such happens, as in the instant case, the law is clear that the case should be dismissed. See *Mogaji v. Cadbury (Nig.) Ltd. supra*''

E As has been pointed out earlier in this judgment the defendants did not plead any traditional history as relating to their ownership of the land in dispute. Not only that, the evidence in support of their case was completely at variance with their pleadings, On the other hand, the plaintiff traced their root of title to Utele the original founder of the land, find it difficult to agree with the Court below that the traditional history pleaded by the plaintiffs did not disclose in full detail their root of title, With profound respect. I think the Court of
F Appeal was clearly in error.

G The only point that calls for some comment is the alleged contradiction in the evidence of the plaintiffs vis-a-vis their pleadings. Mr. Egonu both in the respondents' Brief and in oral argument argues strenuously and cited passages from the evidence of some plaintiffs' witnesses to show that the evidence was at variance with the plaintiffs' pleadings and that the court below was right in disturbing the trial Judge' s findings of fact. The most serious of the seeming contradictions is that part of the evidence given in cross-examination by P. W. 2. He was a star witness for the plaintiffs. To questions under cross-examination this witness testified as follows:

H " I am from Osina town along with my co-plaintiffs on record. There are 4 villages in Osina namely: Ofeke, Eluama, Uhuala and Durunakpu. Each of the four villages has its separate land inherited from their common ancestor called Osina. The four villages representing the four sons of Osina share Osina land and each took its own share. The descendants of the four sons of Osina live in their ancestor's shares of Osina land in

It would appear both from learned counsel’s arguments and the Judgment of the court below that this passage was taken out of context. A careful reading of the whole of the evidence of this witness would reveal that the passage above referred to the communal land inherited by the four villages in Osina which the respective communities of these villages inherited from their common ancestor Osina. It was never suggested to the witness nor did the defendants attempt to show that the land in dispute was part of this communal land inherited from Osina. The witness at the beginning of his cross-examination testified:-

“The land in dispute belongs to me and my relations. There is a land in Osina called ‘Ukabi Utele’. Ukabi Utele land belongs to me and my relations.”

His evidence-in-chief was substantially in line with the Plaintiffs’ pleadings. The rest of the cross-examination of this witness strengthened in no small measure the case for the Plaintiffs.

Another instance of contradiction cited by learned leading counsel for the defendants is the sentence extracted from the evidence of P.W. 3. This witness is the head of Umuezemkpu family in Ofeke. The witness is not a member of Utele family. He was called primarily to testify about the existence of Ekpe wall on part of the boundaries of the land in dispute. Cross-examined, this witness testified thus:

“When Utele died, his sons shared his land. Utele had three sons. The two plaintiffs on record come from one branch or one son of Utele.

P. W. 5 who is from Umuoazu family testified under cross-examination:

“Utele had about four or five sons. Utele is dead and his sons are living. The custom is that when a person died his sons share his property. I live near Akokwa and I cannot say whether the four or five sons of Utele share his property”

It is argued that the evidence of P. W. 3 and P. W. 5 is at variance with plaintiffs’ pleadings and is contradictory to the evidence of P. W. 2. With profound respect to learned leading counsel for the Defendants. I do not share his views. There is nothing in the pleadings as to the number of children left by Utele. Not only that, these two witnesses that is, P.W. 3 and P. W. 5 are not from Utele family. It has not been shown either how their evidence contradicted that of P. W. 2.

I can see no justification whatsoever for the court below interfering with the evaluation and appraisal of the evidence by the learned trial Judge. The Court below also faulted the learned trial Judge’s finding on possession.

This is what Onu, J.C.A., (as he then was) said -

"In Paragraphs 9, 10 and 11 of the Statement of Claim - See Page 17 of the Record - the respondents admitted that the appellants were in possession of the land in dispute at least from 1969 up to 1972 when the instant suit was instituted: that they farmed the land in dispute and planted palm trees thereon. It is trite that parties are bound by their pleadings. See Atolaghe v. Shorun (1985) 1 NWLR (Pt. 2) 360 and Chief Elija Adejorin v. Phillips Ewe (1975) WACA 184 at 191."

With respect to the Court below, it laboured under a complete misconception of the plaintiffs pleadings and evidence in support. The Plaintiffs pleaded as follows in their statement of claim:

"8. The present plaintiffs succeeded to the ownership and possession of the said land from their immediate ancestors and have been in continuous and quiet enjoyment of same ever since without any interference.

9. In 1969 between February and November, the defendants, taking advantage of the war situation in the country, for the first time went into Ukabi Utele, in the northern part of it (now the land in dispute) and brushed it and cultivated crops thereon without the consent and against the will of the plaintiffs.

10. The plaintiffs protested vehemently to the defendants and as part of their protest interplanted their own crops with the defendants' crops.

11. Before the crops were properly ripe the defendants reaped them and at the same time re-planted others, thus giving the plaintiffs no opportunity to anything on the land. They furthermore planted palm trees on the land without the consent or permission of the plaintiffs, and have been harassing, and threaten to continue to harass the Plaintiffs in their use of this land."

In his evidence, P. W. 2 testified, inter alia, as follows:-

"As owners of the land in dispute we farm it, plant cassava, reap fruits of economic trees therein, e.g., oil bean tree, ube okpoko, oji or kolanut, cashew trees etc. We planted the said trees. Nobody disturbs us when we harvest the fruits of the said economic trees. Apart from cassava we plant yams in the land in dispute and build huts on the land during farming season and live there to carry on farming. Nobody had objected to our living on the land during the farming season. The 'Ekpe' walls I referred to earlier were built on the land boundary by our ancestors. We repair the Ekpe walls and nobody questions us as to why we repair the Ekpe wall. The Defendants came across the 'Ekpe' from where they are living into the land. The trespass took place during the Nigerian civil war when people were encouraged to farm extensively so as to produce food. The defendants brushed the land in dispute when they encroached on it. I saw the three defendants and others.

The defendants and others entered upon the land during the farming season about nine years ago. When I saw the defendants I asked the 2nd defendant why they were clearing the land but he said nothing to me nor did any of the others answer me anything. Defendants left after I questioned them why they were clearing the land. Where the defendants live over the northern portion of the land in dispute is owned by Umuezemkpu people. After defendants left when I questioned them they returned to the land in the month of November of the same year and planted cassava. My people and I inter-planted cassava on the land after I had seen defendants do so. After the one year and six months we went to the farmland and saw that the cassava had been uprooted and new ones planted. I saw defendants when they were uprooting the cassava and planting young palm seedlings in the land in dispute. My family did not permit or give consent to all that the defendants did on the land in dispute.”

P. W. 7 in her evidence testified as follows:-

“I am a widow. I am a famer. My husband was Benedict Ofoekwe. He died before the Nigerian civil war. I know the parties in this suit. I know the land in dispute. I and co-wives of my husband’s relation farm there. The defendants farm the land in dispute as we farm it. The cassava I planted last on the land in dispute is still there. Those others from my family who farm the land in dispute are Sussana Ofoekwe, Ihudiya Ofoekwe.”

P. W. 8 a member of the plaintiffs’ family in his own evidence deposed as follows:-

“The dispute between us (Plaintiffs) and the defendants began in 1969 during the Nigerian civil war. In February 1969 the defendants entered the land in dispute and started clearing it. P. W. 2 gave us the information. Following information from P. W. 2 my family appointed me and late Lazarus Anudu (late 1st plaintiff on record) to go and see the, defendants on the land in dispute. There we saw the three defendants on record and their other relations.

They were clearing the land and we asked them why they were doing so. They asked us if we did not know that the then Government had asked everybody to farm anywhere he saw vacant land. Following our enquiry they left the land and went away.

My family farmed last on the land since in 1906. Why we did not farm the land in dispute in 1969 is that we have a system of shifting cultivation. We live (sic) a piece of land fallow for five years and farm it again in the sixth year because our land is not quite fertile.

After we protested to the defendants in February 1969, and they left the land in dispute, they again came up in November 1969 and started

clearing and planting crops along. There was heavy rain that year. I saw them. We asked the defendants why they had come back on the land and they said nothing.

We then asked all our women to go and plant cassava on the land in dispute and they did so. About 1971 the defendants uprooted the whole cassava planted in the land in dispute and replanted cassava stems as they uprooted and also planted palm seedlings along with the cassava stem. I saw the defendants plant palm seedlings replant cassava and uproot the planted ones. Our reaction was to take out action against them at the Okigwe High Court from where the present suit was transferred.”

The learned trial Judge accepted the evidence of these witnesses. It is, therefore strange to see how the court below could have found that the plaintiffs admitted that the defendants were in possession of the land in dispute.

Having considered the reasons given by the court below for interfering with the findings of the learned trial Judge. I find myself unable to agree with them. It would appear that what that court did was to re-evaluate the evidence so as to arrive at a conclusion different from that of the trial court. Bearing in mind the pleadings of the parties, the apparent weaknesses in the case for the defence and the findings of the trial court based, as it were, on the credible evidence before it. I have come to the inevitable conclusion that Question 5 must be answered in the negative.

In conclusion, therefore, having answered all the questions posed (except Question 4 which in any event occasioned no miscarriage of justice) in favour of the Plaintiffs, this appeal succeeds and it is allowed by me. The judgment of the court below is hereby set aside while that of the trial court together with the order for costs is hereby restored. I award to the Plaintiffs against the defendants costs of this appeal assessed at N 1,000.00 and costs of the appeal in the court below assessed at N600.00.

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UWAIS JSC

I have had the opportunity of reading in draft the judgment read by my learned brother Ogundare J.S.C. I entirely agree with the judgment and do not wish to add anything more to it. I therefore, adopt it as mine. The appeal is allowed. The decision of the Court of Appeal is hereby set aside and the judgment of the trial Court is restored with costs as assessed in the said Judgment of my learned brother Ogundare J.S.C.

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MOHAMMED JSC

I entirely agree with the opinion of my learned brother, Ogundare JSC, in the judgment just read, that this appeal ought to be allowed. The lead judgment has covered all the salient issues raised in this appeal and I agree from the evidence before the trial court that the inevitable conclusion was to decide this case in favour of the plaintiffs/appellants.

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This appeal succeeds and it is allowed. The judgment of the Court of Appeal is set aside and the judgment of the trial High Court is hereby restored. I abide by the assessment and award of costs made in the lead judgment.

ADIO JSC

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I have had the opportunity of reading, in advance, the judgment just delivered by my learned brother, Ogundare J.S.C., and I agree with him that the appeal succeeds. Accordingly, I allow the appeal and abide by the consequential orders, including the orders for costs.

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IGUH JSC

I have had the advantage of a preview of the judgment of my learned brother Ogundare J.S.C. just delivered.

E

The issues raised in the appeal have been fully set out and adequately considered. I agree entirely that there is merit in this appeal and that the same should be allowed.

I desire however to comment briefly on one or two issues that arise in this appeal by way of emphasis only. The first is the criticism by the court below of the course adopted by the learned trial Judge in arriving at his judgment. The suggestion would appear to be that the trial court put the cart before the horse by considering certain aspects of the evidence of the defendants first before dealing with the plaintiffs' case. The court below was of the view that this course of action had the effect of misleading the trial court into shifting the primary burden of proof wrongly on the defendants who claimed no reliefs at the trial to establish their defence and that this procedure ipso facto prejudiced the defendants' case and thereby occasioned a miscarriage of justice.

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I do not think it can be seriously argued that there is any rigid or unalterable set formula for the writing of judgments by courts of first instance. Trial courts may naturally differ in the procedure and style in which they approach their consideration of the entire evidence in any given case; some may prefer to begin with a consideration of the evidence led by the defence

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and others may prefer to begin with the plaintiff's case. But whatever procedure or style that is adopted by a trial court must ensure that to succeed the onus of proof is on the plaintiff to establish his case in civil matters on the balance of probability or the preponderance of evidence and that justice and nothing but justice has been done to all the parties.

No doubt, it may be common and perhaps more convenient for a trial court to examine the evidence by the plaintiff first before turning to the evidence adduced by the defendant. It seems to me, however, that a trial Judge has a discretion on what issue or what evidence, whether of the plaintiff or the defendant he proposes to review first before turning to the evidence of the other party. In my view and I am in agreement with the learned Senior Advocate, Kehinde Sofola Esq that all that is required is that a trial Judge should carefully review and evaluate all the admissible evidence led by all the parties before the court. Having given a dispassionate consideration to all such evidence and arrived at a judicious decision on the facts so considered a Court of Appeal has no business to interfere with such a judgment. See *Ogbero Egri v. Ededho Uperi* (1974) 1 NMLR 22; *Victor Woluchem and others v. Simon Gudi & Others* (1981) 5 S.C. 291 etc.

In the present case, it is true that the learned trial Judge reviewed some aspects of the evidence led by the defendants before turning to the evidence led by the plaintiffs. It is equally clear that he exhaustively reviewed and evaluated the entire evidence led by both parties on all the issues canvassed before the court before he reached his final decision. Under such circumstances, I do not think it can be seriously suggested that the method adopted by the learned trial Judge in his consideration of the case led to any miscarriage of justice or that it was prejudicial to either of the parties, With profound respect. I find myself unable to associate myself with the observation of the court below to the effect that the trial court's consideration of certain aspects of the defendants' evidence before dealing with the plaintiffs' evidence occasioned any miscarriage of justice or shifted the primary onus of proof in the case on the defendants.

The second issue I wish to comment upon is the wholesale reversal of the finding of fact of the trial court by the Court of Appeal as a result of which the court below naturally found itself able to dismiss the plaintiffs' claim in toto. The principles under which a Court of Appeal can interfere with the findings of fact of a trial court have been well settled. A Court of Appeal which has not had the same advantage which the trial Judge enjoyed of seeing the witnesses and watching their demeanour would only disturb the findings of fact of such a Judge where it is satisfied that the trial Judge had made

no use of such an advantage. If the learned trial Judge has clearly and properly evaluated the evidence before him, it is not for the Court of Appeal to re-evaluate the same evidence and come to its own decision. See *A. M. Akinloye v. Bello Eyiola & Ors.* (1968) NMLR 92 at page 95; *Fatoyinbo & Ors v. Williams* (1956) 5 SCNLR 274; (1956) IFS,C. 87; *Lawal v. Dawodu & Ors.* (1972) 1 All N.L.R., (Pt. 270) at page 271; *Agedegudu v. Ajenifuja & Ors.* (1963) 1 All NLR 109 at page 114; *Chief Victor Woluchem & Ors. Chief Simon Gudi, Supra* etc.

In the present case, the learned trial Judge extensively evaluated all the evidence adduced by both parties before him and properly arrived at clear findings of fact thereupon. In the circumstance, it was a grave error of law on the part of the court below to reverse those findings of fact without any justifiable cause.

It is for the above and the more elaborate reasons contained in the lead judgment of my learned brother, Ogundare, J.S.C., that I, too, allow this appeal. The judgment of the court below is set aside and the decision of the trial court together with the order for costs is hereby restored, I abide by the order for costs as contained in the lead judgment.

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