

SUPREME COURT OF NIGERIA
19TH SEPTEMBER, 1995. SC. 297/1990
CORAM:- S.M.A. BELGORE, A. B. WALI,
I.L. KUTIGI, E.O. OGWUEGBU, S.U. ONU, JJSC.

1. BARO BAJODEN
2. NATHANIEL OTOMU BAJODEN APPELLANTS

AND

1. ENOCK IROMWANIMU
2. WILSON EREJUWA
(For and on behalf of themselves and RESPONDENTS
people of Ikorigho Town in Ugbo Area
of Ilaje District)

APPEALS - Concurrent findings of fact - Appellate Court will not interfere with correct findings of facts - Where it is not perverse.

EVIDENCE - Abundance of evidence - Traditional history - Reliance thereon for claim of ownership of land - Whether there is abundant evidence.

LAND LAW - Survey plan - Grant of title - Where there is no difficulty in identifying land in dispute - Whether possible without survey plan.

LAND LAW - Survey plan - Title to land - Grant thereof - Based on survey plan tendered - By person other than the licensed surveyor - Whether proper.

PLEADINGS - Native Law and custom - Reliance thereon - In a claim of ownership - Whether properly pleaded.

PLEADINGS - Customary tenancy - Where that term was not employed by the parties - Respondents were not bound to plead same.

FACTS

The respondents as plaintiffs sued the defendants/appellants in the High court of Ondo State, Ondo, claiming - Declaration to title and possession of land; Perpetual injunction against the defendants; and N1,000.00 general damages for trespass to the said land by the defendants. The case proceeded to trial and both parties called witnesses. The respondents as well as the appellants relied on traditional history in their claim to title and

possession of the land in dispute. The respondents who traced their history to one Tapa, said their ancestors as first settlers permitted the ancestors of the appellants, who are Binis, to fish in the waters on the land. Whereas the appellants traced their own history to 4 ancestors, one of whom they claimed permitted the respondents ancestors to fish in the waters. At the close of trial, the trial judge granted title and possession of the land to the respondents but dismissed their other two claims.

Dissatisfied with the decision, the appellants appealed to the court of Appeal Benin, which court, for some curious reasons, decided the appeal on the Grounds of Appeal rather than the issues, dismissed it and affirmed the decision of the trial court. The appellants brought this appeal to the Supreme Court formulating 4 issues.

ISSUES FOR DETERMINATION

“1. Whether the Court of Appeal was justified in holding that Plaintiffs/Respondents were entitled to a DECLARATION of title to land on the burden of proof based on their amended pleading or statement of claim and issues joined or stated pleadings?

2. Whether the Court of Appeal was correct in holding that the Plaintiffs/Respondents merely pleading claims for land “under Native Law and Custom” without setting out the terms of the Native Law and Custom relied upon was sufficient to find in favour of the Plaintiffs?

3. Whether the Court of Appeal was justified in holding that the Plaintiffs/Respondents on their stated pleading particularly paragraphs 22, 23 and 24 depicting defendants as their Customary Tenants, were absolved from pleading the terms and customary incidents of their assertion.

4. Whether on the settled pleadings and specific claim of plaintiffs that defendants were strangers and got permission to stay on the land in dispute, the learned Justices of Court of Appeal were justified in holding that “the respondents have probably not attached any condition or term to the interest they allow the appellants to enjoy, subject of course to their right to forfeiture.”

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

Survey plan - Grant of title

1. I think this issue of Survey Plan or no Survey Plan can be disposed of quickly once it is realized that it is settled law that where there is no difficulty in identifying the land in dispute a declaration of title may be made without it being based on any plan. It was thus crystal clear that both sides knew the land in dispute. There was no difficulty in identifying it. (p. 1715A)

Survey plan tendered by a person other than the licensed surveyor

2. I am therefore firmly of the view that the lower courts were right when they granted the declaration of title to the land based on the Survey Plan (Exh.1) and that Exhibit 1 was properly tendered in evidence by consent of the parties and that it was not necessary to call the licensed Surveyor for that purpose only. The Respondents did properly discharge the burden of proof placed upon them as held by the lower courts. (p. 1716 B)

Native law and custom - Reliance thereon

3. There is no doubt that the Respondents pleaded ownership of land according to native law and custom from time immemorial as contained in paragraph 4 of the Amended Statement of Claim above. It is direct and clear. The Respondents then pleaded in subsequent paragraphs above the type or terms of the native law and custom they relied upon. It is in my view none other than that of "first settlement" by their ancestors. In other words, it was by traditional history. The names of the ancestors and who begat who, were all pleaded. It is not therefore correct to say that the particular customary law or its incidents were not pleaded. They were pleaded and supported by evidence at the trial. (p. 1717 C)

Respondents not bound to plead customary tenancy.

4. There is no doubt that the learned trial judge found that the Appellants sought and obtained permission from the ancestors of the Respondents to fish and build floating houses at Ikorigho. I agree with the Court of Appeal that the word "tenancy" or any word to that effect was not employed by the parties in the pleadings or at any time throughout the proceedings in the High Court. The Respondents were not therefore bound to have pleaded any term or incidents of customary tenancy if indeed there was one. (p. 1717 F)

Concurrent findings of fact

5. The Court of Appeal did not find it necessary to set aside any of the above findings of fact. I have no reason too to interfere as none has been shown to be perverse or not supported by evidence or unjustified. The learned trial judge having properly and unquestionably evaluated the evidence and appraised the facts, it is not the business of an appeal court to substitute its own views for the views of the trial court. (p. 1718 E)

Abundant evidence in support of claim

6. There was abundant evidence in support of respondents' claim of ownership of the land in dispute by traditional history. All the issues having failed,

the appeal must be dismissed. The decisions of the lower courts are affirmed. (p. 1718 F)

NOTABLE POINTS OF INTEREST

KUTIGI JSC

B

1. Whether it is wrongful to treat grounds rather than issues

The Court of Appeal for reasons which cannot be justified on the record preferred to treat the Grounds of Appeal rather than the issues. Since the issues themselves must and did flow from the Grounds of Appeal, I find nothing wrong or unfair with that option as contended by Appellant's counsel.

C

(p. 1714 B)

ONU JSC

2. Uncontroverted allegations of facts - Deemed as established

D It is enough to say in answer to these questions that the Appellants neither joined issues with the Respondents as to the nature of their holding nor the mode of tenure, failure on their part to lead evidence to controvert specifically allegations of facts contained in the Respondents' pleadings and evidence led in support thereof relating to their acquisition of the land, bush and water in dispute via Native Law and Custom and traditional history ought to be deemed as established. (p. 1723 H)

E

REPRESENTATION

K.S. Okeaya-Inneh SAN with Miss J.O. Okeaya-Inneh

F

K.I. Inmasusuanangbah and O.U. Ndu for Appellants.
Yinka Adeyosoye for Respondents

CASES REFERRED TO

Enang v. Adu (1981) 11-12 S.C. 25 at 42

G

Lokoyi v. Olajo (1983) 8 S.C. 61 at 68

Overseas Construction Ltd. v. Creek Enterprises Ltd. (1985) 3 N.W.L;R (Pt. 13) 407 at 413-414

Akpagbue v. Ogu (1976) 6 SC. 63

Garba v. Akacha (1966) NMLR 62

H

Etiko v. Aroyewun (1959) 4 FSC. 129

Chief Ordia v. Piedmont (Nig.) Ltd. (1995) 2 NWLR (Part 379) 516

STATUTE REFERRED TO

Evidence Act Cap 112 Laws of the Federation of Nigeria, 1990, ss.75;91(4)

Aguda on Practice and Procedure page 301, para. 24.02

LEAD JUDGMENT BY KUTIGI JSC

The plaintiffs, now respondents, sued the appellants as defendant, in the Ondo State High Court, holden at Ondo and claimed as follows:-

"1. Declaration of title to and possession of all that piece or parcel of land, bush and water called Uba Ikorigho now known as Otumara Mogun Ohen situate, lying and being at Odonla Town in Ugbo area in Okitipupa Division.

2. Perpetual injunction restraining the defendants, their servants, agents and/or all persons claiming through them from entering or doing any act e.g. cutting trees or harvesting fishes in the river upon the said land, bush and water.

3. N1,000 or (500pounds) being General Damages for trespass committed by the defendants upon the piece or parcel of the said land, bush and water."

After the filing and exchange of pleading the case proceeded to trial. At the trial the respondents called three witnesses while the appellants called two. The facts are straight forward. The respondents claimed that their ancestor - one Tapa, who, originally came from Ile-Ife was the first to settle at Ikorigho. He came from Ugbo. Tapa begat Ogunro. Ogunro had three children called Ogunje, Aiyeirin and Ehinmosan who were born at Ikorigho about 200 years ago. They said the appellants who are Binis from Bendel State are not related to them by blood. That the ancestors of the appellants met Ogunje, Aiyeirin and Ehinmosan on the land in dispute fishing. The appellants' ancestors then took permission from Ogunro's children above to fish in the waters and to build floating houses at Ikorigho which they were permitted to do. The appellants on the other hand said it was their ancestor who first settled at Ikorigho. That their ancestors are Kanikan, Okunbo, Mogun-Ohen, and Bajoden (called Bazuaye or Obazuaye). They said it was their ancestor Bajoden, who permitted plaintiffs/respondents' ancestor to fish at Ikorigho. In a reserved judgment the learned trial judge, Ogunleye J. entered judgment in favour of the respondents for a declaration of title to land in respect of claim (1) above, while claims (2) and (3) were dismissed or refused.

The appellants dissatisfied with the judgment of the High Court appealed to the Court of Appeal holden at Benin-City. Four grounds of appeal were filed and the following issues were submitted for determination -

"(i) Are some of the findings of fact made by the learned trial judge and the conclusions reached on those findings justified by the evidence on

record to entitle the plaintiffs/respondents to judgment?

(ii) Are the plaintiffs/respondents entitled to judgment for a declaration of title on the strength of the evidence adduced by them in support of their claim as shown on the printed record?

(iii) Whether the plaintiffs/respondents have proved their title under customary law as held by the learned trial Judge.

(iv) Whether the learned trial Judge was right in holding that the defendants/appellants sought and obtained the permission of the descendants of Tapa to fish at Ikorigho. ”

The Court of Appeal for reasons which cannot be justified on the record preferred to treat the grounds of appeal rather than the issues. Since the issues themselves must and did flow from the grounds of appeal, I find nothing wrong or unfair with that option as contended by appellants’ counsel.

The Court of Appeal carefully considered all the four grounds of appeal (and therefore the four issues above) and came to the conclusion that the appeal failed and dismissed it. Dissatisfied with judgment of the court below the appellants lodged a further appeal to this court.

Both sides filed and exchanged briefs which were adopted at the hearing.

The following issues are set down in the appellants’ brief for determination -

“1. Whether the Court of Appeal was justified in holding that plaintiffs/respondents were entitled to a declaration of title to land on the burden of proof based on their amended pleading or statement of claim and issues joined or stated pleadings?

2. Whether the Court of Appeal was correct in holding that the plaintiffs/respondents merely pleading claims, for land ‘under Native Law and Custom ” without setting out the terms of the Native Law and Custom relied upon was sufficient to find in favour of the plaintiffs?

3. Whether the Court of Appeal was justified in holding that the plaintiffs/respondents on their stated pleading particularly paragraphs 22, 23, and 24 depicting defendants as their Customary Tenants, were absolved from pleading the terms and customary incidents of their assertion.

4. Whether on the settled pleadings and specific claim of plaintiffs that defendants were strangers and got permission to stay on the land in dispute, the learned Justices of Court of Appeal were justified in holding that “the respondents have probably not attached any condition or term to the interest they allow the appellants to enjoy subject of course to their right to forfeiture. ”

Issue (1) was argued first. The complaint here was that the re-

spondents having failed to prove the features in their Survey Plan (Exhibit 1) were not entitled to judgment based on such a plan. In addition it was claimed that Exhibit 1 itself was not properly tendered in evidence because the license survey or who prepared it was never called and it was through a layman P.W.1, a non-expert, that the exhibit was tendered. I think this issue of Survey Plan or no Survey Plan can be disposed of quickly once it is realised that it is settled law that where there is no difficulty in identifying the land in dispute a declaration of title may be made without it being based on any plan (see Etiko v. Aroyewun (1959) 4 FSC 129; Ibuluya v. Dikibo (1976) 6 S.C. 97; Akinhanmi v. Daniel (1977) 6 S.C. 12 Garba v. Akacha (1966) NMLR 62).

In this case the respondents pleaded in paragraph 5 of their Amended Statement of Claim thus: -

"5. The plaintiffs and community they represent are owners in possession of the area of land shown in Plan No.L & L/D. 175 I drawn by Laniyonu and Lawson Licensed Surveyors and dated 6/4/75 and the plaintiffs will rely on the said Survey Plan already filed."

The appellants in their amended statement of defence said they deny paragraph 5 (amongst others) of the amended statement of claim above but proceeded to plead in para. 5 as follows:-

"5. The defendants aver that their ancestors first settled on all the parcels of land (marked as land in dispute and land not in dispute delineated on the Survey Plan attached to the statement of claim) before the plaintiffs' ancestors arrived from Ehunpen in Ijebu Province/Division to reside thereon with the permission of the defendants' ancestors."

It was thus crystal clear that both sides knew the land in dispute. There was no difficulty in identifying it. In addition Mr. Enock Iromwanimu who testified as P.W.1 stated on page 55 of the record thus -

"In support of our claim we engaged licensed surveyors. What plan they gave us is Exhibit I in this case. The area in dispute is marked Green. It is a swampy area. South of it is the Uba Ikorigho. My people have floating houses on the land in dispute. Where these houses are is what we call Uba (camp) Ikorigho. There are two shrines at the said Uba and one (the 3rd) is near it. The ones there are (1) Oju-Olotupa and (2) Ojo-Oruru. The one near the Uba is called Oluagbara shrine. Our ancestors came from Ugbo in Ilaje/Ese-Odo Local Government area of Ondo State and settled H at Ikorigho."

Which evidence of "features" did the appellants want again? It was this same P.W.1 who took the respondents' Surveyor round the land in dispute. He produced from his custody the Survey Plan (Exhibit I herein)

which the Surveyors prepared for them and it was through him that it was tendered in evidence without any objection. It is significant to note that the appellants did not produce or tender any counter-Survey Plan of their own throughout the proceedings in the High Court. One therefore finds it difficult to appreciate what the appellants are really complaining about. They B admitted the respondents' plan as shown above and there was no indication that the learned trial Judge misconceived the evidence in the proceedings. I am therefore firmly of the view that the lower courts were right when they granted the declaration of title to the land based on the Survey Plan (Exh. 1) and that Exh. 1 was properly tendered in evidence by consent of C the parties for that purpose only. The respondents did properly discharge the burden of proof placed upon them as held by the lower courts.

Issues 2, 3 and 4 were considered next. They were argued together and rightly so in my view. The brief clearly reveal that the only contention here is whether or not the respondents pleaded or ought to have D pleaded the applicable customary law and terms upon which they claimed ownership of the land in dispute. It was submitted that it was not sufficient for the respondents to have merely averred that they claimed for a declaration under "native law and custom" without pleading the specific terms of the applicable native law and custom. It was contended also that the re- E spondents equally failed to plead the terms or incidents of customary tenancy to sustain their claim for a declaration of title.

Now paras. 4, 15, 18, 19, 22, 23 & 24 of the Amended Statement of Claim read thus -

"4. The plaintiffs and all members of Ikorigho Town whom they F represent i.e. excluding the defendants - are the owners of Ikorigho Town according to Native Law and Custom from time immemorial.

15. The ancestors of the plaintiffs and those they represent are among others, Guge, Aiyerin and Eyinmosan who were (maternal) full brothers by their mother Ogunro and Tapa Ogunro 's father born by Alawo G of Ugbo and whose parents migrated from Ugbo (an ancient town in Ilaje) very many years ago to settle in the present town of Ikorigho - part of which the said Ikorigho's land is now in dispute.

18. The Tapa referred to in paragraph 15 above as the father of Ogunro who (Ogunro) in turn is the mother of Guge, Aiyerin and Ehinmosan H was from Ugbo and the Olugbo was a Prince of the Oni of Ife who migrated from Ile-Ife time out of mind.

19. The ancestors of the plaintiffs namely - Guge, Aiyerin and Eyinmosan were born on the land in dispute and were in possession of the

same, exercising all rights of ownership by immemorial settlement and fishing on same according to Native Law and Custom of Ilajes.

22. *The defendants are non-Ilajes by tribe and descent but migrated from Benin Area in the Bendel State of Nigeria not many years ago.*

23. *The defendants during their migration arrived at Ikorigho town then already settled by the ancestors of the plaintiffs; this was during the life time of Ogundere an Ilaje from Ugbo.*

24. *On their arrival at Ikorigho the defendants asked for permission and concession to reside and fish in Ikorigho Waters as Tenants. This permission and consent were granted. Ever before then Guge, Aiyerin and Eyinmosan had firmly settled on the land and were already in effective occupation and possession of the Ikorigho land' exercising all rights of ownership and possession without let or hindrance from any source whatsoever."*

There is no doubt that the respondents pleaded ownership of the land according to native law and custom from time immemorial as contained in paragraph 4 of the Amended Statement of Claim above. It is direct and clear. The respondents then pleaded in subsequent paragraphs above the type or terms of the native law and custom they relied upon. It is in my view none other than that of "*first settlement*" by their ancestors. In other words, it was by traditional history. The names of the ancestors and who begat who, were all pleaded. It is not therefore correct to say that the particular customary law or its incidents were not pleaded. They were pleaded and supported by evidence at the trial. I must state here that the appellants themselves relied on the same native law and custom of "*first ancestral settlement or traditional history*". The appellants' Amended Statement of Defence followed the same pattern with the respondents' Statement of Claim even though significantly enough the appellants did not make a counter-claim.

There is no doubt that the learned trial Judge found that the appellants sought and obtained permission from the ancestors of the respondents to fish and build floating houses at Ikorigho (see paras. 22, 23 & 24 of the Amended Statement of Claim above and the testimonies of PW's 1, 2 & 3). I agree with the Court of Appeal that the word "tenancy" or any word to that effect was not employed by the parties in the pleadings or at anytime throughout the proceedings in the High Court. The respondents were not therefore bound to have pleaded any term or incidents of customary tenancy if indeed there was one.

It is probably appropriate at this stage to reproduce the finding of facts made by the learned trial Judge on page 84 of the record as follows-

“(1) That the owner and first settler at Ikorigho was Tapa; the ancestor of the plaintiffs as well as of the former plaintiff.

(2) That the ancestors of the present defendants sought and obtained the permission of the descendants of Tapa to fish at Ikorigho and build floating houses on the waters there.

B *(3) That this was over one hundred and fifty years ago (about 1802).*

(4) That the plaintiffs’ ancestors originally came from Ile-Ife in Oyo State while the ancestors of the defendants originally came from Benin City in Bendel State of Nigeria.

C *(5) That Oba Ikorigho and Otumara-Mogun-Ohen are two distinct villages in Ilaje/Ese-Odo Local Government Area of Ondo State of Nigeria.*

(6) That there are three shrines at Ikorigho and that the plaintiffs and their people worship at these shrines up till today.

D *(7) That the pond drilled by Seismograph Service (Nigeria) Ltd., Warri, on Exhibit 1 (one) belongs to the plaintiffs and that in the process of drilling crops on the land (but not houses) were destroyed.*

(8) That the plaintiffs live at Ikorigho while the defendants live at Utumara-Mogun-Ohen. That these are separate villages.

E *(9). That the defendants on 8/9/65 changed the name of Ikorigho to Otumara-Mogun-Ohen but that on 20/1/66 the plaintiffs refuted it in a counter publication in the Daily Times.”*

The Court of Appeal did not find it necessary to set aside any of the above findings of fact. I have no reason too to interfere as none has been shown to be perverse or not supported by evidence or unjustified. The learned trial Judge having properly and unquestionably evaluated the evidence and appraised the facts, it is not the business of an appeal court to substitute its own views for the views of the trial court. There was abundant evidence in support of respondents’ claim of ownership of the land in dispute by traditional history.

G All the issues having failed, the appeal must be dismissed.

The decisions of the lower courts are affirmed. The respondents are awarded costs of N1,000 only.

H **BELGORE JSC**

I agree with the judgment of my learned brother Kutigi, J.S.C. Having had the opportunity of a preview of the judgment I have nothing to add but I adopt the same as mine in dismissing this appeal and making the same consequential orders.

WALI JSC

I have had a preview of the lead judgment of my learned brother Kutigi, J.S.C. and I entirely agree with him that the appeal lacks merit and must be dismissed.

The two lower courts have meticulously considered the evidence adduced and made findings of fact which are unimpeachable. I also hereby affirm these findings and dismiss the appeal with N 1,000 costs to the respondents.

OGWUEGBU JSC

I agree with the judgment just delivered by my learned brother Kutigi, J.S.C., and for reasons given, that this appeal should be dismissed. It is apparent from the record of proceedings that the findings and conclusions of the courts below are amply supported by the pleadings and the evidence adduced.

It was the appellants' contention that they never admitted the features of the survey plan (Exhibit 1) tendered by the respondents, and that by the general traverse of paragraphs 5, 6 and 10 of the amended statement of claim in paragraph 4 of the statement of defence, the burden of proving those paragraphs of the amended statement of claim and the features averred, shifted to the plaintiffs/respondents.

It was further submitted that the court below was wrong in holding that the tendering of the said survey plan (Exhibit 1) by P.W.1, a layman, and the failure of the appellants to cross-examine him were sufficient to prove the averments.

The plaintiffs/respondents in paragraphs 5-14 of their amended statement of claim pleaded the survey plan (Exhibit 1) and gave details of the boundaries and features of the land in dispute, thus:-

"5. The plaintiffs and the community they represent are owners in possession of the area of land shown in Plan No. L & L/D1751 drawn by G Lanionu and Lawson Licensed Surveyors and dated 6/4/75 and the plaintiffs will rely on the said Survey Plan already filed.

6. The said area referred to above measures 564.36 Acres and is verged red in the aforementioned Survey Plan.

7. The said area referred to in paragraph 6 above is bounded on the west by the Atlantic Ocean where there are Flare sites, on the south by Odonca's Coastal Town and Odonla's Land; on the East by Ikorigho's land and on the North by Ojomole's land.

8. On the western side of this land are three flares close to the

Atlantic ocean and within the Ilaje coast. Further inwards from the Ilaje coast is the Ikoriko Coastal Town with Floating Houses owned and occupied by Ikorigho (plaintiffs) people.

9. *Within the Ikorigho Coastal Town and situated close to the Floating Houses is the Oluagbara Shrine worshipped by the ancestors of the plaintiffs.*

10. *287.42 acres of this land and which is verged Green in the Survey Plan referred to in paragraph 5 above is the one (land) in dispute between the plaintiffs and the defendants.*

11. *Close to the western side of the Green area referred to in paragraph 10 above is a Pond belonging to the plaintiffs' community. This Pond is now being filled and drilled by an Oil Prospecting Company from whom the plaintiffs have applied for compensation.*

12. *Close to the Pond referred to above are Floating Houses owned and occupied by members of the plaintiffs community the extension of which is the Uba or Ikoriko Camp.*

13. *In the Eastern South of the area edged green in the plan referred to in paragraph 5 above is the Ojuotupa Shrine worshipped by the ancestors of the plaintiffs.*

14. *Towards the South Eastern side of the area edged Green in the said plan is the Ojutoru Shrine worshipped by the ancestors of the plaintiffs."*

The defendants/appellants averred as follows in paragraphs 4 and 5 of their amended statement of defence:

"4. *The defendants deny paragraphs 2,4, 5, 8,9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19,20,21,22,23,24,25,26,28 and 29 of the amended statement of claim and put the plaintiffs to the strictest proof of the averments contained therein.*

5. *The defendants aver that their ancestors first settled on all the parcels of land (marked as land in dispute and land not in dispute) delineated on the survey plan attached to the statement of claim before the plaintiffs' ancestors arrived from Ehunpen in Ijebu Province/Division to reside thereon with the permission of the defendants' ancestors."*

(Italics is for emphasis only)

The notes of the evidence-in-chief of P.W.1 (Enock Iromwaninu) read:

"Mr. Fagbemi applies to tender the plan through this witness who took the surveyor round the land surveyed. No objection by defence counsel. Plan with No. L & L/D1 751 drawn by Lanijonu and Lawson (Licensed Surveyors) and dated 6:4:75 is admitted and marked Exh. 1. No objection by defence counsel."

The defendants did not cross-examine P.W.1 on the survey plan

(Exhibit 1). After their general denial of paragraphs 5, 8-14 of the amended statement of claim in paragraph 4 of the amended statement of defence, the defendants in paragraph 5 of the said amended statement of defence proceeded to adopt Exhibit 1 with all its delineations. This in my view, is an admission of the identity of the land in dispute, its boundaries and features which were copiously pleaded in paragraphs 5-14 of the amended statement of claim. This is so particularly when the defence filed no counter-plan. B

The plaintiffs' witnesses gave evidence which was in line with their pleadings on the boundaries and features of the land in dispute. These being the case, there was no need for further proof of the identity, boundaries and features of the land in dispute after the survey plan was admitted without objection from the learned defence counsel. Further more, the appellants did not challenge the accuracy of Exhibit 1 in their evidence. C

In civil proceedings, facts admitted require no evidential proof. See section 75 of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990 and the case of *Obhiami Brick & Stone (Nig.) v. A.C.B. Ltd.* (1992) 3 NWLR (Pt.229) 260 at 301 and *Balogun v. Labiran* (1988) 3 NWLR (Pt.80) 66. D

The issue joined in the paragraphs of the statements of claim and defence reproduced above was in respect of the first settler on the land in dispute and not its identity. E

I do not intend to go into the other issues raised in the appeal as they have been ably treated in the judgment of my learned brother Kutigi, J.S.C.

This is an appeal against concurrent findings of two courts. It is settled law that such findings should not be disturbed where there is sufficient evidence to support them as in the instant case. No miscarriage of justice has been shown to have occurred. See *Enang & Ors. v. Adu* (1981) 11-12 S.C. 25 at 42; *Lokoyi v. Olojo* (1983) 8 S.C. 61 (1983) 2 SCNLR 127 at 68 and *Overseas Construction Ltd. v. Creek Enterprises Ltd.* (1985) 3 NWLR (Pt.13) 407 at 413-414. F

I will also dismiss the appeal and affirm the judgment of the court below. I abide by all the orders made in the judgment of my said learned brother Kutigi, J.S.C. G

ONU JSC

I have been privileged to read before now in draft the judgment of my learned brother Kutigi, J.S.C. just delivered and with it I agree. H

A word or two of mine need be said in expatiation of Issues 1, 2

and 3 submitted by the appellant as arising for determination, the latter with Issue 4, which were argued together by learned Senior Advocate and the former two together in oral submission.

In relation to Issue 3 the respondents had in paragraph 5 of their Amended Statement of Claim pleaded the existence of Exhibit 1 (the Survey Plan) as follows:-

"5. The plaintiffs and the community they represent are owners in possession of the area of land shown in Plan No. L&L/D/1751 drawn by Laniyonu and Lawson Licensed Surveyors and dated 6/4/75 and the plaintiffs will rely on the said Survey Plan already filed."

C When Exhibit I was received in evidence, through 1st plaintiff, Enock Iromwanimu as P.W.1, learned counsel for the appellants raised no objection. Indeed, in their Amended Statement of Defence in paragraphs 5 and 7, the appellants not only acknowledged the existence of Exhibit I, but predicated their defence (they themselves filed no plan) on it when they D pleaded thus:-

"5. The defendants aver that their ancestors first settled on all the parcels of land (marked as land in dispute and land not in dispute delineated on the survey plan attached to the statement of claim before the plaintiffs ancestors arrived from Ehunpen in Ijebu Province/Division to reside thereon with the permission of the defendants' ancestors."

7. The defendants aver that they live in some of the floating houses shown on the plan too (as they and the plaintiffs must live some-where) and that it was they the defendants who worshipped at the shrines delineated on the survey plan before they embraced Christianity." (Italics above F is mine for emphasis)

The appellants having thus palpably indicated that they were conversant with the area covered by Exhibit 1 bordering on an acknowledgement of its features and accuracy, coupled with the fact that when both respondents testified, nothing was said by learned counsel for appellants to attack G the admissibility of Exh. 1, it is too late in the day for the appellants who filed no counter plan to raise objection to evidence which went unchallenged. See *Piaro v. Tenalo & anor.* (1976) 12 S.C. 31; *Chief Okparaeke v. Egbuonu & ors.* (1941) 7 WACA 53 at 55; *Olubode v. Oyesina* (1977) 2 S.C. 79 at 85; *Udofia v. Afia* (1940) 6 WACA 216 at 219. See also Section H .B 75 of the Evidence Act Cap. 112 Laws of the Federation, 1990 which provides inter alia that -

"No fact need be proved in any civil proceedings which the parties thereto or their agents agree to admit at the hearing, or which, before the

hearing they agree to admit by any writing under their hands, or which by any rule or pleading in force at the time they are deemed to have admitted by their pleadings.....

See also Aguda on Practice and Procedure page 301, para. 24.02.

Besides, it is not in all cases that a plan is an absolute necessity. This is the *moreso*, in the instant case, where the piece of land in dispute is clearly ascertainable not only through the pleadings wherein the appellant admitted its area, location and boundaries on the ground but acknowledged its existence both in oral evidence as well as when the plan thereof was tendered by the respondents as Exhibit 1, thus substituting the eye for the ear. See *Akpagbue v. Ogu* (1976) 6 S.C. 63; *Omoriegie v. Idugiemwanye* (1985) 2 NWLR (Pt.5) 41 at 60; *Ndukwe Okafor v. Obiwo* (1978) 9-10 S.C. 115; *Garba v. Akacha* (1966) NMLR 62; *Etiko v. Aroyewun* (1959) 4 SC 129; *Maberi v. Alade & ors.* (1987) 2 NWLR (Pt.55) 101; (1987) 18 NSCC 514; and *Arabe v. Asanlu* (1980) 5-7 S.C. 78 at 90.

It is for this reason that the reliance placed by the learned Senior D Advocate, Chief Okeaya-Inneh, on Section 91 (4) of the Evidence Act, Laws of the Federation of Nigeria 1990, Cap. 112 and the recent decision of this Court of Chief Paul Ordia v. Piedmont (Nigeria) Ltd. (1995) 2 NWLR (Pt.379) 516, for the proposition that failure on the part of the respondents to call the surveyor who made or prepared Exhibit 1 to tender same in evidence as fatal to their case, is in my respectful view, misconceived and inapposite. E One of the principles propounded in that case is that a document is admissible in evidence if it is tendered by the person who prepared the document and not the person who signed it, although the latter might be available but not called to testify to it or to tender it. The decision there is distinguishable F from that in the instant case in which the tendering of Exhibit I was, so to say, rendered superfluous by the parties thereto who no longer regard its receipt in evidence as an absolute necessity through its maker. The issue is accordingly resolved against the appellant.

Issue 1 queries whether the court below was justified in holding G that the respondents were entitled to a Declaration of title to land on the burden of proof based on the amended pleadings on which issues were joined while Issue 2 asks whether the court below was correct in holding that the respondents by merely pleading claims for land under Native Law and Custom without setting out the Native Law and Custom relied upon, H was sufficient to find in favour of the respondents.

It is enough to say in answer to these questions that the appellants neither having joined issues with the respondents as to the nature of their holding nor their mode of tenure, failure on their part to lead evidence to

controvert specifically allegations of facts contained in the respondents' pleadings and evidence led in support thereof relating to their acquisition of the land, bush and water in dispute via Native Law and Custom and traditional history, ought to be deemed as established. See *Ajibade v. Mayowa & anor.* (1978) 9-10 S.C. 1 at 6; *Odume v. Nnachi* (1964) 1 All NLR 329 B and *Atolagbe v. Shorun* (1985) 1 NWLR (Pt.2) 361. The respondents having proved their case by reliance on the traditional history pleaded, obtained the judgment of the trial court which properly evaluated the evidence led and the court below had no hesitation in affirming. As the two decisions consist of concurrent findings of facts and I find nothing perverse C or anything wrong both as to the law as well as the procedure adopted to arrive thereat, I see no reason to interfere therewith. Furthermore, and in conclusion, as in paragraph 24 of their Amended Statement of Claim the respondents deliberately used the words '*permission*' and '*concession*,' regarding the acquisition, it amounts to flagrantly putting words they never D used into the mouths of the Justices of the court below by the appellants in suggesting that they (the justices) used the words '*Customary Tenancy and its incidents therein*.' The two issues are accordingly answered in the positive.

For the above reasons and those elaborately set out in the judgment of my learned brother Kutigi, J.S.C. I too, dismiss this appeal with the same consequential orders inclusive of those as to costs.

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