

SUPREME COURT OF NIGERIA
16TH JANUARY, 1996. SC. 99/1989
CORAM:- M. L. UWAIS CJN, M. E. OGUNDARE,
U. MOHAMMED, Y. O. ADIO, A. I. IGUH, JJSC.

J. B. ATUNRASE & 4 ORS DEFENDANTS/
APPELLANTS

AND
SAMUEL CHARLES OLADIPO
PHILLIPS & 7 ORS PLAINTIFFS/RESPONDENTS

JUDGMENTS - Construction - Recitals s. 130 Evidence Act - Whether trial court placed a different construction on this section - In its judgment.

LAND LAW - Documents of title - Failure to produce document of title relied upon - Whether plaintiff's case must fail thereby.

LAND LAW - Sale - Relying on other evidence of sale in finding for a party - That failed to produce document of title also pleaded - Whether proper.

LAND LAW - Possession - Exercise of acts of possession by the plaintiffs - Without any protest from the original owners - Supports the claim that plaintiffs have bought the land.

FACTS

The plaintiffs/respondents filed an action against the defendants/appellants claiming the land in dispute. It is agreed by both parties that the land originally belonged to the Oloto family. Plaintiffs traced their root of title by purchase through one Bello Bashorun to the Oloto family. They were unable to produce in evidence the conveyance pleaded by them, by which Bashorun bought the land in dispute from the Oloto family in 1910. The defendants also traced their root of title by purchase from the same Oloto family.

The trial court found for the plaintiffs. The defendants unsuccessfully appealed to the Court of Appeal contending that plaintiffs' case ought to have been dismissed since they failed to establish their root of title as pleaded. Defendants have further appealed to the Supreme Court raising 3 issues.

ISSUES FOR DETERMINATION

"(i) Have the Plaintiffs established their root of title as pleaded in paragraph 4 of the Statement of Claim to wit a Sale by the Oloto family - admitted by both parties as being the original owners of the land.

(ii) *Was the Court of Appeal right in its application of the provisions of S. 129 of the Evidence Act and in also holding that a sale under customary law by the Oloto family has been established when there was no such evidence before the Court and the Plaintiffs' claim was also not grounded on a sale under native law and custom.*

(iii) *Was it proper to grant a declaration of title to the Plaintiffs/ Respondents on the ground of long possession when ... (b) any act of possession if established has not been shown to be adverse to the interest of the Oloto family particularly as there was no evidence of knowledge on their part of anyone making any adverse claim to the land. "*

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

Construction - Recitals s. 130 Evidence Act

1. There is nothing in the judgment of the learned trial Judge to indicate that he placed a different construction on the section. Omosanya v. Anifowoshe (1959) 4 FSC 94 which he relied on was cited with approval by this Court in Johnson v. Lawanson (supra). To this extent, Nnaemeka-Agu JCA, with profound respect, was in error when, in his judgment, he observed:

"So he judged the age of the document as at the date of the proceedings."

The learned trial Judge did nothing of the sort. Nor could that suggestion be read into his judgment. (p. 146 A)

Documents of title

2. Surely, "documents of title" are evidence of transactions between the parties thereto such as sale, grant etc. relating to the land. It cannot, in my humble view, be the law that where a plaintiff who relies on document of title fails or is unable to produce same at the trial, he must necessarily lose. In appropriate cases where secondary evidence can be given of the contents of the document, such evidence, if sufficient and accepted by the court, will suffice. This is not a case where a plaintiff pleads settlement on land but proves grant of it from somebody else. On the authorities, in such a case he loses. The Plaintiffs in the instant case relied on sale and proved same to the satisfaction of the trial court. (p. 147 H)

Sale - Relying on other evidence

3. In the circumstances of this case I would not fault the courts below in relying on the other evidence of sale to find in favour of the Plaintiffs. And on the welter of the evidence on record I am not prepared to say that the courts below are wrong in their concurrent finding that sale of a parcel of

Land which the land in dispute forms part was made by Oloto family in 1910 to Beshorun. (p. 148 D)

Exercise of acts of possession

4. The learned trial Judge found that the 1st Plaintiff had been on the land and was in possession long before the 1st Defendant. There is abundant evidence on the record to support this finding which the court below also affirmed. There is equally abundant evidence on record that since Bello Bashorun purchased the land he and his successors-in-title had been in possession of same, fanning thereon and surveying same with a view to preparing survey plans. On the facts, as found by the learned trial Judge and affirmed by the court below, the Oloto family could not claim not to know of the activities of Bello Bashorun and his successors-in title, on the land. There was no protest from them. Their silence or non-protest over such a long period gives vent to the claim that they had sold the land to Bello Bashorun. The defence is made worse by the evidence of the head of the Oloto family who stated that his family was not keeping records or proper records of sales of family land. (p. 148 H)

REPRESENTATION

P. O. Okoh, for the Appellants
B. Aluko for 1st, 2nd and 7th Respondents
R. O. Ahonaruogho, for 3rd - 6th Respondents

CASES REFERRED TO

Johnson v. Lawanson (1971) 1 All NLR 56
Okupe v. Ifemembi (1974) 2 SC 97
Omosanya v. Anifowoshe (1959) 4FSC 94
Idundun v. Okumagba (1976) 9-10 SC 227, 246-250
Agunbiade v. Sasegbon (1968) NMLR 223, 226

STATUTE REFERRED TO

Evidence Act s. 130

LEAD JUDGMENT BY OGUNDARE JSC

It is agreed by both parties herein that the Oloto family of Lagos had the radical title to the land in dispute. Plaintiffs traced their root of title by purchase through one Bello Bashorun to the Oloto family. The defendants also traced theirs by purchase from the same Oloto family. At the trial, the plaintiffs tried as they could but were unable to produce in evidence the conveyance by which Bello Bashorun

bought from the Oloto family in 1910 a large piece or parcel of land that included the land in dispute. In spite of this lapse in their case the learned trial Judge gave judgment in their favour. The defendants appealed unsuccessfully to the Court of Appeal and have now further appealed to this Court contending

(a) that as the plaintiffs failed to establish their root of title as pleaded their action ought to have been dismissed and

(b) that section 129 (now section 130) of the Evidence Act was wrongly applied in favour of the plaintiffs.

The Plaintiffs had pleaded *inter alia* as follows:-

“4. The plaintiffs aver that the said hereditament (hereinafter referred to as the land in dispute) originally belonged to the Oloto chieftaincy family of Lagos from time immemorial under native law and custom and that the said Oloto family sold the land in dispute to one Bello Bashorun by virtue of a deed of Conveyance registered as No.66 at page 169 volume 134 at Lagos Registry and dated 19th January 1910.

5. That the said Bello Bashorun having exercised diverse acts of ownership on the land in dispute nec vi nec clam nec precario later sold 2,980 acres of the land to one Salami Ajigbotinu for an estate in fee simple in possession free from all incumbrances by a deed of conveyance executed on the 26th day of January 1920. The said Deed of Conveyance will be tendered as EXHIBIT during the Trial.

6. That the said Salami Ajigbotinu exercised maximum acts of ownership on the land without let or hindrance from any quarters but later made an absolute sale of the land in dispute to one Mrs. S.C. Phillips, mother of the first plaintiff for a sum of 250pounds being full purchase price of the said land as shown by the purchase receipt dated 14/4/53 and duly signed by Salami Ajigbotinu in favour of Mrs. S.C. Phillips.

7. That the said Mrs. S.C. Phillips died on the 26th day of December, 1956, while she had not obtained a Deed of conveyance for the land in dispute, and having by her will dated the 24th day of December, 1956 and proved on the 31st day of January 1957 in the probate Registry in Lagos by the Executors and Executrix named therein, devised certain real Estate including the Land in dispute to his son Mr. S.C.O. Phillips the first plaintiff in this suit.

8. The plaintiffs aver that by a Deed of conveyance dated the 27th day of August, 1959 and registered as No. 22 at page 22 in volume 340 of the Lands Registry in the office at Ibadan: Salami Ajigbotinu as Vendor and

(1) Marian Abimbola Silva

(2) Samuel Charles Oladipo Phillips

(3) *William Olatunde Bucknor as*

Executors and Executrix of the said Mrs. S.C. Phillips (Deceased) conveyed the Land in dispute to Samuel Charles Oladipo Phillips as sale beneficiary thereof for an estate in fee simple in possession free from all

incumbrances.
 B 9. *That subsequently the first plaintiff as sole Beneficial owner laid out the land in dispute into 18 building plots, as evidence by the Layout plan No. CT51/66A and No. CT/165/66, 15 of which plots were sold to the 2nd, 3rd, 4th, 5th, 6th, 7th and the 8th Plaintiffs respectively.*

10. *That the first plaintiff and his predecessors-in-title have repos-*
 C *session of the land in dispute from time immemorial, which land was fenced with concrete pillars and wires immediately after he bought the land in dispute, and part of the pillars are still visible today”*

Paragraphs 12 - 23 of the amended Statement of Claim recited how the 1st plaintiff sold portions of the land to the 2nd - 8th plaintiffs and how
 D each of them went into possession. In paragraphs 24 - 26 the plaintiff complained about the defendants’ interference with their enjoyment of their respective parcels of the land in dispute.

They jointly claimed:

(1) Declaration of Title fee simple to all that piece or parcel of land situate, lying and being at Pedro Village Bariga in the Ikeja Division of the
 E Lagos State of Nigeria.

(2) 200 (Two Hundred Pounds) damages for trespass committed on the land by the defendants, their privies and/or their servants or agents.

(3) Injunction restraining the defendants third privies, agents and/or
 F servants from further acts of trespass upon the plaintiffs’ land situate, lying and being at Pedro Village aforementioned.”

Each defendant filed a separate Statement of defence. The 1st defendant in answer to the plaintiffs’ case pleaded inter alia, thus:

5. The 1st defendant avers that the land in dispute formed portion of large area of land originally owned and possessed from time immemorial by the Oloto Chieftaincy Family under Yoruba Native Law and Custom.
 G

6. The 1st defendant further avers that under and by virtue of a Deed of Conveyance dated the 3rd day of August, 1964, and registered as No.51 at page 51 in Volume 981 of the Lands Registry Office, Ibadan (but now kept in the Lands Registry in Lagos) the land in dispute was sold and conveyed to him (the 1st defendant) by the Oloto Chieftaincy Family who
 H also put him in immediate possession thereof.

.....
 12. The 1st defendant further states that the said Oloto Chieftaincy Family have never sold or alienated the land in dispute to any person

whomsoever before the said sale to him”

In paragraphs 8 - 10 of his statement of defence, 1st defendant recited that he sold portions of the land in dispute to 2nd and 3rd defendants and other unnamed purchasers.

2nd defendant, for his part, pleaded:-

“5. The 2nd defendant states that under and by virtue of a deed of conveyance dated the 3rd day of August, 1964, and registered as No. 51 at page 51 in volume 781 of the Lands Registry Office, Ibadan (but now kept in the Lagos Lands Registry) a large area of land of which the land in dispute forms a portion was sold and conveyed to one Mr. Joseph Banjo Atunrase by the Oloto Chieftaincy Family and he (Joseph Banjo Atunrase) was not put into immediate possession thereof.

6. The 2nd defendant avers that under and by virtue of a Deed of Conveyance dated the 20th day of November 1967 and registered as No. 54 at page 54 in Volume 1035 of the Lands Registry Office, Ibadan (but not kept in the Lagos Lands Registry) the land in dispute was sold and conveyed to her by the said Mr. Joseph Banjo Atunrase and she (the 2nd defendant) took immediate possession thereof.

7. The 2nd defendant further avers that since about seven years ago she had erected a building on the land in dispute through a mortgage loan which she raised from the Nigeria Building Society of No. 11, Breadfruit Street, Lagos.”

3rd, 4th and 5th defendants pleaded along the same line as above except that in the case of the 4th defendant he bought his own portion from one Sule Solanke Sobowale to whom the 1st defendant had earlier sold that portion.

At the trial an attempt was made by counsel for the plaintiffs to tender in evidence the deed of conveyance executed in 1910 by the Oloto family in favour of Bello Bashorun, but the attempt failed. One Mrs. Afolabi of the Lands Registry who was called to produce the document was unable to do so. In the end plaintiffs’ case was closed without the document being produced in evidence. The head of the Oloto family testified in favour of the defendants and the deed of conveyance executed by that family in favour of the 1st defendant was also tendered in evidence. In his judgment, the learned trial Judge found:

“(1) “.....plaintiffs mother and plaintiff’s possession would date from 1953. From 1920 to 13 April, 1953 (the date on Exhibit ‘D’) the property would be covered by Exhibit ‘F’”

(2) “I have no doubt in my mind that the evidence of the Oloto Chieftaincy Family in this case was not intended to show the correct state of affairs.

(3) *"I believe the evidence of the 3rd plaintiff witness, Salami Ajigbotinu that he was on the land and of the 4th plaintiff witness, Bashorun that his grandfather was on it also."*

B (4) *I hold the view that the 1st defendant armed with his own plan had every chance to discover that there was a previous conveyance, that of 1st plaintiff, relating to the land older than his own but decided to ignore it; just as he decided to ignore all the 1st plaintiff's pillars on the site though his (defendant's) Surveyor let the cat out of the bag."*

C (5) *"I find that the 1st plaintiff had been on the land and was in possession long before the 1st defendant."*

(6) *"I find as of fact that the conveyance Exhibit 'F' carries a plan which in all respect is similar and the same as the one in Exhibit 'C' 1st plaintiff's plan and Exhibit 'M' 1st defendant's plan."*

D Although 1st plaintiff's root of title to the Oloto family, that is, the deed of conveyance made in 1910 by which Oloto family transferred title to Bello Bashorun was not in evidence, the learned trial Judge however opined thus:

E *"Exhibit 'F' (the deed of conveyance by which Bello Bashorun sold to Ajigbotinu) was made in 1920 and therefore more than 20 years old. By the provisions of Section 129 of the Evidence Law there is a presumption that the Recital relating to the purchase of the land in dispute from the Oloto Chieftaincy Family is sufficient evidence of the facts in the statement until they are disproved. See Omosanya v. Anifowoshe (1959) SCNLR 217; (1959) 4 F.S.C. page 94 and Etiko v. Aroyewun (1959) SCNLR 308; (1959) 4 F.S.C. page 129."*

F (Italics, Brackets mine)

Following on the view above, the learned trial Judge held:

"I accept that the land originally belonged to the Oloto Chieftaincy Family of Lagos but that in view of the Recital in Exhibit 'F' the family had alienated its rights and interest in the land since 1920 to 1st plaintiff's predecessors in title."

G He concluded -

"I hold that all the other plaintiffs in this matter since they claim through the 1st plaintiff are properly in possession and have every right to so remain without let or hinderance from the 1st defendant or the other defendants who claim from and through the 1st defendant."

H and entered judgment for the plaintiffs as claimed.

The defendants appealed to the Court of Appeal. Three Issues were canvassed before that court, that is to say:

"1. Both parties having traced their root of title to the Oloto family, should the respondent still be entitled to a declaration of title having failed to establish a sale as alleged in paragraph 4 of the Statement of Claim."

2. *Was the trial Court right in invoking the provisions of section 130 of the Evidence Act to the facts of this case.*

3. *What relevance if any is the finding of the Court that the land in dispute was surveyed by someone else before the 1964 sale to the 1st appellant."*

The Court resolved issue (1) in favour of the plaintiffs. By a majority decision (Ademola and Kolawole JJ.C.A., with Nnaemeka-Agu, JCA (as he then was, dissenting) the Court, per Kolawole JCA observed:

"I think that the learned Judge, rightly applied the provisions of section 130 of the Evidence Act to the case in hand with regard to the Deed of Conveyance Exhibit F made on 26th January. 1920."

After setting out the section and quoting a passage from the judgment of this Court in Johnson v. Lawanson (1971) 1 All NLR 56, Kolawole JCA went on to say:

"Now the Deed relied upon for the presumption contemplated by Section 130 is Exhibit F. It was made on 26th January 1920. The contract on which the deed relied upon is the one dated 14th April 1953 that is the purchase receipt made between Salami Ajigbotinu and Mrs. S.C. Philips the mother of the first respondent which relates to the land in dispute. Exhibit F was 33 years old at the date of the contract when Exhibit D was made. It was therefore right in law to presume that Salami Ajigbotinu had title to the land in dispute by virtue of Exhibit F. It is also to be taken as sufficient evidence of the truth that Bello Bashorun was seized of and well entitled to the land in dispute by purchase from Chief Oloto.

My understanding of section 129 of the Evidence Act and the case of Johnson v. Lawanson (supra) is that two documents are envisaged to bring into play the presumption contemplated by section 129. First, the deed which contains the recitals statements and descriptions of matter and parties etc .. which must be 20 years old at the date of the contract. Second, the contract with reference to the subject matter before the court and bearing relevance to the deed which must have a gap of 20 years between it and the deed. Here the deed is Exhibit F and the contract is Exhibit D."

On Issue (3) the Court unanimously held that the plaintiffs could rely on acts of possession in proof of their title.

It unanimously dismissed the appeal of the defendants.

The defendants appealed against this judgment to this court upon four grounds of appeal and in their Brief of Argument set out the following three questions as calling for determination, to wit:

"(i) Have the plaintiffs established their root of title as pleaded in paragraph 4 of the Statement of Claim to wit a sale by the Oloto family - admittedly by both parties as the original owners of the land

(ii) Was the Court of Appeal right in its application of the provisions of S.130 of the Evidence Act and in also holding that a sale under customary law by the Oloto family has been established when there was no such evidence before the Court and the plaintiffs claim was also not grounded on a sale under native law and custom.

iii) Was it proper to grant a declaration of title to the plaintiffs/respondents on the ground of long possession when (a) that was not the basis on which the claim was ground (b) any act of possession if established has not been shown to be adverse to the interest of the Oloto family particularly as there was no evidence of knowledge on their part of anyone making any adverse claim to the land."

It is trite that issues for determination must be predicated on the grounds of appeal. As there is no ground of appeal on which Question (iii) (a) can be tagged, I shall not countenance arguments on it.

No issue has been predicated on ground 4 nor is any argument advanced on it. Ground 4 must therefore, be taken as abandoned. It is accordingly hereby struck out by me.

The issues as formulated in the respondents' Brief are, however, not in any way apt having regard to the grounds of appeal. I do not consider them as basis for determining this appeal.

I shall deal first with Question 2. In his judgment in the court below, Nnaemeka-Agu, J.C.A (as he then was) had observed on section 129 (now section 130) of the Evidence Act as follows.

"The law is that the presumption under the section arises in respect of documents which are 20 years old at the date of the contract in which they are recited, not those documents which are twenty years old at the date of the proceedings. See on this: Johnson v. Lawanson (1971) NMLR 380. See also M.A. Okupe v. B.O. Ifememhi (1974) 3 Sc. 97. Indeed the cases relied upon by the learned counsel for the respondents were among those earlier decisions which were expressly over-ruled by the decision in Johnson v. Lawanson (supra). I think that what is relevant for this case as argued is the recital in Exh. F of the sale contract by Oloto Family not the recital in Exh. 'CG'. In my view 'at the date of the contract' refers to the contract wherein the recital occurs, not necessarily the contract of the parties before the court."

Professor Kasunmu, SAN learned leading counsel for the defendants has submitted in the appellants' Brief of argument that both the learned trial Judge and the court below were in error in their application of the section of the Evidence Act under consideration and has argued in favour of our affirming the opinion of Nnaemeka-Agu JCA on the issue.

Relying on *Johnson v. Lawanson* (1974) All NLR 56 and *M.A. Okupe v. B.O. Ifemembi* (1974) 2 Sc. 97, the 3rd, 4th, 5th and 6th plaintiffs submitted in their Brief that the provisions of section 130 were correctly applied by the learned trial Judge.

The 1st, 2nd and 7th plaintiffs, in their Brief, submitted that the lower court's interpretation given to section 130 was correct.

I shall start my consideration of this issue by setting out the relevant recital in Exh. 'F' that has given rise to all these arguments on section 130 of the Evidence Act Cap. 112. In 1920 Bello Bashorun sold a piece or parcel of land to Salami Ajigbotinu for an estate in fee simple and executed a conveyance, Exhibit "F" in the latter's favour. In that conveyance it was recited thus:

"Whereas the said Vendor is seised of and well entitled to by purchase from Chief Oloto of a large plot, piece or parcel of land situate at Oko Bariga Ebute Metta aforesaid for an estate of inheritance in fee simple in possession free from incumbrances.

And whereas the said vendor hath agreed with the purchaser for the absolute sale to him of a portion of the said hereditaments"

In April 1953, that is 33 years later, the said Salami Ajigbotinu sold the land conveyed to him in 1920 to Mrs. S.C. Philips from whom 1st plaintiff derived his title. The question now arises: does section 130 of the Evidence Act Apply to raise a presumption - rebuttable though - that Chief Oloto sold land (including the land in dispute) to Bello Bashorun?

Section 130 provides:

"130. Recitals, statements and descriptions of facts, matters and parties contained in deeds, instruments 20 years old at the date of the contract, unless and except so far as they may be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters and descriptions.

I do not think there is much dispute about the correct construction of the section. The construction placed on it by this Court in *Johnson v. Lawanson* (1971) 1 All NLR 58-67 runs thus:

"We hold therefore that a deed to be competent for the presumption contemplated by section 129 of the Evidence Act must be 20 years old at the date of the contract" in which the deed is sought to be relied upon and not 20 years old at the date of the proceedings at which such deed is being offered in evidence. We have come to the conclusion that the decision in Maurice Goualin Ltd. & Anor v. Wahabi Atanda Aminu, (Privy Council appeal No. 17 of 1957) and other decisions based on it in so far as they have measured the age of the deed relied upon for securing the benefit of the presumption created by section 129 of the Evidence Act by reference to

the date of the proceedings at which such deed is being offered in evidence were wrongly decided and we over-rule them”

There is nothing in the judgment of the learned trial Judge to indicate that he placed a different construction on the section. Omosanya v. Anifowoshe (1959) SCNLR 217: (1959) 4 FSC 94 which he relied on was cited with approval by this Court in Johnson v. Lawanson (supra) To this extent, Nnaemeka-Agu JCA. with profound respect, was in error when in his judgment he observed:

“So he judged the age of the document as at the date of the proceedings.”

The learned trial Judge did nothing of the sort. Nor could that suggestion be read into his judgment.

I can also not see anything in the judgment of the court below per Kolawole JCA nor that of Nnaemeka-Agu JCA to suggest that that court also place a wrong construction on section 130.

What appears to be the point of divergence is the application of the section to the facts of the case. Both the learned trial Judge and the court below took Exh. “F” as the deed to which section 130 applied. While, however, the former took the conveyance to the 1st plaintiff (Exhibit “CG”) as the contract, the court below took Exhibit “D” (the purchase receipt E Ajigbotinu gave to Mrs. Phillips on the sale to her of the land) as the contract. I think the court below is clearly right in this regard. Exhibit “CG” recited the sale contract to Mrs. Phillips which was the basis for Exhibit “CG”.

With profound respect to Nnaemeka-Agu, JCA, I find difficulty in F agreeing with his observation that -

“In my view “at the date of the contract” refers to the contract wherein the recital occurs, not necessarily the contract of the parties before the court,”

In my respectful view, the deed containing the recitals in respect of G which the presumption under section 130 is being sought is different to the contract which must come into being at least 20 years after the deed. There are passages in Johnson v. Lawanson (supra) in favour of this construction. This Court, per Coker JSC at page 63 of the Report observed:

“The plain position is that the occurrence in the course of the title of H a deed more than 20 years old when the contract of sale is in hand of statements of fact or recitals material to the prior title, will be prima facie evidence in favour of that prior title and unless disputed will be sufficient evidence of those statements of fact or recitals”

In as much as Exhibit “F” was over 20 years old at the time of the

contract of sale between Ajigbotinu and Mrs. Philips the courts below were in my judgment right to apply section 130 of the Evidence Act to the recitals in that deed. I, therefore answer question (2) in the affirmative.

Question (1)

In paragraph 4 of their amended Statement of claim the plaintiffs pleaded:

"4. The plaintiffs aver that the said hereditament (hereinafter referred to as the land in dispute) originally belonged to the Oloto Chieftaincy Family in Lagos from time immemorial under native law and custom: and that the said Oloto family sold the land in dispute to one Bello Bashorun by virtue of a deed of Conveyance registered as No. 66 at page 169 volume 134 at Lagos Registry and dated 19th January 1910."

The deed of conveyance referred to therein was not produced in evidence. But evidence was led - and the trial Judge accepted the evidence of the sale by the Oloto family to Bello Bashorun. Furthermore, the recital of the said sale in Exhibit "F" was relied on has raised a presumption of the sale under section 130 of the Evidence Act. It is the contention of the defendants that having failed to produce in evidence the 1910 deed of conveyance from the Oloto family to Bello Bashorun plaintiffs' claims must be dismissed as they could not rely on any method, other than as pleaded in proof of their title. Attractive as this argument appears to be I regret cannot accept it.

From the pleadings it cannot be doubted that the 1st plaintiff (through whom the other plaintiffs claim title) predicated his root of title on a sale by the Oloto family the radical owners of the land in dispute to Bello Bashorun. This much is accepted by the defendants for in their Brief they assert:

"The respondents claim is based on a sale in 1910 by the Oloto family"

The plaintiffs went on to plead a deed of conveyance from the Oloto family to Bello Bashorun. This presupposes that he is relying on the second method of proving title as laid down by this Court in *Idundun v. Okumagba* (1976) 9 - 10 SC. 227, 248. This Court per Fatayi-Williams. J.S.C. (as he then was) had said:

"Secondly, ownership of land may be proved by production of documents of title which must of course be duly authenticated in the sense that their due execution must be proved, unless they are produced from proper custody in circumstances giving rise to the presumption in favour of due execution in the case of documents twenty years old or more at the date of the contract (See section 129 of the Evidence Act and *Johnson v. Lawanson* (1971) 1 All NLR p. 56.

Surely, documents of title are evidence of transactions between the parties thereto such as sale, grant etc relating to the land. It cannot in my humble view, be the law that where a plaintiff who relies on document

of title fails or is unable to produce same at the trial, he must necessarily lose. In appropriate cases where secondary evidence can be given of the contents of the document, such evidence, if sufficient and accepted by the court, will suffice. This is not a case where a plaintiff pleads settlement of land but proves grant of it from somebody else. On the authorities, in such a case he loses. The plaintiffs in the instant case relied on sale and proved same to the satisfaction of the trial court.

The defendants also contend that plaintiffs did not establish sufficient premise to warrant secondary evidence of the deed from Oloto family to Bello Bashorun, being received in evidence. They contend that lawyer Olorunnimbe whom PW4 claimed in evidence had the deed was not called to give evidence. It is on record that genuine efforts were made to produce the deed in evidence but these efforts failed. The official from the Lands Registry who was subpoenaed to produce it could not do so. Plaintiffs had to close their case without it. The court below regarded the deed as 'lost'. It is, however, not correct to say, as the defendants put it in their Brief, that the trial court found that "no such deed existed". What the learned trial Judge said was:

"No such Deed is an Exhibit in this case."

In the circumstances of this case I would not fault the courts below in relying on the other evidence of sale to find in favour of the plaintiffs. And on the welter of the evidence on record I am not prepared to say that the courts below are wrong in their concurrent finding that sale of a parcel of land which the land in dispute form part was made by the Oloto family in 1910 to Bello Bashorun.

Question (3)

I am only left with question (iii)(b) as formulated in the Brief. The main arguments of the defendants are:

- (a) that the claim for declaration of title was not grounded on long possession; and
- (b) that there was no specific finding by the trial Judge of knowledge by or acquiescence of the Oloto family to any act of possession by the 1st plaintiff and his predecessors-in-title.

As regards (a) the defendants overlooked paragraph 11 of the amended statement of claim which runs thus:-

"11. That besides, the first plaintiff for several years was clearing the bush on the land in dispute and uprooting the stumps of kolanuts and palm trees and erected Signboards with his names thereon on conspicuous parts of the land."

The learned trial Judge found that the 1st plaintiff had been

on the land and was in possession long before the 1st defendant. There is abundant evidence on the record to support this finding which the court below also affirmed. There is equally abundant evidence on record that since Bello Bashorun purchased the land he and his successors-in-title had been in possession of same farming thereon and surveying same with a view to preparing survey plans. On facts not too dissimilar to the facts of the instant case, this Court, in *Agunbiade v. Sasegbon* (1968) NMLR 223, 226 observed, per Coker JSC.

“..... The witnesses testified that he occupied that land as a tenant of D.T. Sasegbon for many years until he was driven away therefrom by the defendant immediately before the commencement of the proceedings. Section 45 of the Evidence Act may as well be relevant there but the fact of a user by the Sasegbon family for the several years in-between without any objection or protest from the Okoya Family left no room for any serious doubt about the sale to D.T. Sasegbon of that land by the Family and of their total abdication of any claims or interest in the land thereafter.”

On the facts as found by the learned trial Judge and affirmed by the court below, the Oloto family could not claim not to know of the activities of Bello Bashorun and his successors-in-title on the land. There was no protest from them. Their silence or non-protest over such a long period gives vent to the claim that they had sold the land to Bello Bashorun. The defence is made worse by the evidence of the heads of the Oloto family who stated that his family was not keeping records or proper records of sale of family land.

This disposes of Question (III).

In conclusion, I find that this appeal fails and it is hereby dismissed by me. I affirm the judgment of the court below and award N1,000.00 to each set of plaintiffs/respondents.

UWAIS CJN

I have had the opportunity of reading in draft the judgment read by my learned brother Ogundare, J.S.C. I entirely agree with it. For the reasons stated therein I too see no merit in the appeal. Accordingly, the appeal is hereby dismissed with N1,000.00 costs to each set of the respondents.

MOHAMMED JSC

I have had the advantage of reading before now the opinion of my learned brother Ogundare. J.S.C. in the judgment, just read and I

entirely agree with him that this appeal must fail. I have nothing more to add subsequently, I hereby dismiss the appeal and abide by the orders made on costs in the lead judgment.

B

ADIO JSC

I have had the opportunity of reading, in draft, the judgment just delivered by my learned brother, Ogundare, J.S.C., and I agree that the appeal fails. One of the important issues in this case concerned the legal position and effect of Exhibit “F”. The document was over 20 years old at the time of the contract of sale between Salami Ajigbotinu and Mrs. Philips. In the circumstance, the courts below were right in applying section 129 (now section 130) of the Evidence Act to the recitals set out in that deed. In the case of the deed executed by Oloto family in favour of Bello Bashorun unfortunately it could not be produced owing to certain circumstance, it was certainly in existence but all efforts made to cause it to be produced failed. It was perfectly in order to adopt another permissible means to prove what the deed would have been used to prove. The courts below were right in resolving the issue in favour of the plaintiffs.

It is for the foregoing reasons and the detailed reasons given in the lead judgment of my learned brother, Ogundare, J.S.C. that I agree that the appeal fails. I too, dismiss it and abide by the order for costs.

F

IGUH JSC.

I have had the privilege of reading in draft the lead judgment just delivered by my learned brother Ogundare, J.S.C. He has comprehensively considered all the issues canvassed before us and I agree entirely with his reasonings and conclusion.

This appeal is totally devoid of substance and I too dismiss it. I abide by the order for costs contained in the lead judgment.

H