

SUPREME COURT OF NIGERIA
9TH JANUARY, 1996. SC. 252/1989
CORAM:- M. L. UWAI S CJN, M. E. OGUNDARE,
U. MOHAMMED, S. U. ONU, A. I. IGUH, JJSC.

NELSON NWOSU ONWUGBUFOR
& 2 OTHERS PLAINTIFFS/APPELLANTS
(For themselves and on behalf of
Uruokpala Family of Amawa

AND
HERBERT OKOYE & 3 OTHERS DEFENDANTS/RESPONDENTS

APPEALS - Findings of fact - Where supported by evidence - Appellate court cannot substitute its own views on the evidence.

APPEALS - Criticism - Court of Appeal's assertion - That trial judge relied on quantity rather than quality of witnesses' evidence - Held to be totally unjustified.

APPEALS - Observation of lower court - Whether a misconception of plaintiffs' pleadings.

APPEALS - Findings of fact - Made by the trial court - Whether rightly attacked

EVIDENCE - Evaluation - Where trial judge properly reviewed and evaluated the evidence - Court of Appeal cannot substitute the trial court's view of the facts

LAND LAW - Ownership - Where not established based on traditional evidence - Whether evidence of various acts of ownership and possession - Is enough to warrant the inference that plaintiffs are exclusive owners.

LAND LAW - Title - reliance on acts of possession and ownership - Such must extend over a sufficient length of time - Must be numerous and positive enough - For claimant to succeed.

LAND LAW - Ownership - Whether ownership from time immemorial - Must be established - Before plaintiffs can lead evidence on their acts of possession - Where they did not rely exclusively on traditional evidence.

LAND LAW - *Location of the land in dispute - Whether in issue and relevant - In the determination of ownership in the present case.*

PRACTICE & PROCEDURE - *Court fees - Where not paid in respect of an amended claim - Whether court should entertain the relief claimed.*

PRACTICE & PROCEDURE - *Competence of claim - Where no payment of court fee was made - In respect of appellants' new claim for forfeiture - Whether that claim is competent.*

FACTS

Before the Onitsha High Court, the plaintiffs/appellants sued the defendants/respondents claiming declaration of customary right of occupancy in respect of the land in dispute. Plaintiffs also claimed damages for trespass, injunction, and forfeiture of the defendants' tenancy. Plaintiffs relied on evidence of traditional history and various acts of ownership and possession for a long period of time. Defendants' ancestors were plaintiffs' customary tenants. It is the defendants' failure to continue paying the usual annual tributes that has given rise to this action.

The defendants denied the claim and averred that the land has been their absolute property. The trial court found for the plaintiffs but granted only their claim for customary right of occupancy. Being dissatisfied, both parties appealed to the Court of Appeal. The lower court found for the defendants and dismissed the plaintiffs' claim. Plaintiffs have further appealed to the Supreme Court raising 7 issues, but the apex court preferred the 4 issues raised by the respondents.

ISSUES FOR DETERMINATION

"1. Whether the Court of Appeal was right in its decision, based on the pleadings and evidence before the trial court, in holding that the plaintiffs did not make out a case of declaration of title based on (a) the principle decided in Ekpo Vs. Ita, II N.L.R. 68 and (b) long possession and enjoyment of land envisaged by section 45 of the Evidence Act.

2. Whether the Court of Appeal was right to re-evaluate the evidence before the trial court and to come to a different conclusion by acting under well settled principle of law to the effect that when the findings of facts of the trial Judge do not flow from the evidence before him and therefore perverse, or, when the findings are not based on the trial Judge having seen or heard the witnesses and watched their demeanour, then the Court of Appeal is at liberty to make its own

findings. Etc, see p. 14

HELD (Allowing the appeal per Lead judgment of **IGUH JSC**, Ogundare JSC dissenting)

Ownership - Where not established based on traditional evidence

1. In the present case, it cannot be disputed that the appellants neither sufficiently pleaded nor gave evidence in support of their original ownership of the land in dispute by tradition from time immemorial. Recognizing the fact that there are five modes of establishing title to land, the next issue must be whether the appellants pleaded and/or relied on any other way or ways in proof of their title to the land in dispute. Besides, although a plaintiff is entitled to rely on traditional evidence alone to succeed in his case if such evidence of tradition is inconclusive, the case must rest on the question of other facts pleaded and relied on at the trial. A close study of the averments in paragraphs 3 to 11 of the amended Statement of Claim already discloses in the clearest possible terms that the appellants pleaded and relied primarily on various acts of ownership and possession, in and over the land in dispute, by themselves and, before them, their forefathers, numerous and positive enough to warrant the inference of exclusive owners thereof. (p. 20 A)

Reliance on act of possession and ownership

2. A party, as in the present case, who relies on acts of possession and ownership of the land in dispute as evidence of, and in proof of, his title to land must, to succeed establish that such acts not only extend over a sufficient length of time but also that they are numerous and positive enough to warrant the inference of exclusive ownership of such land. (p. 21 G)

Whether ownership from time immemorial - Must be establish

3. With profound respect, I cannot agree with the court below that the plain issue that arises in this case establish their ownership of the land in dispute from time immemorial and whom their forefathers were before they can lead evidence of their acts of possession on the land. The reason is because where, as in the present case, the appellants merely relied on mere acts of ownership and possession of the land and did not rely exclusively on traditional evidence as proof of their root of title from a particular source proof of the original ownership of the land in dispute such as who founded it, how he founded it and the particulars of intervening owners through whom he claims cannot arise, (p. 22 E)

Observation of lower court below

4. With profound respect, I think that the observation of the court below to the effect that while the appellants asserted ownership of the land, they did not “say how the ownership came about” is a total misconception of their pleadings and the mode of title pleaded and relied upon by them. In my view, once a plaintiff in a declaration of title to land claim relies as his proof of title, on acts of ownership and possession in and over the land in dispute, extending over a sufficient length of time and numerous and positive enough as to warrant the inference that he is the true owner of the land and satisfactorily discharges the burden of proof on him in that regard, he will be entitled to the declaration sought. (p. 25 B)

C
Location of the land in dispute

5. There can be no doubt that the parties joined issue on the situs or location of the land in dispute, namely, whether it is situate at Amawa or Azu village. Indeed I accept the submission of the appellants that a resolution of this issue would go a long way in determining who owns the land in dispute in so far as neither party pleaded purchase as their root of title. It therefore seems to me crystal clear that the boundaries of the land in dispute in so far as its situs or location is concerned was in issue. If the land is conclusively established to lie within Amawa village, then of course it must belong to the appellants. If, on the other hand, it is found to be situate in Azu village, then, naturally it must belong to the respondents. The court below was clearly in error when it held that the evidence of boundary witnesses is devoid of value. This is so as they all came from Amawa village and testified that the entire land surrounding the land in dispute belonged to them and indeed to their Amawa village. Their evidence of boundary was therefore very relevant as, if believed, as indeed it was, the inescapable inference would be that the land is situate within Amawa village and would therefore belong to the appellants. In the second place, these witnesses did not just give evidence of their boundaries with the appellants on the land in dispute, they also gave material evidence in support of the appellants’ case. (p. 27 D)

Findings of fact - Whether rightly attacked

6. In view of the above findings and observations of the trial court, it is clear that the Court of Appeal cannot, with respect, be right when it held that the trial Judge did not appreciate or pay regard to what the appellants must prove in support of their claim. I also find myself unable to accept the view of the Court of Appeal that the trial court failed to determine whether the appellants discharged the burden of proof on them in the case. Of

course, the learned trial Judge clearly appreciated and paid close regard to what the appellants must prove to succeed, namely, acts of ownership and possession in respect of the land in dispute extending over a sufficient length of time and numerous and positive enough to warrant the inference that they are the true owners thereof. It cannot also be seriously argued that he failed to determine whether the appellants discharged the onus on them in respect of their claim for title to the land in dispute. The point was clearly decided by him as a result of which he proceeded to grant to the appellants the customary right of occupancy in respect of the land in dispute verged yellow in Exhibit A. In view of all my observations above, I entertain no doubt that issue number one as formulated in the respondents' brief must be answered in the negative. (p. 29 E)

Evidence – Evaluation

7. In my view, it is clear that the learned trial Judge reviewed the relevant evidence before him, evaluated them and made his findings thereupon. He preferred the evidence of the appellants and their witnesses to those of the respondent and their witnesses and it seems to me beyond dispute that a trial court is entitled so to do. With the greatest respect, I think the court below was grossly in error when it proceeded to substitute its own views with that of the trial court. (p. 30 B)

Findings of fact - Where supported by evidence

8. In the present case, no where in the judgment of the learned trial Judge can it be suggested that he failed to make a proper use of the opportunity of seeing and hearing the witnesses or that he drew any wrong conclusion from evidence, neither can it be said that he made any finding which was perverse or not supported by the evidence. The only complaint by the respondents is that the trial Judge after considering all the evidence led before him the evidence of the appellants and their witnesses to those of the respondents and their witnesses. In my view, this course of action by the learned trial Judge cannot be faulted since he was entitled under the law to do so and his action flowed from the evidence before the court. The court of Appeal was therefore in error to interfere with the finding of fact of the trial court which, in all respect, are justified and supported by the evidence, and, to substitute its views on the evidence for those of the trial court. (p. 31 C)

Appeals - Criticism

9. With profound respect to the court below, the above criticism of the learned trial Judge seems to me totally unjustified and completely unsupported by the judgment and cannot therefore be sustained. Nowhere throughout his judgment can it reasonably be said that the learned trial Judge relied on the number of witnesses rather than the quality of their evidence and I must dismiss this criticism of the trial court as unwarranted and without justification. The issue of weight of evidence was examined in extenso earlier on in this judgment and it will be idle to repeat them all over again. I need only say that in view of all that I have stated above, the answer to issue number 3 must be in the affirmative. (p. 31 H)

Court fees - Where not paid

10. Quite apart from the fact that court orders must be obeyed as directed, it cannot be over-emphasized that for a valid and effective commencement of a claim, an intending plaintiff shall strictly comply with the provisions of relevant statutes and the Rules made thereunder and governing the claims made such as the High Court Law and Rules of Anambra State. It is the responsibility of the plaintiff inter alia to pay the requisite fees in respect of each and every relief claimed as prescribed by the rules to enable the court's judicial functions to commence. A court shall not entertain a relief claimed without payment of the prescribed requisite fees unless such fees have been waived or remitted by the court or such fees are payable by any Government Ministry or non-Ministerial Government Department or Local Government pursuant to the provisions of the said High Court Rules of Anambra State. (p. 33 H)

Competence of claim - Where court fee was not paid

11. In the present case, no payment whatever was made by the appellants in respect of their new claim for forfeiture. Payment of the prescribed fees being a condition precedent to the filing of a valid claim before the court, it seems to me clear that the claim for forfeiture in the present suit is incompetent, improperly before the court and ought to be struck out. In the circum stance, it becomes entirely idle and academic to examine the various reasons given by both courts below in refusing the appellants' claim for forfeiture which must be and is hereby struck out. (p. 34 D)

NOTABLE POINTS OF INTEREST

IGUH JSC

1. Ways of proving ownership of land in dispute

It is now settled that there exists five different ways or methods of establish-

ing or proving ownership of land in dispute. For the avoidance of doubt, these methods, as postulated by the various decisions of this court are as follows:-

(i) Proof by traditional evidence.

(ii) Proof by production of documents of title duly authenticated, unless they are documents 20 or more years old, produced from proper custody..... What is of paramount importance is that a party claiming declaration of title to a statutory or customary right of occupancy to land needs not plead and prove any more than one of the above methods to succeed. It must however be stressed that if, as it is sometimes the case, the claimant pleads and/or relies on more than one method to prove his title, he merely does so *ex abundanti cautela* as proof of one single root of title is sufficient to sustain a plaintiffs claim for declaration of title to land. (p. 18 C)

2. Proof of title based on tradition - How to be properly done D

The point has repeatedly been made and it seems to me well settled that it is not sufficient for a party who relies for proof of original title to land on tradition to merely plead that he and his predecessors in title had owned and possessed the land in dispute from time immemorial without more. The question of original ownership of land from time immemorial is an issue of hard historical facts. Accordingly material and necessary facts to sustain such a claim must be clearly averred and proved. And they are not established by sweeping and vague assertions that the land is owned by the plaintiff from time immemorial or from time beyond human memory without further details. Such sweeping assertions clearly leave the traditional evidence at large and in the air and can be fatal to a plaintiffs case if they are the only root of title relied on. (p. 19 D)

3. Claim for Title - Need to give satisfactory evidence

It cannot be overemphasized and it seems to me elementary that a plaintiff in a declaration of title action who bases his claim on customary title must give satisfactory evidence of how he derived the particular title pleaded and claimed. The burden which is on a plaintiff in such an action is to lead clear evidence that is sufficiently cogent and credible in proof of the particular root of title relied on. Accordingly, a plaintiff in a declaration of title action who bases his claim on a particular root of title must sufficiently plead and establish how he derived the specific title claimed. (p. 24 F)

OGUNDARE JSC (DISSENTING)

4. Plaintiffs cannot succeed on their faulty pleadings

From all I have been saying, it follows that, on the state of the law, the Plaintiffs could not have succeeded in their claim for title based, as it were, on the faulty pleadings put in by them. The Court below is quite right in its observation on the Plaintiffs' pleadings. (p. 46 F)

B

Trial judge made no specific finding of fact

5. Apart from ascribing credibility to some witnesses for the reasons given, the learned trial Judge made not one specific finding of fact before reaching his conclusion. This is rather strange. Did he find that the land in dispute belonged to the Plaintiffs from time immemorial, as pleaded? Did he find that Plaintiffs' forefathers ever exercised acts of ownership and possession on the land? Did he find that Plaintiffs were ever in possession of the land. What evidence was led by the Plaintiffs in support of their case? The learned trial Judge relied on the evidence of PW3, PW6, PW7 and PW9 who are D from the Defendants' family or village. Did he properly consider the evidence of these witnesses to see if it could support a claim for title to land? I rather think not. (p. 46 H)

6. Plaintiffs' evidence is bereft of required standard of proof

E The evidence for the Plaintiffs is completely bereft of the standard of proof required in law to establish title to land. The learned trial Judge, with respect to him, not only failed to make specific findings of fact but failed also to advert his mind to what was required of the Plaintiffs to discharge the burden on them to prove their case. Shorn of all irrelevancies in the lead F judgment of Uwaifo JCA (for example, proof of boundary between the two villages of Amawa and Azu), which irrelevancies, in my respectful view do not occasion any miscarriage of justice, I think the Court below came on the whole, to the right decision by reversing the trial court on the issue of title. (p. 52 F)

G

7. Plaintiffs' evidence show that defendants are in possession

The totality of the evidence adduced by the Plaintiffs showed that the defendants and their people of Azu-Ogbunike are the persons in possession of the land in dispute. Possession, as the saying goes, is nine-tenths of H law. To succeed against them the Plaintiffs must prove that they are the owners of the land in dispute. The Plaintiffs failed to discharge the burden on them to establish their title; their claim for title, on their showing, was rightly dismissed by the Court of Appeal. (p. 53 B)

REPRESENTATION

Chief F.R.A. Williams, SAN with G.E. Ezeuko, SAN and T.E. Williams for the Appellants

H.C. Ogbuli with J.E.O. Ogbuli for the Respondents

CASES REFERRED TO

Idundun v. Okumagba (1976) 9 and 10 S.C. 227 at page 246 - 250

Atanda v. Ajani (1989) 3 N.W.L.R. (Part 111) 511

Anyanwu v. Mbara (1992) 5 N.W.L.R. (Part 242) 381

Balogun v. Akanji (1988) vol. 19 1 N.S.C.C. 180

Alada v. Awo (1975) S.C. 215 at page 229

Akinloye v. Eyiyoila (1968) N.M.L.R. 92

Piaro v. Chief Tenalo (1976) 12 S.C. 31 at page 41

Olujinle v. Adeagbo (1988) 2 N.W.L.R. (Part 75) 238

Kodilinye v. Mbanefo Odu 2 W.A.C.A. 336 at 337

Cobblah v. Gbeke 12 W.A.C.A. 294

Akinola v. Oluwo (1962) 1 All N.L.R. 224 at page 225

Nwagbogu v. Chief Ibeziako (1972) 1 All N.L.R. (Part 2) 137

Thomas v. Holder 12 W.A.C.A. 78 at 80

Jegade v. Gbajumo (1947) 10 S.C. 183 at 187

Olanrewaju v. Governor Oyo State (1992) 11 - 12 SCNJ 92 106

Ekpo v. Ita 11 NLR 68, 69

LEAD JUDGMENT BY IGUH JSC

This is an appeal against the judgment of the Court of Appeal, Enugu Division, which had on the 16th day of May, 1989 allowed the appeal by the defendants from the decision of Awogu, J. as he then was, sitting at Onitsha in the High Court of the former Anambra State.

The plaintiffs, for themselves and on behalf of the Uruokpala family of Amawa village, Ogbunike had instituted an action against the defendants claiming, as subsequently amended, as follows:-

“(a) Declaration that the plaintiffs are entitled to the Customary Right of Occupancy under Ogbunike Customary Law to the piece and parcel of land situate at Amawa in Anambra Local Government Area and commonly called Ubulu Land and shown on the plaintiffs’ plan and therein verged yellow.

(b) N1,000.00 damages for trespass.

(c) Injunction restraining the defendants, their servants and/or agents from further trespass on the said land.

(d) Forfeiture of the defendants’ tenancy on the land.”

Pleadings were ordered in the suit and were duly settled, filed and exchanged. At the subsequent trial, both parties testified on their own behalf and called witnesses.

The plaintiffs case is that their family, known as and called the Uruokpala family of Amawa village, Ogbunike town in the Anambra State of Nigeria is the bona fide owner of the land in dispute verged yellow in their survey plan No. PO/E/116/78 dated the 31st December, 1978. The said plan was tendered and admitted in evidence at the hearing as Exhibit A. Whereas the plaintiffs are from the Amawa village, Ogbunike, the defendants come from a different village to wit, the Azu village of Ogbunike town. They claimed that the land in dispute known as and called "Ubulu" is situate in Amawa village and that it has been their property from time immemorial. In further support of their title to the said land, the plaintiffs claimed that they, and before them, their forefathers had exercised maximum and positive acts of ownership and possession over the same for a long period of time without any let or hinderance from the defendants or anyone else. They claimed that they, and before them, their fore-fathers farmed the land, reaped the fruits of their economic trees thereon and made customary grants of several portions thereof at various times to various tenants for residential and farming purposes on payment of annual tributes. These customary tributes comprise of 8 yams, 4 kolanuts and palm wine.

It is the plaintiffs case that the said tenants are mainly from the defendants Umuezemba family of Azu village, Ogbunike and included Okoye Oneze, the 1st defendant's father, whose walled compound was granted to him by the plaintiffs several years ago.

On his death, his sons, the 1st and 2nd defendants continued to live on the said land let to their father by the plaintiffs. Other residential tenants such as the deceased John Ipim and Onyeagana lived on the land as plaintiffs tenants but later moved out and surrendered the reversion to the said plaintiffs. Their other residential tenants on the land included the late Agudosi, although his son, the 3rd defendant still lives on the portion granted to his late father. There are also P.W.3, Udenze Obeagha, the 4th defendant Clement Ikwuazom, Eziosa Nwafudalu and Humphrey Nwafudolu who are plaintiffs residential tenants on the land. They all paid customary tributes to the plaintiffs family. The land on which P.W. 3 lives was originally granted to his late father for residential purposes by the plaintiffs family. His father built a house and lived on the land on payment of tributes to the plaintiffs until his death some 30 years ago. Thereafter P.W. 3 continued to live on the premises and paid the same tributes to the plaintiffs as his late father.

They asserted that the defendants' ancestors who were granted parts of the land in dispute by the plaintiffs' family duly paid their customary annual tributes all the time to the plaintiffs ancestors.

The plaintiffs sought to tender several agreements between them and some of their said customary tenants but these were rejected in evidence by the trial court for want of registration under the Land Instruments Registration Law and non-compliance with the provisions of the Illiterates Protection Law of Anambra State. They concluded by stating that despite repeated demands, the defendants had refused to pay their tributes as their fathers did and had in fact denied their title to the land in dispute hence this action. They claimed as per their amended statement of claim. C

The defendants, on the other hand, who are from the Azu village of Ogbunike claimed that the land in dispute as shown in their survey plan, Exhibit F, is their absolute property. They claimed that they inhabit the land in dispute in large numbers, cultivate crops and reap economic trees thereon. They exercise these acts of ownership and possession over the land from time immemorial without any disturbance from the plaintiffs family. They stated that they have an ancient footpath on the land. They denied being tenants of the plaintiffs family on the land in dispute or ever paying annual tributes to anybody in respect of their occupation of the land. They asserted that they live on the land in their own right as owners thereof. The 1st defendant agreed that one Obeagha who is related to his father begat P.W.3, Udenze Obeagha. He also admitted that the junior brother of P.W. 3 Daniel, resides where their father lived within the land in dispute. He could not however tell if P.W. 3 ever paid annual tributes to the plaintiffs family. He testified that if P.W. 3 paid tributes to the plaintiffs, the defendants did not authorise such payments. He claimed that the plaintiffs originally came from Isi-Uzo in Abatete to settle at Ogbunike. He agreed that P.W. 3 came from Umu-chiemesi sub-family to which he belonged. He admitted that P.W. 3, P.W. 6, P.W. 7 and P.W. 9 are all from their Azu village, Ogbunike. D E F

At the conclusion of hearing, the learned trial Judge, Awogu, J., as he then was, after a careful review of all the evidence led before him preferred the testimony of the plaintiffs and their witnesses to those of the defendants. He described the evidence of the defence as unreliable and he proceeded to grant customary right of occupancy in respect of the land in dispute to the plaintiffs. He however dismissed the plaintiffs H claims in damages for trespass, perpetual injunction and forfeiture.

Dissatisfied with this decision of the trial court, both parties

lodged appeals to the Court of Appeal, Enugu Division. The defendants ap-

pealed against the order for declaration of customary right of occupancy in favour of the plaintiffs whilst the plaintiffs cross-appealed against the dismissal of their claims for trespass, perpetual injunction and forfeiture. The Court of Appeal in a considered judgment dismissed the plaintiffs cross-appeal in respect of trespass, injunction and forfeiture but allowed the appeal of the defendants against the declaratory relief awarded to the plaintiffs.

Aggrieved by this decision of the Court of Appeal, the plaintiffs have further appealed to this Court. I shall hereinafter refer to the plaintiffs and the defendants in this judgment as the appellants and the respondents respectively.

Altogether, five grounds of appeal were filed by the appellants. These grounds of appeal are as follows:-

“(1) The Court of Appeal erred and/or misdirected itself in law in holding as follows:-

“From the passage quoted from the judgment, the learned Judge seemed to have failed:

(a) to adequately determine whether the plaintiffs discharged the burden on them to entitle them to the declaration of title he made in their favour;

(b) to appreciate that since the plaintiffs relied on acts of possession, the principles to be applied cannot be substituted by evidence of witnesses who merely testified that the plaintiffs own the land; and

(c) to realise that a case is not proved by the number of witnesses called by a party but by the quality of the evidence led.”

Particulars of Error and Misdirection

(a) It is patent from the passage in question and from other parts of his judgment that the learned Judge was satisfied that the appellants have discharged the burden of proof on them.

(b) It is an established proposition of law that ownership of land carries with it the right to possession. In any event in the context of the evidence given in this case the plaintiffs have proved their possessory rights over the land in dispute to the satisfaction of the learned trial Judge.

(c) No where in his judgment can it reasonably be said that the learned trial Judge relied on the number of witnesses rather than the quality of their evidence.

(ii) The Court of Appeal further erred and misdirected itself in law and on the facts when he held as follows:-

“From the manner the trial Judge considered this case, first, he did not seem to bear in mind what the plaintiffs were expected to prove, secondly, he did not evaluate the evidence before him; and thirdly, which was a consequence of the foregoing two factors, he gave undue probative value to the evidence of P.W. 3, P.W. 6, P.W. 7 and P.W. 9. He relied strongly on

the evidence of those witnesses whom he regarded as members of "the family of the defendants" and that "their evidence was to the effect that the plaintiffs of Amawa owned the land in dispute. This, in effect, was evidence against interest." He held that it was not enough for the defendants to say they lied. He also thought it was a decisive factor that the plaintiffs called boundary witnesses, namely, PW. 2, PW. 4, PW. 5 and B PW. 8, and that the defendants called none.

With due respect, I think the learned Judge considered the case from obviously wrong factors."

Particulars of Error and Misdirection

(a) It is incorrect to say that the learned trial Judge "did not seem to C bear in mind what the plaintiffs were expected to prove" or that he did not evaluate the evidence before him.

(b) There are no rational grounds for attacking the value placed by the learned trial Judge (who saw and heard the witnesses) on the evidence of P.W. 3, P.W. 6, P.W. 7 and P.W.8). D

(iii) The Court of Appeal was wrong in law and on the facts in failing to appreciate the relevance of the evidence of those whom it described as "boundary witnesses."

(iv) The Court of Appeal erred in law and on the facts in refusing to make the order for forfeiture. E

(v) Judgment is against the weight of evidence."

Pursuant to the rules of this court, the parties through their respective counsel filed and exchanged their written briefs of argument. In the appellants brief, the following seven issues are set out as arising for determination in this appeal, namely:- F

"1. Whether the court below was right in holding that the high Court did not appreciate or pay regard to what the plaintiffs must prove in support of their claim for a declaration of title to the said land.

2. Whether the Court below was right in holding that the High Court failed to determine whether the plaintiffs have discharged the burden of G proof which lay on them in this action.

3. Whether the Court below was right in holding that the plaintiffs did not prove acts of ownership and possession over the land in dispute.

4. Whether the court below was right in dismissing the appellant's case in the light of the evidence led and the findings of fact of the learned H trial Judge. Put the other way - Is the Court below competent to substitute the findings of the trial court with its own findings when the findings of the trial court accurately reflect the evidence before it.

5. Whether the Court below was right in holding that the boundary

witnesses are unnecessary having regard to the value attached in law to boundary witnesses. Put the other way, are boundary witnesses necessary only where the boundary is in dispute.

6. Whether the Court below was right in holding that the High Court gave undue weight to the number (i.e. quantity) rather than credibility (i.e. quality) of witnesses who testified before it or did it give undue weight to certain witnesses.

7. Was the High Court right in refusing to make an order for forfeiture when the defendants were sued not in a representative capacity but in their personal capacities."

C The respondents, on the other hand, submitted four issues in their brief of argument as arising for determination in this appeal. These are:-

"1. Whether the Court of Appeal was right in its decision, based on the pleadings and evidence before the trial court, in holding that the plaintiffs did not make out a case of declaration of title based on (a) the principle decided in *Ekpo v. Ita* (1932) 11 NLR 68 and (b) long possession and enjoyment of land envisaged by section 46 of the Evidence Act.

2. Whether the Court of Appeal was right to re-evaluate the evidence before the trial court and to come to a different conclusion by acting under well settled principle of law to effect that when the findings of fact of the trial Judge do not flow from the evidence before him and therefore perverse, or, when, the findings are not based on the trial Judge having seen or heard the witnesses and watched their demeanour, then the Court of Appeal is at liberty to make its own findings.

3. Whether the decision of the Justices of Appeal was against the weight of evidence having regard to the evidence of P.W. 3, P.W. 6, P.W. 7 and P.W. 9 described as witnesses from the defendants family, and the evidence of P.W. 2, P.W. 4, P.W. 5 and P.W. 8 described as boundary witnesses at the trial.

4. Whether the Court of Appeal was wrong "in law and in the facts" in refusing to make the order for forfeiture."

H I have closely examined the two sets of issues identified in the respective briefs of the parties and it seems to me clear that the seven issues raised in the appellants brief are adequately covered by the issues set out in the respondents brief which I find sufficiently comprehensive for the determination of this appeal. I shall therefore adopt, in this judgment, the set of questions formulated in the respondents brief for my consideration of this appeal.

At the hearing of the appeal, learned counsel for the appellants, Chief F.R.A. Williams, SAN adopted the briefs filed on behalf of the appel-

lants and proffered additional arguments in further elucidation of the written submissions therein contained. Learned respondents counsel, for his own part, also adopted respondents brief.

The first question raised by issues 1 and 2 of the appellants brief is, firstly, whether the court below was right in holding that the trial court failed to appreciate what the appellants were expected to prove in support of their claim for a declaration of title to the land in dispute. The second question is whether the court below was right in holding that the trial court failed to determine whether the appellants discharged the burden of proof on them in this action. These questions are related to the respondents first issue which poses the question whether the court below from the pleadings and evidence was right in holding that the appellants did not make out a case of declaration of title from acts of ownership and possession over a long period of time to warrant the inference that they are the owners of the land in dispute.

Learned appellants counsel, Chief F.R.A. Williams, SAN submitted that the criticism of the trial court by the court below to the effect that the learned trial Judge did not bear in mind what the appellants were expected to prove is, with respect completely wrong. He argued that the trial court clearly set out what the appellants pleaded and proved in support of their claim. He contended that the court below was in gross error also when it held that the learned trial Judge failed to determine whether the appellants had discharged the burden of proof on them in this action. He pointed at the various evidence of positive and numerous acts of ownership established by the appellants on the land in dispute over an extensive period of time. In this regard, he referred in particular to the evidence of the 1st appellant and those of P.W. 3, P.W. 7 and P.W. 9 of which the last three are some of the customary tenants of the plaintiffs family on the land. Attention was drawn to the fact that P.W.3 is a blood relation of the 1st respondent and to the evidence of P.W. 6, P.W. 7 and P.W. 9, all of whom are from the respondents Azu village but testified in favour of the appellants of Amawa village at the trial. He further referred to the evidence of P.W. 2, P.W. 4, P.W. 5 and P.W. 8 the appellants boundary witnesses on the land in dispute. He stressed that the testimony of the 1st appellant together with those of the appellants witnesses were fully accepted by the learned trial Judge. He pointed out that the learned trial Judge after a careful evaluation of the evidence preferred the appellants testimony and those of their witnesses to that of the respondents. He submitted that the overwhelming evidence adduced by the appellants and their witnesses were more than

sufficient to justify the declaration of title awarded in favour of the appellants.

Learned respondents counsel, B.C. Ogbuli, Esq. for his own part, submitted that the appellants pleaded ownership of the land in dispute from time immemorial but led no evidence of traditional history as to how the land was acquired by them. He contended that the appellants allegation of “immemoriality” was not established before the court. He submitted that the original ownership of the land in dispute must first be established before any acts of ownership allegedly exercised by the appellants on the land can be considered by the court. He argued that the appellants having failed to lead evidence of traditional history as to their root of title were bound to fail in their claims for title and forfeiture. He relied for this proposition on the decisions in *Mogaji & ors v. Cadbury Nig. Ltd. & ors.* (1985)2 NSCC 966; (1985) 2 NWLR (Pt. 7) 393 and *Odojin v. Ayoola* (1984) 11 SC 72 at 120. He contended that evidence of long possession and enjoyment of land cannot found a claim of declaration of title against a true owner of the land. He argued that the findings of fact of the trial court must not be treated as sacrosanct and submitted that the Court of Appeal is entitled in appropriate cases to make its own findings.

The appellants in their reply brief submitted that it cannot be the law as postulated in the respondents brief that the original ownership or root of title of the land in dispute must firstly be established before any acts of ownership exercised thereupon may be considered by the court. It was asserted that the appellants mainly relied on acts of ownership and possession and not on any traditional history and that this is why no evidence of traditional history in establishment of their root of title to the land in dispute was led by them.

The appellants contended that proof of their root of title to original ownership of the land was not the principal mode of ownership relied upon in their amended statement of claim. There was therefore no necessity on their part to lead any evidence of tradition in proof of their title to the land.

I think it will be necessary for a better appreciation of the issues that have arisen in this appeal to set out the relevant paragraphs of the appellants amended statement of claim. These are as follows:-

“2. The land trespassed upon by the defendants which is situate at Amawa village belongs to the plaintiffs from time immemorial and is more particularly shown delineated pink on the plaintiffs plan No. PO/E116/78 filed with this statement of claim.

3. The said area verged pink forms part of the vast area of the plaintiffs land known as and called “Ubulu land” and more particularly shown on the plaintiffs plan and therein verged yellow. The said area verged

pink is within the area verged yellow all of which belong to the plaintiffs.

4. As owners the plaintiffs like their fore-fathers before them exercise maximum acts of ownership and possession by themselves and through their tenants in and over the land without any let or hinderance from the defendants or anybody else.

5. In pursuance of their acts of ownership and possession, the plaintiffs farm the land known as Ubulu land, reap the fruits of the economic trees therein. The 1978 farms of the plaintiffs family are more particularly shown in the plaintiffs plan referred to in paragraph 3 of this statement of claim.

6. In furtherance of their acts of ownership and possession, the plaintiffs have granted portions of the land known as Ubulu land to people for residential and farming purposes under Ogbunike Customary Law and in the understanding that the tenants pay annual tribute to the plaintiffs and in the events of the tenants vacating the area granted to them the land will revert to the plaintiffs. One of the plaintiffs tenants was one John Ipim for Ogidi and when he died and his family moved back to Ogidi, the land granted to him reverted to the plaintiffs.

7. At the end of each year during the feast of "Igbonwunwu" which marks the end of farming season, the tenants pay their tribute to the plaintiffs which said tribute consists of 8 yams, 4 Colanuts and 2 gallons of palm wine. The tenants are mainly from Umuezemba family of Azu Ogbunike.

8. Some of the plaintiffs tenants on the land are- Agudosi family, that is to say, the family of the 3rd defendant, Humphrey Eziosa Nwafodu, Sylvester Ofia. The plaintiffs will found on the Memorandum of Agreement between the plaintiff and the tenants above referred to. The area verged orange and walled round was granted to the 1st defendants father Okoye Oneze by the plaintiffs family many years ago and on his death his son Herbert Okoye the 1st defendant continued to live within the area granted to his father.

9. In pursuance of their acts of ownership and possession, members of plaintiffs family have brought actions against trespassers into their Ubulu land and obtained judgment. The plaintiffs will rely on Ogidi Native Court Suit No. 194 of 17/4/17; Nwosu v. Onyeaghana (2) Nwosu v. Nwanyiaso & Anor Suit No. 537/538/1917 of 14/8/17.

10. By a Memorandum of Agreement dated the 28th of February, 1977, the plaintiffs granted under Ogunike Customary Law the area verged pink in the plaintiffs plan to one Sylvester Ofia of Umuezemba Family of Azu Ogbunike for residential purposes under a condition that in the even of his vacating the said area verged pink, the land refers to the plaintiffs.

This grant was in response to an application by the said Sylvester Ofia dated the 16th of February, 1977. The plaintiffs will found on both the agreement and the said application.

11. *The defendants who are also members of Umuezemba Family of Ogbunike have no land near the land in dispute and their forefathers B never made any claim of ownership to the land in dispute."*

It suffices to state that the respondents denied the above averments in the appellants amended statement of claim. They stated inter alia that the land in dispute is their own portion of the communal land of Azu village, Ogbunike. They further averred that they are in occupation and C possession of the said land in their own right from time immemorial without any let or hinderance from the plaintiffs.

It is now settled that there exists five different ways or methods of establishing or proving ownership of land in dispute. For the avoidance of doubt, these methods, as postulated by the various decisions of this court D are as follows:-

- (i) Proof by traditional evidence.
- (ii) Proof by production of documents of title duly authenticated, unless they are documents 20 or more years old, produced from proper custody.
- E (iii) Proof by acts of ownership, in and over the land in dispute, such as selling, leasing, making a grant, renting out all or any part of the land or farming on it or a portion thereof - extending over a sufficient length of time, numerous and positive enough as to warrant the inference that the persons exercising such proprietary acts are the true owners of the land.
- F (iv) Proof by acts of long possession and enjoyment of the land which prima facie may be evidence of ownership, not only of the particular piece of land with reference to which such acts are done, but also of other land so situated or connected therewith by locality or similarly that the presumption under Section 46 of the Evidence Act, Cap. 112 of 1990 G applies and the inference can be drawn that what is true of the one piece of land is likely to be true of the other piece of land.

(v) Proof by possession of connected or adjacent land in circumstances rendering it probable that the owner of such connected or adjacent land would in addition, be the owner of the land in dispute.

H See: D.O. Idundun & Ors v. Okumagba (1976) 9 and 10 SC 227 at pages 246-250; Atanda v. Ajani (1989) 3 NWLR (Pt.111) 511; Anyanwu v. Mbara (1992) 5 NWLR (Pt. 242) 386 etc etc. What is of paramount impor

tance is that a party claiming declaration of title to a statutory or custom-

any right of occupancy to land needs not plead and prove any more than one of the above methods to succeed. It must however be stressed that if, as it is sometimes the case, the claimant pleads and/or relies on more than one method to prove his title, he merely does so *ex abundanti cautela* as proof of one single root of title is sufficient to sustain a plaintiff's claim for declaration of title to land. See: *Balogun & Ors. v. Akanji & Another* (1988) B Vol. 19 1 NSCC 180; (1988) 1 NWLR (Pt. 70) 301. It is now necessary to turn to the material facts pleaded by the appellants in their amended statement of claim in support of the reliefs claimed.

Without doubt, paragraph 2 of the amended statement of claim averred that the land in dispute belonged to the appellants from time immemorial. But it is equally true that no particulars or material facts whatever concerning this averment of traditional history were pleaded in proof of the alleged original ownership of the land in dispute from time immemorial. Consequently no evidence was led by the appellants in proof of ownership of the land by traditional history.

The point has repeatedly been made and it seems to me well settled that it is not sufficient for a party who relies for proof of original title to land on tradition to merely plead that he and his predecessors in title had owned and possessed the land in dispute from time immemorial without more. The question of original ownership of land from time immemorial is an issue of hard historical facts. Accordingly, material and necessary facts to sustain such a claim must be clearly averred and proved. And they are not established by sweeping and vague assertions that the land is owned by the plaintiff from time immemorial or from time beyond human memory without further details. Such sweeping assertions clearly leave the traditional evidence at large and in the air and can be fatal to a plaintiff's case if they are the only root of title relied on. See *Alade v. Lawrence Awo* (1975) 4 SC 215 at page 229.

Where evidence of tradition is relied on in proof of declaration of title to land, it is well settled that the plaintiff, to succeed, is bound to plead and establish facts such as:-

- (i) Who founded the land.
- (ii) How he founded the land and
- (iii) The particulars of the intervening owners through whom he claims.

See: *Akinloye v. Bello Eyiyiola* (1968) NMLR 92; *Sunday Piaro v. Chief Tenalo & Anor* (1976) 12 SC 31 at page 41; *Olujinle v. Adeagbo* (1988) 2 NWLR (Pt. 75) 238; *Adejumo v. Ayantegbe* (1989) 3 NWLR

399. In the present case, it cannot be disputed that the appellants neither sufficiently pleaded nor gave evidence in support of their original ownership of the land in dispute by tradition from time immemorial. Recognising the fact that there are five modes of establishing title to land, the next issue must be whether the appellants pleaded and/or relied on any other way or
 B ways in proof of their title to the land in dispute. Besides, although a plaintiff is entitled to rely on traditional evidence alone to succeed in his case (for which See *Stool of Abinabina v. Enyimadu* 12 WACA 171 at 174 and *Idundun v. Okumagha*. (supra) if such evidence of tradition is inconclusive, the case must rest on the question of other facts pleaded and relied on at
 C the trial. See: *Ekpov. Ita II NLR* 68 and *Balogun & Ors. v. Akanji & Anor* (1988) Vol. 19 1 NSCC 180; (1988) 1 NWLR (Pt. 70) 301.

A close study of the averments in paragraphs 3 to 11 of the amended statement of claim already set out above discloses in the clearest possible terms that the appellants copiously pleaded and relied primarily on various
 D acts of ownership and possession, in and over the land in dispute, by themselves and, before them, their forefathers, numerous and positive enough to warrant the inference that they are the exclusive owners thereof. The respondents do not dispute this fact for in their brief of argument, they stated as follows:-

E *"It is clear from the pleadings that the plaintiffs based their claim to title to the land in dispute on two well settled ways in which ownership of land may be proved viz:*

*(a) acts of person/persons claiming the land such as selling, leasing, renting out the land or parts of it, farming on it or on a portion of it. Such
 F Acts must extend over a sufficient length of time and are numerous and positive enough as to warrant the inference that the person/persons are the true owner. See: Ekpo v. Ita II NLR 68.*

*(b) acts of long possession and enjoyment of the land may also be prima facie evidence of ownership of the particular piece or quantity of
 G land with which such acts are done. See Section 46 of the Evidence Act. See: Idundun & Ors. v. Okumagha (1976) 9 & 10 SC 227 at 246/252."*

Similarly, the Court of Appeal fully recognised the position when, Per Uwaifo, J.CA. who delivered the lead judgment, it stated thus:-

*"It can therefore be taken that the plaintiffs rely on (a) acts of pos-
 H session as their root of title; and (b) acts of ownership i.e. alienating renting and farming of land. Such acts of possession and ownership constitute two of the five ways of establishing title to land as laid down by the Supreme Court. See: Idundun v. Okumagba (1976) 9 & 10 SC 227 at 246; Sunday Piaro v. Tenalo & Anor (1976) 12 SC 31 at 42-43; Okonkwo v. Okolo*

(supra) at page 656. As for acts of ownership, they must extend over a sufficient length of time and must be numerous and positive enough as to warrant the inference that the plaintiff is the true owner in conformity with the principle of *Ekpo v. Ita* II NLR 68. The other aspect of the root of title, namely acts of long possession, derives from Section 46 of the Evidence Act that such possession and enjoyment may be prima facie evidence of ownership of the particular piece mass of land.”

A little later in the judgment of the court below, it was further stated as follows:-

“What the plaintiffs set out to prove from the facts pleaded by them were acts of ownership which must be numerous and positive, and also acts of long possession and enjoyment of the said land.”

The judgment of the learned trial Judge also was based entirely on the appellants acts of ownership and possession on the land in dispute and not on any traditional evidence. There can be no doubt that all concerned were ad idem on the issue that the appellants in this case pleaded and relied primarily on acts of ownership and possession of the land in dispute extending over a period of time numerous and positive enough to warrant the inference that they are the true owners of the land.

The above is the third method, as adumbrated in the leading case of *D.O. Idundun & Ors. v. Okumagba* together with those of *Atanda v. Ajani* and *Balogun & Ors. v. Akanji & Anor*, supra, of establishing or proving ownership of land in dispute. It must however be emphasised that the applicable principle is that a plaintiff when claiming declaration of title must succeed on the strength of his own case and not on the weakness of the defence although where any aspect of the defendant’s case supports the plaintiff’s case, the plaintiff will not be deprived of the advantage of such support. See: *Kodilinye v. Mbanefo Odu* 2 WACA 336 at 337; *Cobblah v. Gbeke* 12 WACA 294; *Akinola v. Oluwo* (1962) 1 SCNLR 352; (1962) 1 All NLR 224 at page 225; *Nwagbogu v. Chief Onoli Ibeziako* (1972) 1 All NLR (Pt. 2) 200. A party, as in the present case, who relies on acts of possession and ownership of the land in dispute as evidence of, and in proof of, his title to land must, to succeed, establish that such acts not only extend over a sufficient length of time but also that they are numerous and positive enough to warrant the inference of exclusive ownership of such land. In effect, such a party must show:-

(i) That from the overwhelming number of such acts over a sufficient length of time on the land in dispute, it is but safe and imperative to conclude that the party exercising such acts is the exclusive owner of the land.

(ii) That from the nature of such acts nec vi, nec claim, nec precario

exercised over a sufficient length of time as aforesaid, any person asserting a contrary title would have known of such exercise of rights and ought to have asserted his adverse title to the land.

It must however be stressed in this connection that an isolated or a few of such acts which the adversary was not in a position to have known about may not suffice. See: Ekpo v. Ita (supra); Piaro v. Tenalo (1976) 12 SC 31 at 41; Balogun & Ors. v. Akanji & Anor and Anyanwu v. Mbara (supra) etc etc. I will later in this judgment deal with the appellants acts of ownership and possession on the land in dispute.

It was submitted on behalf of the respondents that the original ownership of the land in dispute must first be established before any acts of ownership and possession exercised by the appellants on the land can be considered. I find myself unable to accept this proposition of law as well founded. Learned respondents counsel in making this submission was obviously labouring under the misconception that the appellants relied on traditional history only as their root of title to the land in dispute. This is clearly not the case.

The Court of Appeal for its own part put the issue as follows:-

"It will be noted that, while the plaintiffs assert ownership of the land, they have not said how the ownership came about Nothing was pleaded or given in evidence as to who the forefathers were or to show 'immemoriality'"

With profound respect, I cannot agree with the court below that the appellants must on the main issue that arises in this case establish their ownership of the land in dispute from time immemorial and whom their forefathers were before they can lead evidence of their acts of possession on the land. The reason is because where, as in the present case, the appellants merely relied on mere acts of ownership and possession on the land and did not rely exclusively on traditional evidence as proof of their root of title from a particular source, proof of the original ownership of the land in dispute, such as who founded it, how he founded it and the particulars of the intervening owners through whom the claims cannot arise. See: Balogun v. Akanji (supra) at pages 322-323 where this court Per Oputa, J.S.C. explained the matter lucidly in the following terms:-

"One final word on Ekpo v. Ita supra, anyone who pleads acts of possession as his root of title is really relying on the presumption that possession is 9/10 of the law and that he who is in possession is presumed by S. 145 of Evidence Act Cap. 62 of 1958, to be the owner and that the onus of proving that he is not the owner is on the person who affirms that he is not the owner. Looked at critically and logically a person pleading acts of

possession as his root of title is simply saying "I do not know how I got the land" All that I know is that I have been in possession and have exercised various acts of possession. Now you prove that I am not the owner."

(Underlining supplied for emphasis)

In the present case, the only evidence led by the respondents is that the land in dispute is their own portion of Azu village communal land. B No single independent witness was called by them to show that he has a common boundary with them on any side of the land in dispute. On the contrary, four members from their Azu village, including their blood relations, testified that they were let on the land by appellants on payment of annual tributes. I will return to this aspect of the case later in this judgment. C

It was further argued by respondents learned counsel, citing the cases of Mogaji & Ors. v. Cadbury Nig. Ltd. (1985) 2 NSCC Vol. 16 959 at 966-968; (1985) 1 NWLR (Pt. 7) 393 and Odofin v. Ayoola (1984) 11 SC 72 at 120-122, that since the appellants failed to establish how their ancestors came about the land in dispute, that is to say, whether by grant, inheritance, conquest or otherwise, their claims for title to the land in dispute and forfeiture ought to fail. As I have repeatedly observed, the appellants in the present case mainly relied, not on tradition but on acts of ownership and possession which are one of the recognised methods for the establishment of title to land. These are clearly pleaded in paragraphs 4, 5, 6, 7, 8 and 9 D of the appellants amended statement of claim. Both the trial court and the court below fully recognised this fact. E

In the second place, the facts in the Mogaji and Odofin cases relied on by learned counsel for the respondents are with respect, not apposite to those of the present case under consideration. In the Mogaji case, the plaintiffs F who pleaded and traced their root of title to the land in dispute to Aina Adeokun or Dada Okin family relied on traditional evidence in proof of their original ownership of the land. The traditional evidence as regards the only root of title pleaded by them was substantially self conflicting and totally at variance with their pleadings by reason of the conflicting testimonies of their witnesses. The defendants claim to ownership by their predecessors-in-title was accepted by the court as solid and established on oral evidence and previous judgments confirming their ownership of surrounding lands. It was held by this court that parties are bound by their pleadings, that the plaintiffs/appellants having pleaded and traced a particular root of title could not dispense with proof of that title as pleaded and that unless the origin of such title was valid, possession would not ripen an invalid title of a trespasser to a valid ownership of title. See too Thomas v. Holder 12 WACA 78 at 80; Jegede & Ors. v. Gbajumo & Ors (1974) 10 G H

SC 183 at 187 and *Da Costa v. Ikomi* (1968) 1 All NLR 394 at 398.

So also, in the *Odofin* case, the plaintiff who claimed declaration of title to land and injunction relied on traditional evidence. The root of title claimed was granted by the Oni of Ife to his ancestor. Upon a finding by the trial court that the plaintiffs traditional history in respect of the alleged grant was conflicting, unreliable and inconclusive, the claims were accordingly dismissed.

Reference may also be made to the recent decision of this court in *Gbaniyi Osafile & Anor v. Paul Odi & Anor* (1994) 2 NWLR (Pt. 325) 125. In that case, the plaintiffs in a claim of declaration of title to land, trespass and injunction based their root of title on ownership by inheritance from time immemorial. The plaintiffs evidence of traditional history was preferred by the trial court to that of the defendants and judgment was entered for the plaintiffs. This was inspite of the fact that in their statement of claim, only bare ownership by inheritance with clearly insufficient material facts in proof of the alleged root of title they relied upon were averred. Although, the plaintiffs root of title was based on original ownership by inheritance from their forefathers, there was total lack of averments in their pleadings in that regard. Consequently no evidence whatever relating to the founding of the land and the actual person who first founded and exercised original acts of possession thereon was led by the plaintiffs at the trial. Additionally, not one single act of effective possession by any of the plaintiffs ancestors was also pleaded. Consequently the alleged original ownership of the land by the plaintiffs ancestors was found not established either in the Statement of Claim or by evidence. In those circumstances this court had no difficulty in dismissing the plaintiffs/appellants claim for title to the land in dispute.

It cannot be over-emphasized and it seems to me elementary that a plaintiff in a declaration of title action who bases his claim on customary title must give satisfactory evidence of how he derived the particular title pleaded and claimed. The burden which is on a plaintiff in such an action is to lead clear evidence that is sufficiently cogent and credible in proof of the particular root of title relied on. Indeed, delivering the judgment of this court in the *Osafile* case (*supra*) Uwais, J.S.C. (as he then was) aptly observed as follows:-

"The difficulty which the plaintiffs ran into, as pointed out by the Court of Appeal, is that they omitted in their pleadings to aver fully the facts about their root of title. In the absence of such averment, they did not and indeed could not have validly adduced evidence to establish their root

of title.”

(Underlining supplied for emphasis)

Accordingly, a plaintiff in a declaration of title action who bases his claim on a particular root of title must sufficiently plead and establish how he derived the specific title claimed.

In the present action, the appellants copiously pleaded and simply relied on acts of ownership and possession extending over some length of time, numerous and positive enough to warrant the inference that they are the true owners which constitute a settled method of establishing ownership of the land. With profound respect, I think that the observation of the court below to the effect that while the appellants asserted ownership of the land, they did not “say how the ownership came about” is a total misconception of their pleadings and the mode of title pleaded and relied upon by them. In my view, once a plaintiff in a declaration of title to land claim relies as his proof of title, on acts of ownership and possession in and over the land in dispute, extending over a sufficient length of time and numerous and positive enough as to warrant the inference that he is the true owner of the land and satisfactorily discharges the burden of proof on him in that regard, he will be entitled to the declaration sought. I will now turn to the question of whether the appellants made out a case for declaration of title.

In this regard, the vital evidence on the issue is principally that of the 1st appellant. This witness gave detailed evidence of a number of tenants, both residential and farming tenants, to whom portions of the land in dispute were granted on payment of annual tributes at various times right from the time of their forefathers until the institution of this action. These tenants included the late John Ipim and Onyeaghana, both of whom had left the land. These tenants are mainly from the respondents family of Azu Ogbunike and included Okoye Onaeze, now dead, whose walled compound was granted to him by the appellants. His son, the 3rd respondent still lives on the land. There are also Udenze Obeagha, the 4th respondent Clement Ikwuazom, Eziosa Nwafudolu and Humphrey Nwafudolu. These tenants are from the respondents family and are the appellants residential tenants on the land. The 1st appellant’s father made grants of portions of this land to the fathers of Agbapuonwu, Agbakoba and Ikwuemesi on payment of tributes to the appellants. All the above named grantees are from the respondents family and duly paid their tributes to the appellants. The premises on which Udenze Obeagha now lives was granted by the appellants to his father who built a house and lived therein on payment

of annual tributes until his death some 30 years ago. His son who is P.W. 3 in this case has continued to live on the land and paid his tributes to the appellants as his late father did.

The 1st appellant testified that a number of the respondents ancestors who were granted parts of the land in dispute by the appellants family B duly paid their annual tributes to the appellants family until their death. The appellants and before them their forefathers exercised and have continued to exercise numerous and positive acts of ownership and possession on the land over a long period of time without any let or hinderance from the respondents or anyone else. Accordingly they had always fanned on the C land by cultivating yams and cocoyams thereon as their fathers and forefather did, reaped the fruits of their economic trees thereon and made the said customary grants of various portions of the land at various times to several named persons for residential and farming purposes on payment of annual tributes of 8 yams, 4 kolanuts and palm wine.

D Some of the appellants grantees testified before the trial court. They included P.W. 3, Udenze Obeagha, to whose father part of the land in dispute was originally granted by the appellants on payment of annual tributes. P.W. 3, himself was born on the land in dispute and has been on the land in his own right for over 27 years after the death of his father in E 1967. Some of the other tenants who testified for the appellants were P.W. 7, Ezenagu Onyenyozina and P.W.9, Sylvester Offia. P.W. 7 had always cut down palm fruits on the land in dispute for the plaintiffs wives on payment of some fees. Only the appellants family collected the palm fruits so harvested and he was never challenged by the respondents or anyone else F while cutting the palm fruits for the appellants. He had been harvesting and cutting down these palm fruits for the appellants both before and after the Nigerian Civil War of 1966-1970. The appellants also showed him where he fanned on the land in dispute no one ever disturbed him thereon. P.W. 7 listed members of the respondents family who now live on the land and G whose respective fathers lived and paid tributes to the appellants until their death.

Of clear importance, also, is the evidence of P.W. 2, P.W. 6, P.W. 7 and P.W. 9 all of whom either related to or came from the respondents village of Azu Ogbunike. They testified that the land in dispute belonged to the appellants and not to the respondents. They also gave evidence in H confirmation of various grant of parts of the land in dispute by the appellants family to named ancestors and various members of the respondents family including themselves on payment of tributes.

Coupled with all the above evidence is the testimony of P.W. 2, P.W.4, P.W. 5 and P.W. 8 to the effect that where all from Amawa village of the

appellants and had boundaries with the appellants to the north, south, east and west of the land in dispute as indicated in the appellants plan Exhibit A. However, for reason which, with respect, are difficult to appreciate, the Court of Appeal looked at the evidence of these witnesses with disfavour, dismissing them outright with the observations that acts of possession and enjoyment of land are not proved by boundary witnesses and that it was unnecessary to call boundary witnesses in this case as *“the issue was not as to the boundaries of the land in dispute.”*

With profound respect, I think the court below was in gross error by dismissing the evidence of the appellant’s boundary witnesses as unnecessary. In the first place, paragraph 2 of the appellants amended statement of claim averred that the land in dispute which situates in Amawa village belongs to the appellants. In reply thereto, the respondents per paragraph 3 of their statement of defence traversed the same and averred that the land in dispute is situate at Azu Village, Ogbunike. In other words, whereas the appellants averred that the land is situate within their Amawa village, the respondents claimed that it is situate within their Azu village.

There can be no doubt that the parties joined issue on the situs or location of the land in dispute, namely, whether it is situate at Amawa or Azu village. Indeed I accept the submission of the appellants that a resolution of this issue would go a long way in determining who owns the land in dispute in so far as neither party pleaded purchase as their root of title.

The court below would appear to have appreciated this point when it stated thus:-

“One obvious fact which the plaintiffs had to prove was that they know the land of Amawa village as distinct from the land of Azu Ogbunike. This they could prove by showing the boundary between them by credible evidence. This is important because these are separate villages and the land in question must necessarily be within one of the villages. So it would appear that one of the facts that ought to be satisfactorily established by the plaintiffs is the boundary.”

It therefore seems to me crystal clear that the boundaries of the land in dispute in so far as its situs or location is concerned was in issue. If the land is conclusively established to lie within Amawa village, then of course it must belong to the appellants. If, on the other hand, it is found to be situate in Azu village, then, naturally it must belong to the respondents. The court below was clearly in error when it held that the evidence of boundary witnesses is devoid of value. This is so as they all came from Amawa village and testified that the entire land surrounding the land in dispute belonged to them and indeed to their Amawa village. Their evidence of boundary was therefore very relevant as, if believed, as indeed it

was, the inescapable inference would be that the land is situate within Amawa village and would therefore belong to the appellants.

In the second place, these witnesses did not just give evidence of their boundaries with the appellants on the land in dispute, they also gave material evidence in support of the appellants case. P.W. 2, for instance, not only gave evidence of his boundary with the appellants on the land in dispute but corroborated the appellants testimony to the effect that the respondents family members lived on the appellants land in dispute. P.W. 4, on the other hand, further testified that the land in dispute belonged to the appellants family. P.W. 5 for his own part, testified as to the ownership of the land in dispute by the appellants family. P.W. 8 also testified that the land in dispute belonged to the appellants. He confirmed that the palm trees on the land were being harvested by the appellants family. I think it can be said with some degree of certainty that had the court below given due weight to all aspects of the evidence of these witnesses which it summarily dismissed as unnecessary, it could have come to a different conclusion other than the setting aside of the judgment of the trial court on the issue of the declaration of title to the land claimed.

I have deliberately dwelt in extenso on the various acts of ownership and possession exercised by the appellants family on the land in dispute as adduced in evidence before the trial court in order to project their overwhelming nature.

The respondents, as I have earlier on explained, claimed the land in dispute to be their own share of the communal land of Azu village. They also claimed various acts of ownership and possession exercised by them on the land in dispute. In particular, they claimed that their members lived on the land in dispute in their own right as owners of the land and not as tenants of the appellants. It suffices to say that the learned trial Judge after a close examination and evaluation of the evidence led on behalf of both parties conclude thus:-

"The burden is, of course, on the plaintiffs to prove the declaration sought. For this purpose, the 1st plaintiff gave evidence in support of the averments in the statement of claim and also called 9 witnesses. Of these P.W. 3, P.W. 6, P.W. 7 and P.W. 9 were from the family of the defendants, but their evidence was to the effect that the plaintiffs of Amawa owned the land in dispute. This, in effect, is evidence against interest. It was therefore not enough to suggest, as the defendants and their witnesses did, that they were telling lies. P.W. 3 was a close relation of the 1st defendant, but while he said that the land in dispute belonged to the plaintiffs, the 1st defen

dant denied this. Yet, the father of P.W. 3 and 1st defendant were brothers. The unreliable evidence of 1st defendant became comical when he agreed that PW 3 and himself lived in the same premises, which he claimed for their family, but P.W. 3 said it belonged to the plaintiffs; D.W. 1 (Daniel Obeagha), younger brother of P.W. 3, contradicted 1st defendant by claiming that where P.W. 3 lived was land of the plaintiffs not in dispute. Although the 3rd defendant died during the trial, D.W. 2, a brother, gave evidence. The 4th defendant also gave evidence. Again P.W. 3, P.W. 7 and P.W. 9 stated that the land occupied by 3rd and 4th defendants was within the plaintiffs land in dispute. Their answer was that these witnesses were liars. It must be added that while the plaintiffs called boundary witnesses to wit: P.W. 2, P.W. 4, P.W. 5 and P.W. 8, the defendant called no witnesses in support of same. Having carefully considered the evidence before me, I prefer the evidence of the plaintiffs and their witnesses to that of the defendants and their witnesses. No credible explanation was offered as to why 4 witnesses from Azu should claim the land in dispute for Amawa. I grant the plaintiffs the customary right of occupancy in respect of the Ubulu land, shown verged in yellow in Exh. "A". It is shown verged green on the defendants plan, Exhibit "E". (Underlining supplied for emphasis)

In view of the above findings and observations of the trial court, it is clear that the Court of Appeal cannot, with respect, be right when it held that the trial Judge did not appreciate or pay regard to what the appellants must prove in support of their claim. I also find myself unable to accept the view of the Court of Appeal that the trial court failed to determine whether the appellants discharged the burden of proof on them in the case. Of course, the learned trial Judge clearly appreciated and paid close regard to what the appellants must prove to succeed, namely, acts of ownership and possession in respect of the land in dispute extending over a sufficient length of time and numerous and positive enough to warrant the inference that they are the true owners thereof. It cannot also be seriously argued that he failed to determine whether the appellants discharged the onus on them in respect of their claim for title to the land in dispute. The point was clearly decided by him as a result of which he proceeded to grant to the appellants the customary right of occupancy in respect of the land in dispute verged yellow in Exhibit A. In view of all my observations above, I entertain no doubt that issue number one as formulated in the respondents brief must be answered in the negative.

The second issue questions whether the Court of Appeal was right to reevaluate the evidence before the trial court and to have come to a differ

ent conclusion from the findings of the trial court. In this regard, Chief Williams, SAN has submitted that having regard to the judgment of the learned trial Judge, no one can accuse him with not having evaluated the evidence. I agree entirely with him on this point and must dismiss the argument of learned respondents counsel to the contrary as untenable and B totally lacking in merit. In my view, it is clear that the learned trial Judge reviewed the relevant evidence before him, evaluated them and made his findings thereupon. He preferred the evidence of the appellants and their witnesses to those of the respondents and their witnesses and it seems to me beyond dispute that a trial court is entitled so to do. With the greatest C respect, I think the court below was grossly in error when it proceeded to substitute its own views of the facts for the views of the trial court when it observed:-

“.....that the preponderance of evidence of acts of possession is clearly on the side of the defendants even from the evidence adduced by D the plaintiffs.”

This must be so as in the first place, the respondents evidence which was based on acts of possession on the land in dispute in their own right was clearly rejected by the trial court in preference to the overwhelming evidence of acts of ownership and possession of the land in dispute by the E appellants. These, in the main, included grants of parts of the land made to the respondents and members of their family for residential and farming purposes on payment of annual tributes to the appellants family. In the second place, I have searched in vain from the record of proceedings and can find no evidence from the appellants which may be construed as tilting F the preponderance of evidence of evidence of acts of possession on the land in dispute on the side of the respondents as pronounced by the court below.

I think the point must be emphasized that the evaluation of evidence and the ascription of probative value to such evidence are the primary functions of the court of trial who saw, heard and assessed the witnesses. Where a court of trial unquestionably evaluates the evidence and justifiably appraises the facts, it is not the business of the Court of Appeal to substitute its own views for the views of the trial court. See: Akinloye & Anor v. Eyiola & Ors. (1968) NMLR 92 at page 95; Enang v. Adu (1981) 11-12 SC 25 at page 39; Woluchem v. Gudi (1981) 5 SC 291 at page 320 H etc. What the Court of Appeal ought to do is to find out whether there is evidence on which the trial court could have acted. Once there is sufficient evidence on record from which the trial court made its findings of fact, the appellate court cannot intervene. See: Akpagbue v. Ogu (1976) 6 SC 63; Odojin v. Ayoola (1984) 11 SC 72; Amadi v. Nwosu (1992) 5 NWLR

(Pt.241) 273 at page 280 etc. Where, however, the trial Judge failed to make a proper use of the opportunity of seeing, hearing and observing the witnesses at the trial or to exercise his discretion properly, or where the findings cannot be regarded as resulting from the evidence or where it has drawn wrong conclusions to accepted evidence or has taken an erroneous view of the evidence adduced before it or its findings of fact are perverse in the sense that they do not flow from accepted evidence or are not supported by evidence before the court, the appellate court will be at liberty to intervene and to make the necessary findings from such evidence. See: Okpiri v. Jonah (1961) All NLR 102 at page 104; (1961) 1 SCNLR 174; Maja v. Stocco (1968) 1 All NLR 141 at page 149; Ike v. Ughoaja (1993) 6 C NWLR (Pt. 301) 539 at page 555; Chief Frank Ebba v. Ogodo (1984) 4 SC 84 at page 90-91 etc.; (1984) 1 SCNLR 372.

In the present case, no where in the judgment of the learned trial Judge can it be suggested that he failed to make a proper use of the opportunity of seeing and hearing the witnesses or that he drew any wrong conclusion from the evidence, neither can it be said that he made any finding which was perverse or not supported by the evidence. The only complaint by the respondents is that the trial Judge after considering all the evidence led before him preferred the evidence of the appellants and their witnesses to those of the respondents and their witnesses. In my view, this course of action by the learned trial Judge cannot be faulted since he was entitled under the law to do so and his action flowed from the evidence before the court. The Court of Appeal was therefore in error to interfere with the findings of fact of the trial court which, in all respects, are justified and supported by evidence, and, to substitute its views on the evidence for those of the trial court. See too Fatoyinbo v. Williams (1956) 1 FSC 87; (1956) SCNLR 274. In these circumstances, the answer to issue number 2 must again be in the negative.

Issue number 3 poses the question whether the decision of the Court of Appeal is against the weight of evidence. A corollary to this question is whether the Court of Appeal was right in holding that the trial court gave undue weight to the number, that is to say, the quantity of witnesses called by the appellants rather than the credibility, viz: the quality of witnesses who testified before it. In this regard, the Court of Appeal opined that the learned trial Judge seemed inter alia to have failed to realise:-

"...that a case is not proved by the number of witnesses called by a party but the quality of the evidence led."

With profound respect to the court below, the above criticism of the learned trial Judge seems to me totally unjustified and completely unsup-

ported by the judgment and cannot therefore be sustained. Nowhere throughout his judgment can it reasonably be said that the learned trial Judge relied on the number of witnesses rather than the quality of their evidence and I must dismiss this criticism of the trial court as unwarranted and without justification.

B The issue of weight of evidence was examined in extenso earlier on in this judgment and it will be idle to repeat them all over again. I need only say that in view of all that I have stated above, the answer to issue number 3 must be in the affirmative.

C The last issue canvassed by the parties was whether both the trial court and the Court of Appeal were right in refusing to make an order for forfeiture as claimed by the appellants. The appellants argument is that there was sufficient evidence of misconduct, particularly the denial by the respondents of the appellants title to the land in dispute to warrant an order of forfeiture. They pointed out that the trial court declined to grant the order for forfeiture on the ground that other persons who might be affected by the order were not made parties to the suit. This reasoning of the learned trial Judge, they submitted, cannot be right as the respondents were sued in their personal capacities and not in any representative capacity. The court below for its own part, declined to grant the forfeiture on the ground that the appellants, in its view, were not entitled to a declaration to the customary right of occupancy claimed. They attacked this reasoning of the court below as erroneous on point of law in view of the facts established before the trial court.

F The respondents argument is that the appellants having failed to establish their title to the land in dispute cannot be entitled to an order for forfeiture as claimed. They stressed that before the court below, the respondents filed and argued a respondents notice to the effect that the appellants claim for forfeiture is incompetent on the ground that the appellants when they claimed the additional relief for forfeiture by an amendment of their statement of claim failed to pay the requisite court fees for the new relief. The Notice urged the court below to refuse the appellants claim for forfeiture on ground other than those for which the trial court refused to grant the order.

H The appellants in their reply brief did not contest that they did not pay the requisite court fees within seven days or at all in respect of their claim for forfeiture as ordered by the trial court on the 21st April, 1983. It was urged on this court to hold that the issue of non-payment of the requisite court fees in respect of the claim for forfeiture cannot now be canvassed before it because of the failure of the respondents to raise it before

the trial court although it was canvassed before the court below.

It is now beyond dispute that forfeiture as a relief is available to a landlord whenever his tenant disputes the landlord's title to the land or alienates the whole or part of the piece or parcel of land let out to him under customary law without the landlord's consent. See: Salami v. Oke (1987) 2 NSCC 1167; (1987)4 NWLR (Pt. 63) 1; Dokubo v. Bob-Manuel B (1967) 1 All NLR 113; Onyia v. Onyia (1981) 1 NSCC 319; Taiwo v. Akinwunmi (1975) 4 SC 143 at page 230 etc. This, however, is not now the issue. The basic issue that now arises seems to me to be whether the appellants claim for forfeiture was properly before the court or otherwise incompetent as submitted by learned respondents counsel. The issue, being radically fundamental, appears to me properly raised before the court below and is, indeed, properly raised before this court as it involves substantial question of law, substantive or procedural and it is plain that no further evidence would be necessary to reach a decision on the point and it is further desirable to decide the issue to prevent an obvious miscarriage of D justice. See: Attorney-General of Oyo State v. Fairlakes Hotels Ltd. (1988) 5 NWLR (Pt. 92) 1 at 29; Management Enterprises Ltd. v. Jonathan Otusanya (1987) 2 NWLR (Pt.55) 179; John Bankole & Ors.v. Mojidi Pelu & Ors. (1991) 8 NWLR (Pt.211) 523.

In the present case, it is clear from the record of proceedings that E following the appellants application for the amendment of their statement of claim to include, inter alia an additional claim for forfeiture of the respondents tenancy over the land in dispute, the trial court ordered as follows:-

“..... Application for amendment allowed. Plaintiffs to file same F within 7 days and also pay the appropriate court fees for forfeiture claimed on paragraph 14(d)”

(Underlining supplied for emphasis)

This was on the 21st April, 1983.

On the 25th April, 1983, the appellants duly filed their amended G statement of claim which ex facie shows that no summons fees as ordered by the court in respect of the new claim for forfeiture were paid by the appellants. The payments made were endorsed on the face of the amended statement of claim as being in respect of:

<i>“Filing Amended Statement of Claim</i>	<i>50k</i>	H
<i>Service</i>	<i>20k</i>	
<i>Kilo</i>	<i>20k</i>	
<i>Paid CR No. 803684 of 25/4/83</i>	<i>90k”</i>	

Quite apart from the fact that court orders must be obeyed as

directed, it cannot be over-emphasized that for a valid and effective commencement of a claim, an intending plaintiff shall strictly comply with the provisions of relevant statutes and the rules made thereunder and governing the claims made such as the High Court Law and Rules of Anambra State. It is the responsibility of the plaintiff *inter alia* to pay the requisite fees in respect of each and every relief claimed as prescribed by the rules to enable the court's judicial functions to commence. A court shall not entertain a relief claimed without payment of the prescribed requisite fees unless such fees have been waived or remitted by the court or such fees are payable by any Government Ministry or non-Ministerial Government Department or Local Government pursuant to the provisions of the said High Court Rules of Anambra State. If the default in payment is that of the plaintiff, the claim in respect of which such prescribed fees have not been paid cannot be said to be properly before the court and should be struck out in the absence of an appropriate remedial action or application to regularise such anomaly.

In the present case, no payment whatsoever was made by the appellants in respect of their new claim for forfeiture. Payment of the prescribed fees being a condition precedent to the filing of a valid claim before the court, it seems to me clear that the claim for forfeiture in the present suit is incompetent, improperly before the court and ought to be struck out. In the circumstance, it becomes entirely idle and academic to examine the various reasons given by both courts below in refusing the appellants claim for forfeiture which must be and is hereby struck out.

In the final result, this appeal accordingly succeeds and it is hereby allowed. I set aside the decision of the Court of Appeal together with the order for costs therein made and restore the judgment of the trial court which decreed customary right of occupancy in respect of the land in dispute in favour of the appellants. The appellants claim for forfeiture is struck out as incompetent.

There will be costs to the appellants against the respondents which I assess and fix at N600.00 in the court below and N1,000.00 in this court.

UWAIS CJN

I have had the opportunity of reading in draft the lead judgment read by my learned brother Iguh, J.S.C. I entirely agree that this appeal has merit and that it should succeed. Accordingly, the appeal succeeds and it is hereby allowed with the exception that the appellant's claim for forfeiture is dismissed for non-compliance with the condition precedent to pay the appropriate prescribed court fees for filing the claim. I abide by the order

for costs as contained in the said judgment.

OGUNDARE JSC (Dissenting):

The principal issues in this appeal are issues of fact. By a writ of Summons issued in October 1978, the plaintiffs (who are now appellants before us) sued the defendants (who are now respondents) over a piece or parcel of land. Their claims, as per paragraph 14 of their amended statement of claim, read:

“(a) Declaration that the plaintiffs are entitled to the Customary Right of Occupancy under Ogbunike Customary Law to the piece of parcel of land situate at Amawa in Anambra Local Government Area and commonly called Ubulu Land and shown on the plaintiffs plan and therein verged Yellow.

(b) N1,000.00 damages for trespass.

(c) Injunction restraining the defendants, their servants and/or agents from further trespass to the said land.

(d) Forfeiture of the defendants tenancy on the land.”

On completion of pleadings the case proceeded to trial at which the 1st plaintiff gave evidence and 9 other witnesses testified in support of plaintiff's case. 1st and 4th defendants and 5 other witnesses testified for the defence. After addresses by learned counsel for the parties, the learned trial Judge (Awogu J. as he then was) found for the plaintiffs in respect of the 1st leg of their claims and dismissed the other claims.

Being dissatisfied with that judgment both parties appealed to the Court of Appeal. The defendants appealed against the declaration of title made in favour of the plaintiffs while the plaintiffs cross-appealed against that part of the judgment dismissing their claim (d) for forfeiture. The Court of Appeal allowed the defendants appeal and dismissed the cross-appeal. It dismissed the plaintiffs claims in-toto. It is against that judgment that the plaintiffs have now appealed to this court upon five grounds of appeal. In the appellants Brief seven issues are formulated as arising for determination. Apart from their Issue (7) which relates to the refusal by the two courts below of the claim for forfeiture sought by the plaintiffs, all the remaining six issues relate essentially to findings of fact made by the appellate court below. I agree entirely with Chief Williams, S.A.N. who at the oral hearing of this appeal before us observed that the judgment of the Court of Appeal was based on a reversal of the finding of fact made by the trial court. In my respectful view, therefore, having regard to the judgment appealed against and the grounds of appeal, this appeal revolves on two questions,

these are:

(a) Was the court below right in reversing the declaration of title made by the trial court in favour of the plaintiffs to the land in dispute?

(b) Whether the two courts below were right in refusing the claim for forfeiture made by the plaintiffs.

B Question (a)

The plaintiffs claim the land in dispute as belonging to them from time immemorial and that they, and their forefathers before them, have been exercising acts of ownership on the land ever since. They claim that members of the defendants family were granted portions of the land for building purposes and were paying tribute until when the defendants refused to pay tribute and that the defendants demolished a house being built by one of those to whom the plaintiffs granted a portion of the land in dispute.

The defendants for their part, claim that the land in dispute belong to their family, also from time immemorial and they too have been exercising rights of ownership thereon. They assert that they are on the land by right of ownership and not by any grant made to them by the plaintiffs.

I pause here to observe that the plaintiffs belong to Amawa village in Ogbunike while the defendants belong to Azu village in Ogbunike. In effect the parties belong to two different villages in Ogbunike. The defendants were sued in their personal capacities.

The plaintiffs in their amended statement of claim pleaded inter alia as follows:

"2. The land trespassed upon by the defendants which is situate in Amawa village belongs to the plaintiffs from time immemorial and is more particularly shown and delineated pink on the plaintiffs Plan No. PO/E116/78 (sic) filed with this Statement of Claim.

3. The said area verged pink forms part of the vast area of the plaintiffs land known as and called "Ubulu land" and more particularly shown on the plaintiffs plan and therein verged Yellow. The said area verged Pink is within the area verged Yellow all of which belong to the plaintiffs.

4. As owners the plaintiffs like their forefathers before them exercise maximum acts of ownership and possession by themselves and through their tenants in and over the land without any let or hindrance from the defendants or anybody else.

5. In pursuance of their acts of ownership and possession, the plaintiffs farm the land known as Ubulu land, reap the fruits of the economic trees therein. The 1978 farms of the plaintiffs family are more particularly shown in the plaintiffs plan referred to in paragraph 3 of this state-

ment of claim.

6. *In furtherance of their acts of ownership and possession, the plaintiffs have granted portions of the land known as Ubulu land to people for residential and farming purposes under Ogbunike Customary Law and in the understanding that the tenants pay annual tribute to the plaintiffs and in the event of the tenants vacating the area granted to them the land will revert to the plaintiffs. One of the plaintiffs tenants was one John Ipin from Ogidi and when he died and his family moved back to Ogidi, the land granted to him reverted to the plaintiffs.* B

7. *At the end of each year during the feast of "Igbonwunwu" which marks the end of farming season, the tenants pay their tribute to the plaintiffs which said tribute consists of 8 yams, 4 kolanuts and 2 gallons of palm wine. The tenants are mainly from Umuezemba family of Azu Ogbunike.* C

8. *Some of the plaintiffs tenants on the land are - Agudosi Family that is to say the family of the 3rd defendant Humphrey Eziosa Nwafor, Sylvester Ofia. The plaintiffs will found on the Memorandum of Agreement between the plaintiffs and the tenants above referred to. The area verged Orange and walled round was granted to the 1st defendant's father Okoye Oneze by the plaintiffs family many years ago and on his death his son Herbert Okoye the 1st defendant continued to live within the area granted to his father.* D

9. *pursuance of their acts of ownership and possession, members of plaintiffs family have brought actions against trespassers into their Ubulu land and obtained judgment. The plaintiffs will rely on Ogidi Native Court Suit No. 194 of 17/4/17 Nwosu v. Onyeaghana (2) Nwosu v. Nwanyiasa & Anor.....Suit No. 537/538/1917 of 14/8/17.* E

10. *By a Memorandum of Agreement dated the 28th of February, 1977, the plaintiffs granted under Ogbunike Customary Law the area verged Pink in the plaintiffs plan to one Sylvester Ofia of Umuezemba Family of Azu Ogbunike for residential purposes under a condition that in the event of his vacating the said area verged Pink, the land reverts to the plaintiffs. This grant was in response to an application by the said Sylvester Ofia dated the 16th of February, 1977. The plaintiffs will found on both the agreement and the said application.* F G

X X X X

All the repeated demands made on the defendants to pay the agreed tribute fell on deaf ears and the defendants are now contesting the plaintiffs right of customary occupancy to the land under Ogbunike Customary Law." H
(Italics are mine)

It is on the above pleadings that the plaintiffs predicated their case.
The defendants for their part pleaded inter alia as follows:

“3. *The defendants deny paragraph (2) of the statement of claim and in further answer thereto say that the land in dispute situates at Azu village in Ogbunike. It is a tiny portion only of Azu Ogbunike Communal land known as and called Ubulu land. The defendants are from Azu Ogbunike. They and the plaintiffs family do not enjoy the land in dispute in common. Further to paragraph (2) of the statement of claim, the defendants say that the whole of Ubulu land is owned communally by Azu Ogbunike Community (defendants). Each sub family in Azu Ogbunike enjoys a distinct portion of the land exclusively. The land in dispute belongs exclusively to the Chiemesi Family of Azu Ogbunike village viz: first and second defendants. The third and fourth defendants known as and called Umuatuona i.e. Atuona Family of Azu Ogbunike village own and enjoy exclusively their own portion of Ubulu Land. The said Ubulu land (including the land in dispute) and the features thereon are shown on the defendants’ survey plan No. ECAS 23/79 filled with this statement of defence.*

4. *The defendants deny paragraph (3) of the statement of claim and further say that the area of land enclosed in yellow in the plaintiffs survey plan No. PO/E116/78 comprises of parcels of Ubulu Land in absolute possession of members of Chiemesi Family, (defendants) Atuona Family (defendants) and Ezueora Family, all of Azu Ogbunike Family who inhabit the same, cultivate crops, reap economic fruits thereon and prospect timber from time immemorial, without let or hinderance from the plaintiffs or anyone whatsoever. The defendants further say that the plaintiffs deliberately omitted all the dwelling houses of Azu Ogbunike people (defendants) on the yellow area of their plan. (Italics are mine)*

In effect they too claim the land in dispute as belonging to them and as being in their possession from time immemorial. After a review of the evidence adduced by the parties and a consideration of the addresses of their learned counsel, the learned trial Judge said:

“The burden is, of course, on the plaintiffs to prove the declaration sought. For this purpose, the 1st plaintiff gave evidence in support of the averments in the statement of claim and also called 9 witnesses. Of these, P.W.3, P.W.6, P.W.7 and P.W.9 were from the family of the defendants, but their evidence was to the effect that the plaintiffs of Amawa owned the land in dispute. This, in effect, was evidence against interest. It was therefore not enough to suggest, as the defendants and their witnesses did, that they were telling lies. P.W.3 was a close relation of the 1st defendant, but while he said that the land in dispute belonged to the plaintiffs, the 1st defendant denied this. Yet, the father of P.W.3 and 1st defendant were brothers. The unreliable evidence of 1st defendant became comical when

he agreed that P.W.3 and himself lived in the same premises, which he claimed for their family, but P.W.3 said it belonged to the plaintiffs; D.W.1, (Daniel Obeagha), younger brother of P.W.3, contradicted 1st defendant by claiming that where P.W.3 lived was land of the plaintiffs not in dispute. Although the 3rd defendant died during the trial, D.W.2, a brother, gave evidence. The 4th defendant also gave evidence. Against P.W.3, P.W.7 and P.W.9 stated that the land occupied by the 3rd and 4th defendants was within the plaintiffs land in dispute. Their answer was that these witnesses were liars. It must be added that while the plaintiffs called boundary witnesses to wit: P.W.2, P.W.4, P.W.5 and P.W.8, the defendants called no witnesses in support of same; Having carefully considered the evidence before me, I prefer the evidence of the plaintiffs and their witnesses to that of the defendants and their witnesses. No credible explanation was offered as to why 4 witnesses from Azu should claim the land in dispute for Amawa."

Without more, he concluded -

"I grant the plaintiffs the customary right of occupancy in respect of the Ubulu land, shown verged in Yellow Exh. "A". It is so shown verged in Green on the defendants Plan, Exhibit "E".

He devoted the rest of the judgment to a consideration of the other claims for forfeiture, damages for trespass and injunction all of which he refused.

The court below in the lead judgment of Uwaifo JCA. observed:

"The plaintiffs in this case pleaded their ownership of the land in dispute "from time immemorial". They did not plead any traditional history and therefore traced nothing in that direction in the evidence adduced by them."

After further observing that "I am afraid the learned Judge cannot be taken as having considered the case properly". Uwaifo J.C.A. set out the passage of the trial court's judgment which I have just quoted and remarked:

"From the passage quoted from the judgment, the learned Judge seemed to have failed: (a) to adequately determine whether the plaintiffs discharged the burden on them to entitle them to the declaration of title he made in their favour; (b) to appreciate that since the plaintiffs relied on acts of possession, the principles to be applied cannot be substituted by evidence of witnesses who merely testified that the plaintiffs own the land; and (c) to realise that a case is not proved by the number of witnesses called by a party but by the quality of the evidence led."

The learned Justice of the Court of Appeal reviewed the evidence for the plaintiffs and found:

"Therefore out of P.W.3, P.W.6, P.W.7 and P.W.9, there is none whose

evidence can be regarded with any seriousness to be of help to the plaintiffs. Only the evidence of P.W.3 that he is the plaintiffs' tenant has some face value."

On the evidence of P.W.1, P. W. 2, P.W.5 and P.W.7, he also found:

"...I can say that their evidence does not weigh sufficiently in favour of the plaintiffs."

After a further consideration of the evidence for the plaintiffs, Uwaifo J.C.A. observed:

"It will therefore be noted that the preponderance of evidence of acts of possession is clearly on the side of the defendants even from the evidence adduced by the plaintiffs."

After a consideration of the evidence led for the defence the learned Justice of Appeal concluded:

"The plaintiffs in this case were wrongly awarded a declaration of title to the land verged yellow in Exhibit A upon the evidence they adduced which on the whole was very weak."

It is on these findings, remarks and observations that the learned Justices of Appeal finally allowed the defendants appeal and set aside the judgment of the trial court declaring title to the land in dispute in the plaintiffs.

Katsina-Alu and Macaulay, J.J.C.A. agreed entirely with the judgment of Uwaifo, J.C.A.

The question that now arises is: Is the court below right in reversing the judgment of the trial court on the issue of title in the manner it has done? Chief Williams learned Senior Advocate submits before us that as the trial Judge relied on the evidence before him in finding for the plaintiffs, there was no basis for the court below to conclude that the trial Judge was wrong in his ascription of credibility to witnesses. Learned leading counsel for the plaintiffs further submits that the review of evidence of the witnesses in the lead judgment of the court below is no ground for reversing the judgment of the trial court. He relies on *Woluchem v. Gudi* (1981) 5SC 291 at pages 320-330; (1979-81) 12 NSCC 214, 229 per Nnamani J.S.C. The learned Senior Advocate further submits that the fact that documents were rejected in evidence is no reason for rejecting the evidence of the tenants particularly P.W.9 Ofia who testified for the plaintiffs.

Mr. Ogbuli learned leading counsel for the defendants submits that findings by trial court are not sacrosanct and relies on *Olanrewaju v. Governor Oyo State* (1992) 11-12 SCNJ 92, 106; (1992) 9 NWLR (Pt.265) 335 in support. He further submits that the court below was right in setting aside the judgment of the trial court on the issue of declaration of title.

The defendants had before the oral hearing of this appeal filed a

notice of preliminary objection in which objection was taken to ground (4) of the grounds of appeal and the format of the plaintiffs Reply Brief. Mr. Ogbuli for the defendants did not at the beginning of the oral hearing of this appeal move the court on this notice. After Chief Williams had addressed the court on the appeal and he too had replied, it was then that Mr. Ogbuli attempted to move the court on the preliminary objection. We declined to hear him further on it since he failed to raise the objection at the appropriate time. The Notice was taken as having lapsed. B

There are two principles of law that I need restate at this stage. These are:

(1) In a claim for declaration of title, it is well settled that the onus is on the plaintiff to establish his case and he must succeed on the strength of that case and not on the weakness of the defence. See *Woluchem v. Gudi* (supra). C

(2) Where a plaintiff claims ownership of land, he must plead and prove by evidence his root of title to the land. See *Piaro v. Tenalo & Anor.* (1976) 12 S.C. 31,41-42; *Alade v. Awo* (1975) 4S.C. 215, 228; *Kalio v. Woluchem* (1985) 1 NWLR (Pt.4) 610 and *Osafire v. Odi* (1994) 2 NWLR (Pt.325)125. D

Now *Idundun v. Okumagba* (1976) 9 -10 S.C. 227,246-250 lays it down it is now settled law, that there are five ways by which ownership of land may be proved, that is to say: E

1. by traditional evidence;
2. by production of documents of title which are duly authenticated;
3. by acts of ownership, that is, by acts of selling, leasing, renting out all or part of the land, or farming on it or on a portion of it;
4. by acts of possession and enjoyment of the land; and F
5. by proof of possession of connected or adjacent land in circumstances rendering it probable that the owner of such connected or adjacent land would, in addition, be the owner of the land in dispute.

Looking at the pleadings of the plaintiffs in the instant case, it would appear that they rely on three of the five ways. The three methods I can glean from the pleadings are: G

(a) Proof by traditional evidence since they claim to be owners of the land in dispute "from time immemorial" see paragraph 2 of the amended Statement of Claim.

(b) Proof by acts of ownership.

(c) Proof by acts of long possession and enjoyment of the land. This H method is of course really a weapon more of defence than of offence. As to (b) and (c) see paragraphs 3- 10 of the amended Statement of Claim. It is the view of the court below that the plaintiffs failed to establish

their claim to title by the methods relied on by them. It, therefore, reversed the judgment of the trial court. Is the court below right?

It is now well settled that Court of Appeal should be slow in interfering with or reversing findings of fact made by a trial court unless such findings are perverse. This principle of law is well stated by this court in *B Ebba v. Ogodo* (1984) 1 SCNLR 372; (1984) NSCC 255 where *Eso J.S.C.* observed at page 259 of the Report:

“Now, the principles upon which a court of appeal would act have been well stated in the English case of Watt or Thomas v. Thomas (1947) A.C. 484 and approved several times by this court. Indeed, it is the duty of the trial court to assess witnesses, form impressions about them and evaluate their evidence in the light of the impression which the court forms of them. That is one good reason why the trial court is named a “trial court” it is the trial court (and hence a court of appeal should attach the greatest weight to the opinion of the trial Judge) that has the duty to see and indeed, in this case, has seen the witnesses and also heard their evidence. The Court of Appeal should not disturb a finding of fact unless that court is satisfied that such finding is unsound; it is in the process of deciding whether the finding is sound or not that the Court of Appeal (because it does not see the witnesses) is left only to examine the grounds that led to the conclusion reached by and the inferences that have been drawn from such conclusions of the trial court.

In this country, trial is usually, unlike in England, without a jury and the trial Judge has the singular experience and duty of taking a lone decision on the evidence for the purpose of determining the facts, from his advantage of seeing and hearing simultaneously the witnesses. Unless the trial court has failed to make use of this singular advantage, and for that reason thereof the Court of Appeal finds that the decision is perverse, the Court of Appeal, whose opportunity is confined to printed record, is obliged to and must accord to the finding of fact due respect. That indeed is the division of labour, and a sensible one at that, between the trial court and the appellate court.

But this division ends or, rather does not exist, where the question does not affect the issue of credibility of witnesses; in other words, the Court of Appeal itself will obviously be in as good a position as the trial court, for in such a case, the trial court has no advantage really over the Court of Appeal. For the Court of Appeal will be in a proper position to evaluate, as the trial court? the evidence which has been given in the case, for in such cases the matter in dispute has been completely narrowed down to inference that could be drawn from proved facts, without going through the rigour of credibility of witnesses. When we have this type of cases, the Court of appeal should not shrink from the task of such evaluation or be

inhibited therefrom, just because it is a Court of Appeal. See Benmax v. Austin Motor Co. Ltd. (1955) A.C. 370. See also Lion Building Ltd. v. M.M. Shadipe (1976) 12 S.C. 135 as per Sir Udo Udoma J.S.C. at P. 153."

Later in the judgment, the learned Justice added at page 261:

"An appeal court, in applying these principles should, I venture to B suggest -

(a) start with an attitude to the trial court, as the only court which has, principally, the duty to make findings of fact from the evidence "oral and or documentary" before it, also that the trial court is the court that has been specially suited, by its peculiar constitution, set-up and rules, so to do. C [The trial Judge sees the witnesses and has the exclusive advantage to observe their demeanour] ;

(b) then find out whether the conclusion which has been arrived at by the trial court is justifiable, when it is re-examined against the very premise and or the controversy vel non which formed the basis of the conclusion arrived at by the trial court. D

(c) where the conclusion is arrived at without any real controversy, e.g. in the case of documentary evidence, or where it does involve a controversy the controversy is limited only to number, complexity or contradiction or interpretation of the document or further where there is oral evidence but it involves merely an admission by the adversary or there is an unchal- E langed piece of oral evidence, the Court of Appeal should consider itself to be in as good a position as the trial court, in so far as the evaluation of such evidence as aforesaid in this paragraph is concerned;

(d) Where the decision is arrived at, after there has been an examination of a controversy (and this is the commonest aspect) as where the F opposing parties produce witnesses in the case to contradict each other by oral evidence, then the Court of Appeal should appreciate that the following will be relevant:

(i) Credibility of Witnesses based on demeanour of the witnesses only:-

Here, the trial court is the sole judge as the observation of the G demeanour of witnesses has to be peculiar and exclusive to the trial court which advantage is not and can never be available to the appellate court.

(ii) Credibility of Witnesses based on factors other than demeanour:

The Court of Appeal should examine those factors which the trial H court examined as a result of which it made the inference which led to its finding and determine whether that trial court has made use of its singular advantage of seeing and hearing the witnesses before making its finding especially having regard to the inference that could reasonably be made by a just and reasonable tribunal from the same factors."

And Obaseki J.S.C. at page 267 added his own voice when he opined:

"This court has times without number emphasised that it is no business of the appeal court to substitute its view of the evidence for that of the learned trial Judge and I find it again necessary to point out that miscarriage of justice will definitely result from adopting such a course of action when it is unwarranted. The need to ensure that justice is not miscarried should always dominate the attitude and thinking of appeal courts when dealing with appeals raising questions of fact. See Victor Woluchem & Ors. v. Chief Simeon Gudi & Ors. (1981) 5 S.C. 319 at 326; Akinloye v. Eyiola (1968) NMLR 92 at 95 S.C.; Obisanya v. Nwoko (1974) 6 S.C. 69 at 80 S.C.; Lawal v. Dawodu (1972) 1 All NLR (Pt.2) 270 at 286; Kakarah v. Imonikhe (1974) 4 S.C. 151; Mogaji v. Odojin (1978) 4S.C.91."

I have earlier in this judgment highlighted the reasons given by the court below, per Uwaifo, J.C.A. for reversing the trial court. I shall now proceed to consider how valid these reasons are having regard to the methods of proof relied on by the plaintiffs, their pleadings and the evidence accepted by the learned trial Judge.

Proof by traditional evidence:

The court below, per Uwaifo J.C.A., observed as follows:

"The plaintiffs in this case pleaded their ownership of the land in dispute "from time immemorial." They did not plead any traditional history and therefore traced nothing in that direction in the evidence adduced by them."

It is not disputed that this observation is valid. The pleadings and evidence are completely devoid of any traditional history showing who founded the land in dispute and how it devolved on the plaintiffs. In *Piaro v. Tenalo & Ors.* (supra) this court at pages 41-42 of the report observed:

"We find however in the pleadings and the evidence a total absence of facts about (1) the founding of Bomu village in general and Kporo, the land in dispute, in particular; (2) the persons who founded the land and exercised original acts of ownership, and (3) the persons who have held title or on whom title has devolved in respect of the land since the founding before the 1st plaintiff/respondent acquired control of the land on behalf of the community."

All these facts which are necessary for the proper determination of the issue raised are not provided by the sweeping assertion that "the land is communal land of Bomu people." This leaves the traditional evidence in the air and it is fatal to plaintiffs claim (See F.M. Alade v. Lawrence Awo (1975) 4 S.C. 215 at 229."

In *Kalio v. Woluchem* (supra), this court held that a plaintiff who relies on customary title must give evidence how that title was derived. The plaintiffs in that case had pleaded:

“3. The land trespassed upon by the defendants is part and parcel of the plaintiffs premises .It forms part of the entire homestead of the Woluchem’s family “ B

Commenting on this pleading, Karibi- Whyte J.S.C. observed at pages 628-629 of the report:

“The averment in paragraph 3 of the statement of claim suggests unquestionably that respondents relied on their claim on customary title. In the circumstance, they must give evidence of how that title was derived. See Ekpo v. Ita II NLR 68, Preston Holder v. Thomas 12 (1946) WACA 78. Ahinahina v. Chief Enyimadu (1953) A.C. 207. Thus where title is derived by grant or inheritance, the traditional history or evidence of acts of continuous exclusive possession should be given to justify the grant, See Alade v. Awo (1975) 5 S.C. 215. In Piaro v. Tenalo & Ors. (1976) 12 S.C. 31 at P. 41, this court held that in such cases the pleading should aver facts relating to the founding of the land in dispute, the persons who founded the land and exercised original acts of possession, and the person on whom the title in respect of the land was devolved since its first founding, as necessary for determination of the issue in what communal capacity the land was being held. In this case the Statement of Claim of the respondents regrettably is lacking in such averments. It is therefore difficult to comprehend how, without such evidence before them, the courts below could come to the conclusion that respondents established that there was a Woluchem family land, and that the land in dispute, subject matter of Exhibit “B”, was part of such land.” C D E F

In *Osafile v. Odi* (supra), the plaintiffs had pleaded:

“5. Both plaintiffs are heads of their respective said villages and are related in that they had a common ancestor and they inherited the ownership of the land in the death of their respective fathers and forefathers.” G

6. The land in dispute is situate along both sides of Agbor - Asaba road, lying almost directly opposite each other: Idumu - Esegbana land on the right hand side of the said main road whilst Idumu Ozoba land lies on the left hand side of the said main road. It is more particularly described and delineated on the survey plan filed in court; the area in dispute being verged Pink. H

7. The said land in dispute is and has been the property of the plaintiffs from time immemorial.”

Uwais, J.S.C. (as he then was) delivering the lead judgment of this court

observed at page 138 of the Report:

“The next question is whether the plaintiffs had discharged the burden on them. To do so the plaintiffs were obliged, since they based their own (sic claim) on customary title, to give evidence of how they derived the title - see Ekpo v. Ita. (1932) NLR 68 and Preston Holder v. Thomas (1946) 12 WACA 78. The difficulty which the plaintiffs ran into, as pointed out by the Court of Appeal, is that they omitted in their pleadings to aver fully the facts about their root of title. In the absence of such averment they did not and indeed could not have validly adduced evidence to establish the root of title.

After quoting the above dictum of Karibi-Whyte J.S.C. in Kalio v. Woluchem he went on to say:

“In the present case the plaintiffs pleading fell short of stating the persons that founded the land in dispute and exercised the original acts of possession. Nor did they aver how the founders of the land in dispute came to be on the land. Surely, with this poor state of the plaintiff’s case no court could have judicially exercised its discretion to grant them the claim of declaration of title to the land in dispute.

Therefore, the trial court was in error to have granted the declaration sought and the Court of Appeal was right to have reversed that decision of the learned trial Judge as it was based on wrong principle and was consequently perverse.”

And Mohammed, J.S.C. in his concurring judgment at page 142 put it succinctly in these words:

“The necessary ingredients of averments for a claim for title, namely, facts relating to the founding of the land: The persons who founded the land and exercised original acts of possession and the person on whom the title in respect of the land has devolved since its first founding, have not been given adequately by the plaintiffs in their statement of claim. See Piaro v. Tenalo & ors. (1976) 12 S.C. 31 at 41.”

From all I have been saying, it follows that, on the state of the law, the plaintiffs could not have succeeded in their claim for title based, as it were, on the faulty pleadings put in by them. The court below is quite right in its observation on the plaintiffs pleadings.

Proof by acts of ownership and long possession:

As the plaintiffs relied on the same pleadings in support of these two methods of proof of title I shall consider them together.

The court below had remarked per Uwaifo, J.C.A. that

“I am afraid the learned Judge cannot be taken as having considered the case properly.”

The penultimate portion of the trial court’s judgment leading to title being declared in the plaintiffs has been set out by me above. Apart from ascribing

credibility to some witnesses for the reasons given, the learned trial Judge made not one specific finding of fact before reaching his conclusion. This is rather strange. Did he find that the land in dispute belonged to the plaintiffs from time immemorial, as pleaded? Did he find that plaintiffs forefathers ever exercised acts of ownership and possession on the land? Did he find that plaintiffs were ever in possession of the land? B

What evidence was led by the plaintiffs in support of their case? The learned trial Judge relied on the evidence of P.W.3., P.W.6, P.W.7 and P.W.9 who are from the defendants family or village. Did he properly consider the evidence of these witnesses to see if it could support a claim for title to land? I rather think not. C

P.W.3 testified that the plaintiffs gave his father land on which his father built and farmed. Both his father before him and he himself were paying tribute to the plaintiffs. But the land given his father is not part of the land in dispute! Here is what he said:

"Plaintiffs gave my father a portion of the land where he lived on Ubulu land, outside the area now in dispute. My father is dead. He died in 1967. He built on the land where I now live. It was in this house that I was born. My father also farmed on the land. I now farm on the land. The Uruokpala family of plaintiffs allow me to do so. D

My father paid Annual tribute to plaintiffs. It consisted of 4 Kolanuts, 8 yams and 2 gallons of palm-wine. I now pay the same tribute to the plaintiffs. The plaintiffs also farm on the Ubulu land, not in dispute. No one ever disturbed my father or myself on the land." E

(Underlining are mine)

That P.W.3 lives outside the land in dispute is supported by the F evidence of D.W.1, his brother. The latter testified thus:

"I know P.W.3; he is my elder brother of same parents. He lives on land of the plaintiffs, but not on the land in disputeP.W.3 lived at (sic) land of plaintiffs at Amawa for over 40 years before our father died."

P.W.3 testified on land outside the land in dispute. His evidence can G hardly, therefore, be said to be evidence supportive of plaintiffs' acts of ownership and possession of the land in dispute.

P.W.6, hails from the defendants' village; he testified for the plaintiffs. It would appear from the evidence of this witness that the people living on the land in dispute were from the defendants village and that they were H partly on land belonging to their village Azu-Ogbunike and partly on land not belonging to that village.

The next witness I shall consider is P.W.7. He too is from Azu-Ogbunike, the defendants village. His evidence goes like this:

"I know the land in dispute. It is called Ubulu land. The land in dispute belongs to the family of plaintiffs. I used to cut palmfruits from the land in dispute. Plaintiffs wives collect the palmfruits and pay me for cutting them. Only plaintiffs collect the fruits. No one ever challenged me while cutting the fruits. I was cutting the fruits both before and after the civil war. Those who live on the land in dispute are the 4 defendants, and one Teniah Agbapuonwu.

Plaintiffs also used to show me where to farm on the land in dispute. No one disturbed me while I farm the land. My cassava farm is now on the land, but I have harvested my yams.

The land in dispute does not belong to people of Azu Ogbunike."
(Underlining is mine)

Cross-examined, he deposed:

There is a portion of land in Ogbunike called Ani Azu-Ogbunike where Azu-Ogbunike people live. Their forefathers lived there before them.

Azu people who live on Azu land include John Iloana, Chinwu Onyeagom, John Okonkwo and others. Godian Onumba (i.e. PW.6) lives at Amawa, not Azu-Ogbunike land. I know Luke and Eleazer Okeke. Both are cousins of PW.6. Both of them live at Amawa. I know Chief Gibson Onwuagbu. He too lives on Amawa land not in dispute. Chief Obidinma lives on Amawa land. I know Agbakoba Okwudi and the son, Osita, Stephen Okwudi, Mathew Okwudi, Nwoye Okwudi, Nneke Okwudi, Beniah and Lawrence Agbapuonwu, Pius Mazeli, Augustine Igweze and Raymond Ikwuemesi. All are of Azu Ogbunike land I know where they live. All of them live on Ubulu land of plaintiffs. Their fathers lived before them. Their fathers enjoyed the land and paid tribute to plaintiffs."

Apart from this witness saying that he cut palm-fruits on the land in dispute and farm thereon on plaintiffs permission, the significance of his evidence is the admission of the presence of many members of the defendants community of Azu Ogbunike on the land in dispute.

PW.9. Sylvester Offia is from Azu Ogbunike, the village of the defendants, he is from the same family as the defendants. It is the grant of part of the land in dispute by the plaintiffs to the witness that was the immediate cause of the dispute that led to this action. He built on the land granted him in 1978 but the defendants destroyed it claiming the land as theirs.

Of the other witnesses called by the plaintiffs, PW.2, PW.4, PW.5 and PW.8 are boundary men. I must mention that the identity of the land is not in dispute. This is clearly borne out by the plans Exhibits "A" and "F" tendered by the parties.

P.W.2, under cross-examination, testified as follows:

"I know all the defendants. They are people of Azu village of Ogbunike. I know where each of them lives at Azu Ogbunike. Where they live is called Ubulu land of Azu-Oghunike. I know the footpath (i.e. Eziana) that cuts across the land in dispute and leads to the house of Okoye Onaeze where 1,2 defendants live. After the house of Okoye Onaeze on this foot-path, you find the house of 4th defendant. The foot-path continued beyond the house of Onaeze and joins the Ogidi-Nkwelle Road. From 4th defendant's house, you come to the house of Agbakoba Okwudi and other houses belonging to that family. After these, you reach the storey-building of Beniah Agbapuonwu, and then the storey-building of Gibson Onwuegbu. All the persons mentioned are of Azu-Ogbunike. The Agbakobas and Agbapuonwu live on Ubulu land of Uruokpala." (Italics are mine)

I fail to see how, in the light of the above evidence, it could be said that the testimony of this witness was of assistance to the plaintiffs. Contrary to the impression the plaintiffs would like the court to accept that the defendants and their people lived on their (plaintiffs) land, the testimony of this witness did not appear to support that impression. It is noteworthy to observe that the witness is from Amawa Ogbunike, plaintiffs' village. The evidence of this witness is also at variance with that of P.W.3 wherein the latter under cross-examination deposed:

"I have never heard of Ubulu land which belongs to Azu-Ogbunike."

The next boundaryman to testify is P.W.4. His evidence under cross-examination, is to say the least, very damaging to plaintiffs case. He not only contradicted some other plaintiffs witnesses but gave evidence supportive of the defendant's case. I shall state in full his evidence under cross-examination:

"I do not know any of the defendants. I do not know Okoye Oneze of Azu-Ogbunike. I also do not know Agudozi Mekowulu. I know the location of Azu Ogbunike village. People of Azu-Ogbunike live at Azu-Ogbunike. I have heard of one Agbakoba Okwudi of Azu Ogbunike, but did not know him in person. I do not know where he lived. I have also heard of Beniah Agbapuonwu of Azu Ogbunike but did not know him in person. I do not know where he lived. I only know one Onwania of Azu-Ogbunike who lives at Azu-Oghunike. I am about 70 years old. The land on which Onwania lives belongs to Azu-Ogbunike."

There are no buildings near my boundary with plaintiffs. I went on the land in dispute to fetch fire or water from the plaintiffs. The last time I went to the land in dispute was 3 years ago. There are no houses on

the land in dispute and none was under construction. I do not know if there are houses on the land in dispute. There is no stream on the land in dispute. I do not know Sylvester Ofia."

(Underlinings are mine)

The learned trial Judge did not comment on him but merely referred to him as a boundaryman called by plaintiffs as a witness.

The next boundaryman is PW.5 from Amawa-Ogbunike village. Suffice it to say that this witness contradicted some other plaintiffs witnesses in some aspects of his evidence under cross-examination, principally on the location of the houses of some of defendants' people.

The last boundaryman to testify was P.W.8 from Amawa-Ogbunike village. In some respects his evidence under cross-examination was at variance with the evidence of some of the other plaintiffs' witnesses.

The 1st plaintiff testified. He deposed:

"I know the land in dispute. It is called Ubulu. It belongs to the Uruokpala family of the plaintiffs. We made a plan of the land in dispute. This is the plan (Exh. A identified). As owners of the land, we plant yam and cocoyam reap the economic trees and let out portions for residential purposes and farming purposes. For residential purposes, there is a right of reversion. Such tenants pay tribute of 8 yams, 4 kolanuts and palm-wine annually. We grant land for residential purposes to John Ipim and Onyeaghana. Both have since left the land. Those still living on the land include Agudosi (now dead) but his son, 3rd defendant still live there; Udenze Obeagha, Okoye Onaeze (now dead) but his sons, 1st and 2nd defendants still live there; Clement Ikwuazom and Eziosa Nwafodulu (also Humphrey)." (Underlining mine)

Continuing, he said:

"We have other tenants on the land in dispute. One of them is Humphrey Nwafolu. His grant is shown on Exh. A.

.....

I know one Sylvester Offia, I made a grant to him on the land in dispute. I know 1st and 2nd defendants. My father gave father of 1st and 2nd defendants where they live on the land in dispute. Okoye fenced the area granted him with mud-wall. On his death, 1st and 2nd defendants still live there.

We have had disputes over the land in dispute. One of the disputes is between Nwosu Onwugbufor and Onyeaghana - the plaintiff was my father while the defendant was from Azu Ogbunike, which is the village of the present defendants."

Attempts by this witness to tender some documents vital to plaintiffs case failed. Continuing his evidence, he deposed:

"Another case was between Nwosu (i.e. my father) and Nwanyiaso, it is Suit No. 537/538/1917. The defendants were from Azu Ogbunike. I have a copy of the judgment, which I produce. Ezeuko seeks to tender it. Ogbuli does not object. Admitted in evidence and marked Exh. E.

Sylvester Offiah wrote to my family for a grant on the land in dispute. The letter tendered on 14/5/82 through P.W.9 and marked Exh. I B reject identified by witness. The letter was followed by an agreement - Exh. 2 reject identified.

My family has no boundary on the land in dispute with the Umuezemba family of the defendants. In 1978, P.W.9 was erecting a building on the land we granted him on the land in dispute, but the defendants pulled it down. The defendants claimed the land as their own as well as the entire Ubulu land now in dispute. The defendants ancestors used to pay tribute to my ancestors, but have refused to pay me, inspite of demands. My boundary neighbours on the land in dispute are Umu-nwanyibuaku land up to Ogbangba Central School, land of Uruekwulum up to a foot path, land of Umuanyaeji to a foot path joining our boundary with Umu-Nwanyibuaku.

I claim a customary right to the land in dispute, N1,000.00 damages for trespass and perpetual injunction. I also claim forfeiture of the tenancy of defendants."

(Italics are mine)

Cross-examined, 1st plaintiff testified:

"Some Azu Ogbunike people live on Ubulu land in dispute. The grant was made to their father by my father. They include Beniah Agbapuonwu, Agbakoba Okwudi, Raymond Ikwuemesi, Pius Mazeli. All of them were paying tribute to my father, they have not been paying me, inspite of my demands. My father died in 1967.

I showed P.W.1 the features in Exh. A. I did not include the names of the above 4 in Exh. A. because I have no quarrel with them even though they are my debtors.

*I know Chief Gibson Onwuagbu, Chief Obidinma and Bernard Okakpu, All 3 of them do not live on our Ubulu land in dispute. They live on land of Umu-nwanyibuaku."**(Italic are mine)*

The evidence of the 1st plaintiff who was the star witness for the plaintiffs did not show what acts of possession his family exercised on the land in dispute. No member of the family (and that includes him) is shown to have farms or buildings on the land or do any other thing thereon. His evidence of acts of ownership is in respect of alleged grants made by his father to some people in Azu Ogbunike village but the children of whom have not paid him tribute since his father died in 1967!. The learned trial Judge did

not express any opinion on the evidence of the 1st plaintiff.

Now, the acts of ownership and possession that will support a claim for title to land must extend over a sufficient length of time and must be numerous and positive enough to warrant the inference that the plaintiff is the true owner - see Ekpo v. Ita, (1932) 11 NLR 68, 69. No evidence of such acts of ownership was led in this case. At best what one can say of the evidence of 1st plaintiff is that his father granted land to the fathers of some people from Azu Ogbunike who paid customary tribute to him (1st plaintiff's father) but since his death in 1967, the grantees and their children have refused to pay tribute to 1st plaintiff and have laid claim to the land. Surely such evidence as this cannot by any straining of the authorities be described as evidence "of positive and numerous acts of ownership pointing unequivocally to the fact that he was exercising dominion over the land in dispute" per Coker, J.S.C. in Olujebe of Ijebu v. Oso, Eleda of Eda (1972) 5 S.C., 143, 151. There is no scintilla of evidence of long, continuous and undisturbed possession that can warrant a declaration being made in favour of the plaintiffs. If anything at all, all the evidence shows is that it is the defendants and their people of Azu Ogbunike that are on the land in dispute. There is no evidence that the plaintiffs have any structure on the land. No member of the plaintiffs family gave evidence as to any farming he was doing on the land. Nor is there evidence of what their forefathers did on the land before 1st plaintiff's father started granting portions of it to people of Azu-Ogbunike. It is significant to observe that as pleaded in paragraph 7 of the amended statement of claim and as given in evidence, the plaintiffs so called tenants were mainly from the defendants family of Umuezemba in Azu Ogbunike. On the evidence, they are the only people that appear to have houses on the land. They are indeed the people in actual, physical possession of the land. The evidence for the plaintiffs is completely bereft of the standard of proof required in law to establish title to land. The learned trial Judge, with respect to him, not only failed to make specific findings of fact but failed also to advert his mind to what was required of the plaintiffs to discharge the burden on them to prove their case. Shorn of all irrelevancies in the lead judgment of Uwaifo J.C.A (for example, proof of boundary between the two villages of Amawa and Azu), which irrelevancies, in my respectful view, do not occasion any miscarriage of justice. I think the court below came, on the whole, to the right decision by reversing the trial court on the issue of title. The observations, remarks and findings I have earlier highlighted in the lead judgment of the court below are, in my respectful view, properly justified. This is not a case where an appellate court sets out to ascribe credibility to witnesses other than those to whom same had been ascribed by the trial court. It is a case where

the trial court failed to draw the correct inference or conclusion from the evidence accepted by it. Although there are obvious inconsistencies in the evidence of witnesses for the plaintiffs particularly as to whether the defendants people or some of them built on plaintiffs land at Amawa or on land belonging to Azu Ogbunike, I do not consider it necessary to determine the effect of these inconsistencies on the judgment of the trial court. B

The totality of the evidence adduced by the plaintiffs showed that the defendants and their people of Azu-Ogbunike are the persons in possession of the land in dispute. Possession, as the saying goes, is nine-tenths of the law. To succeed against them the plaintiffs must prove that they are the owners of the land in dispute - see section 146 of the Evidence Act which provides: C

"When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner." D

The plaintiffs failed to discharge the burden on them to establish their title; their claim for title, on their showing, was rightly dismissed by the Court of Appeal.

Having failed on the issue of title, the plaintiffs must necessarily fail on the claim for forfeiture. This disposes of Question (b) posed by me earlier in this judgment. E

While naturally regretting that I have the misfortune to differ from by brethren on the main issue of title. I have no hesitation whatsoever in concluding that this appeal is completely devoid of any merit. If it rests with me, I would dismiss it and uphold the judgment of the court below. F

Appeal allowed in part

MOHAMMED JSC

I agree with my learned brother, Iguh, J.S.C., that this appeal ought to be allowed for the reasons given in the lead judgment, the draft of which I have had the advantage of reading before now. G

It is quite clear from the facts as established by evidence from the pleadings that the appellants had not adduced any evidence in support of their averment in the statement of claim that they owned the land in dispute from time immemorial. Nevertheless, as pointed out by my learned H brother in the lead judgment, proof of ownership of land could well be through showing such acts of selling, leasing, making grant, renting out all or any part of the land or farming on it or a portion thereof extending over a sufficient length of time numerous and positive enough as to warrant the

inference that the persons exercising such proprietary acts are the true owners of the land. See *Ekpo v. Ita* (1932) II NLR 68 and *Mogaji & Ors v. Cadbury Nigeria Limited and Ors* (1985) 2 NSCC 959 at 991 (1985) 2 NWLR (Pt. 7) 393. The learned trial Judge, contrary to the findings of the Court of Appeal, reviewed the evidence before him and came to a correct conclusion by preferring the evidence of the appellants and their witnesses to that of the defendants and their witnesses. It cannot be correct to say that there is no evidence that the appellants family farmed the land in dispute. The evidence of P.W.7 Ezenagu Onyenyoizina, stands as a proof of farming the land in dispute by the appellants. In his evidence P.W.7 said:

"I know the land in dispute. It is called UBULU land. The land in dispute belongs to the family of the plaintiffs. I used to cut palm fruits from the land in dispute. Plaintiffs wives collect the palm fruits and pay me for cutting them. Only plaintiffs collect the fruits. No one ever challenged me while cutting the fruits. I was cutting the fruits both before and after the Civil War."

Above is positive evidence of farming. Farming does not stop in growing cassava, yams or rice. Any plantation or harvest of economic trees is an act of farming.

The learned Justice of the Court of Appeal who wrote the lead judgment, found fault in the findings of the learned trial Judge wherein the trial court attached probative value to the evidence of P.W.3, P.W.6, P.W.7 and P.W.9. These witnesses are members of respondents family. They testified to the fact that the appellants were the owners of the land in dispute. I cannot see how the learned trial Judge could have erred in this finding. For I cannot see how an owner could give evidence and say that his family's land in which he lives is owned by someone else. The evidence of P.W.3, P.W.6, P.W. 7 and P.W.9 is indeed evidence against interest.

The Court of Appeal thereafter embarked on re-evaluating the findings of fact made by the trial court. The principle of law upon which an appeal court could interfere with or reverse findings of fact made by a court of trial have been stated in the English case of *Waft or Thomas v. Thomas* (1947) AC 484 and approved several times by this court. See *Chief Frank Ebba v. Chief Warri Ogododo & Anor* (1984) 4 Sc. 84 (1984) 1 SCNLR 372. The undisputable fact is that the trial Judge has seen and heard the witnesses, whereas the Appeal Court is denied that advantage and only has before it a written transcript of their evidence. No one would seek to minimise the advantage enjoyed by the trial Judge in determining any question whether a witness is or is not trying to tell what he believes to be the truth, and it is only in rare cases that an appeal court could be satisfied that trial Judge

has reached a wrong decision about the credibility of a witness. But the advantage of seeing and hearing a witness goes beyond that: the trial Judge may be led to a conclusion about the reliability of a witness's memory or his powers of observation by material not available to an appeal court. Evidence may read well in print but may be rightly discounted by the trial Judge or, on the other hand, he may rightly attach importance to evidence which reads badly in print. Of course, the weight of the other evidence may be such as to show that the Judge must have formed a wrong impression, but an appeal court is and should be slow to reverse any finding which appears to be based on any such considerations. See *Benmax v. Austin Motors Co. Ltd.* (1955) A.C. 370 at 375.

In a case like this one where the traditional history is not helpful the evidence of positive acts of ownership as given by the appellants is enough to convince the trial court to decide in their favour. It is for this reason that I agree with the learned trial Judge that evidence of PW.3, PW.6, PW.7 and PW.9 is cogent in establishing the fact that the land in dispute is owned by the appellants.

For these reasons and the fuller reasons in the lead judgment this appeal is allowed. The Judgment of Court of Appeal is set aside. In its place I hereby restore the judgment of Awogu J (as he then was) of the High Court of Anambra State. I abide by the order made by my learned brother on costs.

ONU JSC

I have read in advance the judgment of my learned brother Iguh, J.S.C. and I am in entire agreement with him that this appeal succeeds and it is allowed by me.

In adding a few comments of mine to the comprehensive judgment of my learned brother Iguh, J.S.C. wherein the entire case by and large turned on the facts, the appellants herein who were plaintiffs, claimed against the respondents who were defendants, in their amended statement of claim in the following terms:-

“(a) Declaration that the plaintiffs are entitled to the Customary Right of Occupancy under Ogbunike Customary Law to the piece and parcel of land situate at Amawa in Anambra Local Government Area and commonly called UBULU LAND and shown on plaintiff's plan and therein verged yellow.

(b) N1,000.00 Damages for trespass.

(c) Injunction restraining the defendants, their servants and/or agents from further trespass to the said land

(d) Forfeiture of the defendants tenancy on the land."

From the pleadings filed and exchanged in the trial court, it was clear that the appellants claim for customary right of occupancy was predicated on acts of ownership and possession. At the conclusion of evidence, the learned trial Judge Awogu J. (as he then was) in a considered judgment granted the appellants the declaration they sought although dismissing their claim for trespass, injunction and forfeiture.

As both parties were dissatisfied with the decision of the trial court, the appellants appealed against the dismissal of their claim against forfeiture while the respondents grouse was against the declaration of the Customary Right of Occupancy granted in favour of the appellants. The Court of Appeal (hereinafter referred to as the court below) in a considered judgment dismissed appellant appeal for forfeiture while allowing the respondents appeal against the declaratory relief awarded to the appellants.

The appellants are aggrieved by this decision and have further appealed this court on five original, and later with leave, five grounds in substitution therefor. Of the seven issues proffered by the appellants for our determination the exchange of briefs that took place between the parties in accordance with rules of this court, I need only set out hereunder issues 1 to 6 since issue seven who complains that:

"Was the High Court right in refusing to make an order for forfeiture when the defendants were sued not in a representative capacity but in their personal capacities" being an attack on the decision of the trial court and not that of the court below is in my view, incompetent and is accordingly struck out. See *Oloriode v. Oyebe* (1984) 5 SC 1 at pages 16, 21 and 28 (1984) 1 SCNLR 390. The six remaining issues are:-

1. Whether the Court below was right in holding that the High Court did not appreciate or pay regard to what the plaintiff must prove in support of their claim for a declaration of title to the said land.

2. Whether the Court below was right in holding that the High Court failed to determine whether the plaintiffs have discharged the burden of proof which lay on them in this action.

3. Whether the Court below was right in holding that the plaintiffs did not prove acts of ownership and possession over the land in dispute.

4. Whether the court below was right in dismissing the appellants case in the light of the evidence led and the findings of fact of the learned trial Judge. Put the other way is the court below competent to substitute the findings of the trial court with its own findings when the findings of the trial Court accurately reflect the evidence before it.

5. Whether the Court below was right in holding that the boundary

witnesses are unnecessary having regard to the value attached in law to boundary witnesses. Put the other way are boundary witnesses necessary only where the boundary is in dispute

6. Whether the Court below was right in holding that the High Court gave undue weight to the number (i.e. quantity) rather than credibility (i.e. quality) of witnesses who testified before it or did it give undue weight to certain witnesses. B

I wish to deal with all six issues formulated by the appellants which, to all intents and purposes, encapsulate the four distilled in the respondents Brief, together as follows:-

The court below having held inter alia that - C

"It can therefore be taken that the plaintiffs rely on (a) acts of possession as their root of title and (b) acts of ownership i.e. alienating renting and farming as pleaded in paragraphs 4, 5 and 6 of the statement of claim. Such acts of possession and ownership constitute two of the five ways of establishing title to land as laid down by the Supreme Court" in my view D provided the answer to the first and second issues in relation to which the questions posed consist of "Whether the court below was right in holding that the High Court did not appreciate or pay regard to what the plaintiffs must prove in support of their claim for a declaration of title to the said land" E

and *"whether the court below was right in holding that the High Court failed to determine whether the appellants have discharged the burden of proof which lay on them in this action."*

What indeed the court below ought to have borne in mind instead of disturbing the findings of fact of the trial court in this respect was to have F adverted its attention to the fact that there are five ways or methods of proving title set out by this court in the case of *Idundun & ors. v. Okumagba & ors.* (1976) 9-10 SC 227. As re-stated by this court recently in the case of *Nwosu v. Udejaja* (1990) 1 NWLR (Pt. 125) 188 at 218 the principle postulates that *"Each of the [five] methods will suffice independent of the others G to prove the title. So in a case like this in which the appellant's case was based on ownership by grant, it is a misdirection to insist additionally that he had also to prove additional acts of ownership extending over a long time and numerous and positive enough to warrant the inference that he was an exclusive owner. It is enough if he proves the grant."* H

See also *Sunday Piaro v. Chief Wopnu Tenalo & ors.* (1976) 12 SC 31 at pages 42-43 and *Okonkwo v. Okolo* (1988) 2 NWLR (Pt. 79) 632 at page 656.

When therefore the court below (per Uwaifo, J.C.A.) held that -

“From the manner the trial Judge considered this case, first he did not seem to bear in mind what the plaintiffs were expected to prove.”

What the learned Justice would seem to impute the appellant did was that of the five ways of proof of ownership, to wit:

- B 1. by traditional evidence;
 2. by production of documents of title which are duly authenticated;
 3. by acts of ownership, that is by acts of selling, leasing, renting out all or part of the land, or farming on it or on a portion of it
 4. by acts of possession and enjoyment of the land; and
 5. by proof of connected or adjacent land in circumstances rendering
 C it probable that the owner of such connected or adjacent land would, in addition, be the owner of the land in dispute

they (appellants) would seem to rely on principles 1,3 and 4 respectively but that they failed to establish all three principles, both in their pleadings and evidence. I respectfully beg to disagree with him.

- D It is trite law that an appellate court would be slow to disturb or reverse findings of fact made by the trial court unless such findings are shown to be perverse having been based on inadmissible evidence or relevant and admissible evidence having been rejected which in either case occasioned a miscarriage of justice. See *Adimom v. Ajufo* (1988) 3 NWLR
 E (Pt. 80) 1; *Okafor v. Idigo* (1984) 6SC.1; (1984) 1 SCNLR 481 and *Ebba v. Ogodo* (1984) 1 SCNLR 372; (1984) 4 SC 84 at 98. From the above it became inescapable that there being ample evidence and the law to back the trial court’s judgment from which the learned trial Judge could come to no other decision than the one he did, the court below was wrong to disturb
 F the findings of fact of the trial Judge. At the end of the day, the question to ask is not what the trial Judge bore in mind but the evidence available in proof of the pleaded acts of ownership and possession. See *Hassan Saidi v. Nigerian Automobile Co. Ltd.* (1956) 1 FSC 107 and *Alhaji A. W. Akibu v. Joseph Opaleye* (1974) 11 SC 189.

- G Such acts of ownership in the instant case first came in the evidence of the 1st plaintiff/appellant that he and his co-plaintiff/appellant made grants or pieces of Ubulu land to tenants in return for payment of tribute, pin-pointing thereby names of various persons, dead and still alive along with some of the grantees such as P.W.3 P.W.7 and P.W.9 who testified; albeit that the Memorandum of Agreement tendered through P.W.9 was
 H rejected in evidence, but which disclosed overwhelming acts of ownership or possession. Secondly, the evidence of PW3 P.W.6, P.W.7 and P.W.9 who are relations of the respondents in support of the appellants case in this respect and which is a manifestation of evidence against interest - See

Emmanuel Taiwo Ayeni & 3 ors. v. W.B. Sowemimo (1982) 5 SC 60, 85 - justified the trial court's decision. In this regard, I can do no better than quote from the following extract in the trial court's judgment, to wit:

"The burden is, of course, on the plaintiffs to prove the declaration sought. For this purpose, the 1st plaintiff gave evidence in support of the averments in the statement of claim and also called 9 witnesses. Of these PW.3, PW.6, PW.7 and PW.9 were from the family of the defendants, but their evidence was to the effect that the plaintiffs of Amawa owned the land in dispute ...It is shown verged green on the defendants plan, Exhibit "E"

On the calling of boundary witnesses, it is as clear as day-light that the appellants adduced this in the evidence on PW.2, PW.4, PW.5 and PW.8 on record, whereas the respondents called none. Based on such witnesses evidence, the learned trial Judge went on to hold that he preferred the evidence of the appellants and their witnesses to that of the respondents and their witnesses. He thereafter, quite rightly and justifiably, in my view, proceeded to grant the appellants the customary right of occupancy they sought in respect of Ubulu land delineated and verged yellow in Exhibit "A" and shown verged green on respondents plan, Exhibit "E" (supra).

Taking the above preponderance of evidence into account, I agree with the appellants submission that the court below was in grave error to have proceeded to substitute its views of the facts for the views of the trial court when it held, inter alia:

"...that the preponderance of evidence of acts of possession is clearly on the side of the defendants even from the evidence adduced by the plaintiffs."

That this must be so can be deciphered firstly, from the point that the respondents evidence was based on acts of possession on the land in dispute by the appellants which the trial court accepted. These, by and large, included grants of parts of the land made to the respondents and members of their families for residential and farming purposes on payment of annual tributes to the appellants, all at the instance of the appellants. For instance, the 1st plaintiff/appellant, Nelson Onwugbufor, testified inter alia thus:

"...In 1978, PW.9 was erecting a building on the land we granted him on the land in dispute, but the defendants pulled it down. The defendants claimed the land as their own as well as the entire Ubulu land now in dispute. The defendants ancestors used to pay tribute to my ancestors"

PW.3 Udenze Obeagha, in his testimony before the trial court said inter alia that -

"I know the land in dispute. It is called UBULU Land. It belongs to the family of the plaintiffs. They are of Uru-Okpala family. Plaintiffs gave my father a portion of the land where he lived on Ubulu land, outside the area now in dispute."

B PW.7 Ezenagu Onyenyoizina, gave the following evidence among others when examined-in-chief:

"I know the land in dispute. It is called Ubulu land. The land in dispute belongs to the family of the plaintiffs. I sued to cut palm fruits from the land in dispute. Plaintiffs wives collected the palm fruits and pay me for cutting them "

C And PW.9 Sylvester Offiah, had the following inter alia, to say in respect of the land in dispute.

"The plaintiffs gave me the land under native law and custom. The plaintiffs are to take back the land if I no longer occupy it. I built a house on the land about 5 years ago, but 1st defendant broke it down..... "

D It is noteworthy, firstly that the above three witnesses for the appellants, viz PW.3, PW.7 and PW.9 from the respondents Azu Village and who testified for the appellants, are some of the customary tenants of the appellants family on the land while PW.2, PW 4 and PW.8 are boundary witnesses.

E Secondly, a careful perusal of the entire record reveals nothing to indicate that the preponderance of evidence tilted in favour of the respondents and against the appellants. The evaluation and ascription of probative value of such evidence being the primary function of the trial court which saw, heard and assessed the witnesses evidence, the court of appeal was wrong indeed, has no business to interfere therewith or substitute its

F own view for those of the evaluated and appraised evidence. See Balogun v. Agboola (1974) 1 All NLR (Pt. 2) 66; Omoregie v. Idugiemwanye (1985) 2 NWLR (Pt.5) 41 at 42; Oladehin v. Continental Textile Mills Ltd. (1978) 2 SC 23 at 35 and Nzekwu v. Nzekwu (1989) 2 NWLR (Pt. 104) 373. The court below ought to have approached any findings of fact of the trial court with caution. This, it failed to do in this case.

G On the issue whether the court below was right in holding that the High Court gave undue weight to the number (i.e quantity) rather than credibility (i.e. quality) of witnesses who testified before it or gave undue weight to certain witnesses, the holding of the court below, among others " that a case is not proved by the number of witnesses called by a party but by the quality of the evidence led."

in overturning appellants' case cannot in my opinion, be justified or sustained more so in the light of what transpired in the trial court. Quite apart from there being no justification for saying that quantity supplanted

quality in the evidence accepted by the trial court, I am of the view that to so hold as did the court below, is preposterous. Rather, the trial court in the instant case fully evaluated and appraised the evidence adduced before it and that it was rather the court below that erroneously found that there was a wrong assessment appraisal and/or evaluation by the trial court which had weighed the evidence adduced before it on the proverbial scale, before arriving at the conclusion it did. See *Mogaji v. Odofin* (1978) 4 SC 91 at 93/94; *Woluchem v. Gudi* (1981) 5 SC 291 at 309; *S.B. Fashanu v. M.A. Adekoya* (1974) 6SC 83 at 91; *Akpapuna & ors v. Ohinzeka II & ors* (1983) 7 SC 1 at 26 (1983) 2 SCNLR 1; *Akinola & ors v. Oluwo & ors.* (1962) 1 SCNLR 352; (1962) 1 All NLR 224 at 227 and *Incar Nig. Ltd. v. Adegboye* (1985) 2 NWLR (Pt. 8) 453 at 458.

On the preliminary objection filed by learned counsel for the respondents on the competence of Ground (iv) in the Notice of Appeal filed on 13th April, 1992 as well as to the competence of the REPLY BRIEF of no date purportedly filed on 11th November, 1993, we had indicated on 9th October, 1995 when we heard this appeal that we would give our ruling thereon today in this judgment. It will suffice it to say here that action of learned counsel in moving it being belated, I wish to point out that having been in court to watch learned Senior Advocate, Chief Williams, argue his appeal on his brief and he (learned counsel for the respondent) also arguing his appeal on the respondents Brief, for him to wake up late in the day to talk of moving his notice of preliminary objection, is to say the least, a belated act. It is for this reason that I discountenance the notice of preliminary objection, which by the events recounted in the main body of my judgment just read, makes it clearly to be overtaken by events.

For these reasons and the fuller ones contained in the lead judgment of my learned brother Iguh, J.S.C. I too allow the appeal and make the same consequential orders inclusive of costs as therein made.

H