

SUPREME COURT OF NIGERIA
13TH DECEMBER, 1996. SC. 118/1992
CORAM:- S. M. A. BELGORE, I. L. KUTIGI, M. E. OGUNDARE,
E. O. OGWUEGBU, Y. O. ADIO, JJSC.

LIGALIADEREMI ADESHOYE PLAINTIFF/RESPONDENT
AND
ALHAJI FASASI OLOWOLAGBA & ANOR DEFENDANTS/APPELLANTS

EVIDENCE - *Past proceedings and judgment - Where not tendered in evidence - Whether it ought to be considered by the court.*

EVIDENCE - *Burden of proof - It is for the plaintiff - To prove the assertion in his statement of claim.*

LAND LAW - *Possession - Land Use Act - Possession simpliciter - Does not confer entitlement to right of occupancy - As it must be shown that possession was rightly conferred.*

LAND LAW - *Traditional history - Evidence thereof - Whether irrelevant in view of the Land Use Act - Whether the Act wiped away normal methods of acquiring possession.*

LAND LAW - *Root of title - Where defendant's evidence thereon was not controverted - Whether mere possession can confer right of occupancy - Upon the plaintiff under the Land Use Act.*

LAND LAW - *Previous Supreme Court judgment - Where very limited in scope - That no link can be established between the parcels of land in issue - That judgment should not be relied upon.*

LAND LAW - *Title - In view of defendant copious evidence of recent possession - Whether the trial court erred by disbelieving them.*

FACTS

The plaintiff/respondent filed an action before the Lagos High Court against the defendants/appellants claiming declaration that he was entitled to a statutory right of occupancy, N200,000.00 special/general damages and perpetual injunction in respect of the land in dispute. Plaintiff traced his title through his mother to one A. T. Bakare and relied on two deeds of convey-

ances. He did not establish Bakare's root of title. He sought to rely on a previous Supreme Court judgment that was not linked to the land in dispute by any evidence. The defendants by credible evidence traced their root of title to their ancestors and also relied on evidence of recent possession.

The trial court disbelieved the evidence of the defendants and found for the plaintiff. Defendants' appeal to the Court of Appeal was dismissed. The lower courts seem to have the view that since the plaintiff was in pm session, he was entitled to right of occupancy under the Land Use Act, irrespective of how he secured that possession. Being dissatisfied, one of the defendants has further appealed to the Supreme Court raising two issues.

ISSUES FOR DETERMINATION

"1. Whether, having accepted that the Plaintiff failed to establish his root of title having regard to the claims, the pleadings and the evidence led and the complaints of the defendants about the wrong evaluation of evidence and misdirections by the learned trial Judge, the Court of Appeal was justified in affirming the decision of the learned trial Judge entering judgment for the Plaintiff declaring him titled to a statutory right of occupancy over and possession of the land in dispute and granting an injunction restraining further trespass?"

2. Whether the Court of Appeal was correct in affirming the decision of the learned trial Judge on damages?"

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

Possession - Land Use Act

1. The global view of the Court of Appeal on this matter seems to be that once you gain possession by whatever means, the Land Use Act automatically confers the right to be on the land in question through statutory right of occupancy if applied for; I find this stand a great misinterpretation of the Land Use Act. By finding possession through someone whose right to be on the land not extending beyond that person is an unjustified assault on the intent of the Act, i.e. S. 39(1) of the Act which sets out the relief that the High Court may grant. The Act in Section 40 is very clear as it sets out clearly what should be done by the court in actions on land pending before 29th March, 1978, the date the Act came into operation. Possession simpliciter will not automatically confer right of statutory or customary right of occupancy, it must be shown that that possession was rightly conferred. The Court must look further beyond the possession. (p. 1962 F)

Traditional history - Evidence thereof

2. The 1st Defendant, traced the history of the land that was with his family over generations of which the one now in dispute forms part; both Courts held this traditional history was irrelevant in view of the Land Use Act. Land Use Act is unfortunately not a monster it is being portrayed to be, neither has it wiped into oblivion the normal methods of acquiring, possession through title or non-adverse possession; what the Act has done is to superficially control the land use by granting certain rights and converting existing rights as statutory right of occupancy or customary right of occupancy. In the present case, one party led copious evidence of traditional history through family roots that gave right to the land and possession; the other gave evidence of purchase through A.T. Bakare, but nothing before the courts about how Bakare came about the land. The claim based on the root through this Bakare, in my considered view, goes nowhere to establish claim to the right of statutory or any right of occupancy in the plaintiff as the Courts below seemed to view the matter. (p. 1963 D)

Root of title

3. The evidence of the 1st defendant, as detailed as it is as to the root of title never controverted by the plaintiff, now respondent. The trial Court indeed the Court of Appeal erred by holding that the Land Use Act consumed all the previous rights on land and once a person is in possession no more, by whatever means, confers on that holder the right to statutory right of occupancy or customary right of occupancy. That revolution on land holding has not taken place. *Mogaji vs Cadbury* (1985) 2 NWLR (Pt. 7) 393; *Ogunleye vs Oni* (1990) 2 NWLR (Pt. 135) 745, 751, 753. (p. 1964 A)

Previous Supreme Court judgment

4. The use of Exhibit 3 is, to say the least, unjustified in the view of its limited scope. The Trial Court held it to be Judgment in rem. The Court of Appeal found this to be wrong and held it to be judgment in personam and that it did not bind the appellants who were not parties to it. By then turning round that it established possession in the plaintiff is a great error by the Court of Appeal; what it took away from the findings of the trial court by the right hand, it gave back by the left hand. The record of proceedings in Exhibit 3 is not before the courts below and no link could be established between land addressed in that case and the one now in dispute. Similarly, except mere conjecture the respondents in Exhibit 3 cannot be linked with the defendant in this case now on appeal. The position taken on this Exhibit 3 by the Courts below certainly

offends sections 76 and 132 of Evidence Act. (p.1964 C)

Past proceedings and judgment

5. The proceedings as well as the judgment in the suit IK/168/1975 was not exhibited and demonstrated before the Courts below though it was pleaded. As no evidence was led as to its contents which could only be done if it was tendered; the Court erred in giving it consideration. (p. 1964 F)

Burden of proof

6. It is always for the plaintiff who asserts to prove his assertion as in the statement of claim. This he must do and do successfully, to win his case. The 1st defendant in this case appeared to have been saddled with a burden not his own; too much was expected of him to prove while the plaintiff's case was based on fragile evidence as contained in Exhibits 1, 2 and 3. The surveyor, D P.W.4, testified that he had the plan of A.T. Bakare's layout but he never produced it in Court. This was made a strong point in the appellant's case in the Court of Appeal but that Court erroneously ignored this very important point. (p. 1964 H)

Whether court erred by disbelieving defendants

7. The learned trial judge merely held he disbelieved the defendants and believed the plaintiff. He was in error in doing so in view of the evidence and the claim in this case. The 1st appellant copiously produced the evidence of traditional root of his title, and also of recent possession as indicated in the evidence of D.W.2; the Court of Appeal omitted advertng to this important evidence. Both parties relied on different roots to the right on the disputed land. The plaintiff claimed his root of title from A.T. Bakare without explaining how Bakare got there, and on the Land Use Act; the 1st defendant and the appellant relied on traditional history and recent acts of possession. G (p. 1965 B)

NOTABLE POINTS OF INTEREST

OGUNDARE.JSC

1. Whether plaintiff established his title

H On the question as to whether the plaintiff established his root of title, I find myself unable to agree with the Court below in the distinction it made between a claim for declaration of title and a claim under the Land Use Act, for a declaration of entitlement to a right of occupancy. The standard of proof required in a claim for a declaration of title is the same as that required in a

declaration of entitlement to a right of occupancy. Indeed, the latter claim arose as a result of the provisions of the Land Used Act whereby Court could no longer grant a declaration of title to land but rather a declaration of entitlement to a right of occupancy. This change in the nature of the claim has, however, not affected the law as to what is required to be wed to sustain the latter claim. (p. 1977 C)

B

2. Where two parties plead possession

It is settled law that where two parties in an action for title both plead possession, to determine who has the better right to possession, it is to title that the Court must turn. That is the position in the case on hand. Unless the Plaintiff could prove that he had a better right to possession in the sense that he had a better title than the Appellant, he could not defeat the latter. The Court below is, therefore, clearly in error in saying that title was not involved in this case. (p. 1977 H)

D

3. Judgment in personam - Binding effect thereof

As the Court below rightly found, Exhibit 3, contrary to the finding of the trial Judge, is not a judgment in rem. Being a judgment in personam, it is binding only on the parties to it and their privies. It is certainly not binding on the Defendants who were neither party to the judgment nor privy to any of the parties involved in it. Secondly, there is nothing in Exhibit 3 to identify the land to which it relates and the plan used in that case was never tendered in evidence in the present proceedings. Thus, no evidence was led to show the land in litigation in Exhibit 3 let alone that the land presently in dispute forms part of it. (p. 1978 F)

F

REPRESENTATION

E.O. Sofunde, SAN with M.I. Hanafi for the Appellant

O. J. Tadema Esq. for the Respondent

G

CASES REFERRED TO

Aromire v. Awoyemi (1972) All N.L.R. 105, 115

Amakor v. Obiefuwa (1974) All N.L.R. 109, 116

Abioye v. Yakubu (1991) 5 NWLR 5 NWLR (Pt. 190) 130, 236, 2481

Mogaji v. Cadbury (1985) 2 NWLR (Pt. 7) 393

Ogunleye v. Oni (1990) 2 NWLR (Pt. 135) 745 751, 753

Ekueku v. Aniola (1988) 2 NWLR (Pt. 75) 128

Nzekwu v. Nzekwu 1 NWLR (Pt. 124) 501

Elias v. Omo-Bare (1982) 5 SC. 25, 58

H

Abisi v. Ekwealor (1993) 6 N.W.L.R. (Pt.302)

Piaro v. Tenalo (1976) 12 SC 31

STATUTES REFERRED TO

Land Use Act 1978 ss. 39(1), 40

B Evidence Act ss. 76, 132, 134 (3)

LEAD JUDGMENT BY BELGORE JSC

This appeal concerns dispute on land in which the plaintiff (now first
C respondent, as he was at the Court of Appeal) claimed that he purchased it
from his mother by virtue of Exhibit 1, a deed of conveyance. According to him
his mother also purchased it from one Alhaji Asani Taiwo Bakare and the
evidence is Exhibit 2, another deed of conveyance. Till Plaintiff claimed at trial
Lagos High Court that he was in possession of the land (now No. 57 Allen
D Avenue, Ikeja, Lagos), when Grace Okpalugo now appellant, and Alhaji Fasai
Olowolagba (referred to in the appellant's brief of argument as "second re-
spondent" when in fact he is passive party to the appeal as he neither ap-
pealed, much less filed a brief) trespassed on it. Apart from the conveyances
which are Exhibits 1 and 2 aforementioned, the plaintiff also relied on Exhibit 3,
E judgment of Supreme Court delivered on 16th day of December, 1974 [Coram:
Elias, C.I.N., Sowemimo, J.S.C.
and Ibekwe, J.S.C. reading as follows:-

*"Judgment of the Court
(delivered by Elias C.I.N.)*

F *Between A. T. Bakare v. I. Karimu Owodina*

2. Saka Owodina

*Appeal is allowed. The judgment appealed from is set aside. The
appellant is declared the owner of the land in dispute. Costs assessed at
N80.00 in the Court below and at N127. 00 in this Court.*

G *The other reliefs sought are hereby granted as per Plaintiff's Writ."*
This short judgment was perhaps written instantly on the Bench for it has not
set out all the facts and the arguments of the parties. It has also not set out the
land in dispute even though the appellant is the same A. T. Bakare, mentioned
by the respondent as his root of title and the suit was not, as in the one now
H at hand, in a representative capacity. The claim of the plaintiff at the trial court
was for declaration that he was entitled to "a statutory right of occupancy" in
respect of the land in dispute, N200,000.00 as special and general damages for
trespass and perpetual injunction to restrain the defendants, their servants
and or agents from entering or committing further acts of trespass on the land

in dispute. The special damages claimed were set out as follows with the general damages:

1. Cost of purchase of the land in dispute together with their structures and blocks and building materials	N75, 000.00
2. Cost of drawing, building and structural plan	N 5,000.00
3. General damages	N120, 000.00
Total:	200,000.00

The defendants on their own set out the traditional history of their connection with the disputed land. In the Statement of Defence, the Defendants clearly in paragraphs 17, 18, 19, 20, 21, 22, 23, 24, 25, 26 and 27 set out how one Amore first settled on the land of which this one now forms parts and exercised absolute rights thereupon. Amore died several years ago but left six children, to wit, Fayemi, Matemi, Faluyi, Olabisi, Omolabake and Aileru, Amore, before his death, partitioned the land among his children and each had vested in him or her absolute right. The defendants are defendants of Matemi, the second child of Amore. Matemi died leaving seven children and her children never partitioned the land. Sunmonu Apena headed the family, at his death, his son Tiamiyu Sunmonu Apena; and After Tiamiyu Sunmonu Apena, the 1st Defendant, Alhaji Fasasi Olowolagba became the head of the family.

The trial Judge generally held that he believed the plaintiffs and that the defendant's evidence was unsatisfactory by holding as follows:

"1. The Plaintiff had established his ownership of the land through exhibits 1 and 2, (the deeds of conveyance of his vendor and himself), exhibit 3 (the Supreme Court judgment between his predecessor in title and Karimu and Saka Owodina who were strangers to the parties to this case) and the oral testimonies of the witnesses.

2. The Defendants' evidence was unsatisfactory and in the face of failure to give conclusive evidence of their root of title, failure to give conclusive evidence of recent user, failure to prove the extent of the land originally settled on by Amore (the Defendants' predecessor in title) and the admission of the 1st Defendant that his family lost the action in the High Court against A. T. Bakare (the predecessor in title of the Plaintiff) which action was pending on appeal, they ought to lose.

3. The Defendants were liable in trespass but only in respect of special damages claimed for the cost of drawing a building and structural plan for which he awarded N5,000.00 and general damages for which he awarded N100.00. " (Brackets mine for emphasis)

Being aggrieved by this decision the defendants appealed to the

Court of Appeal. The complaints at the Court of Appeal were that:

i. the plaintiff failed to establish his root of title

ii. Exhibit 3, Supreme Court judgment in SC. 121/1994 (Supra) was wrongly relied upon as conferring title on the plaintiff

iii. the learned trial Judge wrongly relied on a case No. ID/168 / B 1975 before Lagos High Court but not tendered as evidence in Court even though pleaded but not admitted.

iv. there were errors and misdirections by the trial Judge in evaluation of evidence, and

v. the award of damages was erroneous in law."

C The Court of Appeal in its judgment dismissing the defendants' appeal arrived at some far reaching conclusions. It held that though the Plaintiff failed to establish his root of title beyond A. T. Bakare, whose root of title is unknown, that shortcoming would not avail the defendants because the plaintiff's claim was "statutory right of occupancy" and not title because he was in possession. On the contention that Exhibit 3 (Supreme Court Judgment) was wrongly used as confirming the title of the plaintiff, it held that learned judge indeed erred but that it was proved that the predecessor in title of the plaintiff (i.e. A. T. Bakare), had some relationship with the disputed land and held that as a result of the evidence of the fourth plaintiff's witness (P.W.4), the Surveyor, E the disputed land related to Exhibit 3. As to the use of the suit No. *IK/168/1975* against the Defendants, the Court of Appeal held that it was a correct approach by the trial Court even though the case was never before the trial Court as an Exhibit. Court of Appeal however never made any finding on misdirection by the trial court on the claim of P. W.2 that she was put in F possession of the land in dispute. It also never pronounced on the trial Court's rejection of the defendants' defence about the extent of the land originally settled on by their predecessor in title. The same lapse, according to the appellant, can be found in the plaintiff/respondent's case at the trial Court; at any rate the plaintiff never went beyond A. T. Bakare whose antecedents on G the land remains unknown in the proceedings in this appeal.

In the appeal before this Court the appellant raised the following issues:

H *"1. Whether, having accepted that the Plaintiff failed to establish his root of title having regard to the claims, the pleadings and the evidence led and the complaints of the defendants about the wrong evaluation of evidence and misdirections by the learned trial Judge, the Court of Appeal was justified in affirming the decision of the learned trial Judge entering*

judgment for the Plaintiff declaring him titled to a statutory right of occupancy over and possession of the land in dispute and granting an injunction restraining further trespass?

2. *Whether the Court of Appeal was correct in affirming the decision of the learned trial Judge on damages?"*

What is remarkable in this case is that the Court of Appeal held that the plaintiff/respondent's root of title was not proved at the trial court that based on the claim before the trial court for declaration of right to statutory right of occupancy, the claim was proved. This was in the light according to the Court of Appeal, of the Land Use Act 1978. It is pertinent to quote the Court of Appeal rationale on the issue of Exhibits 2 and 3 reading as follows: C

"The appellants have criticized the declaration made on the ground that Exhibit 2 and Exhibit 3 upon which the learned Judge relied in giving judgment for the respondent did not show a better title or a superior title to that of the appellants.

Exhibit 2 does not tell how Bakare became owner of a large parcel D of land. The nature of his ownership, whether it is by settlement, purchase lease or possession. Exhibit 3 i.e. the judgment of the Supreme Court simply said Bakare is the owner of the land in dispute in that case and did not tell us more about how he came to own the land.

In short the origin of title of the predecessor in title of the respondent is very vague. I think the answer to this criticism is very simple. A look at the claim would reveal that respondent is not asking for declaration of title. What he is asking for is that he is entitled to a statutory right of occupancy based upon his possession of the land in dispute. Presumably he intends to use the judgment so obtained to get a statutory right of occupancy F under the Land Use Act from the Military Governor of Lagos State.'

The criticism of the appellants could have been relevant and may be sustained if this claim was for a declaration of title by the respondent. This distinction is important since the introduction of the Land Use Act. A right to a Certificate of Occupancy could either be based and grounded on G the fact that you have title, possession, leasehold or whatever interest you have in the land.

A declaration of right of occupancy, which is what the respondent wanted, could be based on possession which is what he is claiming and that is what he asking for in this case.

It is sufficient in my view for him as he did to prove that his predecessor in title, i.e. A. T. Bakare was declared an owner of the land comprised in the judgment in Exhibit 3. That the disputed land is within the layout of A. T. Bakare which has been approved by the Planning Authority.

The learned Judge made findings upon possession, due execution of the conveyance to the respondent's predecessor in title, Exhibit 2. These findings which were rightly made were based upon the evidence of PW1, PW2, PW3 which the learned Judge accepted,

It is true that the learned Judge did not accept the evidence of the appellants and the story of the traditional history of the settlement on the land in dispute. The issue as I said as postulated by claim 1 in the respondent's writ of summons is, who is in possession of the land in dispute and not as to who owns the land in dispute.

On this, the judgment of the court below cannot in my view be faulted. It is true that the judgment in Exhibit 3 of the Supreme Court is not against the family of the 1st appellant because they were not parties to the Judgment. But the matter does not end there.

The judgment is relevant in the present proceedings as showing that the predecessor in title of the respondent had a relationship to which ever land is encompassed, or embraced or comprised in Exhibit 3. It is not a judgment in rem as the learned trial Judge said, and as rightly conceded by the respondent, it is a judgment in personam. It does not bind the appellants, but as it has transpired in evidence, there is the judgment of the court in Suit No, IK/168175 which the 1st appellant lost while fighting on the issue of trespass against A. T. Bakare."

Learned Justices of Court of Appeal proceeded on this premise admit that the parties never tendered the judgment in IK/168/1975, Whose appeal was either pending in their Court or already decided, but it would suffice for the purpose of facts before them "that the facts as deposed by the first appellant shows that he lost the case for trespass on WHAT MUST BE THE LAY-OUT OF BAKARE from Exhibits 1 and 2, the deed of conveyance relied upon by the respondent,

The global view of the Court of Appeal on this matter seems to be that once you gain possession by whatever means, the Land Use Act automatically confers the right to be on the land in question through statutory right of occupancy if applied for, I find this stand a great misinterpretation of the Land Use Act. By finding possession through someone whose right to be on the land not extending beyond that person is an unjustified assault on the intendment of the Act, i.e. S. 39(1) of the Act which sets out the relief that High Court may grant. The Act in Section 40 is very clear as it sets out clearly what should be done by the court in actions on land pending before 29th March, 1978, the date the Act came into operation. Possession simpliciter will not automatically confer right of statutory or customary right of occupancy, it must be shown that that possession was rightly conferred. The

Court must look further beyond the possession. The traditional history of the land; the right to title before the Land Use Act which was subsisting up to when the Act came into commencement; who was in effective control of the land without challenge and not in stealth; all these must be put into focus. B Exhibit 3 for its remarkable brevity has not indicated how A.T. Bakare came by plot of land now in issue; it is not even clear whether it concerns the land now in dispute. It is true Exhibit 3 is between A.T. Bakare and Karimu Owodina and Saka Owodina. It is not shown that the defendants/respondent that appeal were by any way agents of relations of, or privies to the present 1st Defendant. Possession based on transfer through a credible head title in historical perspective is what can ground entitlement to grant of right of occupancy. C (Aromire & Ors. vs Awoyemi (1972) All N.L.R. 105, 115 Amakor vs Obiefuwa (1974) All N.L.R. 109, 116. The Statement of Claim at the trial court, as found by the courts below, avers only that A,T. Bakare passed possession to the plaintiff/respondent, but there is absolute void as to how this Bakare came by the land. **The 1st Defendant, traced the history of the land that was with his family over generations of which the one now in dispute forms part; both Courts below held this traditional history was irrelevant in view of the Land Use Act. Land Use Act is unfortunately not a monster it is being portrayed to be, neither has it wiped into oblivion the normal methods of acquiring possession through title or non-adverse possession; what the Act has done is to superficially control the land use by granting certain rights and converting existing rights as statutory right of occupancy or customary right of occupancy.** D (Abioye & Ors. vs Yakubu & Ors. (1991) 5 NWLR (Pt.190), 130, 236, 2481. F

In the present case, one party led copious evidence of traditional history through family roots that gave right to the land and possession; the other gave evidence of purchase through A. T. Bakare, but nothing was before the courts about how Bakare came about the land. The claim based on the root through this Bakare, in my considered view, goes nowhere to establish claim G to the right of statutory or any right of occupancy in the plaintiff as the Courts below seemed to view the matter. The appellant's root of title must not be cursorily ignored in view of the plaintiff's simple claim through this Bakare. Exhibit 3, without more proves nothing in this case; it only established against the respondents therein the right of A. T. Bakare. The respondents in Exhibit3 H are neither linked by evidence or pleadings with the 1st defendant in this appeal; the land in Exhibit 3, unfortunately without further and better evidence cannot be linked with the land now in dispute, The evidence of the surveyor being extrinsic cannot be linked with Exhibit 3, nor could Exhibit 3 be

linked with this disputed land. The evidence of the 1st defendant, as detailed as it is as to the root of title was never controverted by the plaintiff, now respondent. The trial Court and indeed the Court of Appeal erred by holding that the Land Use Act consumed all the previous rights on land and once a person is in possession and no more, by whatever means, confers on that holder the right to statutory right of Occupancy or customary right of occupancy. That revolution on land holding has not taken place. (Mogaji vs Cadbury (1985) 2 NWLR (Pt. 7) 393, OgunIeye vs ani (1990) 2 NWLR (Pt. 135) 745,751,753.

The use of Exhibit 3 is, to say the least, unjustified in view of its limited scope. The Trial Court held it to be Judgment in rem. The Court of Appeal found this to be wrong and held it to be judgment in personam and that it did not bind the appellants who were not parties to it. By then turning round that it established Possession in the plaintiff is a great error by the Court of Appeal; what it took away from the findings of the trial court by the right hand, it gave back by the left hand. The record of proceedings in Exhibit 3 was not before the courts below and no link could be established between the land addressed in that case and the one now in dispute. Similarly, except by mere conjecture the respondents in Exhibit 3 cannot be linked with the 1st defendant in this case, now on appeal. The position taken on this Exhibit 3 by the Courts below certainly offends sections 76 and 132 of Evidence Act. (Ekueku vs Aniola (1988) 2 NWLR (Pt. 75) 128, 148, 149; Nzekwu & Ors. vs Nzekwu & Ors., 1 NWLR (Pt. 124) 501. It is only if the identity of the land in Exhibit I, ascertained in Court that some consideration of the evidence of P.W.4. the surveyor, could perhaps link it with the land now in dispute.

The proceedings as well as the judgment in the suit IK/168/ 1975 was not exhibited and demonstrated before the Courts below though, it was pleaded. As no evidence was led as to its contents which could only be done if it was tendered; the Court erred in giving it consideration.

The 1st Defendant described the land as “forming part of a large track of land extending from Ikeja to Ojota and to Mary land up to the Airport Road by the customs and Excise”. The Plaintiff described the land as situate at Alade Village and extending to Oregun Stream, Ikeja in Lagos State of Nigeria “

It is always for the plaintiff who asserts to prove his assertion as in the statement of claim. This he must do and do successfully, to win his case. The 1st defendant in this case appeared to have been saddled with a burden not his own; too much was expected of him to prove while the plaintiff’s case was

based on fragile evidence as contained in Exhibits 1, 2 and 3. The surveyor, P. W.4, testified that had the plan of A. T. Bakare's layout but he never produced it in Court. This was made a strong point in the appellant's case in the Court of Appeal but that Court erroneously ignored this very important point.

The learned trial judge merely held he disbelieved the defendants B and believed the plaintiff. He was in error in doing so in view of the evidence and the claim in this case. The 1st appellant copiously produced the evidence of traditional root of his title, and also of recent possession as indicated in the evidence of D. W.2; the Court of Appeal omitted advertng to this important evidence. Both parties relied on different roots to the right on the disputed C land. The plaintiff claimed his root of title from A. T. Bakare without explaining how Bakare got there, and on the Land Use Act; the 1st defendant and the appellant relied on traditional history and recent acts of Possession. I have held that the rights claimed under the Land Use Act are exaggerated and it is unfortunate that the 1st defendant's case was ignored in its entire Substance. D

I therefore find great merit in this appeal and I therefore allow it. This disposes of the necessity for the consideration of the issue of damages. I enter the verdict of dismissal of the Plaintiff's claim. I award N1,000.00 costs in this Court, N500.00 as costs in the Court of Appeal and N300.00 as costs in the High Court. If costs in the Courts below have been paid, they should be E returned to the appellant.

KUTIGI.JSC

F

I read before now the judgment just delivered by my learned brother Belgore J.S.C. There is no doubt at all that the trial High Court erroneously held that the Plaintiff had established his ownership of the land in dispute through Exhibits 1 and 2 (the Deeds of Conveyance of his vendor and himself, Exhibit 3 Supreme Court Judgment) and oral testimonies of the witnesses. The G Court of Appeal therefore having rightly in my view come to the conclusion that the Plaintiff failed to prove his root of title had no alternative but to have dismissed the Plaintiff's claim. It was wrong and a serous error too, for the Court of Appeal to have held that because plaintiff's claim was not for a declaration of title but for a statutory right of occupancy based on the Land H Use Act Cap. 202 Laws of the Federation of Nigeria 1990, therefore the failure did not matter. It did, and does, matter. It is settled that save for alteration of the reliefs claimable in land disputes, the Land Use Act has not altered the general principles applicable thereto (see for example Abioye & Ors. v. Yakubu

& Ors (1991) 5 NWLR (Pt. 190); Mogaji v. Cadbury (1985) 2 NWLR (Pt. 7) 393; Fasoro & Ors v. Beyillh & Ors. (1988) 2 NWLR (Pt. 76) 236; Eronini & Ors v. Iheuku (198(1) NWLR (Pt.101) 46.

It is for the above reason and others contained in the lead judgment B of Belgore JSC that I too allow the appeal. The Plaintiffs’ case is dismissed. This shall be the order of the lower courts. I endorse the order for costs.

OGUNDARE.JSC

C By a Writ of Summons issued in September, 1980, the Plaintiff (who is now the Respondent) sued, as Defendants, one Alhaji Fasasi, Olowolagba and Mrs Grace Okpalugo (who is now the Appellant) for-

D *“(1) Declaration that the plaintiffs entitled to a statutory right of occupancy and possession of ALL THAT piece or parcel of land known as Plot No. 12 in Block “E” in A.T. BAKARE’S ALLOTMENT situate at Alade Village, Ikeja and now known as 59, Allen Avenue, Ikeja, Lagos State comprising an area of 50’ x 110’ sold and conveyed to the Plaintiff in 1977 and duly registered as No. 55 at Page 55 in Volume 1610 of the Land Registry in the Office at Lagos.*

E *(2) N200, 000.00 [Two hundred thousand naira] being special and general damages for trespass committed on the plaintiff’s aforesaid land by the Defendants, their servants and/or Agents between July and September, 1980.*

F *(3) Perpetual injunction restraining the Defendants, their servants and/or Agents from entering the Plaintiff’s aforesaid land or committing further acts of trespass upon the said land and from further or any other manner of interfering with the rights and interests of the Plaintiff on the said land.”*

G The particulars of damages claimed were given in paragraph 1601 the amended Statement of Claim as follows:-

“(a) SPECIAL DAMAGES:

- 1. Cost of Purchase of the land in dispute together with their structures and blocks and building materials.... N75, 000.00*
 - 2. Cost of drawing Building and Structural Plan*
- H *5,000.00*

(b) GENERAL DAMAGES:

N120,000.00

200,000.00

Pleadings were ordered, filed and exchanged.

In his amended Statement of Claim, the Plaintiff pleaded, inter alia as hereunder:

“2. That the land in dispute covers an area 50' x 110' and is situate at and known as Plot No. 12 in Block E in A. T. Bakare's Allotment at Alade Village, Ikeja, and now known as and described as No. 59 Allen Avenue, B Ikeja.

3. That the Plaintiff bought the said land for valuable consideration in February, 1977 from Alhaja Muniratu Bolaji Adeshoye who immediately in 1977 installed the Plaintiff in possession and the Plaintiff has since been in undisturbed possession till July, 1980. C

4. That Alhaja Muniratu Bolaji Adeshoye bought the land in dispute under Alhaji Sanki Taiwo Bakare (deceased) of 42, Oju Olokun.

5. The Plaintiff avers that he became owner of the land in dispute under and by virtue of the Deed of Conveyance dated 21st February, 1977 and the attached Plan registered as No. 55 at Page 55 in Volume 1610 of the D Lands Registry in the Office at Lagos.

6. The Plaintiff avers that he was installed into peaceful possession of the land in dispute in 1977 by his predecessor in title Alhaja M.B. Adeshoye who in turn derived her title from the original owner A.T. Bakare (deceased) as per the Deed of Conveyance dated 28th January, 1975 between ALHAJA E M.B. ADESHOYE AND A.T. BAKARE and registered as No. 61 at Page 61 in Volume 1484 of the Lands Registry in the Office at Lagos which would be founded upon at the trial of this action.

7. That the aforesaid A. T. Bakare's title and claimed to the land in dispute was confirmed by the Federal Supreme Court in Suit No. SC/121/ F 1974,

Between:

A. T. BAKARE PLAINTIFF/APPELLANT

KARIMU OWODINA AND OTHERS..... DEFENDANTS/RESPONDENTS

8. That the aforesaid A.T. Bakare laid out the land into plots covered by Ikeja Area Planning Authority Approval No. TPA 0429 dated the 10th August, 1971 within which falls Plot No. 12 in Block E, the land now in dispute between the Plaintiff and the Defendants. G

9. That the Plaintiff has already prepared and submitted a Building Plan for Approval on the land in dispute. H

10. That since 1977 the Plaintiff has been in physical possession of the land in dispute and erected a shed and fences thereon and employed a Labourer to do farming works for him on the said land and now produce and marked as EXHIBIT LAA3 the photograph showing the position of the site as

at June, 1980 as a result of the Defendant's acts of trespass on the land.

11. That in July 1980, the Defendants and their Servants/Agent accompanied by hired thugs forcibly entered the Plaintiff's aforesaid land destroyed his sheds, block fences and farming works thereon and I now
B produce and mark as EXHIBIT LAA.4 the photograph showing the position of the site as at July, 1980 as a result of the Defendant's acts of trespass on the land.

14. That the Plaintiff has been in an exclusive and undisturbed possession of the land in dispute since 1977 and exercising overt acts of
C ownership till July 1980 when the Defendants and their Servants/Agents and workmen forcibly and unlawfully entered the land in dispute and destroyed the Plaintiff's structures, fences and blocks thereon."

The two defendants to the action filed a joint Statement of Defence wherein they pleaded, inter alia, as follows:-

D "2. The Defendants deny paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 of the Statement of Claim put the Plaintiff to the, strictest proof thereof

3. With reference to paragraph 2 of the Statement of Claim, the Defendants state that the 2nd Defendant is the owner of a plot of land measuring 495.168 square meters, along Allen Avenue, Ikeja within the Lagos
E State Government, Opebi Scheme No. TPH/003/73 and not an area of land of 50ft x 100ft in Block E in A.T. Bakare's Allotment at Alade Village, Ikeja.

4. The defendants categorically deny paragraphs 3, 4, 5 and 6 of the Statement of Claim and state that neither Alhaja Muniratu Bolaji
F Adeshoye nor the Plaintiff were ever owners of the Defendants' said plot of land; nor were they ever in possession thereof in any manner whatsoever.

5. The Defendants state that they and their predecessor-in-title have been absolute owners of their said plot of land from time immemorial, under
G native law and custom in the manner and particulars hereinafter stated and have remained in undisturbed possession thereof from time immemorial without let or hindrance.

6. The Defendants categorically deny paragraph 7 of the Statement of Claim and state Karimu Owodina and others are unknown to them nor
H have they any interest in their said plot and that Suit No. SC/121/19N is irrelevant to this Suit and the Plaintiff is put to the strictest proof to the contrary.

9. The 2nd Defendant is the owner in possession of all that piece or parcel of land with the building thereon, situate. lying and being on Allen

Avenue, Opebi Scheme, Ikeja and more particularly described with dimensions and abutments on Plan No. R.A. 901 attached thereto and measuring 495.168 square meters more or less, under and by virtue of the Deed of Lease dated the 4th day of September, 1980 but commencing from the day of December 1977 and registered as No. 83 at Page 83 in volume 1804 of the Lands Registry in the Office at Lagos.

10. The Defendants aver that their said plot of land formed part or portion of a large area of land situate lying and being at Ikeja within the Opebi Scheme and which from time immemorial belonged to the Matemi Amore Branch of the Amore Family of Orile Ikeja under native law and custom.

11. The Defendants further state that neither they nor their predecessors-in-title were parties to Appeal No. SC/121/74 and they plead 'res inter alios acta.'

17. The Defendants state that their said plot of land formed portion of vast area of land at Ikeja, which originally belonged to one AMORE, who was the first settler thereupon and was the original owner thereof by prior settlement and thereon exercised absolute rights of ownership from time immemorial.

18. And the said Amore remained in absolute and undisturbed possession of his aforesaid vast area of land until his death several years ago.

19. The said Amore begat six children by one Wife and who succeeded him as follows:-

(1)FAYEMI (ii) MATEMI (iii) FALUYI (iv) OLABISI (v)OMOLABAKE and (vi) AILERU.

20. And before his death several years ago, partitioned his said vast area of land among his six children and one of each child portion vested in wit child, aforementioned as absolute owner thereof under native law and custom.

21. The Defendants state that their ultimate predecessor-in-title are the accredited representatives of the entire descendants of Matemi, the second child of Amore aforementioned and that they remained in absolute and undisturbed possession of Matemi's portion of Amore land as the Matemi branch of the Amore Family.

22. And upon the aforesaid partition of the Amore land, Matemi, the second child thereof had her own portion of the partitioned land vested in her absolute owner thereof, of which the Defendants' plot of land formed moiety.

23. And until her death, the aforesaid Matemi remained in undis

turbed possession of her portion and thereon exercised absolute rights of ownership under native law and custom.

24. *The said Matemi died several years ago and was survived by seven (7) children as follows-*

B (a) ODAYEMI (alias ADELEMO) (b) ABORISHADE (c) AYISATU
(d) B ABUDU (e) SULE (f) MORIATE (g) SUNMONU
who inherited Matemi's portion of A more land under native law and custom.

25. *And the descendants of the said Matemi through the accredited
C representatives remained in absolute and undisturbed possession of their
said portion of land and thereon exercised absolute right of ownership as
absolute owners under native law and custom.*

26. *The aforesaid Matemi's portion now known as Matemi Amore
Family Land was never partitioned and all the descendants thereafter re-
D maind in absolute possession as joint owners.*

27. *That the entire Matemi-Amore Family land belonged to the said
family as one unit with Sunmonu Apena as Head of Family, Tiamiyu Sunmonu
Apena his son, became Head of the Family until his death less than two years
ago; and after him the 1st Defendant herein became the Head of the Family.*

E The Plaintiff filed a Reply Brief in which he pleaded

"1. *The Plaintiff in Reply to paragraphs 3, 5, 7, 9, 10, 17, 21 of the
Statement of Defence avers as follows:-*

(a) *That the Defendants knew or ought to know that the plaintiff
land/or his predecessor in title were in possession of the land in dispute at
F the time when the 2nd Defendant purported to have purchased the said land.*

(b) *That the Defendants had notice of the litigation on the said
land which was part of the land in dispute in Suit No./D1168/75 between the
following:*

G 1. TIAMIYA SUNMONU APENA

2.. ALHAJIOLOLAGBA

3.. SHERIF AYINDE ADELAMO

(Suing for themselves and on behalf of the MatemiAmore Family)

AND

H A.T. BAKARE

(c) *The Plaintiff avers that the 1st Defendant was the 2nd in Suit/
D1168175 and the Defendant in the said Suit was the predecessor-in-title of
the Plaintiff herein. The Plaintiff will rely on the said judgments and also the
Composite Plans drawn by Seweje particularly Plan No. SEW/W/1974/8*

and others relevant to this matter at the trial of this action.

(d) That the Conveyance registered as number 85 at Page 85 in volume 1804 referred to at paragraph 9 of the Statement of Defence was made at the time when Suit No. /D1168/75 was already disposed of and the 1st Defendant's claim to the land in dispute was dismissed."

It will be observed that although the defendants, particularly the 2nd B defendant, traced their root of title to the original owner of the land and how that original owner came to own the land, the same cannot be said of the plaintiff's pleadings. While the plaintiff relied on the title of A. T. Bakare (Deceased), how Bakare came to own the land was never pleaded.

The case went to trial and at the conclusion of evidence on both C sides and after addresses of learned counsel for the parties the learned trial Judge in a reserved judgment found:

"1. that the land in dispute "forms a portion or was included in the land litigated upon in Exhibit '3' as shown and confirmed by the 3rd Plaintiff's and 4th Plaintiff's witnesses" whose evidence the learned Judge accepted. D

2. that the testimony of the 2nd defence witness 4th and 5th defence witnesses on the traditional history is unconvincing and I am right in so holding in that apart from their ipsi dixit, there was no other evidence as to other acts of ownership, cogent, positive and extending over a period of time E to convince me that they were owners of the land in dispute.

3. that the defendants failed to establish the extent of the land alleged to have been settled upon by Amore.

4. "Putting both piece of evidence of the parties on this imaginary scale and the fact that the highest court of this country confirmed the title of F A.T. BAKARE in EXHIBIT '2' and the evidence of the 1st Defendant that the family action against A. T. BAKARE for trespass was lost to him and now subject of appeal, but with more reliance placed on EXHIBIT '3' that the scale tilts in favour of the plaintiff's predecessor-in-title that he had a better title than the Defendant." G

5. "the judgment in Exhibit" 3" is a judgment in rem."

Upon these findings the learned trial Judge found that the land belonged to the Plaintiff and entered judgment in his favour. He, however, rejected his claim for part of the special damages claimed and awarded him a total of N5,100.00 special and general damages. H

The defendants were unhappy with this judgment and appealed to the Court of Appeal which Court dismissed their appeal and affirmed the judgment of the Court below. The 2nd Defendant alone has now, with leave of this Court, granted on the 21st day of April, 1993, appealed to this court upon

seven grounds of appeal. And pursuant to the rules of this Court both the 2nd defendant (hereinafter is referred to as the Appellant and the plaintiff filed and exchanged their respective Briefs of argument.

In the Appellant's Brief, two questions are formulated as calling for determination in this appeal and these are:-

B "1. *Whether, having accepted that the plaintiff failed to establish his root of title and having regard to the claims, the pleadings and the evidence led and the complaints of the Defendants about the wrong evaluation of evidence and misdirections by the learned trial Judge, the Court of Appeal was justified in affirming the decision of the learned trial Judge entering judgment for the plaintiff declaring him entitled to a statutory right of occupancy over and possession of the land in dispute and granting an injunction restraining further trespass?*

2. *Whether the Court of Appeal was correct in affirming the decision of the learned trial Judge for damages?"*

D The plaintiff in his own Brief framed the questions thus:

"(i) *Whether the Court of Appeal was right to have affirmed the decision of the learned trial Judge on declaration of Right of Occupancy, Trespass and injunction?*

E ment of the learned trial Judge on the issue of damages?"

I shall adopt the questions as formulated in the Appellant's Brief.

Question (1)

F I have set out earlier in this judgment the facts pleaded by the parties in support of the case each set out to prove at the trial, In the course of the trial, apart from tendering the title deeds relied on by the Plaintiff and the Appellant, the Plaintiff tendered, as Exhibit "3", a judgment of this Court in Appeal No. SC.121/1974 between A. T. Bakare as Plaintiff/Appellant and Karimu Owodina and Saka Owodina as Defendants/Respondents, This judgment was delivered on December 16, 1974 and because of its importance to this case, I G shall set it out in full. It reads

"JUDGMENT OF THE COURT

(DELIVERED BY ELIAS, C.J.N.)

BETWEEN'

SUIT NO. ID/436/80

L. A. ADESHOYE V. FASISI OLOWOLAGBA AND ANOTHER

H *Appeal is allowed. The Judgment appealed from is set aside. The Appellant is declared owner of the land in dispute. Costs assessed at N80. 00 in the Court below and at N127.00 in this Court.*

The other reliefs sought are hereby granted as per Plaintiff's Writ.

(SGD) D. O. IBEKW

(SGD) T. O. ELIAS

SUPREME COURT CHIEF JUSTICE OF NIGERIA

(SGD) G. S. SOWEMIMO

JUSTICE, SUPREME COURT

In his judgment, the trial High Court Judge (Onalaja J., as he then was) had this to say:

*"In the presentation of his case the plaintiff relies on EXHIBIT" 3" B
as its source or root of title and that its title to the land of A. T. BAKARE
confirmed by the highest tribunal of the land.*

*To press the case further home the 3rd Plaintiff witness testified that
the land litigated upon in EXHIBIT "3" included the land now in dispute. He
was not cross examined on the point.* C

*The 4th Plaintiff's witness the Licensed Surveyor tendered the Com-
posite Plan and stated that the land now in dispute is included in the land
"Hated upon in EXHIBIT "3" as depicted to him in EXHIBIT "7". This witness
was not cross examined that the land litigated upon in EXHIBIT 3 did not
include the land in dispute. "* D

He placed much reliance on Exhibit "3" in finding that the Plaintiff had a better title to the land in dispute than the defendants. He went on to find that Exhibit "3" was a judgment in rem.

On appeal to the Court of Appeal the Defendants challenged the use made by the trial Judge of Exhibit "3" and contended before that court that the Plaintiff failed to establish his root of title. They further contended that Suit No. IK/168/75 was wrongly used against them. The Court of Appeal, per Ademola JCA, observed:- E

*"The appellants have criticized the declaration made on the grounds
that Exhibit 2 and Exhibit 3 upon which the learned Judge relied in giving F
judgment for the respondent did not show a better title or a superior title to
that of the appellants.*

*Exhibit 2 does not tell how Bakare became owner of a large parcel
of land. The nature of his ownership, whether it is by settlement, purchase,
lease or possession. Exhibit 3 i.e. the judgment of the Supreme Court simply G
said Bakare is the owner of the land in dispute in that case and did not tell
us more about how he came to own the land.*

*In short the origin of title of the predecessor in title of the respon-
dent is very vague. I think the answer to this criticism is very simple. A look
at the claim would reveal that respondent is not asking for declaration of H
title. What he is asking for is that he is entitled to a statutory right of occu-
pancy based upon his possession of the land in dispute. Presumably he
intends to use the judgment so obtained to get a statutory right of occupancy
under the Land Use Act from the Military Governor of Lagos State.*

The criticism of the appellants could have been relevant and may be sustained if this claim was for a declaration of title by the respondent. This distinction is important since the introduction of the Land Use Act. A right to a Certificate of Occupancy could either be based and grounded on the fact that you have title, possession, leasehold or whatever interest you have in the land.

A declaration of right of occupancy, which is what the respondent wanted, could be based on possession which is what he is claiming and that is what he is asking for in this case.

It is sufficient in my view for him as he did to prove that his predecessor in title, i.e. A. T. Bakare was declared an owner of the land comprised in the judgment in Exhibit 3. That the disputed land is within the layout of A. T. Bakare which has been approved by the Planning Authority."

Later in his lead judgment with which the other Justices agreed, Ademola JCA said -

The issue as I said as postulated by claim 1 in the respondent's writ of summons is, who is in possession of the land in dispute and not as to who owns the land in dispute.

On this, the judgment of the court below cannot in my view be faulted. It is true that the judgment in Exhibit 3 of the Supreme Court is not against the family of the 1st Appellant because they were not parties to the Judgment. But the matter does not end there.

The judgment is relevant in the present proceedings as showing that the predecessor-in-title of the respondent had a relationship to what ever land is encompassed, or embraced or comprised in Exhibit 3. It is not a judgment in rem as the learned trial Judge said, and as rightly conceded by the respondent, it is a judgment in personam. It does not bind the appellants."

Mr. Sofunde SAN, learned leading counsel for the Appellant, observes that the Court below accepted the contention of the Defendant that the Plaintiff failed to prove his root of title though it felt that the failure to establish his root of title did not matter in this case as the Plaintiff's claim was not for a declaration of title but a statutory right of occupancy based on his possession, a distinction that was justified having regard to the Land Use Act. Learned Counsel then submits that the Court below was wrong in its conception of the Land Use Act. According to learned counsel, the Act merely precludes the Court from granting a declaration of title to land in a land dispute; all it could grant is a declaration of entitlement to a statutory right of occupancy. Learned counsel further submits that on the pleadings, the Plaintiff's claim to possession was based on his claim to title. In the circumstance, therefore, having

failed to prove his title in this case, his claim ought to have been dismissed.

On Exhibit “3” learned Senior Advocate submits that there is nothing in it by which one can discern that the land to which it relates is the same land as in dispute. He adds that Exhibit “3” was tendered in evidence to buttress the claim to title and not as evidence of possession. Consequently, according to learned counsel, the Court below having held that Exhibit 3 was not a judgment in rem and in view of the fact that neither the Defendants nor their predecessor in title were parties thereto, ought to have held that the learned trial Judge was wrong to have considered the judgment as proof of the Plaintiff’s case. It is counsel’s submission that the only way in which the plaintiff could have proved the land to which Exhibit “3” relates is by the production of so much of the proceedings in that case as would enable the Court identify the land dealt with therein or the production of the plan used therein; any other evidence to establish the identity of land to which Exhibit 3 relates would be inadmissible. He adds that it is after establishing the identity of the land to which Exhibit “3” related that the evidence of P. W.4 the plaintiff’s surveyor would be relevant to tie the said land to the land in dispute. Mr. Sofunde further submits that it is not the law that expert evidence must always be accepted. He refers to Section 60 of the Evidence Act and submits that such evidence is only relevant; whether or not such evidence is to be accepted on the point does not depend on failure to cross-examine alone but on other facts, such as admissibility and the intrinsic value of the evidence. Learned Counsel then submits that the evidence of PW4, that is, the Surveyor identifying the land to which Exhibit “3” relates is inadmissible and intrinsically lacking in credence as there is nothing in Exhibit 3 upon which he could have identified the, land referred to therein. He submits that the same consideration goes also for the evidence of the plaintiff and further submits that the Court below ought to have held that the learned trial Judge was wrong in using the document as part of the evidence to find for the plaintiff on his claim.

Suit No. IK/163/75 was pleaded by the Plaintiff in his Reply and admitted by the 1st defendant that it was a suit between his family and A.T. Bakare, the predecessor-in-title of the plaintiff in which judgment was delivered against the 1st Defendant’s family in their action for trespass. Mr. Sofunde observes that neither the proceedings nor the judgment in the suit was tendered in evidence and that it was used by the learned trial Judge on the issue. Learned counsel submits that both the learned trial Judge and the Court below are wrong in that the admission of the 1st Defendant did not establish the land to which the judgment relates. He further submits that even if the

judgment relates to the land in dispute what was admitted by the 1st Defendant is that the claim was one in trespass. As the Judgment was not before the learned trial Judge or the Court below, neither would know why the 1st Defendant's family lost. He submits further in his brief as follows:

- B *"The mere fact of having lost the case did not mean that it was proof that they had no title. It may well be that they lost because they did not prove the trespass or it may well be that the action for trespass was statute barred. See for example Bamishebi & Ors. v. Faleye & Ors. (1987) 2 NWLR Part 54 51 at 56F to 58H and Udo v. Obot (1989) 1 NWLR Part 95 59 at 68E to 73C.*
- C *These cases show clearly that unless it was shown that the issue of title was decided in Suit IK/163/75 it cannot operate as estoppel against the Defendants on the issue of title.*

In view of the foregoing, it is humbly submitted that the Court of Appeal was in error in failing to hold that the learned trial Judge was wrong in using Suit No. IK/163/75 as a basis for determining that the Defendants had no title to the disputed land. "

The Plaintiff in his Brief relies on the evidence of PW3 and PW 4 and the pleadings and submits that the defendants did not specifically deny the existence of Exhibit 3 nor did they deny that the land now in dispute fell within the land in dispute in exhibit 3. He then submits that in the circumstance the learned trial Judge was right to give judgment in favour of the plaintiff based on Exhibit 3 and the Court below was right in affirming that decision. He further submits that it is sufficient for the Plaintiff, as he did, to prove that his predecessor in title, that is A. T. Bakare was declared title owner of the land comprised in Exhibit 3 and that title land in dispute is within the layout of A. T. Bakare which had been approved by the Planning Authority. He further submits that if the evidence as evaluated by the learned trial Judge is read as a whole the learned Judge is justified in reaching the conclusion he arrived at. As regards the proof of the identity of the land to which Exhibit 3 relates the Plaintiff submits that there are exceptions to sections 76 and 134(3) of the Evidence Act and that oral evidence may be given to show the identity of the said land.

On Suit IK/168/75 the Plaintiff in his Brief submits as follows:

- "..... it is respectfully submitted that the respondent pleaded inter alia that the Defendants had notice of the litigation on the said land which was part of the land in dispute in Suit No. IK/168/75- see page 114 lines 13 to 15 of the record. Therefore the submission of the learned counsel for the appellant that the admission did not establish the land to which the said judgment relates cannot be correct because: having regards to the above*

avement to which the said admission was made and also because it was for the said Appellant having admitted that they lost in the said judgment to show that title was not involved in the said suit. The Respondent submits that the rule that in establishing his claim plaintiff must succeed on the strength of his own case and not on the weakness of the Defendant's does not apply where the Defendant's case itself supports that of the Plaintiff, and contains evidence on which the Plaintiff is entitled to rely. See JOSIAH AKINOLA & ANOR. V. FATOYINBO OLUWO & ORS (1962) 1 ALL NLR PART 2 PAGE 22 AT 225. LASISI AKANNI BRAIMOH V. REBECCA AYINKE BAMGBOSE (1989) 3 NWLR PART 109 PAGE 352 AT 366 A-C.

It is respectfully submitted that the Court of Appeal was right in affirming the decision of the learned trial Judge based on the admission of the Defendant/Appellant. “

I have given deep consideration to the submissions of learned counsel. On the question as to whether the plaintiff established his root of title, I find myself unable to agree with the Court below in the distinction it made between a claim for declaration of title and a claim under the Land Use Act, for a declaration of entitlement to a right of occupancy. The standard of proof required in a claim for a declaration of title is the same as that required in a declaration of entitlement to a right of occupancy. Indeed, the latter claim arose as a result of the provisions of the Land Use Act whereby the Court could no longer grant a declaration of title to land but rather a declaration of entitlement to a right of occupancy. This change in the nature of the claim has, however, not affected the law as to what is required to be proved to sustain the latter claim. As Karibi-Whyte JSC put it in Abioye v. Yakubu (1991) 5 NWLR, 130, 236:

“Since the holder or occupier of land shall continue to hold as before the commencement of the Act, it follows that the law applicable will remain the same. The existing law, customary, common law or statute, as the case may be. “

And in Ogunola & Ors. v. Eiyekole & Ors. (1990) 4 NWLR 632 at 653 the learned Justice of the Supreme Court had observed:

“Land is still held under customary tenure even though dominium is in the Governor. The most pervasive effect of the Land Use Act is the diminution of the plenitude of the powers of the holders of land. The character in which they hold remain substantially the same. Thus an owner at customary law remains owners all the same even though he no longer is the ultimate owner. The owner of land, now requires the consent of the Governor to alienate interests which hitherto he could do without such consent.

It is settled law that where two parties in an action for title both plead

possession, to determine who has the better right to possession, it is to title that the Court must turn - See Makanjuola v. Khalil (1962) WNLR 149; Amakor v. Obiefuna (1974) 1 All NLR (Part 1) 119; (1974) ANLR 109; Godwin Eguh v. Duro Ogunkehin SC/529/66 on 28th February, 1969 (unreported) where this Court observed:

B *“If it be alleged that someone in possession of land is a trespass, the person so alleging has the onus of showing that he has a better right to the possession which was disturbed and unless that onus is discharged, the person so alleging cannot defeat the rival party.”*

That is the position in the case on hand. Unless the Plaintiff could C prove that he had a better right to possession in the sense that he had a better title than the Appellant, he could not defeat the latter. The Court below is therefore, clearly in error in saying that title was not involved in this case.

The next question to ask is: did plaintiff show a better title? On this, the Court below seemed to disagree with the learned trial Judge. While the D latter found that plaintiff did, the Court below found, and quite rightly in my view that:

“Exhibit 2 does not tell how Bakare became owner of the large parcel of land. The nature of his ownership, whether it is by settlement purchase, lease or possession, Exhibit 3 i. e. the judgement of the Supreme E Court simply said Bakare is the owner of the land in dispute in that case and did not tell us more about how he came to own the land.

In short the origin of title of the predecessor-in-title of the respondent is very vague.”

The learned trial Judge appeared to have read more into Exhibit 3 F than was in that judgment. As the Court below rightly found, Exhibit 3, contrary to the finding of the trial Judge, is not a judgment in rem. Being a judgment in personam, it is binding only on the parties to it and their Privies. It is certainly not binding on the Defendants who were neither party to the judgment nor privy to any of the parties involved in it. Secondly, there is nothing G in Exhibit 3 to identify the land to which it relates and the plan used in that case was never tendered in evidence in the present proceedings. Thus, no evidence was led to show the land in litigation in Exhibit 3 let alone that the land presently in dispute forms part of it.

The two Courts below, however, relying on the evidence of PW3 and H PW4, held that the land now in dispute is part of the land in dispute in Exhibit 3, PW3, Rasheed Alade Bakare who is a son of late A.T. Bakare (through whom the plaintiff claimed) testified and deposed:

“Exhibit 3 shows that my father A.T. Bakare was Appellant. The matter was decided in favour of my father. The land in dispute is part of the

land in which my late father got judgment in his favour in the Supreme Court.”

PW4, M.A. Seweje, the Plaintiff's Surveyor who prepared and tendered in evidence Plaintiff's plan (Exhibit 7) deposed:

“I know the Plaintiff in this case and also the land in dispute. I carried out the survey of the land in dispute. B

I have a final report of the survey carried out by me. This is the plan made by me for this case.

I seek to tender it.

MR. OKUNUGA:- Says he has no objection.

RULING C

The witness is the maker of this document and knowing from his custody. The learned counsel for the Defendant has not objected.

The survey plan is admitted and marked “7”

(Sgd.) M. O. ONALAJA

JUDGE 7110183 D

I see EXHIBIT ‘2’. The Plan attached was made in favour of the 2nd P. W.

The Plan attached to EXHIBIT ‘6’ is in the name of the 2nd Defendant.

I compared the survey plans in EXHIBITS ‘2’ and ‘6’ and found out that they relate to the same land. E

I remember the case ID1168/75 between APENA; OLOWOLAGBA, SERIF ADELEWO V.A. T. BAKARE.

I see EXHIBIT ‘3’ AND EXHIBIT ‘7’. The Suit in EXHIBIT ‘3’ was connected with the layout in EXHIBIT ‘7’ which included land in dispute. F

There is colouring in survey plan which are also indicated in the KEY, showing the land in dispute.

OKUNUGA: - CROSS-EXAMINATION FOR THE DEFENDANTS:

I am an experienced Licensed Surveyor.

The Plaintiff complained that somebody has jumped on his land and gave me instruction to compare and see whether there was any encroachment. I carried out the instructions and discovered that there was in I” an encroachment. G

The Plans in EXHIBITS ‘2’ and ‘6’ were handed over to me to carry out my work but as I carried out the Survey before I had an overall plan in my office. H

I prepared the Composite Plan.

A.T. BAKARE was my client and so I had the Plan covering his root of title in my office.

I did the Composite Plan in 1982. There is a building on the land and this was shown on the land.

The structure is shown on the land. The area verged RED is slightly bigger than the area verged GREEN.

RE-EXAMINATION BY MR. ABAYOMI FOR PLAINTIFF:- NONE”

B The evidence of PW3 as regards the identity of the land to which Exhibit 3 relates is clearly inadmissible under sections 76 and 132(1) of the Evidence Act which provides:

“76. All fact, except the contents of documents, may be proved by oral evidence.”

C *“132(1) When any judgment of any court or any other judicial or official proceedings, or any contract, or any grant or other disposition of property has been reduced to the form of a document or series of documents, no evidence may be given of such judgment or proceedings, or of the terms of such contract, grant or disposition of property except the document itself, or*
D *secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained; nor, may the contents of any such document be contradicted, altered, added to or varied by oral evidence.*

(The proviso is necessary for the present purpose) unless it qualifies
E as secondary evidence which it is not. That piece of evidence should not have been admitted and having been wrongly admitted, should have been expunged from the record.

The same consideration goes for the evidence of PW 4 on the issue. If he had in his possession the plan relating to the root of title of late A.T.
F Bakare (presumably that used in Exhibit 3) he should have tendered it in evidence and not keep it in his office. The Court has been deprived of the benefit of seeing the plan of the land to which Exhibit 3 relates. There was no admissible evidence upon which the finding could be made that the land now in dispute is part of the land in dispute in Exhibit 3. PW4, though he may be
G regarded as an expert in his own field, his evidence to the effect:

“I see EXHIBIT ‘3’ and EXHIBIT ‘7’ The Suit (sic) in EXHIBIT ‘3’ was connected with the layout in EXHIBIT ‘7’ which included land in dispute.”

ought to have been disregarded by the two Courts below as lacking in
H credence. There is nothing in Exhibit 3 that could lead any reasonable man to the conclusion he reached.

It is, with profound respect, erroneous for the two courts below to find, as they did, that the land now in dispute forms part of the land in litigation in exhibit 3. Paragraph 7 of the statement of claim where Plaintiff pleaded

that Bakare's title to the land in dispute was confirmed in Exhibit 3 was denied in paragraph 2 of the statement of defence. The burden was thereby put on the plaintiff to prove that the land now in dispute is the same as or forms part of, the land in dispute in Exhibit 3. But this burden he failed to discharge. Exhibit 3 being res inter alis in the present proceedings might, at best, amount to evidence of act of ownership on the part of late Bakare if it was established B that the land now in dispute is the same, or forms part of, the land in dispute in that suit. As this was not established Exhibit 3 is valueless in the present proceedings.

Plaintiff claimed through A.T. Bakare. To show he had a better title than the Appellant he must establish the title of Bakare to the land - see: C (Mogaji v. Cadbury (Nigeria) Ltd. (1985) 2 NWLR 393,431; Elias v. Omobare (1982) 5 SC. 25, 58; Ogunleye v. Oni (1990) 2 NWLR 745, 782-783. is he failed to do. He failed to plead and prove Bakare's root of title to radical owner of the land. As things stand, the title he acquires by Exhibit 2 hangs in the air. I cannot, in the circumstance, see how he could be said to have proved better D title to the land in dispute.

Far from the Plaintiff proving better title, the Defendants pleaded and led evidence of traditional history of how Amore Family (through whom the Appellant claimed) came to own the land in dispute. The learned trial judge dismissed their evidence of traditional history, unchallenged as it was. He E said:

"The testimony of the 2nd defence witness 4th and 5th defence witnesses on the traditional history is unconvincing and I am right in so holding in that apart from their ipsi dixit there was no other evidence as to other facts of ownership, cogent, positive and extending over a period of time to F convince me that they were owners.

The defence could not tell the Court the extent of AMORE'S FAMILY LAND, under Yoruba Customary Law of which the 4th defence witness made mention that boundaries are demarcated by trees like PEREGUN or MBOO or by stream, rivers or rivulet all that they state was that AMORE G settled on land between IKEJA and OJOTA and was using the land for farming until the arrival of EGBA REFUGEE, whilst under cross-examination that the land settled upon by AMORE was between IKEJA TO OJOTA, RYLAND and AIRPORT ROAD by Customs and Excise Office. The description is so vague, and in conclusive and it is trite law that a Court cannot guess H the content of a document that is not put in evidence before the court. I therefore cannot surmise the description of the AMORE FAMILY in a master survey plan made in 1970 or 1971. In any event no such survey plan was pleaded and so it goes to no issue. The defence only sale of even the MATEMI

AMORE FAMILY was to the 2nd Defendant and the survey plan attached to EXHIBIT '6' is the only survey plan relied upon by the Defendants in this case. I therefore hold that the extent, of the land alleged to have been settled upon is a material fact and evidence ought to have been established by positive evidence, but regretablely the Defendants failed to establish this vital B evidence before me."

Strangely enough, the learned Judge when considering the evidence ofPW3 and PW4 relating the land in dispute to Exhibit 3, observed:-

"When a Court is faced with a situation where a piece of evidence remained unchallenged and controverted, and that the opposite Party has C the opportunity to deflate, or challenge the piece of evidence but failed to do so, a Court faced with such situation can hold that piece of evidence to be established before him so: HADAD V. ODULAJA 1973 11 SC.PAGE 35: NIGERIAN MARITIME SERVICE LIMITED V. ALHAJI BELLO AFOLABI 19782 SC 79 at 81 - 82, 'ADEL BOSHALI V. ALLIED COMMERCIAL EXPORTERS D LIMITED 1961 ALL NIGERIA LAW REPORT 9-7 applied by IDIGBE JSC in ISAAC OMOREGBE V. DENTAL PENDOR LAWANI 1980 3/4 SC. 117."

He however did not apply the same yardstick to the unchallenged evidence of traditional history led by defence. A case of double-standard? I cannot see what is "unconvincing" in the defence evidence. Plaintiff did not E adduce any evidence in rebuttal. In any event, the burden to prove better title was on the plaintiff and having failed to discharge the burden his claims must fail - see Bamgboye v. Olusoga (1996) NWLR; Amobi v. Amobi & Ors. (1996) NWLR.

Before I leave Question (1) r need to touch briefly on the issue of Suit F IK/168/75 which 1st Defendant admitted was between his family and A. T. Bakare. He testified under cross-examination thus:-

"I was the Plaintiff in the Suit I have just referred to and it was filed in 1975 at Ikeja High Court Suit IK/168/75.

We sued BAKARE for trespass but lost the Suit. We lost the two G judgments, and are now awaiting judgment on Appeal in the Federal Court of Appeal."

Neither the proceedings nor the judgment in the case was ever tendered at the trial. The learned trial Judge non-the-less used it as a plank for finding in favour of the plaintiff on the issue of title. The Court below in H affirming the trial Judge observed, per Ademola JCA:

"..... but as it has transpired in evidence, there is the judgment of the court in Suit No. IK/168/75 which the 1st Appellant lost while fighting on the issue of trespass against A.T. Bakare,"

After quoting the evidence of the 1st Defendant, the learned Justice of Appeal continued:

“The parties in this case did not tender the judgment in that Suit, neither do we know the fate of the appeal in this Court.

It is sufficient for my purpose in this appeal that the facts as deposed to by the 1st Appellant shows that he lost the case of trespass on what must be the layout of Bakare from which Exhibits 1 and 2, the deeds of conveyances relied upon by the respondent, had their origin.

That being the situation in this case, it is idle and unprofitable to talk about respondent not having a better title to that of the appellants.”

With respect, both Courts below are wrong in the use they made of 1st Defendant’s evidence on the issue in arriving at the finding that Plaintiff had a better title. The evidence of the 1st Defendant did not go as far as to suggest that Suit IK/168/75 related to the land in dispute. And in the absence of the Judgment and the plan (if any) used in the case, I do not see how such a conclusion can be reached that the case related to the land now in dispute. The observation of Ademola JCA in the passage just quoted amounts to mere speculation. And a Court must not rely on speculation but on hard facts adduced in evidence.

From all I have said above, I must answer Question (1) in the negative.

Question (2)

The Plaintiff claimed N5000.00 special damages being “cost of Drawing Building and Structural Plan.” In allowing this claim, the learned trial Judge observed:-

“The next head of particulars of claim is for the cost of drawing building and structural plan.”

To substantiate this claim the Plaintiff called his 5th Plaintiff’s witness from the firm of architects given instruction to make the sketch of building plan. Notwithstanding the contradiction in the evidence of the plaintiff under cross examination that the architect fee was N10,000.00 out of which he paid N5,000.00, whilst EXHIBIT ‘5’ and the testimony of the 5th Plaintiff’s witness that the outstanding balance was N10,000.00 all the Plaintiff’s witnesses were ad idem that the Plaintiff paid N5,000.00 which was acknowledged both in EXHIBIT ‘4’ and the testimony of the 5th plaintiff’s witness.

This state of acknowledgment of the sum of N5,000.00 is a statement against the pecuniary interest of the firm of the Plaintiff’s Witness that it received N5,000.00.

Applying Sections 19 and 20 of the Evidence Law this type of State-

ment constitutes an admission in law. An admission is not prove (sic) of the fact admitted, but like every piece of evidence would have to go through the crucible of ascribing weight to it like looking at the circumstances under which it was made before giving it probative value.

In the present case, the Defendant who has the opportunity to challenge this piece of evidence under cross examination did not challenge the 5th Plaintiff's witness, that such an amount was not received. Applying the HADAD V. ODULAJA AND OTHER cases cited supra on this point of non challenge of a piece of evidence I hold and find as a fact that the 1st Plaintiff's witness established before me that he paid the sum of N5, 000. 00 as the cost of drawing the building and structural plan. This item being under claim of special damages I hold that the claim was satisfactory (sic) and strictly proved before me. I therefore enter judgment for the Plaintiff for the sum of N5,000.00 against the Defendant."

The Court of Appeal affirmed the trial Judge on this. Ademola JCA said:

"He was also right in respect of the special damage for the drawing of a building plan. Whether the part-payment of N5,000.00 was in respect either of the consultancy of a project or towards the cost of making a building plan is to my mind immaterial.

The Respondent has paid money and the evidence of the payment has been confirmed by the PW5 and such money is recoverable from the person who has frustrated the purpose for which the money was made in the making of a building plan."

I find it hard to comprehend the rationale behind the award made to the plaintiff on this head of damage. It was not the evidence that the plan was destroyed, damaged or lost as a result of the act of the Appellant. If the Plaintiff had won the case he could either take over Appellant's building on the land on the principle: Quid quid plantatur solo, solo cedit or pull down same and erect new buildings on the land according to his approved Plan. Had Plaintiff succeeded on his claim I would still have set aside the award made to him on this head of damage.

For the reasons I have given in this judgment and the further reasons given in the lead judgment of my learned brother Belgore JSC, a preview of which I had ere now, I too allow this appeal, set aside the judgments of both the Court below and the trial High Court and, in their stead, I dismiss Plaintiff's claim in its entirety. I abide by the order for costs made in the judgment of my learned brother Belgore JSC.

OGWUEGBU JSC

I have had the privilege of reading in draft the judgment just delivered by learned brother Belgore, JSC. I agree with it and I do not wish to add anything.

Accordingly, I too will allow the appeal and will abide by the order as to costs made by him.

B

ADIOJSC

I have had the advantage of reading, in draft the judgment just read by my learned brother, Belgore, JSC, and I agree that this appeal has merit. I too allow it and I abide by the consequential orders, including the order for costs.

I, however, wish to make some comments. In a claim for declaration of statutory right of occupancy, the onus lies on the plaintiff to satisfy the court that he is entitled, on the evidence brought by him, to the declaration. If the onus is not discharged, the weakness of the defendant's case will not assist him (the plaintiff) and the proper judgment is for the defendant. Such a judgment decrees no title to the defendant, he not having sought the declaration. See Kodilinye v. Odu, 2 W.A.C.A. 336; and Abisi v. Ekwealor, (1993) 6 N.W.L.R. (pt.302) 643. The dismissal of the plaintiff's claim, therefore, does not (without a counter-claim by the Defendant) automatically mean that the land in dispute belongs to the defendant.

There are certain methods, recognized by the Courts, for acquiring title to land and it is the duty of the plaintiff to show how he or his predecessor-in-title has acquired title, in one of the ways or methods, to the land-in dispute. See Piaro v. Tenalo (1976) 12 SC 31. This is what is called a root lit title. See Ogunleye v. Oni, (1990) 2 N.W.L.R. (pt.135) 745. In the present case, there was no evidence showing the root of title of the predecessor-in-title of the respondent. Also a judgment of a court was relied upon but the copy of the judgment together with the survey plan attached to it, if any, were not produced to enable the court to determine whether the land in dispute in the present suit is the same or within the land in dispute in the previous suit. Those were some of the gaps or defects in the case of the plaintiff/respondent.

It was for the foregoing reasons and for the more detailed reasons H given by my learned brother, Belgore, JSC in the lead judgment that I allow the appeal. I abide by the consequential orders, including the order for costs.