

**SUPREME COURT OF NIGERIA**  
 13TH DECEMBER, 1996. SC. 194/1991  
**CORAM:- S. M. A. BELGORE, E. O. OGWUEGBU,**  
**S. U. ONU, O. ADIO, A. I. IGUH, JJSC.**

CHIEF NDARAKE AKPAN & 2 ORS.	.....PLAINTIFF'S/
(For themselves and as representatives	RESPONDENTS
of Ikot Ekpe Village, Ibiono Itu Division	APPELLANTS
AND	
CHIEF UDOKANG UMO OTONG & 3 ORS	..... DEFENDANTS/
(For themselves and as representatives of Nkwot Ikot	APPELLANTS/
Obio Ata, in Eastern Ibibio Ikono, Itu Division)	RESPONDENTS

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**APPEALS** - Retrial - Whether ground for ordering a retrial - Arose in the present case.

**APPEALS** - Error of trial court - Where found to be minor - Appeal court should not overlook the preponderance of evidence - And wrongfully overrule the trial court.

**COURTS** - Jurisdiction of Court of Appeal - To evaluate appeal like court of first instance - Should have been exercised - Instead of ordering a retrial.

**EVIDENCE** - Arbitration - Whether evidence of native arbitration - Ought to have been considered - Seeing it could create estoppel by way of res judicata.

**LAND LAW** - Traditional history - Conflict therein - Whether trial judge did proper evaluation - In preferring one of the conflicting stories.

**LAND LA W - POSSESSION** - Decision of arbitration - Or previous judgment - Where it cannot operate as estoppel - Can properly constitute act of possession.

**LAND LAW** - Title - Where plaintiffs relied on pleaded three roots of title - Failure to prove one root of title is not fatal.

**LAND LAW** - Survey plan - Whether a surveyor must testify - Before court can attach credibility - To the tendered survey plan.

**LAND LAW-** *Survey plan - Where a party gives contradictory evidence to his survey plan - The Court will not attach credibility to the plan.*

### **FACTS**

The plaintiffs/appellants filed an action before the Uyo High Court the defendants/respondents claiming declaration of title, damages for trespass and injunction in respect of the land in dispute. The appellants lied on three roots of title in seeking to establish their claim failed to one. The trial judge found in favour of the appellants, though he fell into minor errors.

Respondents appeal to the Court of Appeal was allowed in part as court ordered a retrial of the case. Being dissatisfied, the appellants now appealed to the Supreme Court raising three issues while the Respondents sought to have the Supreme Court vary the lower court's retrial order.

### **ISSUES FOR DETERMINATION**

*"1. Whether the Court of Appeal has the jurisdiction to re-hear a matter before it on appeal, in part or in whole as if the matter had been instituted before it as a court of first instance and to evaluate evidence and findings and inference like the trial court.*

*2. Whether a party, in a land matter, relying on three ways to prove his title to the land need prove all the three ways in order to succeed.*

*3. Whether in a case for declaration of title to land, where parties rely on Survey Plans, the surveyors must testify as of necessity before the court can attach credibility to the survey plans."*

**HELD** (Unanimously allowing the appeal per lead judgment of **ONU JSC**)  
*Traditional history - Conflict therein*

1. The learned trial Judge, much alive to his responsibility, in my opinion, however decided to test the conflicting traditional histories by subjecting both histories proffered to the test laid down in the case of Kojo v. Bonsie (1957) 1 W.L.R. 1223 when he observed thus:

*"Where traditional evidence is inconclusive as in this case, ownership of the land could still be established if there are numerous and positive (lets of ownership over a long period. See the case of Ekpo v. Ita, 11 NLR 68. It is necessary to examine the evidence before me and see which of the parties has established more positive and numerous acts of ownership on the disputed land. "*

From the foregoing, it is clear that the Court below was therefore

wrong when it held that the learned trial Judge did not evaluate and express preference for one of the conflicting stories. (p. 1993 G)

*Evidence - Arbitration*

2. Similarly, the court was also wrong to have held that the trial court ought not to have considered the evidence of arbitration raised by the Appellants since the Respondents were neither parties to nor had knowledge of such an arbitration. It is trite law that a decision of native arbitration, al though not a competent court with judicial powers, but if accepted by the parties, could create estoppel by way of res judicata. (p. 1994 C)

*Decision of arbitration - Or previous judgment*

3. In the instant case, since the Respondents were not parties and assuming they had no knowledge of the arbitration alleged, the decision of the arbitration in favor of the Appellants per se is sufficient to constitute an act oi possession which the Appellants could properly rely upon vide Ogunbiyi v. Adewunmi (1988) 5 NWLR (Part 93) 215 at 221. This is authority for saying that if a previous judgment cannot, for one reason or the other, operate as estoppel per rem judicata, it can properly constitute an act of ownership and possession in an action for declaration of title to land. (p. 1994 G)

*Jurisdiction of Court of Appeal*

4. In the instant case, the court below clearly failed to exercise its jurisdiction under section 16 (ibid) to evaluate and rehear the appeal and give appropriate judgment as if it were a court of first instance since it was of the opinion that the trial court failed to evaluate the evidence properly. The facts and evidence were well before the court below on the printed records. Hence, after its own evaluation of the evidence, the court below could still uphold the judgment of the trial court possibly on different grounds and reasoning other than that arrived at by the trial court. Sending the case back for retrial as ordered in the instant case would, in my firm view, therefore occasion hardship and injustice. (p. 1997 C)

*Appeals - Retrial*

5. The grounds on which a retrial can be ordered are already firmly established. The most important of these grounds is that substantial issues of fact which ought to have been resolved by the trial court, the resolution of which was necessary for a just determination of the reliefs sought, were not resolved. The same cannot be said to hold sway in the instant case where on the records, it is quite clear that evidence had been led and injustice will result to

order a retrial when the appeal court can make the necessary finding which the lower court did not make. (p. 1997 G)

*Error of trial court*

6. The above and other little errors admittedly committed by the learned trial Judge notwithstanding, the preponderance of evidence pointing to exclusive possession and or ownership in Appellants' favor, such as the existence of old settlements and graves of the Appellants' ancestors on the land, which I had earlier on in this judgment adverted to, the decision of the trial court, in my view, is right and unassailable while that of the court below is palpably wrong. (p. 1999 F)

*Failure to prove one root of title*

7. Furthermore, it was not necessary for the Appellants to prove that the Respondents have knowledge of the dispute that was determined by the native arbitrators as wrongly held by the court below. The decision of the native arbitrators was but only one of three ways the Appellants relied on to prove their title to the land. It was not overridingly necessary for the success of the case of the Appellants since they had already proved two oilier ways and if the third failed, it cannot be fatal to the Appellants case as the court below erroneously held. It is trite law that in the case of declaration of title to land, a party claiming title is not bound to plead and prove more than one root of title to succeed. If he can prove only one of the five ways it is enough. (p. 2000 B)

*Attaching credibility to survey plan*

8. As a matter of fact, where a piece of land in dispute is not unascernable e.g. where all the parties to a case are agreed as to its area or location or boundaries on the ground, it is not necessary for them to have filed a plan. Where a party to a land dispute has produced and rendered the Survey Plan showing the area he is claiming with certainty and ascertainable boundaries, a party need not call a surveyor to testify before the court can attach credibility to such a survey plan. (p. 2001 A)

*Contradictory evidence to survey plan*

9. In the instant case, I am of the firm view that the court below was in error when it held that the trial court was wrong to have given credibility to the Survey Plan of the Appellants (Exh. 'A') when the Surveyor who made the plan did not testify. A court may refuse to attach credibility to a Survey Plan when a party gives evidence that is contradictory to his Survey Plan, e.g. as in the

instant case where the Respondents gave evidence as to the boundaries of the land which did not correspond to the boundaries stated in their Survey Plan (Exhibit 'B'). The Appellants on the other hand, gave evidence as to the boundaries of the land they were claiming and their boundary evidence corresponded with both their pleadings and Survey Plan (Exhibit 'A'). Hence, the trial court, in my opinion, was right in accepting the Survey Plan of the Appellants (Exh. 'A') as being more credible than that of the Respondents (Exh. 'B'). (p. 2001 H)

### **REPRESENTATION**

C Chief E. Edet, for the Appellants  
I. A. Inyang, for the Respondents

### **CASES REFERRED TO**

- Kojo 11 v. Bonsie (1957)1 W.L.R. 1223  
D Assampong v. Amuaku (1932)1 W.A.C.A. 192  
Ogunbiyi v. Adewunmi (1988)5 NWLR (Part 93) 215 at 221  
Okoya v. Santilli (1990)2 NWLR (Part 131)172 at 207  
Metalimpex v. Leventis (Nig.) Ltd. (1976) 2 S.C. 91 at 102  
Akibu v. Opaleye (1974)1 All N.L.R. (Part 2) 344 at 356  
E Adeyemo v. Arokopo (1988)2 NWLR 703 at 711 (Part 79)  
Okpiri v. Jonah (1961) All NLR 102  
Fatoyinbo v. Williams (1956)1 FSC 87  
Idundun v. Okumagba (1976)9-10 S.C. 224 (1976)1 NMLR 200 Awere v. Lasoja (1975) N.M.L.R. 100 at 100  
F Odesanya v. Ewedemi (1962)1 All NLR 320 at 321  
Alade v. Awo (1975) 4 S.C. 215 at 228  
Ijebu v. Oso (1972) 5 S.C. 143 at 151  
Atanda v. Ajani (1989) 3 N.W.L.R. (Part 111) 511  
Ekpo v. Ita 11 N.L.R. 68  
G Piaro v. Tenalo (1976) 12 S.C. 31 at 41  
Nwadike v. Ibekwe (1987) 4 N.W.L.R. (Part 67) 718  
Igwego v. Ezengo (1992) 6 N.W.L.R. (Part 249) 561 at 576  
Oje v. Babalola (1991) 4 N.W.L.R. (Part 185) 267 at 282  
Ukejianya v. Uchendu 13 W.A.C.A. 45 at 46

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### **STATUTES & RULES REFERRED TO**

Supreme Court Rules O. 8. rr. 3 & 12(1) & (2)  
Court of Appeal Act 1976 s. 16  
Court of Appeal Rules 1981 O. 1 r. 20(4)

**LEAD JUDGMENT BY ONU JSC**

In the High Court of Cross River (now Akwa-Ibom) State holden at Uyo in Suit No. HT/24/73 the plaintiffs, herein appellants, commenced an action against the respondents then defendants, claiming the following reliefs:-

*“(1) A declaration of title to all that piece or parcel of land known as and called “Abasi Uta Ikot Ekpe” situated, lying and being at Ikot Ekpe in Ibiono, Itu Division within the jurisdiction of the Ikot Ekpene Judicial C Division interfered with by the defendants about six months now.*

*(2) The sum of N1,000.00 as damages for trespass, committed by the defendants, their servants and/or their agents on the said piece of land by clearing it, digging it and planting oil seedlings a few weeks ago.*

*(3) An order of injunction restraining the defendants, their servants and/or their agents from further entering into the said piece of land and from repeating the said acts of trespass on the land”.*

After pleadings were ordered, filed and exchanged by the parties, the case went to trial. The trial court (coram: Nkop, J. as he then was) in a considered judgment delivered on 28th June, 1988 found in favour of the appellants E in the following terms:-

*“1. I hereby declare that the plaintiffs are entitled to a statutory/customary Certificate of Occupancy to all that piece or parcel of land known as and called “Abasi Uta Ikot Ekpe” situated, lying and being at Ikot Ekpe in Ibiono, Itu Local Government Area, within the jurisdiction of this F Honourable Court. The boundaries are as per plan No. ESA/505(L/L) dated 3rd January, 1974 or Exhibit ‘A’.*

*2. It is hereby ordered that the defendants pay N800.00 (Eight hundred Naira) damages for the trespass committed by them on the said land.*

*3. The defendants, their servants, and/or their agents are hereby perpetually restrained from further entering or entry into “Abasi Uta Ikot Ekpe” land and from further repetition on the said or any other acts of trespass on the said land.*

*4. The plaintiffs had attended courts both at Ikot Ekpene and Uyo H High Courts for three months short of fifteen years. This, in addition to their filing fees and out-of-pocket expenses entitles the plaintiffs to costs of this action which I assess at N500.00 (five hundred naira).”*

The respondents were dissatisfied with this decision and they ac-

cordingly appealed to the Court of Appeal, Enugu Division (hereinafter referred to as the court below) which held in its judgment delivered on 8th December, 1989 inter alia as follows:-

Firstly, that the learned trial Judge was wrong in several particulars, particularly in his evaluation of the evidence adduced before him when he B adopted “irrelevant considerations” which were prejudicial to the respondents’ case.

Secondly, that the learned trial Judge wrongly placed the burden of proof on the respondents.

Thirdly, that he relied without good reasons on a previous native C arbitration about which the respondents were not a party and Fourthly, that he wrongly preferred or gave no justifiable reason for preferring the features e.g. the market, in the appellants’ plan to those on the respondents plan when none of the surveyors gave evidence.

The court below finally ordered a retrial, instead of either dismissing D or allowing the respondents appeal, simpliciter.

The appellants being aggrieved with the judgment of the court below have appealed to this court on five grounds contained in a Notice of Appeal dated 10th February, 1990. Except for recasting their third issue, the respondents would appear clearly to have adopted the appellants’ three E issues submitted for the determination of this court which are:

*“1. Whether the Court of Appeal has the jurisdiction to re-hear a matter before it on appeal, in part or in whole as if the matter had been instituted before it as a court of first instance and to evaluate evidence and make findings and inference like the trial court.*

F *2. Whether a party, in a land matter, relying on three ways to prove his title to the land need prove all the three ways in order to succeed.*

*3. Whether in a case for declaration of title to land, where parties rely on Survey Plans, the surveyors must testify as of necessity before the court can attach credibility to the survey plan.”*

G As the only distinction between the three issues each of the parties to this case has submitted as arising for determination of the appeal lies in the respondents’ issue 3 which although composite and comprehensive, I will nonetheless adopt the appellants’ three issues in my considerations of the appeal herein.

H At the hearing of this appeal on 30th September, 1996, learned counsel for the appellants, Chief E. Edet adopted the Brief and Reply Brief filed by them dated 29th August, 1991 and 3rd December, 1991 respectively and urged upon us to allow the appeal, set aside the decision of the court below and restore the decision of the trial High Court. Learned counsel for the respon-

dents, Mr. I. A. Inyang, for his part, after adopting their Brief filed on 24th October, 1991 submitted that he was urging upon us to act pursuant to Order 8 Rule 3 of the Supreme Court Rules, 1985 as amended to vary the order of retrial made by the court below. We pointed out to learned counsel there and then that that we could not do, as Order 8 Rule 3 is now deleted pursuant to Government Notice No. 111/1991, which took effect from 1st October, 1991 B and that the best course of action open to them (respondents) was to have cross-appealed.

I will now commence my consideration of this appeal with issue No. 1 which overlaps grounds 1, 2 and 3 of the grounds of appeal. It enquires whether the court below has the jurisdiction to re-hear a matter before it on C appeal in part or in whole as if the matter had been instituted before it as a court of first instance and to evaluate evidence and make findings and inferences like the trial court.

It is clear that in the trial court the appellants relied on three ways to establish their entitlement to the land in dispute viz: D

- (a) Traditional history
- (b) Acts of Ownership and Possession; and
- (c) Estoppel through a decision of a native tribunal which was in their favour.

The court below agreed that the appellants were relying on (a) and E (b) above in proving their root of title to the land in dispute when it held inter alia:

*"In the lower court, the plaintiffs relied for their title to the land in dispute on (1) traditional history and (2) acts of possession and or owner- F ship."*

The trial court found as a fact that the traditional histories of the litigating parties were in conflict and, quite rightly in my view said:-

*"This court cannot stick out its neck as to the truth of any of the two versions of the traditional history since none of the witnesses was an eye- G witness."*

**The learned trial Judge, much alive to his responsibility, in my opinion however, decided to test the conflicting traditional histories by sub- jecting both histories proffered to the test laid down in the case of Kojo II. v Bonsie (1957) 1 WLR 1223 when he observed thus:**

*"Where traditional evidence is inconclusive as in this case, owner- H ship of the land could still be established if there are numerous and positive acts of ownership over a long period. See the case of Ekpo v. Ita (1932) 11 NLR 68. It is necessary to examine the evidence before me and see which of the parties has established more positive and numerous acts of ownership*



*on the disputed land.”*

He thereafter proceeded to consider the acts done by the appellants on the land in dispute and in his judgment concluded thus:

“All these acts namely the 1959 dispute with Nkwot Ikot Umoh, the cultivation of the land, the market called Urua Edem Obo, and the many dead ancestors buried by the plaintiffs on that land, are still numerous and positive acts indicative of possession. In my opinion, they point to one and only one irresistible conclusion and that is, that the plaintiffs are the owners of the land in dispute.”

From the foregoing, it is clear that the court below was therefore wrong when it held that the learned trial Judge did not evaluate and express a preference for one of the conflicting stories. Similarly, the court was also wrong to have held that the trial court ought not to have considered the evidence of arbitration raised by the appellants since the respondents were neither parties to nor had knowledge of such an arbitration. It is trite law that a decision of native arbitration, although not a competent court with judicial powers, but if accepted by the parties, could create estoppel by way of res judicata. See: Chief Kweku Assampong v. Kweku Amuaku & Ors. (1932) 1 WACA 192. In Ezulumeri Ohiaeri & anor v. Adinnu Akabeze & Ors. (1992) 2 NWLR (Pt.221) 1 Akpata, J.S.C in a case similar to the one in hand stated at pages 24-25, paragraph H-D inter alia thus:

“While it may be sufficient to simply plead the fact of a previous judgment by a regular court as the basis of an estoppel, merely pleading such a decision in respect of a customary arbitration without pleading the ingredients that project it as creating an estoppel, will not be proper pleading because not every decision of a customary arbitration, unlike that of a regular court, can create an estoppel. On the other hand, where it is clearly averred by a party that there was a previous customary arbitration which was in his favour and that he will be relying on it as creating estoppel, it will be necessary for him to plead the ingredients establishing the estoppel. The party will have to adduce credible evidence of the relevant ingredients or incidents necessary to sustain the material plea of estoppel by customary arbitration “ See also Agu v. Ikewibe (1991) 3 NWLR (Pt. 180) 385.

In the instant case, since the respondents were not parties and assuming they had no knowledge of the arbitration alleged, the decision of the arbitration in favour of the appellants per se is sufficient to constitute an act of possession which the appellants could properly rely upon vide Ogunbiyi v. Adewunmi (1988) 5 NWLR (Pt.93) 215 at 221. This is authority for saying that if a previous judgment cannot, for one reason or the other, operate as

**estoppel per rem judicata, it can properly constitute an act of ownership and possession in an action for declaration of title to land.**

Since the court below agreed that the appellants in the trial court had relied on traditional history, which having become unsustainable, they relied on exercise of acts of ownership and possession to establish the existence or proof of-

*“(a) An ancestral shrine called “Iso Abasi Uta Ikot Ekpe” on the land in dispute, which is worshipped annually by the plaintiffs. (b) A house built on the land in dispute near the shrine mentioned in (a) above by one Orok from Nung to Tefuo in Ikot Ekpe who lived therein until his death.*

*(c) A grant of a small portion of the land in dispute made to one Akpan Afia by Chief Umo Akpan Ukot - head Chief of Ikot Ekpe. It was further pleaded that Akpan Afia caused an accidental fire outbreak which destroyed plaintiff’s shrine on the land in dispute and for which occurrence Akpan Afia offered propitiations in the form of a ram, white fowl, tortoise, yam and drinks.*

*(d) Extensive farming done on the land in dispute by the people of Ikot Ekpe.*

*(e) Old settlements and graves of plaintiffs forebears on the land in dispute.*

*(f) The resistance offered by the people of Ikot Ekpe when the people of a nearby village Nkwot Umo trespassed upon the land in 1959. This culminated in the dispute going before a native arbitration of the villages of Nkwot, Nkwot Ikot Obio Ata (of the defendants) and Nkwot Ikot Obio Abia. A suit was first filed at Itu Magistrate’s Court but this was later withdrawn for a settlement by native arbitration. The case was decided in favour of the plaintiffs. The plaintiffs further pleaded that in 1960 the defendants were parties to a dispute between Nkwot Ikot Umo and the plaintiffs which was resolved in favour of the plaintiffs on 30th December, 1961 by one Chief Thompson Ina.”*

Granted (though not conceding) that the trial court had failed to evaluate the evidence of the parties properly and arrive at a conclusion, has the court below no jurisdiction to re-hear and evaluate the evidence presented to it on the printed records, make findings and draw inferences as if it were a court of first instance so as to finally determine the issues between the parties instead of sending the matter back to the trial court for rehearing?

That the court below has jurisdiction so to do can indeed be deciphered from Section 16 of the Court of Appeal Act 1976 which provides that-

*“The Court of Appeal may from time to time make an order necessary for determining the real question in controversy in the appeal and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as court of first instance and may re-hear the case in whole or in part ....”*

In Chief R. A. Okoya & Ors v. S. Santilli & Ors (1990) 2 NWLR (Pt. 131) 172 at 207 this court had this to say about the powers conferred on the Court of Appeal thus:

*“By virtue of section 16 of the Court of Appeal Act, the lower court has all the powers of the trial court i.e. the powers the Federal High Court has in the matter before it which is now before us on appeal... in order to settle completely and finally the matters in controversy between the parties to this appeal in the matter before the lower court and, in order to avoid multiplicity of legal proceedings concerning any of those matters can grant any remedy as any of the parties may appear to be entitled to.”* See also S. Fatuade v. F. C. Onwoamanam (1990) 2 NWLR (Pt. 132) 322 at 330 and 338.

See also Order 8 rule 12(1) and (2) of the Supreme Court Rules which confers on the Supreme Court the powers to rehear the matter on the printed records, evaluate the evidence and give judgment as if it were a court of first instance. Also order 1 rule 20(4) of the Court of Appeal Rules, 1981 as amended provides as follows:-

*“The court shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require, including any order as to costs.”*

See J.E. Ehimare & Anor. v. Okaka Emhonyon (1985) 1 NWLR (Pt. 2) 177 following Metalimpex v. A.G Leventis (Nigeria) Ltd. (1976) 2 Sc. 91 at 102 in which it was held that an appellate court is equally capable like a trial court (unless the findings rest on the credibility of witnesses) of drawing correct legal conclusion or inference or deduction from admitted or disputed facts.

In Alhaji Akibu v. Opaleye & Anor (1974) 1 All NLR (Pt. 2) 344 at 356 this court had the following to say about the duty of the appellate court in this regard, to wit:

*“Although this court rehears a case on appeal it does this only on the record and, where it is quite clear that evidence has been led in the lower court which establishes a fact, it will make the necessary findings which the lower court failed to make.”* See also the cases of Lawal Fatoyinbo & Ors. v.

Sellatu Williams (1956) SCNLR 274 and Ramonu Atolagbe v. Korede Shorun (1985) 1 NWLR (Pt.2) 360 at 364.

And in Sampson Awoyale v. Joshua Ogunhiyi (1986) 2 NWLR (Pt.24) 626 at 634 this court held:-

*“This court has in numerous cases reiterated the rule that the Court of Appeal will not ordinarily interfere with the findings of facts by the trial Judge but where there is ample evidence and the trial Judge failed to evaluate it and make correct findings on the issue, the Court of Appeal is in as much a good position as the trial court to deal with the facts and to make proper findings.”* See: Shell B.P. Petroleum Company of Nigeria Limited v. His Highness Pere-Cole & Ors. (1978)3 S.C. 183 at 194. C

**In the instant case, the court below clearly failed to exercise its jurisdiction under section 16 (ibid) to evaluate and rehear the appeal and give appropriate judgment as if it were a court of first instance since it was of the opinion that the trial court failed to evaluate the evidence properly. The facts and evidence were before the court below on the printed records. Hence, after its own evaluation of the evidence, the court below could still uphold the judgment of the trial court possibly on different grounds and reasoning other than that arrived at by the trial court. Sending the case back for retrial as ordered in the instant case would, in my firm view, therefore occasion hardship and injustice.** See Adeyemo v. Arokopo (1988)2 NWLR (Pt. 79) 703 at 711. D E

If indeed it is true as submitted by the respondents that it was as a result of the thorough evaluation of the evidence of the parties that the court below chastised the trial court for wrongly placing the burden of proof on the respondents; giving undue weight to the decision of a native arbitration, the text of which was unknown; for relying more without reasonable cause on the features shown on the appellants plan as against the respondents plan and for wrongly stating that the appellants evidence as to arbitration was not challenged, etc. then the court below rather than ordering a retrial would have upheld the appellants case. **The grounds on which a retrial can be ordered are already firmly established. The most important of these grounds is that substantial issues of fact which ought to have been resolved by the trial court, the resolution of which was necessary for a just determination of the reliefs sought, were not resolved.** See: Onifade v. Alhaji Olayiwola (1990) 7 NWLR (Pt.161) 130; (1990) SCNJ 10 at 20; Adeyemo v. Arokopo (supra); Okpiri v. Jonah (1961) 1 SCNLR 174 and Armels Transport Ltd. v. Martins (1970) 1 All NLR 27. **The same cannot be said to hold sway in the instant case where on the records, it is quite clear that evidence had been led and injustice will result to order a retrial when the appeal court can make the necessary finding which** F G

**the lower court did not make.** See: Fatoyinbo v. Williams (1956) SCNLR 274 and Akibu v. Opaleye (supra).

My answer to issue 1 is accordingly rendered in the affirmative.

In relation to Issue 2 which overlaps ground 4, it is pertinent to state B that the appellants in the trial court relied on three ways to prove their title to the land in dispute, viz:

- (a) Traditional history
- (b) Acts of Ownership and possession and
- (c) Estoppel by standing by

C With respect to (a) above the trial court as transpired, ignored the traditional evidence led by both parties, same having been in conflict. It instead considered the acts of ownership and possession adduced in evidence by the parties and came inter alia to the following conclusion:-

*“...All these acts, namely the 1959 dispute with Nkwot Ikot Umoh, D the cultivation of the land, the market called Urua Edem Obo, and the many dead ancestors buried by the plaintiffs on that land, are all numerous and positive acts indicative of possession. In my opinion, they point at one and only one irresistible conclusion and that is, that the plaintiffs are the owners of the land in dispute.”*

E (b) The trial court did not consider the dispute which was settled by a native arbitration between the appellants and another village called Nkwot Ikot Umoh (not the respondents) as operating as an estoppel of any kind. Rather, it (trial court) regarded that fact as an act of ownership and possession since the said judgment could not have operated as an estoppel against the F respondents. See Ogunbiyi v. Adewunmi (1988) 5 NWLR (Pt.93) 215 at 221 paragraphs F-G. Thus, when the learned trial Judge held that:

*“One thing significant in the 1959 story is that one Udofia from Umuorem the defendant’s village was even one of the arbitrators who settled that dispute in 1960. That aspect of the evidence of P.W 1 has remained G unchallenged.”*

This finding or fact related to part of what P.W 1, Effiong Ekpo said in his testimony wherein he deposed inter alia as follows:-

*“The present defendants in his case were aware of the disputes H between Ikot Ekpe people and Nkwot Ikot Umoh over the Abasi Uta Ikot Obio Ata did not ask to be joined as a party to the tribunal settlement. The village head of the defendants village was a member of the panel which decided that case. That decision of that panel was binding on the parties. The tribunal has been handling matters of that nature before that our own.....”*

While the purport of the foregoing can be held to relate to an estoppel it cannot be said to be an admission as held by the learned trial Judge when he erroneously said-

*"That means an admission. If the defendants knew that the land in dispute belonged to them as well, why did they not apply to be joined with B Nkwot Ikot Umoh....."*

The above error notwithstanding, it is my view that the trial court's conclusion that the appellants proved their case on a balance of probability cannot be faulted.

(c) If possession was proved it can found an action for title. The trial court had found on the preponderance of evidence adduced before it that

*"The plaintiffs were and definitely are in exclusive possession of the land. To break into the land without permission of the plaintiffs was clearly an act of and still is an act of trespass, by the defendants."*

On the issue of the establishment of a local market at the boundary, while I am of the view that the trial court was in error when it held that-

*"One thing the defendants failed to explain to this court was why they decided to open up a market at the very boundary between them and the neighbouring village. This is most unusual, and quite inconsistent with common-sense."*

thus shifting on respondents the burden of proof thereon, the court below correctly appraised the matter when it held thus:

*"Both parties were agreed that a market was situate near the boundary of the respective lands of the parties. Each party however claimed that the market belonged to its village. It would thus seem that this was plainly a boundary dispute which would be resolved by an identification of the true boundary of the plaintiffs and defendants villages."*

**The above and other little errors admittedly committed by the learned trial judge notwithstanding, the preponderance of evidence pointing to exclusive possession and/or ownership in appellants favour, such as the existence of old settlements and graves of the appellants ancestors on the land, which I had earlier on in this judgment adverted to, the decision of the trial court, in my view, is right and unassailable while that of the court below is palpably wrong.** See section 136(1) (now 137) of the Evidence Act Cap.112 1990 Laws of the Federation which states:

*"137(1) In civil cases the burden of first proving the existence or non-existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings."*

The court below was therefore wrong when it treated the judgment of the trial court as if that court had held the evidence of native arbitration to have created an estoppel against the respondents and thus regarding same as it erroneously did, when in my opinion, it regarded it as *“irrelevant considerations in the evaluation of evidence.”*

**B Furthermore, it was not necessary for the appellants to prove that the respondents have knowledge of the dispute that was determined by the native arbitrators as wrongly held by the court below. The decision of the native arbitrators was but only one of three ways the appellants relied on to prove their title to the land. It was not overridingly necessary for the success of the case of the appellants since they had already proved two other ways and if the third failed, it cannot be fatal to the appellants case as the court below erroneously held. It is trite law that in the case of declaration of title to land, a party claiming title is not bound to plead and prove more than one root of title to succeed. If he can prove only one of the five ways it is enough. See C Idundun v. Okumagba (1976) 9-10 S.C 227; (1976) 1 NMLR. 200. In Chief Oyelakin Balogun & Ors. v. Oladosu Akanji & anor. (1988) 1. N.W.L.R. (Pt.70) 301 at 321 this court had the occasion to state the law succinctly as follows:-**

*“What is to be noted and re-emphasised is that the party claiming E title to land is not bound to plead and prove more than one root of title to succeed. If he relies on more than one root, that is merely to make assurance doubly sure. He does that ex abundantia cautela.”*

What the trial court did in the instant case was to regard native arbitration decision as an act of ownership and possession in favour of the F appellants since the trial court did not consider same to create an estoppel. If the court below had viewed it in this light, it would undoubtedly not have set aside the judgment of the trial court and ordered a retrial.

My answer to issue 2 is accordingly in the negative.

My short answer to issue 3 is that the court below was wrong when G it held that *“unless the surveyors testified it was a futile exercise concluding that the plan of one of the parties was the more credible.”* This is so because the purpose of a Survey Plan in a land matter is to identify the land a party is claiming with ascertainable boundaries. In the case of Arabe v. Asanlu (1980) 6 SC 78 this court had this to say:-

**H “Although a Licensed Surveyor’s plan, if available, is the best proof of the boundaries of the land in dispute in an action for declaration of title, yet its absence need not occasion a dismissal of the action. What is important and necessary is that the land in dispute must be ascertained with “definitive certainty.”**

**As a matter of fact, where a piece of land in dispute is not unascertainable e.g where all the parties to a case are agreed as to its area or location of boundaries on the ground, it is not necessary for them to have filed a plan.** See Akpagbue v. Ogu (1976) 6 SC 63 and Okosun Epi v. Johnny Aigbedion (1972) 10 SC 53. Compare Ezeudu v. Obiagwu (1986) 2 NWLR (Pt.21) 208. **Where a party to a land dispute has produced and tendered the Survey Plan showing the area he is claiming with certainty and ascertainable boundaries, a party need not call a Surveyor to testify before the court can attach credibility to such a survey plan.** In the case of Alhaji Adebola Olakunle v. Chief Timothy Omobare (1982) 5 SC 25 at 38, 39; 45, 46 this court held as follows: C

(1) In an action for declaration of title to land, the plan of the land showing the area in dispute between the parties to the action must be presented.

(2) If the plan cannot be presented, a Surveyor or other persons should be called to identify the land in dispute. D

(3) This plan must be produced by the plaintiff to the action.

(4) The plan must have been prepared by a Licensed Surveyor.

(5) The plan must show clearly the boundaries and dimensions of the land and must be served on the defendant.

In other words, it may be said that a plan of a land is not sine qua non E but some description are necessary to make a disputed land ascertainable. See Sokpui II v. Agbozo III (1951) 13 WACA 241 at 242; Ajadi B. Awere v. Sulenwn Lasojau (1975) NMLR 100 at 100; Odesanya v. Ewedemi (1962) 2 SCNLR 23 and Ayoola v. Ogunjimi (1963) 1 All NLR 188.

The above authorities go to show that where a valid Survey Plan has F been duly admitted in evidence such as Exhibit "A" of the appellants in the case in hand, the court can consider same and rely on it without a surveyor having to testify. Also where a plan has been admitted in evidence, the surveyor who made the plan, if called to testify, is only going to give evidence as to the contents of the Survey Plan which he produced and nothing more. This G will amount to a witness giving evidence as to the contents of the document before the court contrary to the provision of section 76 of Evidence Act which provides that-

*"All facts, except the contents of documents may be proved by oral evidence."* H

**In the instant case, I am of the firm view that the court below was in error when it held that the trial court was wrong to have given credibility to the Survey Plan of the appellants (Exhibit "A") when the Surveyor who made the plan did not testify. A court may refuse to attach credibility to a Survey**



**Plan when a party gives evidence that is contradictory to his Survey Plan, e.g. as in the instant case where the respondents gave evidence as to the boundaries of the land which did not correspond to the boundaries stated in their Survey Plan (Exhibit "B"). The appellants on the other hand, gave evidence as to the boundaries of the land they were claiming and their boundary evidence correspond with both their pleadings and Survey Plan (Exhibit "A"). Hence, the trial court, in my opinion, was right in accepting the Survey plan of the appellants (Exhibit "A") as being more credible than that of the respondents. (Exhibit "B").**

C Issue 3 is accordingly answered in the negative.

The consequence of all I have said is that the appeal herein is meritorious and it is accordingly allowed. The decision of the court below together with the order for costs therein made is hereby set aside and the judgment of the trial court is restored. There will be costs to the appellants against the respondents which I assess and fix at N750.00 in the court below and N1,000.00 in this court.

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#### **BELGORE JSC**

E I have read in advance the judgment of my learned brother, Onu, J.S.C. and I am in full agreement with him wherein he concluded that this appeal has merit. I adopt his reasoning and conclusion as mine in allowing the appeal. I award N175.00 and N1,000.00 respectively as costs in the court below and in this court against the respondents.

F

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#### **OGWUEGBU JSC**

I had a preview of the judgment just delivered by my learned brother Onu, J.S.C I entirely agree with his reasoning and conclusion.

G Accordingly, I agree that this appeal be allowed. It will be unjust to the plaintiffs if the order of retrial is affirmed. I will abide by all the consequential orders made in the lead judgment.

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#### **ADIO JSC**

H I have had the advantage of a preview of the judgment just delivered by my learned brother, Onu, J.S.C and I agree that the appeal has merit. I too allow it. The judgment by the court below is set aside. Judgment of the learned trial Judge is substituted for it. I abide by the order for costs.

## IGUHJSC

I have had the privilege of reading in draft, the leading judgment just delivered by my learned brother, Onu, J.S.C. I agree entirely that there is substance in this appeal and that the same ought to be allowed.

The claim before the trial court was for declaration of title to land, N1,000.00 damages for trespass and perpetual injunction. B

The plaintiffs in proof of their case relied on traditional evidence, acts of long possession and enjoyment of the land in dispute and estoppel by virtue of customary arbitration over the land between them and the people of Nkwot Ikot Umoh in 1959. The defendants, for their part, also relied on evidence of traditional history in addition to acts of long possession and enjoyment of the land in dispute. C

At the conclusion of hearing, Nkop, J., as he then was, entered judgment for the plaintiffs. He described the evidence of tradition produced by both parties as inconclusive but found for the plaintiffs on the issues of long possession and enjoyment of the land and estoppel. The defendants appeal D against this judgment was allowed by the Court of Appeal which ordered a retrial of the suit. The plaintiffs have now appealed to this court.

On the question of the traditional evidence led by the parties, the learned trial Judge stated as follows-

*"This court cannot stick out its neck as to the truth of any of the two versions of the traditional history since none of the witnesses was an eye witness.....where traditional evidence is inconclusive, as in this case, ownership of the land could still be established if there are numerous and positive acts of ownership over a long period. See the case of Ekpo v. Ita (1932) II NLR 68.* F

*It is necessary to examine the evidence before me and see which of the parties has established more positive and numerous acts of ownership on the disputed land."*

The Court below, for its own part, dealt with the trial courts findings on the evidence of tradition in the following manner:- G

*"The court then resolved the dispute on the traditional evidence in a manner I consider equally satisfactory. It held that the evidence of traditional history called by both parties was inconclusive. It therefore resorted to a consideration of the evidence on acts of possession and/or ownership in order to determine the issue of H title. That is certainly the correct approach."*

I must state straight away that the court below was entirely right in its observations with regard to the trial court's resolution on the issue of traditional evidence before it. Evidence of traditional history where this is found to be

cogent and established can sustain a claim for declaration of title to land. See F. M. Alade v. Lawrence Awo (1975) 4 S.C. 215 at 228; Olujebu v. Oso (1972) 5 SC 143 at 151, D. O. Idundun & Ors v. Daniel Okumagba (1976) 9-10 SC 227 at 246, Atanda v. Ajani (1988) 3 NWLR (Pt.111) 511. But where, as in the present case, there is a conflict in the traditional evidence adduced by both parties B and, notwithstanding the application of the well established principle laid down in Kojo II v. Bonsie (1957) 1 WLR 1223 at 1227, the trial court is unable to resolve the conflict in favour of either side and finds such evidence inconclusive, title to land in dispute may still be established inter alia by evidence of numerous and positive acts of possession and ownership. See Ekpo v. Ita C (1932) II NLR 68; D.O. Idundun & Ors. v. Daniel Okumagba, (supra) etc. However, a party relying on acts of possession and ownership as evidence of title to land must show that such acts, not only extend over a sufficient length of time, but that they are numerous and positive enough to warrant the inference that the claimant is the exclusive owner of the land. See Ekpo v. Ita, (supra), D Anyanwu O. v. Mbara (1992) 5 NWLR (Pt.242) 386 at 401, Piaro v. Tenalo (1976) 12 SC 31 at 41; D.O. Idundun & Ors. v. Daniel Okumagba, (supra).

In this regard the learned trial Judge, quite rightly, proceeded to examine and evaluate the evidence of positive acts of possession and ownership led by the parties in respect of the land in dispute. These, he categorised E into three, namely, ownership of the local market situate at the boundary of the land in dispute, possession and cultivation of the said land and the use of the land for the burial of corpses.

By far, what appeared to be the most significant evidence of acts of possession found by the trial court in favour of the plaintiffs was the plain- F tiffs' disposal of their human corpses right from the time of their ancestors on the land in dispute. In this regard the trial court stated thus-

*"I now have to consider the issue of graves on the disputed land. The PW1 did swear as follows:*

*"We ..... have graves of our ancestors on that land. There are some G tombstones there. Udo Okpok Udo Anya, Akpan Udo Effre, Uttuk Umoafia, Umo Akpan Nko, Udeme Etefu, Udo Ekpo Udo Otung, Akpan Umo Idio, Umo Odok Etuno, Uwa Udo Eno were all buried on that land. All these people were chiefs from Ikot Akpe village."*

*The defendants have taken a posture of what is more of an admission than a H denial. Firstly, throughout these proceedings, none of the plaintiffs witnesses was cross-examined on this aspect of burial of plaintiffs late ancestors. Throughout their evidence-in-chief defendants did not deny this assertion. It was only during cross-examination of the defendants by Mr. Emmanuel Edet, that the defence witnesses, managed to deny the allegation as not being*

true. The plan Exhibit “B”, filed by the defendants is a true reflexion of their evasive stance. So many graves have been located in the plan filed by the plaintiffs but not even one grave has been located by the defendants. Their plan is just almost empty. Even though the defendants have carefully evaded the issues of graves, I believe that the graves of the plaintiffs ancestors are very much there on that disputed land. In this part of the country, disposal of human corpses by burial is an important exercise. You can only bury corpses on your own land or on another persons land, only with his permission.” (Underlining supplied for emphasis).

On the other numerous and positive acts of possession relied on by the plaintiffs, the trial court found that apart from cultivating and farming on the land, the plaintiffs have their oil palm plantation, raffia palm trees and plantain plantations on the land in dispute. Said the learned trial Judge:-

“Apart from ... the plaintiffs swore that since 1960, there was no disturbance of any sort from any quarters over that land. They said they used to farm there and that apart from farming, they have planted oil trees, raffia palm trees and plantains on the disputed land ..... All these acts, namely, the 1959 dispute with Nkwot Ikot Umoh, the cultivation of the land, the market called Urua Edem Obo, and the many dead ancestors buried by the plaintiffs on that land, are all numerous and positive acts indicative of possession. In my opinion, they point at one and only one irresistible conclusion and that is, that the plaintiffs are the owners of the land in dispute” ..... Apart from ousting (sic) Nkwot Ikot Umoh from and, planting oil and raffia palms, and burying their deads on that land, several cassava farms have been cultivated there on that land. Exhibit “A” clearly shows this, whereas Exhibit “B”, in its characteristic avoidance, carefully made sure almost any of the farms was not located. I believe that those farms were there on the land and they belong to the plaintiffs but the surveyor must have been prevailed upon by the defendants not to show them on the plan because it was not their own. The plaintiffs were and are definitely in exclusive possession of the land.”

I think it ought to be pointed out that the findings of the learned trial Judge in so far as they concerned the plaintiffs disposal of the human corpses of their chiefs and members by burial from the time of their ancestors and their occupation and possession of the land in dispute by cultivating the same, planting their oil palm trees, raffia palms and plantain plantations thereon are clear findings of facts which are adequately supported by evidence on record. They were neither established to be perverse, nor reached as a result of a wrong approach to the evidence or any principle of substantive law or proce-

pure and may not, therefore, be interfered with by an appellate court. See Enang v. Adu (1981) 11-12 SC 25 at 42; Nwadike v. Ibekwe (1987) 4 NWLR (Pt.67) 718; Igwego v. Ezeugo (1992) 6 NWLR (Pt.249) 561 at 576 etc. In my view these acts of possession and ownership of the land in dispute, having extended over a length of time and being numerous and positive to warrant the inference of exclusive ownership thereof by the plaintiffs are sufficient to sustain the trial court's judgment in favour of the plaintiffs in respect of title to the said land.

I must in all fairness to the court below endorse its observations that the trial court's findings in favour of the plaintiffs with regard to ownership of the market situate within the boundary of the land in dispute and the issue of estoppel pleaded by the plaintiffs were clearly based on wrong principles of law. These wrong principles of law have been fully dealt with in the leading judgment of my learned brother, Onu, J.S.C. and I can only state that I agree entirely with his views thereupon. However, I need stress that it is not every mistake or slip in a judgment that must merit in the appeal being allowed. It is only when the error is substantial in that it has occasioned a miscarriage of justice that the appellate court is bound to interfere. See Onajobi v. Olanipekun (1985) 2 SC (Pt.2) 156 at 163, Oje v. Babalola (1991) 4 NWLR (Pt.185) 267 at 282, Ukejianya v. Uchendu 13 WACA 45 at 46, Azuelonma Ike v. Ughoaja (1993) 6 E NWLR (Pt.301) 539 at 556; Abiodun Famuroti v. Madam Agheke (1991) 5 NWLR (Pt.189) 1 at 14; (1991) 6 SCNJ 54 at 64 etc.

I find nothing in the said errors of the trial court which have occasioned any miscarriage of justice in view of its other more powerful findings which, in my view, are sufficient to sustain its final decision.

On the order of retrial made by the court below, I need only state that an appellate court before deciding to make such an order should satisfy itself that neither of the parties to the suit is being wronged to such an extent that there would be a miscarriage of justice. See Ayoola v. Adebayo (1969) 1 All NLR 159. In the present case, quite apart from the mistakes of the trial court already alluded to, there is abundant evidence on record upon which the judgment of the learned trial Judge in favour of the plaintiffs may be justified. I think an order of retrial in the circumstance, must be regarded as erroneous and clearly not in the interest of justice.

It is for the above and the more detailed reasons contained in the leading judgment of my learned brother, Onu, JSC that I too, allow this appeal. The judgment and orders of the court below are hereby set aside and the decision of the trial court is restored. I abide by the order for costs made in the leading judgment.