

SUPREME COURT OF NIGERIA

20TH DECEMBER, 1996. SC. 13/1991

**CORAM:- A. B. WALI, M. E. OGUNDARE, E. O. OGWUEGBU,
U. MOHAMMED, A. I. IGUH, JJSC**

EZEKIEL NNEJI & 3 ORS. APPELLANTS/
(For themselves and on behalf of Enugu APPLICANTS
Achara Amodu, Awkunanaw)
AND
CHIEF NWANKWO CHUKWU & 7 ORS RESPONDENTS
(For themselves and on behalf of
Umueze Awkunanaw)

APPEALS - *Findings of fact - Land Law - Whether trial court's finding were rightly disturbed.*

APPEALS - *Issue canvassed in the lower court - By the defendants - Whether plaintiffs can now raise that issue before the Supreme Court.*

EVIDENCE - *Evaluation of evidence - Where not properly done by the trial court - Appeal Court will interfere.*

EVIDENCE - *Witnesses - Whether issues of fact resolved by trial Judge - Mostly affect credibility of individual witnesses.*

LAND LAW - *Possession of adjoining land - Whether proved by plaintiff - To warrant drawing inference under s. 45 Evidence Act - In their favour,*

LAND LAW - *Title - Where derived by grant or inheritance - Need to pi the persons who founded the land originally.*

LAND LAW - *User of land - Where put in issue by the defendants - plaintiffs proved their alleged act of possession.*

FACTS

Before the Enugu High Court, the plaintiffs/appellants filed action against the defendants/respondents claiming N1,000.00 damage trespass and perpetual injunction in respect of the land in dispute, parties who claimed the right to possession pleaded traditional history acts of

ownership and possession. Plaintiffs that traced their title to their ancestor, one Amodu, failed to establish the original founder of the land nor how Amodu derived title to the land in dispute.

The trial court found in favour of the plaintiffs. The defendants' appeal to the Court of Appeal was allowed. Being dissatisfied, plaintiffs have now appealed to the Supreme raising 6 issues. B

ISSUES FOR DETERMINATION

“(i) Whether circumstances existed in this case to warrant a re-evaluation of the evidence by the Court of Appeal.

“(ii) Whether in view of the evidence and findings on possession of the land in dispute the Court of Appeal was right to have stated that section 45 of the Evidence Act did not apply or was not available to the plaintiffs. Etc, see p. 2231

HELD: (Unanimously dismissing the appeal per lead judgment of OGWUEGBU JSC)

Title - Where derived by grant or inheritance

1. The Court of Appeal was right when it held that the plaintiff failed to prove who owned the land in dispute before Amodu and how it subsequently devolved until got to the Plaintiffs. Where title is derived by grant or inheritance, the pleading should aver facts relating to the founding of the land in dispute, the persons who founded the land and exercised original is of possession and person on whom title in respect of the land has delved since the first founding. These are necessary for the determination of the issue of the capacity in which the land is being held. The plaintiffs based their claim on customary title, they must plead and give clear evidence of how they derived the particular title. Their pleading fell short of stating how Amodu came by the land in dispute, who the founder of the land was and how he came by the land. The plaintiffs therefore failed to ad and lead evidence of their derivative title. (p. 2234 H)

User of land

2. The plaintiffs were also not able to show that they farm on the land. All they said in evidence is that it is a farm land and there is no evidence as to who farms on it. Since the defendants put the user and features of the land in issue, the burden of establishing by satisfactory evidence the members of their families who farm on it is on the plaintiffs. I am equally of the same view with the court below that the plaintiffs failed to prove the alleged acts of ownership and or possession of the land in dispute. (p. 2235 F)

Possession of adjoining land

3. There is also no way the court below could have drawn the inference under section 45 of the Evidence Act in favour of the plaintiffs. Their possession of pieces of land west and north-east of the land in dispute was not proved. Whereas the plaintiffs can be said to be in possession of the land north of the land in dispute, the defendants are equally in possession of the land south of the land in dispute. (p. 2235 H)

Findings of fact

4. A court of appeal does not easily disturb the findings of fact of a trial Judge who had the singular opportunity of listening to the witnesses and watching them perform. It is settled law, however, that such findings of facts or inferences from time to time may be questioned in certain circumstances. In the instant case, the findings of fact made by the learned trial Judge are not supported by the credible evidence given. In the circumstance, the court below is in as much a good position to deal with the facts and findings as the trial court. (p. 2237 D)

Evaluation of evidence

5. The findings of the learned trial Judge are not supported by the weight of evidence. With respect to the learned trial Judge, the use of expressions: “*I have no reason to doubt the evidence*”, “*I note and accept as true his evidence*”, “*I reject as false.*” “*I do not believe*” without really evaluating the evidence of vital witnesses does not preclude an appeal court from itself evaluating the evidence and seeing whether there is any justification for the use of such expressions. I am satisfied that the learned trial Judge did not evaluate the evidence and the court below was right in interfering with his findings of fact. (p. 2237 F)

Witnesses

6. I am unable to agree with Chief Mogboh, Learned Senior Advocate that most of the issues of fact resolved by the learned trial Judge raised issues of credibility of individual witnesses. How does the issue of credibility arise when the plaintiffs on their pleadings and evidence traced their root of title to Amodu, that Amodu was one of the fours of Awkunanaw and there was neither an averment in the statement of claim nor evidence as to how Amodu acquired the land? (p. 2237 H)

Issue canvassed in the lower court

7. It was not the plaintiffs who canvassed the issue of fair hearing in the

Court of Appeal. They were respondents in that court. They are not competent to raise it in this court. It is not being raised in good faith, more so, when the appellant herein had contended in that court that even if there was delay, it did not occasion any miscarriage of justice. (p. 2239 D)

NOTABLE POINTS OF INTEREST

OGWUEGBU JSC

1. When issue of competing titles must first be resolved.

Both parties claim the right to possession by virtue of their respective titles. The issue of competing titles must first be resolved for the law ascribes possession to one of them with a better title. (p. 2230 F)

2. Condition for the application of s. 45 Evidence Act

While it may be possible in certain cases for the land in dispute to be entirely surrounded or hedged by other lands in the possession and enjoyment of a plaintiff, this is not a condition for the application of section 45 of the Evidence Act. That other land need to be contiguous or near enough to the land in dispute and the similarity is in relation to acts of possession and user of both lands. (p. 2236 H)

3. Plaintiffs not to approbate and reprobate

It is surprising that the plaintiffs who maintained in the Court of Appeal that the delay did not occasion miscarriage of justice should now turn round to contend that failure to consider the issue was a fundamental error and a breach of section 33(1) of the Constitution. It is the defendants who should have complained in this court that the court below did not consider all the issues they brought before it for determination. (p. 2238 D)

WALI JSC

4. Where a trial judge failed to properly consider evidence

The learned trial judge failed to properly consider and assess the evidence of both parties adduced before him and erred in entering judgment for the plaintiffs and granting all the reliefs claimed by them. Learned Senior Advocate rightly submitted in his brief that where a trial court fails to evaluate the evidence as required by law, the appellate court has a duty to do so in order to obviate miscarriage of justice. (p. 2239 H)

REPRESENTATION

Chief A. O. Mogboh, S.A.N. (with A. Haruna) for the Appellants
A.N. Anyamene Esq., S.A.N. (with I. C. Ifebunandu, T. Dutse and H. Y.

Saleh) for the Respondents.

CASES REFERRED TO

Woluchem & Ors. v. Gudi & Ors. (1981) 5 SC. 291 at 294 - 295

Piaro v. Tenalo & Ors. (1976) 12 SC. 31 at 34

Benmax v. Austin Motor Co. Ltd. (1955) A.C. 370

B Akinola & Or. v. Fatoyinbo Oluwo & Ors. (1962) All NLR. 224

Akibu v. Opaleye & Or. (1974) 11 SC. 189

Surakatu J. Amida & Ors. v. Oshobola (1984) 7 SC. 68

Mogaji & Ors. v. Odofin (1978) 4 SC. 91

C STATUTES REFERRED TO:

Evidence Act ss. 45, 46, 145

Constitution of the Federal Republic of Nigeria s. 33(1)

LEAD JUDGMENT BY OGWUEGBU JSC

D This is an appeal from the judgment of the Court of Appeal, Enugu Division dated 12th April, 1990. The action was commenced by the appellants and the claim was for;

“(1) N1,000.00 (*One Thousand Naira*) being damages for trespass.

E vants, agents or privies from further acts of trespass on the said land.”
“(2) A perpetual injunction to restrain the defendants, their ser-

F The plaintiffs call the land in dispute “ANIAJAMANU” while the defendants call it “Azu Agu”. The plaintiffs assert that it belongs to them (i.e. Enugu and Achara families in Amodu Awkunanaw). The defendants who are members of Umueze village in Awkunanaw also assert ownership of the said land. The plaintiffs sued for damages for trespass and injunction. Both parties claim the right to possession by virtue of their respective titles. The issue of competing titles must first be resolved for the law ascribes possession to one of them with a better title. See Umeobi v. Otukoya (1978) 4 SC, 33; (1978) 1 LRN at 172 at 180-181.

G Both parties pleaded traditional history, acts of ownership and possession. The plaintiffs in addition relied on section 145 of the Evidence Act, while the defendant relied on section 45 of the said Act.

H The plaintiffs stated that they derived their title to exclusive possession of the land in dispute from time immemorial from Amodu who shared his land into two, that Amodu gave two of his four sons named Enugu and Achara, a half and his two other sons, Ezinato and Umuoha the other half and that the defendants ancestors were strangers who came from Akpugo and were granted the area where they now occupy by the ancestors of the plaintiffs.

The defendants admitted that Amodu was the plaintiffs' ancestor but denied that the land claimed by the plaintiffs in this action is a portion of a larger parcel of land which the plaintiffs inherited from the said Amodu. They denied being strangers in Awkunanaw and that neither themselves nor their ancestors suffered any disabilities customarily associated with stranger or "awbia" in local parlance. They maintained that they and the plaintiffs have a common progenitor, a man called Akagbe who founded Awkunanaw and that Awkunanaw is not a name of a person but a word denoting merger of four communities. They further stated that Akagbe who founded Awkunanaw was survived by five children whose descendants form the villages now known as Umueze (defendants village), Obuofia and Akagbe Ugwu (comprising Obuagu, Amechi and Amodu) the plaintiffs village) all being some of the communities which together are known as Awkunanaw.

Evidence was led by both parties. At the conclusion of the case and after a purported evaluation of the evidence, the learned trial Judge found in favour of the plaintiffs.

The defendants, being dissatisfied with the decision of the trial court, appealed to the Court of Appeal, Enugu Division on a number of grounds and that court in a unanimous decision allowed the appeal and dismissed the plaintiffs' claim.

It is against that decision that the plaintiffs have appealed to this court. Briefs of argument were filed and the appellants submitted the following issues for determination in the appeal:

"(i) Whether circumstances existed in this case to warrant a re-evaluation of the evidence by the Court of Appeal.

(ii) Whether in view of the evidence and findings on possession of the land in dispute the Court of Appeal was right to have stated that section 45 of the Evidence Act did not apply or was not available to the plaintiffs.

(iii) Whether in view of the nature of the case, particularly the fact that evaluation of evidence in this case involved the issue of credibility of the twelve witnesses called by the parties and the complexity of the case, it was a proper case in which the appellate court could, even on being satisfied that the trial court did not evaluate the evidence properly, have evaluated the evidence itself.

(iv) Whether the Court of Appeal was right to have held that the appellants did not prove their possession of adjoining and connected land to the land in dispute in this case.

(v) Whether the Court of Appeal gave adequate and proper consideration to the question of an order for re-trial before another High Court instead of re-evaluating the evidence by itself.

(vi) *Whether the Court of Appeal was right to have held that “there was no evidence whatsoever to support the action brought by the plaintiffs against the defendants”, and so on a proper evaluation the plaintiffs failed in toto.*”

The defendants identified five issues in their brief of argument B and I am satisfied that they are adequately covered by those identified by the plaintiffs. It is therefore unnecessary for me to reproduce them in this judgment.

I have observed that the issues for determination were argued together in the respective briefs of argument. It is not easy to determine C where argument on an issue started and ended. This is to be expected having regard to the nature of the issues formulated which centre on evaluation of the evidence by the court below.

Chief Mogboh, S.A.N. for the plaintiffs had submitted in his brief that an appellate court is bound to approach issues of fact and D findings thereon by a court of trial with caution. He referred the court to the cases of Chief Fabunmiyi & Or. v. Fatumo Obaje & Or. (1968) NMLR 242 at 247, Federal Commissioner For Works and Housing v. Lababedi & Ors. (1977) 11 - 12 SC. 15 at 24, Fabunmi v. Agbe (1985) 1NWLR (Pt. 2) 299 at 314, Chief Ebba v. Chief Ogoto & Or. (1984) 1 SCNL 372; (1984) 4 Sc. 84 at 99, Mogaji & Ors. v. E Odofin (1978) 4 Sc. 91 at 93 - 94 and Ojogbue & Or. v. Nnubia & Ors. (1972) 8 S.C.227. He said that when any issue of credibility of witnesses arises, an appellate court will not interfere but will do so where the trial court has failed in its primary duty of assessing and evaluating evidence called before it. He further submitted that there were no circumstances in this F case which put the issue of evaluation of evidence at large because the learned trial Judge did that job according to his own style and came to his own conclusions on the different issues and that what is important is whether in the learned trial Judge’s judgment on every issue, he weighed the evidence of both sides to the conflict one against the other, as it were G on an imaginary scale. On this issue, he concluded that the learned Justices of the Court of Appeal went into the areas of evaluation of primary facts which they are not supposed to do and thereby acted contrary to the principle enunciated in Mogaji & Ors. v. Odofin (supra).

It was the submission of Anyamene, Esq. S.A.N. who appeared H for the respondents that the trial court did not evaluate the evidence as required by law and that the court below did what is expected of it in the interest of justice by evaluating the evidence on the printed record. He referred the Court to the cases of Adewumi v. Aduroja (1975) 1 NMLR 125 at 127, Awobiyi & Sons v. Igbalaye Brothers (1965) 1 All NLR 163

and Kakarah & Ors. v. Chief Imonikhe & Ors. (1974) 4 SC. 15.

In Mogaji & Ors. v. Odofin & Ors. (supra) this court restated and followed the rule that a trial Judge is to consider the totality of the evidence in order to determine which has weight and which has no weight at all. He has a duty to review the evidence placed before him, evaluate it, giving reasons thereof, before making a finding. He ought to start by considering the plaintiffs' evidence and then proceed to consider that led by the defendants and where the evidence led by the plaintiffs is so patently unsatisfactory, he does not have to consider the defendant's case at all. Otherwise, he will take the evidence led by both sides and put it on the imaginary scale, weigh it and decide upon the preponderance of credible evidence which has more weight. See Woluchem & Ors. v. Gudi & Ors. (1981) 5 Sc. 291 at 294-295.

In the view of the Court below, the learned trial Judge did not adopt this approach to the evidence in this case. It is the contention of the appellants that the Court of Appeal was wrong to have re-evaluated the evidence since the right approach was adopted by the trial Court.

The Court of Appeal reproduced and considered various findings made by the learned trial Judge which led to his conclusion that the plaintiffs satisfactorily proved their case and gave them judgment. The court below observed as follows:

"I have purposely set out the passage above which shows how the trial Judge dealt with the evidence of PW1, Ezekiel Nneji who is the first plaintiff on record. At that stage the case had already been decided in favour of the plaintiffs. But I think in order for the trial Judge to complete the job of accepting the plaintiff's case, he took the evidence of PW2, PW3, PW4, and PW5 one after the other and with the same deliberate method made "findings" with his habitual phraseology prefacing almost every sentence in this form: "I have no reason to doubt the evidence", "I have no satisfactory reason to doubt his evidence", "I note and accept as true his evidence" This exercise was carried out with what looks like such indiscriminate use of those phrases.... This was how on the other hand he "demolished" one after the other the evidence given by the witnesses for the defence, this time by saying, "I reject as false", "I am unable to accept" "I do not believe" "I am unable in the light of the evidence before me to hold" with unmistakable regularity, and finally rejected the defendants case It has been emphasised on many occasions that the use of those phrases does not prevent an appeal court from examining the evidence to ascertain if they were justifiably used in making its own evaluation if not."

I have myself read the judgment of the learned trial Judge. After

reviewing the evidence, he considered the case of the parties in two water tight compartments and made his findings with the result that before he came to consider the case of the defendants, he had already found for the plaintiffs.

The court below had to consider the pleading and the evidence B to determine whether the plaintiffs in fact proved their case. In paragraphs 4 and 5 of the amended statement of claim the plaintiffs deposed as to how they acquired ownership of the land by inheritance and devolution. Their acts of ownership and/or possession were pleaded in paragraphs 6, 11, 12 and 14. Paragraphs 4 and 5 read:

C “4. Originally the plaintiffs came from a common ancestry by name Amodu (who) was one of the four sons of Awkunanaw.

5. Amodu had four sons namely: Enugu, Achara, Ezinato and Umuoha.”

In paragraph 2 of the amended statement of defence the defendants D denied that Amodu was a son of Awkunanaw. They stated that Awkunanaw is not the name of a person who had ever lived but an administrative word denoting a merging of four communities. In their paragraph 3, they denied the claim to inheritance of the land in dispute by plaintiffs.

The Court below rightly in my view, identified that the matters E pleaded in paragraphs 4 and 5 of the amended statement of claim were put in issue and observed that:-

“The plaintiffs failed in two major respects upon their pleading as per paragraphs 4 and 5 above. First, it was not pleaded how their said ancestor came to own the land which allegedly includes the land in dispute; nor did they plead how the land in dispute devolved through the F years and the names or histories or the several ancestors right from the said Awkunanaw till now. Secondly, there was no evidence led to establish that the said Awkunanaw was a person (as put in issue by the defendants) nor was there any single evidence or devolution of the land.

G In my view, as far as the averments in paragraphs 4 and 5 of the statement of claim are concerned, the proof as to who originally owned the land and how it devolved subsequently must be satisfactorily (sic) if there is to be a pronouncement or finding of those averment in favour of the plaintiffs.

H The law is that a plaintiff who relies on root of title must prove his derivative title. See Abdul H. Ojo v. Primate E.O. Adejobi & Ors. (1978) 3 SC.65.”

The Court of Appeal was right when it held that the plaintiffs failed to prove who owned the land in dispute before Amodu and how it subsequently

devolved until it got to the plaintiffs. Where title is derived by grant or inheritance, the pleading should aver facts relating to the founding of the land in dispute, the persons who founded the land and exercised original acts of possession and persons on whom title in respect of the land has devolved since the first founding. These are necessary for the determination of the issue of the capacity in which the land is being held. See *Piaro v. Tenalo & Ors.* B (1976) 12 SC. 31 at 34. **The plaintiffs based their claim on customary title, they must plead and give clear evidence of how they derived the particular title. Their pleading fell short of stating how Amodu came by the land in dispute, who the founder of the land was and how he came by the land. The plaintiffs therefore failed to plead and lead evidence of their derivative title.** C

The Court below also considered the issue whether the plaintiffs proved acts of ownership and or possession with respect to paragraphs 6, 11, 12 and 14 of the amended statement of claim. In paragraph 6, the plaintiffs averred that the defendants were granted the land where they now occupy by the plaintiffs ancestors. The court below found that D there was no evidence as to who the plaintiffs ancestors were; no evidence of substance to support the allegation of gift of the land to the defendants by the plaintiffs ancestors and that it was the defendants who were able to give meaningful evidence through DW7 as to how they came to settle on the land they now occupy. E

The court below in addition found that the plaintiffs failed to prove their other acts of possession such as the grant of land to the Principal of the Methodist Teachers Training College for the establishment of their school farm and the grant of portion of the land in dispute to Hardel and Enic Construction Company for excavation and extraction F of gravel and stone.

The plaintiffs were also not able to show that they farm on the land. All they said in evidence is that it is a farm land and there is no evidence as to who farms on it. Since the defendants put the user and features of the land in issue, the burden of establishing by G satisfactory evidence the members of their families who farm on it is on the plaintiffs. I am equally of the same view with the court below that the plaintiffs failed to prove the alleged acts of ownership and or possession of the land in dispute.

There is also no way the court below could have drawn the inference H under section 45 of the Evidence Act in favour of the plaintiffs. Their possession of pieces of land west and north-east of the land in dispute was not proved. Whereas the plaintiffs can be said to be in possession of the land north of the land in dispute the defendants are equally in possession of the land south of

the land in dispute.

The learned Senior Advocate of Nigeria appearing for the plaintiffs made heavy whether of the statement made by the court below per Uwaifo, J.C.A. on the application of section 45 of the Evidence Act. He was considering the application by the learned trial Judge of section 45 of the Evidence Act in favour of the plaintiffs. The learned trial Judge said:

“(f) *That their acts of exclusive possession and enjoyment of the land in dispute do in fact extend to other portions of the land so situated or connected therewith by locality or similarity to justify my holding that what is true of those other parcels of land is likely to be true of the land in dispute.*”

The Court of Appeal dealing with the above finding of the trial court said:

“*This is an inference that may be drawn under section 45 of the Evidence Act. But such inference cannot arise unless there is proof by the plaintiff or an admission by the defendant that the land in dispute is surrounded by other land belonging to the plaintiff: See D.O. Idundun 8 Ors. v. Daniel Okumagba (1976) 9-10 SC. 227 at 251; or at any rate, the land in dispute is so hedged in by the plaintiffs other land that there is no reasonable right of access available to the defendant to the land in dispute: or as the alternative condition in section 45 suggests, apart from contiguity, there is such connection or similarity (in acts of possession or user) between the two lands that everything put together what is true as to the ownership of the piece of land is likely to be true of the other piece of land* ”

The probability of the same ownership by the plaintiffs of the land in dispute and other contiguous lands claimed (but not all proved to be owned by them or admitted to be such by the defendants) cannot justifiably be drawn under section 45; and there is nothing whatsoever in the acts of possession or user of the two that can safely lead to such an inference.”

Section 45 now 46 of the Evidence Act Cap. 112, Laws of the Federation of Nigeria of Nigeria, 1990 provides:

“46. *Acts of possession and enjoyment of land may be evidence of ownership or of a right of occupancy not only of the particular piece or quantity of land with reference to which such acts are done, but also of other land so situated or connected therewith by locality or similarity that what is true as to the one piece of land is likely to be true of the other piece of land.*”

While it may be possible in certain cases for the land in dispute to be entirely surrounded or headed by other lands in the possession and

enjoyment of a plaintiff, this is not a condition for the application of section 45 of the Evidence Act. That other land need to be contiguous or near enough to the land in dispute and the similarity is in relation to acts of possession and user of both lands.

On the averment of the plaintiffs on oath-taking in respect of land dispute between them and a family called Umuekwensu Ochie, the defendants B averred that the land in respect of which the oath was taken was not the same as the land the subject matter of the present proceedings and that the person who swore to the oath on behalf of the plaintiffs (Nwosu Abia) died within one year which implied that the plaintiffs falsely claimed the land. The plaintiffs contended that one Ejim Onu, the oldest man in their village swore to the oath C on their behalf, that he survived a year and according to their custom, it meant that the land belonged to them and they resumed cultivation of it. The said Ejim Onu who is alive was not called as a witness for the plaintiffs. The court below finally came to the conclusion that there was no evidence whatsoever to support the action brought by the plaintiffs against the D defendants and dismissed it.

A Court of Appeal does not easily disturb the findings of fact of a trial Judge who had the singular opportunity of listening to the witnesses and watching them perform. It is settled law, however, that such findings of facts or inferences from time to time may be questioned in certain circumstances. See Fabumiyi & Or. v. Obaje & Or. (supra), Benmax v. Austin Motor Co. Ltd. (1955) A.C. 370 and Akinola & Or. v. Fatoyinbo Oluwo & Ors. (1992) 1 SCNLR 352 (1962) All NLR. 224. E

In the instant case, the findings of fact made by the learned trial Judge are not supported by the credible evidence given. In the F circumstance, the court below is in as much as a good position to deal with the facts and findings as the trial court.

The findings of the learned trial Judge are not supported by the weight of evidence. With respect to the learned trial Judge, the use of the expressions: "I have no reason to doubt the evidence", "I note and G accept as true his evidence", "I reject as false", "I do not believe"; without really evaluating the evidence of vital witnesses does not preclude an appeal court from itself evaluating the evidence and seeing whether there is any justification for the use of such expressions. See Akibu v. Opaleye & Or. (1974) 11 Sc. 189. I am satisfied that the learned trial Judge did not H evaluate the evidence and the court below was right in interfering with his findings of fact.

I am unable to agree with Chief Mogboh, learned Senior Advocate that most of the issues of fact resolved by the learned

trial Judge raised issues of credibility of individual witnesses. How does the issue of credibility arise when the plaintiffs in their pleadings and evidence traced their root of title to Amodu; that Amodu was one of the four sons of Awkunanaw and there was neither an averment in the statement of claim nor evidence as to how Amodu acquired the land?

B The plaintiffs contended that the defendants who were the appellants in the court below raised the issue of lack of fair hearing in the court below resulting from lapse of period of four years and nine months between the commencement of taking of evidence and the delivery of the judgment, which rendered it impossible for the trial Judge to recollect his C impressions of witnesses and details of evidence. The plaintiffs' counsel has argued before us that the court below did not consider that issue and that failure to do so was a fundamental error as it is a constitutional right which should not be swept under the carpet. The plaintiffs as respondents in the court below contended that the delay did not lead to miscarriage of justice. It was also the submission of Chief Mogboh, SAN, that D the plaintiffs filed respondents' Notice in the court below and that court did not show that it considered and or expressed any opinion on it.

It is surprising that the plaintiffs who maintained in the Court of Appeal that the delay did not occasion miscarriage of justice should now E turn round to contend that failure to consider the issue was a fundamental error and a breach of section 33(1) of the Constitution. It is the defendants who should have complained in this court that the court below did not consider all the issues brought before it for determination.

It is not correct that the court below did not pronounce or express F opinion on the respondents' Notice. The Notice reads:

"1a. Going by the state of the pleadings the plaintiffs/respondents clearly in their plan Exhibit "A" and their pleadings - (paragraphs 13 and 14 of the records) - presented the trial court enough materials upon which they could obtain title pursuant to section 45 of the Evidence Act. The defendants/appellants did not deny paragraph 13 of the amended statement of G claim. Even paragraph 16 of the statement of defence - page 47- did not meet the clear averments of the plaintiffs/respondents' amended statement of claim hence by admission, the plaintiffs/respondents without more ought to succeed on their case - See Section 45 Evidence Act"

H The court below considered exhaustively, the application of section 45 of the Evidence Act and concluded as follows:

"The probability of the same ownership by the plaintiffs of the land in dispute and the other contiguous lands claimed (but not all proved to be owned by them or admitted to be such by the defendants) cannot justifiably

be drawn under section 45; and there is nothing whatsoever in the acts of possession or user of the two that can safely lead to such an inference.”

There is no substance in this complaint. The respondents’ Notice was fully considered and pronounced upon.

There is an alternative submission by the learned appellants’ counsel that the decision of the court below should be set aside and the case B remitted to another panel of the Court of Appeal for re-hearing, because:

(a) Even if the learned Justices of the Court of Appeal were right in stating that the learned trial Judge did not evaluate the evidence at all or properly, which is not conceded, they ought to have advised themselves that as most of the issues for decision depended on credibility C of twelve witnesses in a complex case, an area in which they, not having seen or watched them testify, they were not competent, they ought to have desisted from evaluating the evidence by themselves.

(b) The learned justices of the Court of Appeal ought to have considered the issue of fair hearing canvassed before it” D

It was not the plaintiffs who canvassed the issue of fair hearing in the Court of Appeal. They were respondents in that Court. They are not competent to raise it in this court. It is not being raised in good faith, more so, when the appellant herein had contended in that court that even if there was delay, it did not occasion E any miscarriage of justice. It was the defendants as appellants in that court who complained that they had no fair hearing as a result of the delay. The plaintiffs who were respondents in that court “offered no injury in the trial court occasioned by any delay. The learned trial Judge did not evaluate the evidence led and as a result, the court below intervened. That being the case, F lapse of time in the hearing of the case by the learned trial Judge and the effect of the delay on him were no longer issues before the court below which evaluated the evidence on the printed record.

The plaintiffs simply failed to prove the case they brought to court. The appeal therefore fails. The judgment of the Court of Appeal, G Enugu Division is affirmed. The appeal is dismissed with N1,000.00 costs to the respondents.

WALI JSC

H

I have had a preview of the lead judgment in draft of my learned brother Ogwuegbu, J.S.C. and I entirely agree with his reasoning and conclusion for dismissing the appeal.

The learned trial Judge failed to properly consider and assess the

evidence of both parties adduced before him and erred in entering judgment for the plaintiff, and granting all the relief, claimed by them. Learned Senior Advocate rightly submitted in his brief that where a trial court fails to evaluate the evidence as required by law, the appellate court has a duty to do so in order to obviate miscarriage of justice. See *Woluchem v. B Gudi* (1981) 5 SC. 291; *Surakatu I. Amida & Ors. v. Oshoboja* (1984) 7 SC. 68 and *Mogaji & Ors. v. Odofin* (1978) 4 SC. 91.

There is no merit in the appeal against the judgment of the Court of Appeal which corrected the error committed by the trial Court, by evaluating and assessing the said evidence.

C The appeal is dismissed and I abide by the order of costs made in the lead judgment.

OGUNDARE JSC

I agree with the judgment of my learned brother Ogwuegbu, D J.S.C. just delivered. I have nothing more to add. I too, dismiss, the appeal and affirm the judgment of the Court below.

I subscribe to the order for costs made in the lead judgment.

MOHAMMED JSC

E I have had the preview of the judgment just read by my learned brother Ogwuegbu, J.S.C. in draft, and I agree with him that there is no merit in this appeal. It is for the reasons given in the lead judgment that I will dismiss the appeal. It is accordingly dismissed. I shall also award F N1,000.00 damages in favours of the respondents.

IGUH JSC

I have had the privilege of reading in draft the leading judgment just delivered by my learned brother, Ogwuegbu , J.S.C. and I am in G agreement with his reasoning and conclusion therein.

Consequently, this appeal fails and the same is hereby dismissed. I abide by the order for costs therein made.

H