

**SUPREME COURT OF NIGERIA**  
20TH DECEMBER, 1996. SC. 198/1990  
**CORAM:- S. M. A. BELGORE, A. B. WALI, I. L. KUTIGI,**  
**M. E. OGUNDARE, E. O. OGWUEGBU, JJSC.**

AINA ARUPE OBAWOLE & ANOR. (For themselves and on behalf of the Obawole family)	..... DEFENDANTS/ APPELLANTS
AND	
ADEKUNLE AGANGA WILLIAMS & ANOR. (For themselves and on behalf of Rev. E. E. Williams' Family)	..... PLAINTIFFS/ RESPONDENTS

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***APPEALS*** - Concurrent findings of fact - Whether perverse in this case.

***COURTS*** - *Suo motu* issues - Practice of Courts raising and deciding issue *suo motu* - Without hearing the parties - Is not proper.

***COURTS*** - Error in law - Trial Judge erred in holding Exhibits 1 & 2 - As "ancient documents" - Court of Appeal also erred - In not disturbing that finding.

***EVIDENCE*** - Burden of proof - Where a party calls upon the court - To make a declaration of right - The onus is on that party - To establish the right claimed.

***EVIDENCE*** - Exhibit- Though admissible - In the absence of evidence identifying it with the land now in dispute - Exhibit 10 is valueless.

***JUDGMENTS*** - Erroneous judgment - A judgment based on a ground has fallen - Is erroneous and must be set aside.

***LAND LAW*** - Title - Having admitted that the radical title is in the defendants -The onus is on the plaintiffs - To prove that the land has been sold to their predecessor in title.

***LAND LAW*** - Title - Where defendants also claim title in their counter claim - They cannot rely on plaintiffs' admissions - To discharge the burden

**ORDERS** - *Dismissal - mere the defendants failed in their counter claim*  
 - *The proper order to make is dismissal.*

### **FACTS**

The plaintiffs/respondents instituted the action leading to this appeal in the High Court of Lagos State, Ikeja Division, against the defendants/appellants claiming a declaration of entitlement to the statutory right of occupancy in respect of the land in dispute, N500.00 damages for trespass and perpetual injunction restraining the defendants. The defendants also counter claimed for declaration of entitlement to the statutory right of occupancy in respect of the same disputed land. During trial, the plaintiffs admitted that the radical title in the land in dispute was in the defendants but contended that the land was sold by the forbears of the defendants to their predecessor in title. The plaintiffs relied on Exhibits 1 and 2 for the contention. The defendants denied that the said land was so sold and relied on Exhibit 10 for their case. At the end of trial, the trial judge refused plain tiffs' claim for statutory right of occupancy, and in so doing, raised a point suo motu, but granted their claim for damages and perpetual injunction. He dismissed defendants counter claim.

The defendants appealed to the Court of Appeal which dismissal their appeal, reversed the trial court on the plaintiffs claim for statutory right of occupancy and affirmed the judgment of the trial court on other aspects. Dissatisfied with the judgment of the Court of Appeal, the defendants have further appealed to the Supreme Court raising 5 issues for determination. The final Court however accepted the 3 issues formulated by the plaintiffs in determining this appeal.

### **ISSUES FOR DETERMINATION**

*"1. Whether the judgment of the Trial Court as confirmed by the Court of Appeal is sustainable having regard to the pleadings and evidence in support thereof by the parties. Grounds I, II, III, IV and VIII.*

*2. Whether Exh. 10 a piece of evidence given in an earlier proceeding can be used in a subsequent proceeding as evidence of the truth of what it contains without due compliance with the provisions of Section 34 (1) of the Evidence Act Cap. 112 Laws of the Federation of Nigeria 1990. Grounds V, VI, and VII.*

*3. Whether the Defendants have shown any special circumstances why the concurrent findings of fact by the Two Lower Courts ought to be disturbed grounds I, II, III, and IV."*

**HELD** (Unanimously allowing the appeal in part per lead judgment of **OGUNDARE JSC**)

***Exhibit 10 is valueless***

1. No doubt. Exhibit 10 is inadmissible under section 34(1) of the Evidence Act. To this extent I agree with their Lordships of the Court below. The same, however, cannot be said of admissibility under section 33(I)(c) of the Act. By his evidence in Exhibit 10, David Hughes admitted, by implication, that he was tenant to Obawole in respect of a farm land. It is true that there is no evidence either in Exhibit 10 or otherwise of the farm land he was talking about let alone identifying that farm land to the land in dispute. But this only goes to the weight to be attached to Exhibit 10 and not to its admissibility. In the absence of evidence identifying the land in dispute with the land David Hughes testified about, Exhibit 10, though admissible, is clearly valueless as rightly held by the learned trial Judge. (p. 2138 A)

***Court raising point suo motu***

2. This Court has in numerous cases strongly deprecated the practice of a court raising a point suo motu and deciding the issue without first hearing the parties on it. Has the Court below given to counsel for the parties the opportunity of addressing it on the admissibility of Exhibit 10 its attention might have been drawn to section 33(1) (c) of the Evidence Act and its decision on the point might have been different. The learned trial Judge also fell into the same error when, without giving counsel for the parties the opportunity of addressing him on whether the land in dispute is in an urban or rural area, he took the point suo motu in his judgment and pronounced on it which pronouncement the Court below was obliged to set aside as it was clearly erroneous and both parties on appeal disowned its correctness. (p. 2138 D)

***Courts - Error in law***

3. Applying this to the facts of this case, there is no contract pleaded that is at least 20 years posterior to the date of the execution of Exhibit 2. Exhibit is executed on 4th day of May, 1909. Exhibit 1 is a certificate of purchase issued to Rev. E. E. Williams and dated 17th day of January 1916 1st the contract of sale therein was on 29th day of August, 1912. Both were clearly within 20 years of Exhibit 2 and would not clothe the recitals therein with the presumption envisaged in section 130 of the Evidence Act. Section 123 (formerly 122) of the Act would apply to presume (and rebuttal presumption for that matter) the proper execution of Exhibit 2 and no more. The learned trial Judge was, therefore, in error

in holding that Exhibits 1 & 2 and more. The learned trial Judge was, therefore, in error in holding that Exhibits 1 & 2 “*are ancient documents within the meaning and intendment of section 129.*” And the Court below was in error not to have disturbed that finding. (p. 2143 F)

**B *Erroneous judgment***

4. And as it now turns out the recitals in Exhibit 2 are not available to the Plaintiffs to raise the rebuttals presumption that Obawole sold or granted absolutely the land in dispute to David Hughes. The two Courts below came to their conclusion that Plaintiffs’ title was proved on the premise that section 130 of the evidence Act was applicable to this case and that the recitals in Exhibit 2, in the absence of any rebutting evidence were correct and sufficient to prove Plaintiffs’ title. As the plank on which the judgments are anchored has now fallen down it follows that those judgments are erroneous and must be set aside. (p. 2144 A)

D

***Land law - Title***

5. Having admitted, both in the pleadings and evidence. Defendants’ radical ownership of the land in dispute the onus was on them to prove that the land had been sold or granted to David Hughes. They attempted to rely on the presumption in section 130 of the Evidence Act to discharge this burden. They have now tailed in that attempt. They relied on production of documents of title in proof of their title. Exhibits 1 and 2 are insufficient for this purpose. Exhibits 1 and 2 only traced plaintiffs’ root of title to Edum Harrison Obafemi. There was no evidence to trace their root of title to the original owner of the land. They cannot rely on acts of ownership as they have failed to establish that ownership. (p. 2144 C)

***Concurrent finding of fact***

6. It is not the practice of this court to disturb concurrent findings of fact of the courts below unless they are perverse. The concurrent finding of the two courts below that plaintiffs are the owners of the land in dispute, being based on a wrong application of section 130 of the Evidence Act, must necessarily be perverse and must be set aside. And since they have failed to show a better title to the land in dispute, they cannot succeed in trespass against the Defendants who also claimed to be in possession of the land. In conclusion, this part of the appeal succeeds and it is hereby allowed. In judgments of the two courts below granting the claims of the plaintiffs are set aside. Plaintiffs’ claim are dismissed. (p. 2144 E)

***Burden of proof - Is on the party calling for declaration of right***

7. The law is that where the court is called upon to make a declaration of a right, it is incumbent on the party claiming to be entitled to the declaration to satisfy the court by evidence, not by admission in the pleadings of the defendant, that is he is entitled. (p. 2145 A)

B

***Where defendants also claim title in their counterclaim***

8. As it so happens in this case, the Defendants sought in their claim a declaration of entitlement to a right of occupancy the onus was on them, therefore, to establish the title they claimed. They adduced no evidence in support of their claim. They, therefore, cannot succeed on the counterclaim. They cannot rely on the plaintiffs' admissions in the pleadings to Discharge the burden on them. They must rely on the strength of their own case - Kodilnve v. Odu 2 WACA 336. I agree with the learned trial Judge when, in his judgment, he observed: "*the case presented by the Defendants ' their title is weak.*" (pp. 2145 H & 2146 A)

D

***Orders - Dismissal***

9. The defendants having failed in their counterclaim, it is my view that the proper order to make is one of the dismissal of the counterclaim. Consequently I dismiss that part of the Defendants' appeal against the dismissal of their counterclaim. I affirm the judgments of the Courts below on this point. (p. 2146 B & F)

**NOTABLE POINTS OF INTEREST****OGUNDARE JSC**

F

***1. Application of s. 130 E.A.***

The law, as it now is, on the application of section 130 of the Evidence Act is laid down in the decision of this Court in Johnson v. Lawanson (1971) ANLR 58. (p. 2141 A)

G

**OGWUEGBU JSC*****2. When does the presumption under s. 130 E. A. arise***

The argument of the learned plaintiffs' counsel as well as the finding of the court below on the application of section 130 of the Evidence Act to exhibit "1" and "2" are grossly erroneous. In order to secure the benefit of the presumption created by section 130, the document must be twenty years old at the date of the contract. The courts below equated the "date of the contract" appearing in section 130 with the date of the proceedings at which Exhibits "1" and "2" are being offered in evidence. This is

not the law. Once the court is satisfied that the document is twenty years old at the date of the contract, it qualifies for the presumption under section 130 of the Evidence Act. (p. 2151 G)

**REPRESENTATION**

- B Chief Kunle Oyewo, for the Respondents.  
Appellants are absent and not represented by counsel.

**CASES REFERRED TO**

- Kuti v. Jibowu (1972) 6 SC. 147  
C Uhan v. Lajoyetan (1972) 6 SC. 190  
Kuti v. Balogun (1978) 1 SC. 53  
Olusanya v. Olusanya (1983) 1 SCNLR 134  
Agborifo v. Aiwereigbo (1988) 1 NSCC 237  
Fashoro v. Beyioku (1988) 2 NWLR 263, 271 - 272  
D Wallersteiner v. Moir (1974) 3 All ER 217  
Kodilinye v. Odu 2 WACA 336  
Bello v. Eweka (1981) 1 SC. 101, 122  
Johnson & Ors. v Lawanson & Ors. (1971) All N.L.R. 58  
Cardoso v. Daniel & Ors (1986) 2 NWLR (Pt. 20) 1 at 19  
E Owoade v. Omitola (1988) 2 NWLR (Pt. 77) 413  
Aiyedou T. Jules v. Ajani (1980) 5 - 7 SC. 96 at 108  
Elias v. Chief Timothy Omo-Baro (1982) 5 SC. 25 at 47  
Rufai v. Ricket & Ors. 2 WACA 95 at 97.

**F STATUTES REFERRED TO**

Evidence Act (E. A.) Cap. 112 L.F.N. 1990, ss. 33, 34, 123 & 130.  
Registration of Titles Act Cap. 181 L. N. 1958

**LEAD JUDGMENT BY OGUNDARE JSC**

- G By a writ of summons issued in June 1981, the plaintiffs, Adekunle Aganga Williams and Adebisi Daniel, for themselves and on behalf of the family of Rev. E.E. Williams, sued the defendants, Aina Orupe Obawole and Lamidi Lawal in a representative capacity as representing the Obawole Family claiming:-  
H (1) Declaration that plaintiffs are the persons entitled to statutory right of occupancy under Edict No.7 of 1978 in respect of the parcel of land shown edged pink on plan No. OGEK 313/81 which parcel is at Ifako Coker Agege, Ikeja Division of Lagos State.  
(2) N500.00 damages for trespass committed by the defendants,

their servants and agents on the said land.

(3) *An order of perpetual injunction restraining the defendants, their servants and agents from committing further acts of trespass on the said land.*

Pleadings were filed and exchanged and subsequently, with leave of court, amended. By their amended statement of claim, the plaintiffs pleaded, inter alia, as follows:

*“1. The plaintiffs are the children of one Rev. E.E. Williams who died sometime ago in Lagos and they are pursuing this action as accredited representatives of the said Rev. E.E. Williams family.*

*2. The defendants are the accredited representatives of the Obawole family otherwise known as Obawole Aina Arupe Family, a family which originated from one Dada Adedipe a hunter who hailed from Ile- Ife some 300 years ago and settled on a vast area of land stretching from Ifako to Ijaiye near Agege within the jurisdiction of this honourable court.*

*4. The said land in dispute form portion of vast and extensive lands belonging to the Obawole family alias Obawole Aina Arupe Family under Yoruba Native Law and Custom from time immemorial, the same having been originally settled by one Dada Adedipe who migrated from Ile-Ife in Nigeria some 300 years ago.*

*5. The said Dada Adedipe lived on the said lands and exercised maximum rights of ownership and possession thereon for several years until he died on the lands leaving children surviving him.*

*6. The children of the said Dada Adedipe after the death of their progenitor succeeded to his landed properties according to native law and custom (sic) themselves, their strangers, their tenants etc. exercising all and full rights of ownership and possession on the said land and still do so on portion thereof.*

*7. The plaintiffs aver that under and by virtue of:*

*(a) Deed of conveyance dated 4.5.1909 and registered as No. 94 at page 291 in volume 61 of the Register of Deeds at the Land Registry in Lagos.*

*(b) Sale effected under Suit No. 111 of 1912 by the Supreme Court of Nigeria.*

*(c) Receipt issued on 29/8/1912 in furtherance of sale mentioned in (b) above.*

*One Reverend E.E. Williams became owner in fee simple of the land subject matter of this action.*

*8. That one Obawole Chief Dada of Otta before 1909 sold the land in dispute to one David Hughes of Ebute Metta.*

*9. David Hughes was placed in possession and he exercised full*

*rights of ownership and possession without any hinderance from any quarters until the said portion of land was sold to Edwin Harrison Obafemi in 1902 at a price of 'a340.00.*

10. Edwin Harrison Obafemi had full possession of the said landed property until the same was sold to one Jemina Emestina George B for the sum of 'a355.00 who also was in effective possession until 1912.

11. In 1911 by virtue of Suit No. 111/1912, the land in dispute which was then in the exclusive possession of Jemina Emestina George was attached and sold to Reverend E.E. Williams who was issued a receipt in evidence of the sale date 29/8/1912

C 12. Ever since the said Reverend E.E. Williams took possession of the land and exercised maximum and effective acts of ownership until his death intestate some few years ago.

13. At the death of Reverend E.E. Williams the said land became family property for the benefit of all the children of the said Reverend E.E. Williams.

14. Since the death of the Reverend E.E. Williams all the children inclusive of the 2 plaintiffs herein had been in full and effective occupation and possession of the said land without any hindrance whatsoever.

E 17. In 1980, the defendants armed with thugs invaded the land in dispute and inspite of the explanation that their ancestors had effectively disposed of the said land to the plaintiff's vendor and those who sold the said land starting from David Hughes to Edwin Harrison Obafemi and Jemina Emestina George."

F The defendants counter-claimed for (a) declaration that they are entitled to a customary right of occupancy to the land in dispute and (b) an injunction. In their further amended statement of defence and counter-claim, they pleaded thus:-

G "1. Save and except as is hereinafter expressly admitted the 1st and 2nd defendants (hereinafter referred to as the defendants) deny each and every allegation of fact contained in the plaintiffs' statement of claim as if each were set out seriatim and specifically traversed.'

2. Save that the defendants admit the identity of the land the subject matter of the plaintiffs' claim as pleaded in the statement of claim, the defendants deny each and every allegation of fact in the plaintiffs' statement of claim.

H 3. The defendants are not in a position to admit or deny paragraph 1 of the statement of claim.

4. The defendants admit paragraphs 2, 4, 5, 6, of the statement of claim.

5. The defendants deny paragraphs 3, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21 and 22 of the statement of claim and put the plaintiffs to



*the strictest proof thereof.*

6. *The defendants aver that the plaintiffs have not got good title to the land in dispute and will contend that at best are squatters.*

7. *The defendants will contend that the conveyance mentioned in paragraphs 3 ad 7 of the statement of claim is worthless because no accredited head with the consent and approval of the principal members of the Obawole-Aina Arupe Family ever sold the land in dispute to one David Hughes 'before 1909'.*

8. *The defendants aver that David Hughes, the root of title of the plaintiffs did not purchase the fee simple interest of the land in dispute from Obawole.*

9. *The defendants will rely on the testimony of the said David C Hughes in (1) Osho v. Odu Ijebu (2) Osho v. Shomefu which was conducted before Rayner C.J. in 1896.*

10. *The defendants also aver that David Hughes had no right to sell the land in dispute to anyone because no members of the Obawole family sold the land to him.*

11. *The defendants aver that David Hughes himself did not say he bought the land from Obawole in fee simple.*

12. *The defendants aver that all the portions of the family land at that period of were never sold outright to anyone but leased as all the other lessees had testified before Rayner, C.J. in the above mentioned paragraph 9.*

13. *The defendants also aver that no leases were executed in favour of the said David Hughes.*

14. *The defendants aver that the presence of the plaintiffs was first detected in 1980 when they purported to have sold portion of the land in dispute to a purchaser.*

15. *The purchaser was chased off but later came to the family to plead and he was allowed to build.*

16. *The defendants aver that a large portion of the land in dispute is settled on by members of their family who farm on the land in dispute from time immemorial - long before the plaintiffs show their facts (sic) on any portion of the family land as per survey plan No. AD 584/77 drawn by surveyor Adeoti."*

*"Counter-claim*

*The defendants repeat their defence, and by way of counter-claim, claim against the plaintiffs:*

(a) *a declaration that the defendants, for themselves and on behalf of the Obawole Aina Arupe family are entitled to a customary right of occupancy in respect of all that the land shown and edged in pink on the plan No. OGEK 313/81 which parcel is at Ifako, Ikeja divi-*

*sion claimed by the plaintiffs in their writ of summons.*

*(b) A perpetual injunction restraining the plaintiffs, their servants and/or agents from trespassing or further trespassing on the said land."*

In their reply and defence to the counter-claim, the plaintiffs pleaded:-

2. The plaintiffs pleaded that the testimonies before Rayner, C.J. in the suit listed in paragraph 9 of the 2nd further amended statement of defence and counter-claim are irrelevant and completely inadmissible in this action because:

(a) Parties in the suits (suit herein and that before Rayner, C.J.) are not the same.

(b) The issues canvassed in the 2 suits are not the same.

2. *With regards to the counter-claim the plaintiffs plead that the forebears of the defendant had effectively divested themselves of all rights, estate and interest in the land covered by Plan No. 313/81 by virtue of the Instrument recited in paragraph 3 of the Amended Statement of Claim and other instrument quoted in paragraph 7 of the said Amended Statement of Claim dated 24/5/1984."*

As the plaintiffs admitted in their pleadings the radical ownership of the defendants to the land in dispute, the only question on which the parties joined issue as regards the main claim is:- Have the defendants divested themselves of their ownership of the land to the plaintiffs through David Hughes, their predecessor-in-title?

The case proceeded to trial at the end of which, and after addresses by learned counsel for the parties, the learned trial Judge (Onalaja, J.), in a reserved judgment, found:-

1. that Exhibits 1 and 2, on which the plaintiffs relied for title are ancient documents and they raise a presumption in favour of the plaintiffs that Obawole sold the land in dispute to David Hughes who in turn sold same to Edwin Harrison Obafemi and who in turn also sold the said land to Jemina E. George. That Jemina's interest in the land was sold to Rev. E. E. Williams at a public auction by order of court in execution of a decree in Suit No. 111 of 1912 wherein Jemina E. George became a judgment debtor;

2. that there was no nexus between the land sold by David Hughes to Harrison Obafemi which land Hughes bought from Obawole and the land in respect of which David Hughes testified (in Exhibit 10) on 18th February, 1896 before the Supreme Court of Colony of Lagos in *Ashade v. Briman Bashorun Awudu*; *Osho v. Odu Ijebu*; *Osho v. Shomefu*.

3. that the presumption was, therefore, not rebutted by Exhibit 10.

4. that the plaintiffs proved their title to the land in dispute and

that it is a better title than that of the defendants;

5. that the plaintiffs, however, failed to show that the land in dispute fell within an urban area as defined in the Land Use Act.

6. that the plaintiffs were in possession of the land when the defendants and their agents in 1980, besieged it and destroyed among other crops palm trees scattered over the land. B

On these findings the learned trial Judge dismissed plaintiffs' claim for a declaration of entitlement to a statutory right of occupancy to the land in dispute but awarded them N250.00 damages for trespass and granted an injunction in their favour. He dismissed the defendants' counterclaim in its entirety. C

Being dissatisfied with the judgment, the defendants appealed to the Court of Appeal. That Court found:-

1. that Exhibit 10 was wrongly admitted in evidence as it was inadmissible;

2. that as the land now in dispute was neither identified in Exhibit 10 nor in issue in it, the evidence of David Hughes in Exhibit 10 could not be evidence against proprietary interest in the present case; D

3. that the learned trial Judge rightly dismissed the defendants' counterclaim;

4. that the plaintiffs "proved to be owners of the land in dispute through David Hughes, Exhibits 1 and 2 and Rev. Williams (who was their father); E

5. that it was not open to the learned trial Judge to reject plaintiffs' claim for a declaration as the issue of the land in dispute being within or outside an urban area was not raised in the pleadings or evidence nor were counsel called upon to address on it. F

The Court of Appeal dismissed the appeal of the defendants and affirmed the judgment of the trial court except as to plaintiffs' claim for a declaration on which it reversed the trial court and declared that the plaintiffs "are entitled to the certificate of occupancy in respect of the land in dispute." G

The defendants have, with leave of this Court, appealed further to this Court. Written briefs of arguments were filed and exchanged. And in the appellants' brief the plaintiffs set out the following five issues as calling for determination, to wit:-

"1. Whether the plaintiff discharged the onus of proof required of them for a declaratory judgment to entitle them to a grant of declaration. H

2. Whether the presumption created by section 129 Evidence Act applies and avails the plaintiffs to prove their pleaded title.

3. Whether the learned trial Judge made proper use of Exhibit

*10 and whether Court of Appeal was right to expunge it from record.*

*4. Whether judgment ought not to have been entered for the defendants on their counter-claim having regard to plaintiffs' failure to prove their root of title.*

*5. Whether the pronouncements referred to in the ground (sic) of B the grounds of appeal conform with principle and the Court of Appeal was right in upholding the judgment based on such pronouncements."*

The plaintiffs reframed the issues thus:-

*"1. Whether the judgment of the trial court as confirmed by the C Court of Appeal is sustainable having regard to the pleadings and evidence in support thereof by the parties. Grounds I, II, III, IV, VIII*

*2. Whether Exh. 10 a piece of evidence given in an earlier proceeding can be used in a subsequent proceeding as evidence of the truth of what it contains without due compliance with the provisions of Section D 34( 1) of the Evidence Act Cap. 112 Laws of the Federation of Nigeria D 1990. Grounds V, VI, and VII.*

*3. Whether the defendants have shown any special circumstances why the concurrent findings of fact by the two lower courts ought to be disturbed. Grounds I, II, III, and IV."*

Having regard to the judgment appealed against and the grounds E of appeal I think the issues as framed by the plaintiffs are to be preferred except that in considering them issues (1) and (3) will be taken together.

The facts briefly are that the land in dispute forms a portion of a large expanse of land originally owned by the defendants ancestor Obawole. Obawole many years ago sold the said land to one David Hughes who in F turn sold to Edwin Harrison Obafemi. By a deed of conveyance (Exhibit 2) dated 4th day of May 1909. Obafemi sold the land to Jemina Ernestina George for 'a355 (Fifty five pounds). Jemina George was involved in an action in 1912. In Suit No.111 of 1912 James George obtained judgment against her. As she was unable to satisfy the judgment debt, her land was G sold by public auction on the order of the court to Rev. E.E. Williams in August, 1912. A certificate of title (Exhibit 1) was issued in his favour. Rev. Williams remained in possession of the land until his death when it became family property. Rev. Williams, and his family after him, exercised various acts of ownership and possession on the land such as granting H portions thereof to customary tenants. In 1980 the defendants and their agents came to the land and destroyed plaintiffs crops growing thereon. Hence the action leading to this appeal.

The defendants are descendants of Obawole. They claimed that David Hughes was their tenant on the land and that the land was never

sold to him. They claimed that he had no right to sell the land to anyone. They relied on the evidence given by David Hughes in February, 1896 at the Supreme Court of Colony of Lagos (Exhibit 10) in which he admitted he paid rent to Obawole for his (David's) own farmholding.

Question (2):

I shall begin by taking Question (2) first as a resolution of it is B crucial to the case. The defendants tendered in evidence at the trial as Exhibit 10 a certified true copy of the evidence given by David Hughes, the plaintiffs' predecessor in title, in *Ashade v. Brimah Bashorun Awodu*, *Osho v. Odu Ijebu*, *Osho v. Shomefu*. The trial of these cases (presumably consolidated) came before Thomas Crossley Rayner, Chief Justice C of the Colony and the evidence of David Hughes was given on 18th day of February, 1896. When tendering Exhibit 10, 2nd defence witness, Saliu Adisa Aina Arupe, testified thus:-

*"I know something about one Mr. David Hughes who was a customary tenant of my family. The land was granted by my family called D Obawole Aina Arupe family.*

*It is correct that my family owned the land in Ifako inclusive of the land in dispute.*

*Obawole Aina Arupe family is still in existence today. I am the current head of the said family.* E

*I know that in 1896 David Hughes testified about the family land which includes the land now in dispute. I got a certified true copy of his testimony from court."*

Concluding his evidence-in-chief the witness deposed:

*"My family did not lease the land to David Hughes; he was only F granted permission to farm and had no authority to sell the land."*

The defendants obviously tendered Exhibit 10 to show that David Hughes had no right to sell the land in dispute to Edwin Harrison Obafemi as recited in Exhibit 2. In Exhibit 10, David Hughes testified thus:-

*"I have paid rent for my own farm to Obawole"* G

When Exhibit 10 was tendered, learned counsel for the plaintiffs objected to its admissibility but later withdrew his objection and the document was admitted in evidence and marked as Exhibit 10.

The question of the admissibility of the document was not one of the issues placed for determination before the court below. Notwithstanding this, that Court, per Awogu, J.C.A. who delivered the lead judgment with which the other Justices agreed, observed:-

*"In his oral argument, Omoyinmi for the appellants, adopted his brief but added to p. 19 thereof the case of Fasoro & Anor v. Beyioku*

& Ors. (1988) 2 NWLR (Pt.76) 263. He urged the court to allow the appeal. Kunle Oyero for the respondents also adopted his brief.

He contended that the additional grounds were unrelated to the arguments in the appellants' brief. He said that Exhibit (10) was admitted in evidence inspite of objection by the respondents (pages 102-5 of the record). There was no evidence that David Hughes was dead, but the learned Judge said so at p.120. He urged the court to expunge Exhibit (10) from the record, and to dismiss the appeal."

After commenting adversely on the respective briefs of the parties, Awogu, J.C.A. went on to say:-

C "Upon a very close examination of the case of the parties, however, the judgment appealed against, the grounds of appeal and the issues for determination, fall within a very narrow compass, namely:-

The admissibility of Exhibit 10, and its effect on the claim of the respondents and the counter-claim of the appellants."

D Later in his judgment the learned Justice of Appeal posed this question:

".....did Exhibit 10 qualify for admission under section 34 of the Evidence Act?"

He answered the question thus:-

"Section 34(1) of the Evidence Act provides as follows:-

E 34(1) Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceedings, or in a later stage of the same judicial proceedings, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or F is kept out of the way by the adverse party, or when his presence cannot be obtained without an amount of delay or expense which, in the circumstances of the case, the court considers unreasonable: Provided:-

(a) that the proceedings was between the same parties or their representatives in interest;

G (b) that the adverse party in the first proceeding had the right and opportunity to cross-examine and

(c) that the questions in issue were substantially the same in the first as in the second proceeding.

True, it is that Exhibit 10 was a judgment of February, 18, 1896, H and David Hughes may well be dead as of September 12, 1985 when Exhibit 10 was tendered in the proceeding. There was, however, no evidence that David Hughes was dead, which is one of the conditions to be satisfied before Exhibit 10 became admissible.

The second requirement of section 34(1) is that the opposing party

*must have had the opportunity to cross-examine the party relying on the document. A careful examination of Exhibit 10 shows that the parties were:-*

*Ashade v. Braimoh Fashoro & Audu;*

*Osho v. Odu Ijebu; and*

*Osho v. Shomefun.*

*Ajasa (later Sir Kitoye) appeared for the plaintiff, which presumably meant 'Ashade' or 'Osho'. Now the evidence of David Hughes was that he went to Ogba first and was told by plaintiff 'Ashade' that if he wanted farm at Ifako, Obawole was the right man to go to. He then went to Obawole who granted the land. Obawole Ijoawo, Odu Ijebu (defendant) were present. Obawole worked them out, but plaintiff Ashade, was not present. He said he knew Shomefun's land which was not far from O'Connor Williams. He knew 'Osho' but did not know him when he got the farm. Sir Kitoye Ajasa then cross-examined him and the only suggestion in the cross-examination was that David Hughes was a friend to Obawole, hence the evidence. In other words, Obawole was not shown to be a party, even if he owned the land in dispute between the parties. Since Ajasa was for the plaintiff, the presumption is that the cross-examination of David Hughes was as a defence witness, but Obawole was not shown to be a defendant in the case. On these two grounds, therefore, the requirements of section 34(1) were not met and Exhibit 10 was clearly inadmissible. The position might, of course, have been different. If Exhibit 10 was being used as evidence against proprietary interest under section 33(c) of the Evidence Act (See: Ojiegbe & Ors. v. Okwaranyia & Ors. (1962) 1 All NLR (Pt.4) 605, but the land now in dispute was neither identified nor in issue in Exhibit 10. Accordingly, Exhibit 10 is hereby expunged from the record and marked 'Exhibit 10 reject.'"*

The defendants argued strenuously in their brief that the decision to expunge Exhibit 10 from the record was erroneous. It is submitted that Exhibit 10 is relevant as an admission by Hughes against interest. Suffice it to say that the plaintiffs argued to the contrary. They argued thus:

*"It is also stated that:*

*'Where a piece of evidence is admissible by virtue of non-compliance with the provisions of Section 34(1) of the Evidence Act the fact that there was no objection to its admissibility is irrelevant. It remains inadmissible - ratio 3 at page 3.*

*It is therefore humbly submitted that both the trial court and the Court of Appeal were right that Exh. 10 is irrelevant to the defence of the defendant and that the necessary requirement for its admission under S. 34(1) of the Evidence Act has not been established.*

*It has therefore been properly expunged from the records.'"*

No doubt, Exhibit 10 is inadmissible under section 34(1) of the Evidence Act. To this extent I agree with their Lordships of the court below. The same, however, cannot be said to its admissibility under Section 33(1)(c) of the Act which provides:-

“33(1) Statements, written or verbal, or relevant facts made by  
B a person who is dead are themselves relevant facts in the following cases:-

(c) when the statement is against the pecuniary or proprietary interest of the person making it and the said person had peculiar means of knowing the matter and had no interest to misrepresent it.”

By his evidence in Exhibit 10, David Hughes admitted, by  
C implication, that he was tenant to Obawole in respect of a farm-land. It is true that there is no evidence either in Exhibit 10 or otherwise of the farmland he was talking about let alone identifying that farmland to the land in dispute. But this only goes to the weight to be attached to Exhibit 10 and not to its admissibility. In  
D the absence of evidence identifying the land in dispute with the land David Hughes testified about, Exhibit 10, though admissible, is clearly valueless as rightly held by the learned trial Judge.

This court has in numerous cases strongly deprecated the practice of a court raising a point suo motu and deciding the issue  
E without first hearing the parties on it -See for example, Kuti v. Jibowu (1972) 6 SC 147; Lahan v. Lajoyetan (1972) 6 SC 190; Kuti v. Balogun (1978) 1 SC 53; Olusanya v. Olusanya (1983) 1 SCNLR 134. Had the court below given to counsel for the parties the opportunity of addressing it on the admissibility of Exhibit 10 its attention might  
F have been drawn to section 33(1)(c) of the Evidence Act and its decision on the point might have been different. Let me draw attention once again to the dictum of Fatayi- Williams, J.S.C. (as he then was) in Kuti v. Jibowu (supra) at pages 172- 173 of the report to this effect:

“It is, in our view, not open to the Court of Appeal to raise  
G issues which the parties did not raise for themselves either at the trial or during the hearing of the appeal. There may be occasions during the hearing of an appeal, however, when the genuineness of any document tendered during the trial of a case may appear to the court hearing the appeal to be in doubt. In such a case, and only if it is material to the  
H determination of the appeal, the party or parties who were supposed to have executed the document in question should be given an opportunity to explain the discrepancy before any opinion is expressed as to the genuineness of the document.”and to that of Sowemimo, J.S.C. (as he then was) in Lahan v. Lajoyetan (supra) at page 200:



*"We regret we cannot but repeat, that a procedure whereby a Court of Appeal takes up a point before parties or their counsel are heard and decides the issue is most inappropriate and irregular. We have often in the past drawn attention to the impropriety of dealing with an appeal in this way and it is our hope that this practice will be discontinued."*

**The learned trial Judge also fell into the same error when without giving counsel for the parties the opportunity of addressing him on whether the land in dispute is in an urban or rural area, he took the point suo motu in his judgment and pronounced on it which pronouncement the court below was obliged to set aside as it was clearly erroneous and both parties on appeal disowned its correctness.**

It is clearly in the interest of the administration of justice and maintaining fairness that all courts should adhere to the practice laid down in the cases cited herein.

Questions 1 and 3:

By their pleadings the plaintiffs admitted that the land in dispute belonged originally to Obawole, defendants predecessor-in-title but said that Obawole had sold it to David Hughes. The onus was on them to prove this:- See: Sogunle v. Akerele (1967) NMLR 58. The plaintiffs relied on the recitals in Exhibit 2 in discharging this burden on them. In Exhibit 2, the deed of conveyance whereby Edwin Harrison Obafemi sold the land in dispute to Jemina E. George, it was recited thus:

*"Whereas the hereditaments hereinafter described form part of the hereditaments sold by Obawole Chief Bada of other on the mainland of Lagos aforesaid to David Hughes of Lagos Street, at Ebute Metta on the said mainland planter in the year one thousand, eight hundred and ninety six, for the sum of twenty pounds which was paid by the said David Hughes to the said Obawole who thereupon put the said David Hughes in possession of the said hereditaments and the said Obawole subsequently died without having executed a conveyance thereof the 29th day of April, 1902 sold to the said Edwin Harrison Obafemi the first G mentioned hereditaments at the price of forty pounds which was then paid as by the adhesive stamped receipt thereof by the said David Hughes dated that date if appears but no conveyance was executed "*

Exhibit 2 must be 20 years old "at the date of the contract" if it is to be competent for the presumption contemplated by section 130 H (formerly 129) of the Evidence Act. The learned trial Judge found it was so competent. He found:-

*"Therefore, I hold that Exhibits 1 and 2 are ancient documents within the meaning and intendment of section 129 been (sic) documents*

*that were more than 20 years old from 1916 and 1909 before the institution of this action in 1981."*

The court below appeared to have affirmed this finding, even though not directly. That court, per Awogu, J.C.A. said:

*"On the same premise, the respondents proved to be owners of the land in dispute through David Hughes, Exhibits 1 and 2 and Rev. Williams (who was their father)."*

The question arises: Are the courts below right in applying the presumption provided in section 130 of the Evidence Act to Exhibit 2? It is the contention of the defendants that section 130 was wrongly applied by the courts below to the facts of this case. The plaintiffs contended to the contrary. They argue thus:-

*"The learned Justices of the Court of Appeal rightly confirmed the finding of the learned trial Judge that the plaintiffs on who the burden of proof lie discharged that burden by the production of Exhibits 1 and 2. These 2 documents were pleaded in paragraph 7(a) and (b) of the Amended Statement of Claim dated 24/5/1984.*

*In paragraph 26 of the said pleading plaintiffs raise the presumption under S. 129 now 130 of the Evidence Act Cap. 112 Laws of the Federation of Nigeria 1990.*

*The 2 documents were tendered through the 1st plaintiff who testified as 1st plaintiffs witness.*

*The 2 documents have been copied in the record of appeal. Exh. 1 bears the date 17th January, 1916.*

*Exh. 2 recites that:-*

*"Where the hereditaments hereinafter described form part of the hereditaments sold by Obawole Chief Bada of other on the mainland of Lagos aforesaid to David Hughes of Lagos Street at Ebute-Metta on the said mainland planter in the year one thousand, eight hundred and ninety-six (1896) for the sum of twenty pounds ('a320) which was paid by the said David Hughes to the said Obawole who the reupon put the said David Hughes in possession of the said hereditament.*

*This is a contract which is 20 years old as at 1916 when Exh. 1 was made by the Supreme Court of Southern Nigeria in Suit No. 111 of 1912. I submit that the requirements of section 129 now 130 of the Evidence Act have been met. It is also noteworthy that both Exh. 1 and 2 are documents well over 20 years old as at the time the action was commenced in 1986, I submit that there is a presumption that these 2 documents have been duly executed by the parties named therein S. 123 of Evidence Act Cap. 112 Laws of Nigeria 1990."*

The law, as it now is, on the application of section 130 of the Evidence Act is laid down in the decision of this court in Johnson v. Lawanson (1971) 1 All NLR 56 where the facts, as appearing in the judgment, read as follows:-

One Salu Ariyo of Lagos died testate on the 31st December, 1923 leaving a will dated the 13th June, 1923 and a codicil dated the 28th December, 1923. The will contains a number of bequests of personal properties and devises of real property and undoubtedly sets out with clear particularity the various properties mentioned but significantly made no mention whatsoever of the property now in dispute. The will also contains a residuary clause in the following terms:-

*"I give devise and bequeath to my trustees all the residue of my real and personal property in trust for the benefit of the members of my family."*

Although, the executors named in the will duly obtained probate they were in the year 1929 relieved of their duties by the (then) Supreme Court of Nigeria and a receiver of the estate was appointed. The receiver, acting in pursuance of an order of court in that behalf, proceeded to sell the "residuary realities" of the estate of the late Salu Ariyo and indeed sold the piece or parcel of land situate at Kadara Street, Ebute Metta (and opening to Cemetery and Strachan Streets, Ebute Metta) to one Emmanuel Elenitoba Johnson. The receiver then executed a conveyance in favour of Emmanuel Elenitoba Johnson and it is appropriate to set out here the recital in that conveyance (produced in evidence as Exhibit M dated 16th June, 1933 and registered as No.5 at p. 5 in Volume 369 of the Register of Deeds, Lagos) dealing with the title of Salu Ariyo. The recital is as follows:-

*"Whereas one Salu Ariyo late of Offin Road Lagos Nigeria being at his death seized in fee simple in possession free from incumbrances of several hereditaments including the hereditaments hereinafter described and expressed to be hereby conveyed died on the 31st day of December, 1923 ....."*

The present appellants are the successors-in-title to Emanuel Elenitoba Johnson. It was common ground however that the land at Kadara Street, Ebute Metta, the subject-matter of these proceedings, lies within the stool lands of the Oloto Chieftaincy Family whose radical title to the lands was in no way disputed. Now pursuant to a writ of execution in Suit No. 339/40 (Supreme Court, Lagos Division) the right title and interest of the Oloto Chieftaincy Family in that land were transferred to one Akin Edun by virtue of a certificate of purchase dated the 13th February, 1946, and on the 6th May, 1946, Akin Edun sold and conveyed the land to one Madam Enitan Edun (see conveyance dated the 6th May, 1946 and registered as No. 20 at p. 20 in Volume 718 of the Register of Deeds

Lagos produced in evidence as Exhibit C). On the 5th June, 1950, Madam Enitan Edun sold and conveyed the land to one Isaac Ogunwemimo Phillips and executed to him a conveyance of that date which was registered as No. 15 at p. 15 in Volume 860 of the Register of Deeds, Lagos and produced in evidence as Exhibit D. Later and on the 31st May, 1960, Isaac Ogunwemimo Phillips obtained a certificate of title on the land pursuant to the Registration of Titles Act, Cap. 181 registering him as the owner of the freehold estate in the land; and later still on the 21st May 1962, by virtue of an instrument of transfer of that date. Phillips transferred the land to the present respondents and the certificate of title was duly endorsed.

This court, per G.B.A. Coker, J.S.C. after a review of the authorities on the point, held at pages 68-69 of the Report:-

*"We hold therefore that a deed to be competent for the presumption contemplated by section 129 of the Evidence Act must be 20 years old "at the date of the contract" in which the deed is sought to be relied upon and not 20 years old at the date of the proceedings at which such deed is being offered in evidence. We have come to the conclusion that the decision in Maurice Goualin Ltd. & Anor v. Wahabi Atanda Aminu (supra) and the other decisions based on it in so far as they have measured the age of the deed relied upon for securing the benefit of the presumption created by section 129 of the Evidence Act by reference to the date of the proceedings at which such deed is being offered in evidence, were wrongly decided and we over-rule them.*

*They are obviously steering a course which may be at present uneventful but which ultimately when pursued to the logical conclusion, would be disastrous and an owner of property would find himself one day confronted with a deed of sale prepared by a stranger some twenty years back on his property and would be obliged to defend his title in the face of such a deed stored away all the time and which may well prove to be bogus. We conclude as well that in the case in hand the recital in the document, Exhibit M, vis-a-vis the proceedings, carries no presumption in favour of the appellants in as much as it is neither referred nor referable to any contract occurring at least 20 years posterior to the date of its execution."*

See: also Ayinla v. Sijuwola (1984) 1 SCNLR 410; (1984) 5 SC44; Owoade & ors v. Omitola & ors. (1988) 2 NWLR (Pt.77) 43; (1988) 1 NSCC 802, at pages 813-814 where Nnaemeka-Agu, J.S.C. in delivering the lead judgment of this Court explained the construction of the section more clearly in these words:-

*"As the section clearly states, the presumption arises with respect to recitals, statements, etc which were twenty years old at the date of the contract, not those that were twenty years old at the date of the*

*proceedings; See: John Kobina, Johnson & Ors v. Irene Ayinke Lawanson (1971) 1 All NLR 56 at p. 66; also Sanya v. Johnson (1974) 1 All NLR at p. 207. Indeed in Johnson v. Lawanson (supra) all the cases which upheld the presumption on the basis of the age of the document only were expressly or impliedly over-ruled. They include: Maurice Goualine Ltd. & Anorv. Wahabi Aranda (P.C. No. 17 of 1957); Odeneye v. Savage B (1964) NMLR 115; Nuru Williams v. Adamo Akinwumi & ors. (1966) 1 All NLR 115. The argument of the learned Senior Advocate for the appellant postulates that the presumption ought to apply to Exh. D2 simply because the document, Exh. D2 having been made in 1926 was over 20 years old on the date of the proceedings (the action was commenced in C 1976 and the High Court trial was in 1978). I must say that in my opinion the law as it is, is that the presumption created by section 129 of the Evidence Act is not available to a party who could, not refer, in the deed he is relying upon to raise the presumption, to a statement, recital, etc of another contract, twenty years before the date of the deed. See on this:- D*

*Johnson v. Lawanson (supra) at p. 66; Omosanya v. Anifowoshe (1959) SCNLR 217; (1959) 4 FSC 94 Re Wallis & Grout's Contract (1906) 2 Ch. 206*

*In the instant case, if the deed, Exh. D 1 made in 1960 had recited Exh. D2 made in 1926 then the presumption would have been E applied in the interpretation of Exh. D 1. That section cannot be invoked to raise a presumption in favour of the content of Exh. D2 when it has not referred to or recited any contract twenty years old at the date of Exh. D2."*

**Applying this to the facts of this case, there is no contract F pleaded that is at least 20 years posterior to the date of the execution of Exhibit 2. Exhibit 2 was executed on 4th day of May, 1909. Exhibit 1 is a certificate of purchase issued to Rev. E.E. Williams and dated 17th day of January, 1916 whilst the contract of sale therein was on 29th day of August, 1912. Both dates were clearly within 20 G years of Exhibit 2 and would not clothe the recitals therein with the presumption envisaged in section 130 of the Evidence Act.**

**Section 123 (formerly 122) of the Act would apply to presume (and a rebuttable presumption for that matter) the proper execution of Exhibits 1 and 2 and no more - See Agbonifo v. Aiwereoba H (1988) 1 NWLR (Pt.70) 325. The learned trial Judge was, therefore, in error in holding that Exhibits 1 & 2 "are ancient documents within the meaning and intendment of section 129". And the court below was in error not to have disturbed that finding.**

I need observe that the recitals in Exhibit 2 were pleaded in paragraphs 8-10 of the amended statement of claim. No evidence was, however, led to prove these averments. And as it now turns out the recitals in Exhibit 2 are not available to the plaintiffs to raise the rebuttable presumption that Obawole sold or granted absolutely the land in dispute to David Hughes. The two courts below came to their conclusion that plaintiffs title was proved on the premise that section 130 of the Evidence Act was applicable to this case and that the recitals in Exhibit 2, in the absence of any rebutting evidence were correct and sufficient to prove plaintiffs title. As the plank on which the judgments are anchored has now fallen down it follows that those judgments are erroneous and must be set aside.

Since Exhibit 2 does not provide the proof contemplated in section 130, can it be said, on the evidence, that the plaintiffs proved their case? Having admitted, both in the pleadings and evidence, defendants radical ownership of the land in dispute the onus was on them to prove that the land had been sold or granted to David Hughes. They attempted to rely on the presumption in section 130 of the Evidence Act to discharge this burden. They have now failed in that attempt. They relied on production of document of title in proof of their title. Exhibits 1 and 2 are insufficient for this purpose. Exhibits 1 and 2 only traced plaintiffs root of title to Edwin Harrison Obafemi. There was no evidence to trace their root of title to the original owner of the land. They cannot rely on acts of ownership as they have failed to establish that ownership - See: *Fasoro v. Beyioku* (1988) 2 NWLR (Pt.76) 263 at 271-272. It is not the practice of this Court to disturb concurrent findings of fact of the courts below unless they are perverse. The concurrent finding of the two courts below that plaintiffs are the owners of the land in dispute, being based on a wrong application of section 130 of the Evidence Act, must necessarily be perverse and must be set aside. And since they have failed to show a better title to the land in dispute, they cannot succeed in trespass against the defendant who also claimed to be in possession of the land.

In conclusion, this part of the appeal succeeds and it is hereby allowed. The judgments of the two courts below granting the claims of the plaintiffs are set aside. Plaintiffs claims are dismissed.

The defendants counter-claimed for a declaration of entitlement to a customary right of occupancy to the land in dispute and an injunction. They did not plead any root of title and led no evidence in support of the averment of long possession pleaded in paragraph 16 of their further amended statement of defence and counterclaim. The plaintiffs by their

pleadings seemed to admit the radical ownership of the defendants to the land but led no evidence of which the defendants could take advantage to bolster the weakness in their case.

**Now, the law is that where the court is called upon to make a declaration of a right, it is incumbent on the party claiming to be entitled to the declaration to satisfy the court by evidence, not by admission in the pleadings of the defendant, that he is entitled.** Eso, J.S.C. in *Vincent I Bello v. Magnus A. Eweka* (1981) 1 SC 101 at page 122, said:-

*"It is my view that it would be a wrong exercise of discretion on the part of a court, which is aware of the issues of competing interest joined by the parties, to close its eyes, against those issues and award declaration to a plaintiff who had adduced no evidence in regard thereto. Indeed, to shift the onus unto the defendant at that stage would be awarding declaration not on the strength of the plaintiff's case but on the weakness of the defendant's case."*

See: also *Wallersteiner v. Moir* (1974) 3 All ER 217 cited with approval in *Bello v. Eweka* where Buckley, L J observed at p. 251:

*"It has always been my experience, and I believe it to be a practice of very long standing, that the court does not make declarations of right either on admissions or in default of pleading. A statement on this subject of respectable antiquity is to be found in Williams v. Powell (1894) WN 141, where Kekewich, J. whose views on the practice of the Chancery Division have always been regarded with much respect, said that a declaration by the court was a judicial act, and ought not to be made on admissions of the parties or on consent, but only if the court was satisfied by evidence."*

As Obaseki, J.S.C. explained it in *Vincent I Bello v. Magnus A. Eweka* (supra) at page 102:

*"The necessity for this arises from the fact that the court has a discretion to grant or refuse the declaration and the success of a claimant in such an action depends entirely on the strength of his own case and not on the weakness of the defence. See: Kodilinye v. Mbanefo Odu (1935) 2 WACA G 336 at 337. In that case, i.e. Kodilinye v. Mbanefo Odu (1935) 2 WACA 336 at 337, Webber, C.J. Sierra Leone, delivering the judgment of the court said:*

*"The onus lies on the plaintiff to satisfy the court that he is entitled on the evidence brought by him to a declaration of title." See also Akinola & Ors. v. Oluwo & Ors. (1962) 1 SCNLR 352; (1962) WNLR 135 at 134."* H

**As it so happens in this case, the defendants sought in their claim a declaration of entitlement to a right of occupancy; the onus was on them, therefore, to establish the title they claimed. They adduced no evidence in support of their claim. They, therefore, cannot succeed on the counter -claim.**

They cannot rely on the plaintiffs admissions in the pleadings to discharge the burden on them. They must rely on the strength of their own case: - **Kodilinye v. Odu (1935) 2 WACA 336.** I agree with the learned trial Judge when, in his judgment, he observed:

*“the case presented by the defendants on their title is weak.”*

**B The defendants having failed in their counter-claim, it is my view that the proper order to make is one of the dismissal of the counter-claim.** As Obaseki, J.S.C. observed in *Bello v. Eweka* (supra) at p. 117:

*“It has been established, for a very long time now, that in a case seeking declaration of title to land, the onus lies on the plaintiff to establish the title which he claims, and he would in that process, have to rely on the strength of his own case and not on the weakness of the defendant’s case. See: Kodilinye v. Mbanefo Odu (1935) 2 WACA 336. In that case, the West African Court of Appeal as per Webber, CJ (Sierra Leone), in a judgment with which Kingdon C.J. (Nigeria) and Butler-Lloyd, J. concurred, refused to apply the rule of non-suit, which would normally apply where satisfactory evidence has not been given entitling the plaintiff or the defendant to the judgment of the court, to a case of declaration of title. The Court said:-*

*“The onus lies on the plaintiff to satisfy the Court that he is entitled on the evidence brought by him to a declaration of title. The plaintiff must rely on the strength of his own and not on the weakness of the defendant’s case. If this onus is not discharged, the weakness of the defendant’s case will not help him and the proper judgment is for the defendant.”*

*I am of the firm view that this statement of the law is as valid today as it was in 1935 when the West African Court of Appeal declared it.”*

**F Consequently, I dismiss that part of the defendants appeal against the dismissal of their counter-claim. I affirm the judgments of the courts below on this point.**

In the net result, this appeal succeeds in part. The judgments of the two courts below granting plaintiffs claims are set aside together with the orders for costs made therein. Those claims are hereby dismissed. I, however, affirm the said judgments of the two courts below in so far as they dismissed the counter-claim of the defendants.

The parties are to bear their respective costs.

H

### **BELGORE JSC**

Under our system of procedure, the duty of the person who asserts is to prove. This burden must be fully discharged so that the trial Court will be satisfied as to the genuineness of the plaintiff’s claim. The



burden of proof will not shift unless the defendant admits the claim of the plaintiff, in which case, there may be no full dress hearing. However, if the plaintiff's case is not proved then the burden of proof remains undischarged and it will be of no help to rely on the weakness of the case for defence. Bello v. Eweka (1981) 1SC 101, 122; Kodilinye v. Mbanefo Odu(1935) 2 WACA 336, 337.

B

I therefore fully subscribe to the judgment of my learned brother, Ogundare, J.S.C. and I also allow this appeal in part in line with the reasons contained in the lead judgment. I however affirm the decisions of the courts below in dismissing the defendant's counter-claim. I make no order as to costs.

C

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### WALI JSC

I have had a preview of the lead judgment of my learned brother Ogundare, J.S.C. and I agree with his reasoning for allowing the appeal D and setting aside the judgments and orders of the two lower courts, including that of costs and dismissing the plaintiff's claim.

For the same reasons advanced by my learned brother Ogundare, J.S.C. I also hereby affirm the order of dismissal of the defendant's counter-claim.

Parties are to bear their own costs in this appeal.

E

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### KUTIGI JSC

I read in advance the judgment just delivered by my learned brother Ogundare, J.S.C. I agree with his reasoning and conclusions. I F will also dismiss plaintiffs' claims and dismiss defendants' counter-claim as well. I make no order as to costs.

---

### OGWUEGBU JSC

G

I agree with the judgment just delivered by my learned brother Ogundare, J.S.C. I wish to make a few comments.

The claim of the plaintiffs was for a declaration of entitlement to a statutory right of occupancy in respect of land edged Pink on Plan No. OGEK 313/81 situate at Ifako, Coker Agege, Ikeja, damages for trespass H and injunction. The defendants counter-claimed for a declaration of entitlement to a statutory right of occupancy in respect of the same land and injunction.

At the end of the trial, the learned trial Judge rejected the plain-

tiffs claim for statutory right of occupancy but awarded the plaintiffs damages for trespass and injunction. He refused the defendants counter-claim.

The defendants appealed to the Court of Appeal in Lagos which dismissed their appeal and reversed the judgment of the learned trial Judge in respect of the plaintiffs' claim for statutory right of occupancy. Judgment was entered for the plaintiffs in that regard. The defendants have further appealed to this court. There was agreement by both parties from the pleadings and evidence that the original owner of the land in dispute was Dada Adedipe who migrated from Ile-Ife to settle on the land in dispute about three centuries ago and was succeeded on the land by Obawole Aina Arupe who founded Obawole Aina Arupe family to which the defendants belonged. The 1st defendant is the present head of the family.

The plaintiffs case is that Obawole sold the right, title and interest in the land in dispute to David Hughes who later transferred his interest in the said land to Harrison Obafemi who also sold his interest to Mrs. Jemina E. George and executed a deed of conveyance in favour of Mrs. J. E. George on 4th May, 1909 and this deed of conveyance was registered in the Lands Registry as No. 94 on page 291 in volume 61 in the Register of Deeds kept in the Land Registry Office in Lagos. The original deed and its certified copy were admitted in evidence as Exhibits "2" and "2A". The plaintiffs gave P.W. 3 (Chief Samuel A. Ogunbiyi) a licensed surveyor, Exhibit "2A" to which a survey plan was attached to work upon. He was taken to the land in dispute and its dimensions were shown to him. He produced survey plan No. OGEK 313/81 which was admitted in evidence as Exhibit "5".

Mrs. J.E. George was adjudged a judgment debtor. When she could not pay the judgment debt, the land was sold to Rev. E.E. Williams at a public auction by the Supreme Court of the Colony of Southern Nigeria in Suit No. 111 of 1912. Rev. E.E. Williams was issued a certificate of purchase which was certified by the presiding judge of the said court. The certificate was dated 29/8/1912.

The certificate of sale by auction to Rev. Williams was admitted in evidence as Exhibit "1". Following this auction sale, Rev. E.E. Williams exercised acts of ownership and possession on the land until his death intestate in 1955 without any disturbance. After his death all his children including the two plaintiffs on record remained in occupation and possession of the land without let or hinderance until 1980 when the defendants disturbed their possession and claimed the land hence the present proceedings.

The defendants case is that David Hughes was a customary tenant of Obawole family who paid rents for the permission granted to him to farm on the land and that the land was not sold to him. The defendants

maintained that David Hughes had no title to convey to the successive purchasers. They tendered Exhibit "10" which is the evidence of David Hughes on 18/2/1896 in consolidated suits between:

Ashade v. Briamah Fashara & Audu;

Osha v. Odu Ijebu and

Osha v. Shomefun.

B

Exhibit" 10" was relied on by the defendants. In the said Exhibit" 10", David Hughes stated that he had paid rent for his own farm to Obawole and that he gave five cases of gin to Obawole when he got the land from him. The defendants contended in the trial court that Exhibit "10" pointed to the fact that David Hughes was a customary tenant and that such tenancy can never ripen into a title which he could transfer to Harrison Obafemi.

C

In paragraphs 7 and 26 of their amended statement of claim, the plaintiffs pleaded thus:

7. *The plaintiffs aver that under and by virtue of:*

(a) *Deed of conveyance dated 4.5.1909 and registered as No. 94 at page 291 in volume 61 of the Register of Deeds at the Land Registry in Lagos.*

(b) *Sale effected under Suit No. 111 of 1912 by the Supreme Court of Nigeria.*

(c) *Receipt issued on 29/8/1912 in furtherance of sale mentioned in (b) above. (sic) one reverend E.E. Williams became owner of fee simple of the land subject matter of this action.*

26. *The plaintiffs will rely on the provisions of section 129 of the evidence (sic) Act in respect of all documents in paragraphs 7(a) to (c)."*

Exhibits "1" and "2" are the documents pleaded in paragraph 7 of the amended statement of claim for which the presumption created in section 129 of the Evidence Act was invoked. Part of Exhibit" 1" reads:-

F

*"This is to certify that Reverend E.E. Williams of Lagos Nigeria has been declared the purchaser of the right, title and interest of Jemina E. George the above named defendant in the land ..... hereinafter mentioned; that is to say; all that piece or parcel of land situate and being at Ifako Agege District, measuring 1982 feet 3 inches on the north and on that side bounded by farm of Mrs. F.A. Wright; 1862 feet 6 inches on the South and on that side bounded by farm of Revd. D. Hughes; 506 feet on the East and on that side bounded by Iju Stream .....*

H

*..... which said land, messuages, and tenements were sold in execution of a decree in the above suit by order of this court, dated the 29th of August, 1912. Dated in Lagos the seventeenth day of January, 1916."*

The material portions of Exhibit “2” read as follows:-

“*This indenture made the fourth day of May, one thousand nine hundred and nine between Edwin Harrison Obafemi of ..... of the one part and Jemina Ernestina George ..... of the other part. Whereas the hereditaments hereinafter described form part of the hereditaments sold by Obawole Chief Bada of other on the mainland of Lagos aforesaid to David Hughes of Lagos Street, at Ebute Metta on the said mainland (sic) planter in the year one thousand, eight hundred and ninety six for the sum of twenty pounds (320) which was paid by the said David Hughes to the said Obawole who thereupon put the said David Hughes in possession of the said hereditaments and the said Obawole subsequently died without having executed a conveyance thereof the 29th day of April, 1902 sold to the said Edwin Harrison Obafemi the first mentioned hereditaments at the price of forty pound (‘a340) which was then paid ..... and no conveyance was executed and whereas the said Edwin Harrison Obafemi (hereinafter called the vendor) has agreed to sell to the said Jemina Ernestina George (hereinafter called the purchaser) the said hereditaments at the price of fifty five pounds (355) now this indenture witnesseth .....The vendor hereby grants unto the purchaser all that piece or parcel of available (sic) land delineated and edged red in map or plan drawn at foot hereof situate at Ifako on the said mainland and measuring ..... to the use of the purchaser, her heirs and assigns ..... In witness whereof the parties hereto have hereunto set their hands and seal the day and year first above written .....”*

Both the High Court and the Court of Appeal construed Exhibits “1”, “2” and “10” and based their decisions on them. The learned trial Judge relied on Exhibits “1” and “2” as ancient documents and applied the provisions of section 130 of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990. The said section reads:-

“*130 Recitals, statements and descriptions of facts, matters and parties contained in deeds, instruments, acts of the National Assembly, or statutory declarations, twenty years old at the date of the contract, shall unless and except so far as they may be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters and descriptions.”*

The learned trial Judge held as follows:-

“*The plaintiffs tendered Exhibits 1 and 2 and relied on them as ancient documents. My understanding of ancient document is to be found in Section 129 of the Evidence Law of Lagos State Cap. 39 as follows:-*

*In applying the said section to Exhibits 1 and 2 the date of the contract in Exhibit 1 is 17th January, 1916 being the date the certificate of purchase was issued .....*

*Exhibit 2 was executed on the 4th day of May, 1909. Therefore (sic) hold that Exhibits 1 and 2 are ancient documents within the meaning of section 129 been (sic) documents that were more than 20 years old from 1916 and 1909 before the institution of this action in 1981."*

On Exhibit 10, the learned trial Judge said:-

*"I therefore hold that the defendants have unsuccessfully rebutted the presumption raised in Exhibit "1" by Exhibit "10".*

He concluded that Rev. E.E. Williams had a good title but refused to grant the declaration of statutory right of occupancy to the plaintiffs because they failed to show that the land falls within the area designated as urban area of Lagos. He refused the claims of the defendants.

The court below impliedly endorsed the finding of the learned trial Judge on Exhibits "1" and "2". On Exhibit "10", the court below relying on the provisions of section 34(1) of the Evidence Act, expunged it from the record of proceedings and marked it rejected. It reversed the learned trial Judge in respect of the plaintiffs claim for statutory right of occupancy and entered judgment for them.

The defendants counsel contended in the brief that the courts below misapplied the presumption created in section 130 of the Evidence Act and wrongly declared that the plaintiffs are entitled to the certificate of occupancy. The plaintiffs argued as follows in their brief of argument:

*1. This is a contract which is 20 years old as at 1916 when Exh. 1 was made by the Supreme Court of Southern Nigeria in Suit No. III of 1912. I submit that the requirements of section 129 now 130 of the Evidence Act have been met. It is also noteworthy that both Exh. 1 and 2 are documents well over 20 years old as at the time the action was commenced in 1986, I submit that there is a presumption that these 2 documents have been duly executed by the parties named therein S. 123 of Evidence Act Cap. 112 Laws of Nigeria 1990."*

The argument of the learned plaintiffs' counsel as well as the finding of the courts below on the application of section 130 of the Evidence Act to Exhibits "1" and "2" are grossly erroneous. In order to secure the benefit of the presumption created by section 130, the document must be twenty years old at the date of the contract. The courts below equated the "date of the contract" appearing in section 130 with the date of the proceedings at which Exhibits "1" and "2" are being offered in evidence. This is not the law. See: Johnson & ors v. Lawanson & ors. (1971) 1 All NLR 56; Cardoso v. Daniel & ors. (1986) 2 NWLR (Pt.20) 1 at 19 and Owoade v. Omitola (1988) 2 NWLR (Pt.77) 413. Once the court is satis-

fied that the document is twenty years old at the date of the contract, it qualifies for the presumption under section 130 of the Evidence Act.

The presumption was not rebutted by Exhibit “10” owing to its own deficiencies. Even if the courts below had come to the conclusion that David Hughes paid rents to Obawole for “farm land” that farm land cannot be related to the piece of land in dispute in the present proceedings in the absence of a survey plan of the piece of land in dispute in Exhibit “10”.

Neither Exhibit “1” nor Exhibit “2” satisfied the statutory requirement. No contract was pleaded which was twenty years or more on the date of the execution of Exhibits “1” and “2”. The plaintiffs traced their root of title to Edwin Harrison Obafemi and no more. They relied solely on Exhibits “1” and “2” and the presumption created in section 130 of the Evidence Act. Having failed to trace their root of title to the original owner, they failed to satisfy the court that they are entitled on the evidence brought by them to the declaration sought. See: *Bello v. Eweka* (1981) 1 SC 101; *Kodilinye v. Odu* (1935) 2WACA D 336; *Aiyedun T. Jules v. Ajani* (1980) 5-7 SC 96 at 108 and *Elias v. Chief Timothy Omo-Bare* (1982) 5 SC 25 at 47.

The defendants offered no evidence in proof of their counter-claim. They as plaintiffs in the counter-claim must rely on the strength of their own case for the declaration of the statutory right of occupancy sought by them. They cannot rely on the weakness of the defendants. See *Kodilinye v. Mbanefo Odu* (supra) and *Rufai v. Ricketts & ors.* (1934) 2 WACA 95 at 97. In conclusion, the judgments of the courts below granting the reliefs sought by the plaintiffs are set aside. The plaintiffs claims are hereby dismissed. The defendants counter-claim is also dismissed. The appeal partially succeeds. Parties are to bear their own costs.

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