

SUPREME COURT OF NIGERIA
13TH FEBRUARY, 1996. SC.5/1990
CORAM:- S. M. A. BELGORE, I. L. KUTIGI,
E. O. OGWUEGBU, U. MOHAMMED, S. U. ONU, JJSC.

CHRISTOPHER EMODI & 2 OTHERS APPELLANTS
(For themselves and on behalf of Oreze
family of Obikporo Village, Onitsha

AND
AKUNNIA RIGHT KWENTOH
& 4 OTHERS RESPONDENTS

COURTS - Discretion – Course of action by the court - Where not inherently wrong - Exercise of trial courts jurisdiction - Cannot be faulted.

LAND LAW - Possession - Exhibits relied upon by the plaintiff's - Where they do not relate to the land in dispute - Allegation that exclusive possession is proved - Is misconceived.

LAND LAW - Title - Modes of proving title - Whether proof of possession of connected land - Avails the plaintiffs.

LAND LAW - Title - Evidence of receipt of rent - In respect of a different land - Whether of any probative value - When no evidence of acts of possession were given at all.

LAND LAW - Trespass - Failure to demonstrate acts of ownership - And or prove exclusive possession - Action for trespass cannot be maintained.

LAND LAW - Ownership - Competing histories of both parties - Whether resolved by trial court in accordance with the principles.

LAND LAW - Traditional histories - Issues decided thereon in earlier unrelated cases - Cannot be relied upon.

LAND LAW - Nexus - Failure to relate the land in dispute - To the Urn acquired by government who paid rent to plaintiffs - Whether the case is destroyed thereby.

FACTS

The plaintiffs/appellants filed an action before the High Court Onitsha against the defendants/respondents claiming the sum of N50,000 as

general damages for trespass and an injunction. Plaintiffs relied on the traditional history of migration of their ancestor from Benin and how their conquered Oze people who were the original inhabitants of the both parties are natives of Onitsha. Defendants adopted part of the traditional history presented by the plaintiffs in seeking to establish their title the land in dispute. They gave evidence of how they were farming on the said land.

Plaintiffs on the other hand gave no evidence of exercising acts of ownership on the land. They rather relied on that fact that they collected rent in respect of adjacent land to the one in dispute acquired by the government. The trial court found that the plaintiffs were not in exclusive possession of the land in dispute and dismissed their claim. Their appeal to the Court of Appeal was also dismissed. Plaintiffs have further appealed to the Court raising four issues.

ISSUES FOR DETERMINATION

(1) Were the learned Justices of the Court of Appeal not in error when they failed to evaluate properly the evidence of recent acts of possession adduced is after it had found that the learned trial Judge had omitted to perform the exercise in accordance with the test of Kojo v. Bonsie (1957)1 WLR 1223. Etc see p. 239

HELD (Unanimously dismissing the appeal per lead judgment of **ONU JSC**)

Possession - Exhibits relied upon

1. The argument of the plaintiffs at page 14 of their Brief that “*it is also our submission that Exhibits “2A”, “2B”, “9” and “16” establish conclusively that the plaintiffs /appellants are in exclusive possession of Ani Ozala land and are entitled to the reliefs sought in their claim*” is misconceived. The truth of the matter is that the four Exhibits do not concern the land in dispute in this case. All of them dealt with the land acquired by the plaintiffs in 1910 by virtue of Exhibit 5. None of them relates, to any Ani Ozala land not acquired by the Government in 1910 which say is the land in dispute. (p. 245 C)

Title - modes of proving title

2. Thus, the plaintiffs’ reliance in the instant case on the proposition of law that one of modes of proving title to land is by proof of possession of connected or adjacent land in circumstances which render it probable that the owner of such connected or adjacent land would, in addition, be the owner of the land in dispute vide Section 45 of the Evidence Act and as

234 EMODI V. KWENTOH (1996) 2 KLR (PT 38) 232; (1996) 2 NWLR decided in the case of Idundun v. Okumaeba (1976) 9-10 S.C. 227 and Okafor v. Idigo (1984) 1 S.C.N.L.R. 481, would be of no avail to them. (p. 247 A)

Title - Evidence of receipt of rent

3. The learned Justices of the court below were therefore perfectly right in saying that the evidence of payment of rent in respect of the so-called Ani Ozala land of the plaintiffs is of no probative value. Furthermore, that the plaintiffs gave evidence neither of any farming on the land in dispute nor of any acts whatsoever over it but rather evidence which centered on acquisition of the ani Ozala land by the Government in 1910. (p. 247 D)

Trespass - Failure to demonstrate acts of ownership

4. The plaintiffs having failed to demonstrate any act or acts of exercise of ownership on the land in dispute, and having equally failed to show that they were ever in exclusive possession thereof cannot, in my judgment, maintain an action for trespass thereon. (p. 248 D)

Ownership - Competing histories

5. The view held by the court below that the trial Judge had not resolved the competing histories as to the ownership of Ani Ozala land in accordance with established principle, cannot therefore be correct. Indeed, as at no time did the plaintiffs say that they had settled on Ani Ozala land but it was the defendants who had put up that story prior to their movement to Obikporo Village, the task before the learned trial Judge for coming to the conclusion that defendants' traditional evidence of first setting on the Ani Ozala land before moving on to Obikporo village becoming, as it ought to, more probable and inescapable, the court below ought to have so found. There was therefore no question of the trial Judge determining whether the plaintiff had first settled on Ani Ozala land or not as that has never been their case. (p. 253 C)

Traditional histories - Issues decided thereon

6. In the instant case, the plaintiffs cannot avail themselves of the issue decided with respect to the traditional histories in the Mbanefo Odu v. Kodilinye and Anatogu v. Kodilinye cases (supra) as they were not between the same parties as in the instant case; the issues are not the same and the lands in dispute are equally not also the same. Indeed, there is nothing to link affirmatively the plaintiffs with the traditional history they now invoke and rely upon. (p. 255 F)

Nexus - Failure to relate the land in dispute

7. Since the plaintiffs made no attempt whatsoever (and the duty lay on them) to relate the land in dispute to the land acquired by the Government where in their plan (Exhibit 1) did they make any reference to the area acquired by the Government in 1910, the deed of grant of the land to fitment (Exhibit 5) in that year, bear no nexus with the land acquired by the government in that year. Yet they made no attempt to relate the land in dispute to the plan attached to the deed of grant, Exhibit 5. This constitutes a fatal omission which destroys completely the plaintiffs' case. (p.257C)

Discretion - Course of action by the court

8. Indeed, as to whether the trial Judge had a discretion to do what he did, led to by both counsel for the parties in their Briefs. The only dispute which is more of academic value is, whether the discretion was exercise at the right time or not. If the learned trial Judge had not adopted a course of action that was inherently wrong, then the exercise of the discretion, albeit, at the wrong time or moment cannot be faulted in as much as he had a discretion so to do. (p. 260 G)

NOTABLE POINTS OF INTEREST**ONU JSC*****1. Brief of appeal defined***

Be it noted that a brief has been defined as a condensed - indeed, a succinct ii of the propositions of law or fact or both, which a party or his wishes to establish at the appeal together with reasons and authority which can sustain them. (p. 240 C)

2. Correction of mistake by a Judge during the courts trial

True it is that it is not competent of a judge to overrule the decision or made by another judge or to sit in judgment over the decision of a brother judge. The reason for this which is not far to seek, stems from the fact that the judges are of co-ordinate jurisdiction, and no one judge can therefore sit on appeal over the decision or ruling of his brother judge. A glaring exception to the above principle of law is perhaps the power to set judgment given in the absence of a party which power can be exercised by any judge of the High Court, not necessarily the judge who gave the judgment. Be it noted that the latter is restricted to default judgment. However, this principle of law cannot be extended to a judge correcting a mistake he might have made during the course of trial. Indeed, a judge, until he delivers his final judgment in a case is still seised of the matter and

in the interest of justice, can rightly correct any mistakes he might have erroneously made during the trial. (p. 259 C)

OGWUEGBU JSC

3. When s. 46 of the Evidence Act will apply

- B Section 46 of the Evidence Act 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 one piece of land is likely to be true of the other piece of land.*” For the above provision of the Evidence Act to apply, the plaintiffs must prove the identity of the land which they claim and relate it to the land which is connected with it by locality similarity and over which they exercise rights of possession and enjoyment. This they failed to do. (p. 265 C)

D REPRESENTATION

G. M. Nwagbogu, Esq. for the Appellants

Dr. Ilochi Okafor, S.A.N. with Chijioke Ozoemena for the Respondents

CASES REFERRED TO

- E Kojo II v. Bonsie (1957)1 W.L.R. 1223
 Odu v. Kodilinye 2 W.A.C.A. 336
 Anatogu v. Chief J.M. Kodilinye (1951) PCR No. 39 of 1951
 Idundun v. Okumagba (1976) 9-10 S.C. 227
 Okafor v. Idigo (1984)1 S.C.N.L.R. 481
 F Amakor v. Obiefuna (1974)3 S.C. 67
 Okorie v. Udom (1960)6 F.S.C.-162 at 165
 Sanyaolu v. Coker (1983)1 S.C.N.L.R. 1
 Ikpong v. Edoho (1978)6-7 S.C. 221
 Ogbuokwelu v. Umeanafunkwa (1994) 8 KLR 79
 G Fadiora v. Gbadebo (1978) 3 S.C.291

LEAD JUDGMENT BY ONU JSC

- This appeal which turns purely on the facts is a classical example of yet another concurrent findings of facts by the two courts below which commenced its journey by a writ of summons issued at the High Court of
 H Anambra State holden at Onitsha at the instance of the plaintiffs/appellants against the defendants/respondents on 7th October, 1980. It is in respect of a parcel of land which they (plaintiffs/appellants) referred to as Ani Ozala

in Onitsha, culminating ultimately in their reliefs couched thereto in paragraph 24 of the Amended Statement of Claim as follows:-

“(a) Whereof the plaintiffs claim from the defendants jointly and severally the sum of N50,000.00 as General Damages for trespass.

(b) Injunction to restrain the defendants, their Servants or Agents from trespassing or entering the said land or disturbing the plaintiffs exclusive rights of possession over the said land.”

Onwuamaegbu, J. (of blessed memory) after hearing the evidence of witnesses and addresses of counsel, dismissed the plaintiffs/appellants claims on 22nd May, 1986. Their appeal to the Court of Appeal, Enugu Division was similarly dismissed on 16th March, 1989 in a well considered judgment. Hence, their further appeal to this court.

But first the brief facts of the case as presented in the two lower courts.

The plaintiffs/appellants (hereinafter referred to simply as plaintiffs) pleaded and relied on traditional history. In this regard, their claim was that their ancestor called Oreze was one of the emigrants from Benin, about four centuries ago and their leader was Ezechima. That Ezechima who was regarded as the king or Obi of the group, did not cross the River Niger but later died at a point on their journey called Obior. That on the death of Oreze, his son led the group which, on eventually crossing the River Niger, met people called Oze, the original inhabitants of Onitsha whom they fought and defeated. Thereafter, Onitsha land was occupied by and shared among the people who remained as exclusive owners in prior possession of Ani Ozala, part of which was in dispute. That Oreze in addition got the portions called Okpoko and Woliwo. The plaintiffs demonstrated by pleading and giving evidence that they are the direct descendants of Ezechima through Oreze's lineage. They further said that it was Uyamasi, a descendant of Oreze who harboured and quartered the defendants/respondents ancestor Idoko and his entourage at the request of Omozele, leading to respondents/defendants eventual assimilation with the plaintiffs forebears in their village known as Obikporo, otherwise called Woliwo. It was agreed on all sides that part of the Ani Ozala land was acquired by the Government in the year 1910. There was a dispute however as to whom the rents had been paid ever since the acquisition. There was a case of 1924 (Exhibit 2A) which did not decide the issue as the Station Magistrate who heard the case was said in a later case (Exhibit 16) not to have had jurisdiction to adjudicate on the ownership of land. Significantly, however, it is worthy of note that the land alleged to have been acquired by the Government and over which rents were allegedly paid to the plaintiffs through

successive Obis of Onitsha, is outside the land in dispute in the instant case. This is because the land the plaintiffs claim is in dispute is the land edged PINK in the plaintiffs Plan (Exhibit 1) which had never been acquired by the Government.

B The defendants/respondents (hereinafter in this judgment referred to as defendants for short) on the other hand, while they admit the history of the migration from Benin, contend that Oreze originally lived on Okpoko land after crossing the river Niger. They denied that Oreze was a son of Ezechima but say he was his brother. They say further that Ezechima was the first Obi or king of Onitsha, being the leader of those emigrants from Benin. They conceded that later, their ancestor led by Idoko, came from Igala. That this was during the reign of Eze Aroli, the 8th Obi of Onitsha. It was this Obi who put the defendants ancestors on Ani Ozala land. At a later date, they were asked to move to Obikporo land, a place then reputed to be the sanctuary for witches. In acceptance of the challenge and to show D their prowess in defiance of the witches through their 'Egugu' masquerade, they moved to Obikporo. As later transpired, the plaintiffs moved from Okpoko to live with defendants at Obikporo. The defendants in effect denied the plaintiffs assertion that they (plaintiffs) were ever in exclusive possession of Ani Ozala. Rather, they say that the said land originally belonged E to them exclusively but later became the communal property of both parties after the "assimilation" of Uyamasi into their (defendants') sub-family of Isolo. They also denied that the plaintiffs collected and enjoyed rents accruing from the acquisition of part of the land.

F The learned trial Judge, although in his reasoning would seem to have run away from some obvious facts and in his consideration of the principles of law applicable appeared to have failed to apply the test in Kojo II v. Bonsie (1957) 1 WLR. 1223 in relation to traditional history by looking for acts in recent times adduced by both parties to ascertain which of the traditional histories as to who of the two settled on Ani Ozala first is G more probable, albeit arrived at the right conclusion when he found nothing in their (plaintiffs') traditional evidence to commend their case to him and so, as hereinbefore pointed out, dismissed it. It is in the court below upholding that judgment, that has led to the further appeal to this court premised on four original grounds of mixed law and facts. Later, with leave of this court, the plaintiffs sought and were duly granted leave, to file four H grounds, three of which are of mixed law and facts and one, solely of law. Further, the plaintiffs sought and obtained leave to argue an additional ground of law.

The parties filed and exchanged briefs of argument in accordance

with the rules of court. The plaintiff and defendants aside from filing their respective appellants and respondents briefs, the plaintiffs also filed a Reply brief. At the hearing of this appeal on 20th November, 1995, the document filed by learned Senior Advocate for the defendants, Dr. Ilochi Okafor, headed respondents Reply Brief on appellants Additional Ground of Appeal was, upon the application of the learned Senior Advocate, allowed to be argued under the nomenclature Additional respondents' brief. In their brief of argument, the plaintiffs formulated the following four issues for our determination:

(1) Were the learned Justices of the Court of Appeal not in error when they failed to evaluate properly the evidence of recent acts of possession adduced by the parties after it had found that the learned trial Judge had omitted to perform the exercise in accordance with the test or *Kojo v. Bonsie* (1957) 1 WLR 1223. C

(2) Whether the learned Justices of the Court of Appeal were not in error to have suo motu introduced an issue which was never part of the issues contested by the parties before them or at the trial when they held that the appellants had not established with certainty the identity of the land in dispute, when in fact both parties had by their pleadings and their evidence identified the bone of contention and the learned trial Judge made a definite finding on it in any way shown to be perverse. D E

(3) Whether the failure of the Court of Appeal to give due and proper consideration to the entire evidence mustered by the appellants in proof of their claim led to a miscarriage of justice.

(4) Whether the Supreme Court's decision in *Sunday Piaro v. Chief Wopnu Tenalo* (1976) 12 SC 31, as regards acts which could qualify as acts of ownership by persons claiming title or ownership to land are exhaustive as to exclude the evidence of receipt of rent exclusively by the plaintiffs/appellants in this case. F

The three issues submitted for our determination by the defendants on the other hand are:

1. Whether there is any merit in the complaint that the learned trial Judge had not applied the principles enunciated by the Privy Council in *Kojo v. Bonsie* (1957) 1 WLR 1223, in resolving the conflicts in the traditional evidence of the parties. G

(2) Whether the lower court was in error in holding that the failure by the plaintiffs/appellants in establishing with certainty the identity of the land in dispute was fatal to the plaintiffs/appellants case. H

(3) Whether the plaintiffs had discharged the onus of proof that they were in exclusive possession of the land in dispute.

Before embarking on the consideration of this appeal and going by the issues canvassed, I wish first of all to comment on the one additional ground of appeal hereinbefore referred to but which, rather than being argued as an issue in an amended brief incorporating all the issues, was later argued as an issue in the plaintiffs Reply Brief dated 30th October, 1993 and filed on 1st November, 1993 - an issue for which leave to argue its ground of jurisdiction and/or competence was granted by this court on 14th March, 1994. This approach taken by the plaintiffs counsel is wrong in so far as one has to look for or rely on two documents, the plaintiffs (appellants) Brief and the Reply Brief in order to comprehend all the issues argued, thus derogating from the proper mode of brief - writing. Be it noted that a brief has been defined as a condensed - indeed, a succinct statement of the propositions of law or fact or both, which a party or his counsel wishes to establish at the appeal together with reasons and authorities which can sustain them - See *Duncan v. Kiler* 37 Minn. 379 and Order 6 Rule 5(1) (a) Supreme Court Rules, 1985, as amended. By virtue of Order 5 rule (2) of the Rules (*ibid*) which requires that *"the respondent shall file in Court and serve on the appellant his own Brief within eight weeks after service on him of the Brief of the appellant,"* the *"appellant may also file in Court and serve on the respondent a Reply Brief within four weeks after service of the brief of the respondent on him but except for good and sufficient cause shown, a Reply Brief shall be filed and served at least three days before the date set down for the hearing of the appeal."* See Order 6 rule (3) (*ibid*). In the instant appeal, the lapse perpetuated is that instead of wrapping all the issues necessary for the disposal of the appeal in an amended brief for which a prior application would have been a *sine qua non*. The untidy manner of tucking away the issue attacking the jurisdiction and/or competence of the trial court in the plaintiffs Reply Brief where it does not belong or is ill-fitted, has led to the learned Senior Advocate for the defendants to file a document he designated respondents Reply Brief on appellants Additional Ground of Appeal, which for lack of a better name, we have now categorized as Additional respondents' Brief to bring the appeal to an expeditious hearing. The only word of admonition I wish to sound on the blunder committed in the present brief by learned counsel for the plaintiffs is that re-echoed by this court in *Atipioko Ekpan & anor v. Chief Agunu Uyo & anor* (1986) 3 NWLR (Pt. 26) 63 at page 76 (per Obaseki, J.S.C.) wherein the learned Justice said that *"future counsel must pay more attention to the requirement of the Rules while filing briefs and that briefs filed without showing evidence of knowledge of the Supreme Court Rule 5(1) of Order 6 thereof, is of little use."* Be that as it may, this Court having allowed

counsel for both sides to argue the appeal herein, is deemed to have waived the non-compliance by the learned counsel for the plaintiffs whose procedural blunder as it affects the defendants in relation to the Reply Brief cannot, in my view, be reasonably said to have misled them (defendants) in the circumstance. See *Surakatu v. Nigeria Housing Development Society Ltd. & ors.* (1981) 1 All NLR (Pt. 2) 230; (1981) 4 SC 26.

In my treatment of the arguments proffered on either side in this appeal it may be pertinent to point out that I will firstly consider the plaintiffs issue 3 which, at it were, overlaps the defendants issue 3. Thereafter, I will consider the plaintiffs issues 1 and 4 together both of which to all intents and purposes, are concomitant with the defendants issue 1. Coming next will be the plaintiffs issue 2 which in scope and coverage coincide with the defendants issue 2. I will finally address what the learned counsel for the plaintiffs has referred to as additional ground which he has embodied as an issue and argued extensively in his Reply Brief hereinbefore alluded to elsewhere in this judgment by me.

Upon adopting and relying on the plaintiffs Brief dated 9th April, 1990 as well as their Reply Brief filed on 1st November, 1993, learned counsel for them orally highlighted Issue 2 by first adverting our attention to paragraphs 15,20 and 23 of the Amended Statement of Claim. To these, learned counsel contended, the defendants made certain admissions in paragraphs 24, 33 and 37 of the Statement of Defence on which the learned trial Judge made a definite finding of fact. In the court below, learned counsel argued, the plaintiffs never raised the issue of the identity of the land in dispute, since that court took up the matter suo motu. After urging us to set aside that finding, he submitted that that court was in error when it held that the identity of the land was the bone of contention in the face of the defendants failure to file any plan while the plaintiffs Exhibit 1 was all that was before the court. The cases of *Atanda v. Ajani* (1989) 3 NWLR (Pt. 111) 511 and *Ukaeghu v. Ugoji* (1991) 6 NWLR (Pt. 196) 127 were founded upon.

On the main issue of traditional evidence, learned counsel for the plaintiffs after referring us to Exhibit 2A on the Record, maintained that the defendants sued the plaintiffs but failed in that bid, adding that subsequently, they (the plaintiffs) continued to receive rents on the land. An example, he contended, was P.W.3 who received rents on Exhibits 17 and 18 as well as P.W.5 who acknowledged his receipt of rents on Exhibit 6 (continued on Exhibit 9 which is the note book kept by the Obi for paying rents out to the plaintiffs). Section 46 of the Evidence Act was said to be instructive in his regard. On top of this, it is further argued, the plaintiffs had called two witnesses in 1978, namely P.W.1 (the surveyor) and P.W.2, the road contrac-

tor who cleared part of the bush and constructed roads in 1979 for and on behalf of the plaintiffs. We were referred to the evidence of PW.3 and the case of Ayinde v. Salawu (1989) 3 NWLR (Pt. 109) 297 at 316, adding that the erection of pillars and the moulding of blocks are acts of possession. We were referred to the evidence of D.W.1 vis-a-vis that of PW.3 from which to hold that there is abundant evidence to find in favour of the plaintiffs as those in possession of the land in dispute. We were finally referred to page 6 of the Reply Brief where the case of A.-G., Oyo State v. Fairlakes Hotels Ltd. (1988) 5 NWLR (Pt. 92) 1 is called in aid.

Arguing issue 3 on the written Brief, first, the complaint in which is whether the failure of the court below to give due and proper consideration to the entire evidence mustered by the plaintiffs in proof of their claim led to a miscarriage of justice or whether the plaintiffs had discharged the onus of proof that they were in exclusive possession of the land in dispute, learned counsel submitted as follows:-

PRELIMINARY

It was his contention under this head that the two lower courts apart from attempting to resolve the conflicts in the traditional evidence adduced by the parties, failed to give due and proper consideration to the entire evidence adduced by them, in particular the traditional history of the plaintiffs. It is trite law, he argued, that a plaintiff need not rely on more than one of the five established modes of proving title or ownership to land to succeed in an action. Where, however, a party anchors his case on traditional history as his root of title, and goes further to plead other acts of ownership and possession numerous and positive enough to warrant an inference of ownership, as in this case, he is only doing so *ex abundantia cautela*, he argued. He then submitted that if the court accepts his traditional evidence, there the matter ends as the plaintiffs would be entitled to the reliefs sought without the court looking for further or additional evidence of acts of ownership and possession except there is a conflict in the traditional evidence of the parties. The cases of Abinabina v. Enyimadu (1953) 12 WACA 171 and Balogun v. Akanji (1988) 1 NWLR (Pt 70) 301 at 322 were cited in support thereof.

PLEADINGS OF THE PARTIES ON TRADITIONAL HISTORY:

Learned counsel further contended that the plaintiffs laid the foundation of their root of title through traditional history vide paragraphs 1-13 of the Amended Statement of Defence. He then pointed out how abundant evidence was led on these issues as joined on the pleadings, adding that in his address, he had drawn the attention of the court to the fact that the traditional history of the Onitsha people had been settled in the cases of: (i) Kodilinye v. Odu (1935) 2 WACA 336

(ii) Philp Akunne Anatogu & anors v. Chief J.M. Kodilinye (1951) Privy Council Report No. 39 of 1951.

DECISIONS OF THE TWO LOWER COURTS:

The learned trial Judge, learned counsel contended, made nothing of the above cases, neither findings on them nor their effect on the issues presented before him for determination. All he did was merely to hold that the traditional evidence adduced by the parties was not of much assistance and then abandoned the issue. Nor also did the court below, which he maintained, merely glossed over the issues without proper determination. If the traditional history of the Onitsha people had been judicially settled, and which indeed is what is involved in the mass of traditional evidence led by the parties in this case, learned counsel's submission was that the learned trial Judge and indeed the court below, ought to have accepted same as incontrovertible and found for the plaintiffs as per their claim, adding that the traditional evidence of P.W.1 and D.W.1, was not put on the imaginary scale of justice by the two courts below. This is the moreso, learned counsel argued, that the court below failed in the consideration of the entire evidence even though there was a ground of appeal which complained that the judgment was against the weight of evidence (which term includes traditional evidence), before concluding that the said evidence on traditional history was conflicting even though it did not. The court below, learned counsel further argued, merely assumed that there was a conflict which the learned trial Judge failed to resolve in accordance with the test in *Kojo v. Bonsie* (supra) and then proceeded to summarily consider the so-called conflict without a dispassionate and detailed view of the evidence in recent years adduced by the parties.

ABDICATION OF ITS DUTY BY THE COURT OF APPEAL

Learned counsel after stating the duty of an appellate court to interfere and make findings where that task has been abandoned by the trial court, pointed out how the court below in the instant case ought to have re-assessed and re-evaluated the entire evidence in this case, namely:

(i) evidence of traditional history led by the parties, especially that led by P.W.1 and D.W.1;

(ii) evidence of recent acts of ownership and possession (if it found conflict) in the traditional evidence of the parties) to determine which of the competing histories is more probable;

(iii) evidence of trespass committed by the defendants which is the cause of action.

Unfortunately, learned counsel contended, it did not, as there was no indication from it that such an exercise would have involved the credibility of

witness. Having thus failed in its duty, the court below did not re-evaluate the entire evidence to determine whether the plaintiffs succeeded in their claim on the preponderance of evidence. The cases of Woluchem v. Gudi (1981) 5 SC 291 and Okafor v. Idigo (1984) 1 SCNLR 481 were cited in support of the proposition.

B THE ISSUE OF A RETRIAL

It was learned counsel's further submission that it is trite law that this Court has the power under section 22 of the Supreme Court Act, 1960 to make findings of fact abandoned by courts below a task it would more readily undertake where there is sufficient evidence on record, provided that the credibility of witnesses is not involved vide Otogbolu v. Okeluwa & ors (1981) 6-7 S.C. 99. (1981) NSCC. (Vol. 12) 275 at 287. Where credibility of witnesses is, however involved, he contends. a retrial would be the proper order to make so as to meet the justice of the case as was done in the cases of Mogaji v. Odojin (1978) 4 SC 91; Chief Igbodim & ors. v. Chief Obianke & anor (1976) 9-10 SC. 179; Solomon v. Mogaji (1982) 11 SC. 1 at 24 and Atanda v. Ajani (1989) 3 NWLR (Pt.111) 511 at 536. He submitted that this is not the case here as there is sufficient evidence on record to find for the plaintiffs. It was therefore strenuously argued that if the traditional evidence adduced by the plaintiffs is accepted, as it ought to, given that their own version of the traditional history of Onitsha people had been judicially settled, then there would be no question of conflict with the version led by the defendants; in which case, the plaintiffs case ought to succeed through this mode of proving title to land. It was the failure of the court below to do so in this case, it is argued, that led to the miscarriage of justice that has been occasioned, much as the failure to resolve the conflict dispassionately, has led to a greater miscarriage of justice. The plaintiffs in their pleadings and evidence, it is maintained, established that there are two distinct and separate portions of Ani Ozala land as far as their case is concerned, one acquired by the Government as part of the totality of land acquired from various Onitsha families vide Exhibit 5, and the other, the unacquired portion which is the land in dispute. That they had received rent exclusively from the Government in respect of the acquired portion. In law, it is therefore argued, a person who is in receipt of rents and profits from tenants is also regarded as being in possession, albeit in a constructive manner. The case of Buraimoh v. Bamgbose (1989) 2 NWLR (Pt. 109) 352 at 336 was called in aid.

I think the writer of the lead judgment in the instant case, Uwaifo, J.C.A., was right when he opined that
"I have no doubt, however, that if the learned Judge had applied

Kojo II v. Bonsie (supra) he could still have found nothing to commend the plaintiffs/appellants case.

I think in particular I should refer to the Supreme Court Case of *Sunday Piaro v. Chief Wopnu Tenalo* (1976) 12 SC 31 which was cited by the respondent's counsel. It is quite instructive in the resolution of the main issue in this case as to how ownership or exclusive possession in a situation like this can be established."

This is because the Supreme Court, in *Piario v. Tenalo* (supra) at page 41 (per Obaseki, J.S.C.) dealt with the question of how ownership or exclusive possession of a piece of land is to be proved. The court below applying that principle to the instant case came to the conclusion that the plaintiffs failed to prove that they own the land or are in exclusive possession. The argument of the plaintiffs at page 14 of their Brief that "it is also our submission that Exhibits "2", "2B", "9" and "16" establish conclusively that the plaintiffs/appellants are in exclusive possession of Ani Ozala land in dispute, and are entitled to the reliefs sought in their claim" is misconceived. The truth of the matter is that the four Exhibits do not concern the land in dispute in this case. All of them dealt with the land acquired by the Government in 1910 by virtue of Exhibit 5. None of them relates to any part of the Ani Ozala land not acquired by the Government in 1910 which the plaintiffs say is the land in dispute. For example, Exhibit 2A showed that it was an action for "*Recovery of the sum of 41 being share of rent in respect of a piece of land situated at Nkisi Road, Onitsha and known as Ani Ozala part of Government.*" Exhibit 2B is merely a letter dated 25th February, 1930 under the mark of one Omane Nwalie to an undisclosed person. Exhibit 9 is an exercise book kept by Obi Ofala Okagbue containing acknowledgements by sundry persons of rents paid to them by the Obi on behalf of the Government in respect of the land acquired by the Government in 1910. The acknowledgements were depicted in evidence as Exhibits "6", "7", "7A", "8", "9", "10", "11" and "12". Exhibit 16 was an action at the then Supreme Court of Nigeria at Onitsha for declaration of title over a certain piece of land said to be the same land over which an action had been brought against the defendants in Exhibit 2A "*to recover the sum of 41 being a share of the rent thereof.*" No final judgment was entered in the case, though the learned Judge, Petrides, J. In an interlocutory application had ruled against the plea of *res judicata* as "*there has been no adjudication upon title in this case (i.e. Exhibit 2A) as the Station Magistrate had no jurisdiction to adjudicate upon title.*"

Be it noted that the Nkisi Road on which the land, the subject matter of that case was situated is nowhere shown on plaintiffs plan, Exhibit 1.

Indeed, to confound an already bad case PW.2, Oseloka Ofo Ile, who said he had made the layout of the land in dispute for the plaintiffs in 1978 and did the carving of plots in 1979, asserted further that he made four roads in the land. He, however, went on to say that “at the time I went to do the clearing, the whole land was thick bush.” Surely, if there was any road like the Nkisi Road within the area in dispute the witness could have seen it, and it could not have escaped the attention of the Surveyor, Mathias Chukwurah (PW.1). Indeed, the plaintiffs have not been able to show how Exhibit 2A, which was for the sharing of rents in respect of a piece of land situate at Nkisi Road, Onitsha and known as Ani Ozala part of Government, would assist them in this case which concerns a piece of land not shown to be situated at Nkisi Road, Onitsha and not said to be Government land.

Furthermore, the judgment of the Station Magistrate in Exhibit “2A” simply states “judgment for defendants with ‘a34.4.0 costs.’” No reasons whatsoever were given for the judgment; or were the grounds for entering it for the defendants stated. However, the defendants were shown as having made the following pleas:

1. The Court has no jurisdiction
2. The defence claims the sole owners (sic) of the land and plaintiffs are not co-owners.
3. Estoppel, Settled before by the Town Chiefs.
4. Laches and acquiescence

It is noteworthy that the Station Magistrate did not state in his judgment which of the above four pleas had been accepted by him on which he entered judgment for the defendants. However, in Exhibit 16 in which the defendant, sought to enter a plea of *res judicata* by virtue of Exhibit 2A, the trial Judge, Petrides, J. clearly ruled that the Station Magistrate who heard Exhibit 2A had no jurisdiction “*to adjudicate on the question of the ownership of the land in respect of which the action for money had and received was brought.*”

In effect, Exhibit 16 knocks the bottom out of the plaintiffs’ case completely. One may ask, of what evidential value is Exhibit 2A after admitting by consent Exhibit 16? One thing which Exhibit 16 has clearly established is that of the four pleas by the defendant in Exhibit 2A, the Station Magistrate could not have entered judgment for the defendants on the 2nd plea which was that “*the defence claims the sole ownership of the land and plaintiffs are not co-owners*”, as that goes to the issue of adjudication of the ownership of the land for which the Station Magistrate lacked jurisdiction. As for Exhibit 9 and its contents, to wit: Exhibits 6, 7, 7A, 8, 9, 10, 11 and

12, it will suffice to say that they were acknowledgments of payments of rents to the people mentioned therein by the Obi of Onitsha for land acquired by the Government. None was shown to relate to any part of the land in dispute which had not been granted to the Government. Thus, the plaintiffs reliance in the instant case on the proposition of law that one of the modes of proving title to land is by proof of possession of connected or adjacent land in circumstances which render it probable that the owner of such connected or adjacent land would, in addition, be the owner of the land in dispute vide Section 45 of the Evidence Act and as decided in the case of *Idundun v. Okumagba* (1976) 9-10 SC 227 and *Okafor v. Idigo* (1984) 1 SCNLR 481 would be of no avail to them.

What is more, no land of any of the witnesses in P.W.4 (Chief Aniemeka Omenye, an Onitsha red cap Chief), P.W.5 (John Okay Emodi, a younger brother of the 1st plaintiff), P.W.6 (Akukalia Izchukwu Areh of Ogbembubu Village, Onitsha) P.W.7 (Ezenobi Anthony Ani weta Agha of Umuokposieke Family of Ogboli -Eke Village, Onitsha), P.W.8 (Ikem Omekam of Iyiauw Village, Onitsha) and P.W.9 (Akunwata Samuel Ike Iwobi of Ogbedogwu Village) called to prove the payments of rents to them had been shown on Exhibit 1, so that the proximity of the land of any of these witnesses to the land in dispute could be seen and identified. The learned Justices of the court below were therefore perfectly right in saying that the evidence of payment of rent in respect of the so-called Ani Ozala land of the plaintiffs is of no probative value. Furthermore, that the plaintiffs gave evidence neither of any farming on the land in dispute nor of any acts whatsoever over it but rather evidence which centered on acquisition of the Ani Ozala land by the Government in 1910; the case of 1924 (Exhibit 2A) about sharing of the rents paid by the Government and the acknowledgments made by the people to whom rents were paid from 1972 by Obi Ofala Okagbue in respect of the land acquired by the Government in 1910 as contained in Exhibit 9. The plaintiffs having failed to lead any evidence whatsoever as to their activities on the land in dispute which is verged pink on the plan, Exhibit 1, it is little wonder that in dealing with the proof of ownership of land the learned Justices of the court below rightly referred with approval to the ratio in *Piaro v. Tenalo* (supra) at page 41 which says –

“This is normally provided by acts of person or persons claiming the land such as selling, leasing, renting out all or part of the land or farming on it or a portion of it or otherwise utilising the land beneficially.”

The only instance that the plaintiffs had at any time utilised the land in dispute beneficially, if at all, is where they asserted that in 1978, they engaged P.W.2 to make a layout of the land and in 1979 to carve same out

into plots. But this was at a time the present dispute between the plaintiffs and the defendants had erupted. The following question and answer elicited from PW.3 in cross-examination will suffice to illustrate the point I am here making.

B “QUESTION. Do you know as a fact that the question of sharing the rent from “Ani Ozala” by Obikporo people was settled in an agreement made on October 21, 1923, which was signed by the court clerk and thumb impressed by the representatives of the plaintiffs and the defendants in this case and by the members of the native court?

C “Answer. I saw the agreement for the first time about the year 1978 when the plaintiffs and the defendants were trying to settle the present dispute before it came to court but I cannot say if the agreement was a genuine document because the thumb impression appeared all identical.”

 If, as is clear from the above extract, that by 1978 when the layout of the land in dispute and its subsequent plotting or carving out was made
D the dispute culminating in the present case had already erupted, could anything done on the land subsequently as would seem to be the position here be of any evidential value? My answer is palpably and categorically in the negative. The plaintiffs having failed to demonstrate any act or acts of exercise of ownership on the land in dispute, and having equally failed to
E show that they were ever in exclusive possession thereof cannot, in my judgment, maintain an action for trespass thereon. See Pius Amakor v. Obiefuna (1974) 3 SC 67; Okorie v. Udom (1960) SCNLR 326; (1960) 6 FSC 162 at 165; Sanyaolu v. Coker (1983) 1 SCNLR 168; Akpapuna v. Obi Nzeka (1983) 2 SCNLR 1; Ikpong v. Edoho (1978) 6-7 SC 221 and
F Olagbemi v. Ajagungbade III (1990) 3 NWLR (Pt. 136) 37 at 55/65.

 The issue is accordingly answered in the negative.

 Issues 1 and 4:

 The consideration of these plaintiffs issues which overlap the defendants issue 1 and which enquires if the learned Justices of the court below
G were not in error when they failed to evaluate properly the evidence of recent acts of possession adduced by the parties after it had found that the learned trial Judge had omitted to perform the exercise in accordance with the test in *Kojo v. Bonsie* (1957) 1 WLR 1223. The question in the alternative enquires whether this court’s decision in *Piaro v. Tenalo* (supra) as regards acts which could qualify as acts of ownership by persons claiming
H title or ownership to land are exhaustive as to exclude the evidence of receipt of rents exclusively by the plaintiffs, in this case, or whether there is any merit in the complaint that the learned trial Judge had not applied the principles enunciated in *Kojo v. Bonsie* (supra) in resolving the conflicts in the tradi-

tional evidence of the parties.

In my treatment of these issues together, I can do no better than my adopting all I had hitherto said in respect of Issue 3 above. The case put forward by the plaintiffs at the trial court had been:

(i) Traditional evidence showing that plaintiffs ancestors had along with other Onitsha indigenes divided Onitsha lands among themselves before the arrival of the defendants. B

(ii) That the ancestors of the plaintiffs got Okpoko, Woliwo and Ani Ozala lands.

(iii) That the entire Ani Ozala so called, was owned partly by plaintiffs ancestors and other families of Onitsha.

(iv) That in 1910 the Government acquired portions of Ani Ozala which comprised part of the plaintiffs Ani Ozala and that of other Onitsha families. C

(v) That the Government paid rent for the acquired portion of the said Ani Ozala to the kings of Onitsha who in turn paid over these rents to the Ani Ozala land owners including plaintiffs. D

(vi) That the unacquired portion of the plaintiffs Ani Ozala is the subject of this case and the land in dispute.

Plaintiffs having laid the foundation in the pleadings, went on to establish in evidence:

(i) Ownership of the entire plaintiffs Ani Ozala land E

(ii) Receipt of rents by the plaintiffs over the land as acts of possession over the entire plaintiffs Ani Ozala land, which land includes the acquired portion and the unacquired portion (now subject of this litigation). See Exhibit "9".

(iii) That the totality of the Ani Ozala land acquired by the Government in 1910 (Exhibit 5) was land owned by various families in various villages in Onitsha (including plaintiffs family) who were paid rents as and when paid by the Government through the various Obis (Kings) of Onitsha. F

(iv) The layout project of 1978/79/80 by the plaintiffs over the unacquired portion showing also acts of possession. G

(v) Trespass by the defendants when they broke and entered plaintiffs unacquired portion that was then being carved into a layout.

The above facts as pleaded, as well as evidence led on them, learned counsel for plaintiffs argued, can be seen to be entirely different from the facts of the Tenalo's case (supra). The principle of series of acts of ownership in a farm land, it is argued, cannot be the same as in the instant case where the plaintiffs collected rents exclusively on part of the land acquired by the Government, and subsequently moved into the unacquired land when they H

decided to partition it into a layout.

It is further submitted that assuming there was a conflict in the traditional histories of the parties, the application of the principle in *Kojo II v. Bonsie* (supra) “to test the traditional history by reference to facts in recent years as established by evidence and by seeing which of the two competing histories is more probable,” ought to be construed by reference to the receipt of rents by the plaintiffs over the acquired portion of the said Ani Ozala land as shown in Exhibit “9” and to the partition into a layout being undertaken by them on the unacquired portion in 1978/79/1980 as well as by the Native Court case of 1924 (Exhibit “2A”) as far as this case is concerned. The plaintiffs’ case, he therefore contended, sounds more probable in the light of their receipt of rents, as contained in Exhibit “9” and the Record Book tendered by PW.4, the Obi of Onitsha’s representative and their successful assertion of that right in Exhibit “2A”. Further reference was then made to the testimony of D.W.1 and the purports of Exhibits “2A” and “9,” adding that the learned Justices of the court below, though they accepted that the trial Judge failed to evaluate the traditional history of both parties in accordance with the principles established in *Kojo v. Bonsie*, they themselves failed to evaluate the recent events or acts of ownership even though it was a ground of appeal before them, thus substantial miscarriage of justice was caused against the plaintiffs.

After our attention was drawn to other documentary pieces of evidence which established conclusively that the plaintiffs are in exclusive possession of Ani Ozala land and so entitled to the reliefs sought in their claim, it is submitted that the plaintiffs disagreed that the decisions of the two courts below constituted concurrent findings of fact. Assuming that they were wrong, it is their further submission, this is one of those cases where this Court ought to interfere to redress the injustice done to the plaintiffs’ case. This is the moreso, it is argued, that evidence of receipt of rents and profit constitutes evidence of ownership and possession as decided in the case of *Buraimoh v. Bamgbose* (supra). Had the court below approached the resolution of the so-called conflicts in the traditional histories of the parties, it is finally submitted, it would have found that Exhibits “2A” and “9” in particular, rendered the plaintiffs case more probable and worthy of belief.

On the traditional histories of the parties the only conflict discernible from available evidence is in the sharing of Onitsha land - there being no dispute whatsoever that the plaintiffs got to Onitsha before the defendant (with them, they came to Onitsha from Igala during the reign of Eze Aroli, the 8th Obi of Onitsha while with the plaintiffs, the time of the defendants coming to Onitsha was during the reign of Omozele, the 10th

King of Onitsha). The plaintiffs version was that the Onitsha lands were shared ever before the defendants came to Onitsha from Igala whilst the defendants case was that there was no sharing of Onitsha lands; and that the plaintiffs did not own the Woliwo and Ani Ozala lands exclusively.

The defendants further contend that the plaintiffs had always owned the “Okpoko” land because that was where they originally lived on their crossing of the river Niger, whilst maintaining that they (the defendants) lived and farmed at the Ani Ozala land upon its grant to them by the said Eze Aroli, their benefactor, before going to live at Obikporo where the plaintiffs were later “assimilated” into their (defendants) village. In resolving the conflict in the traditional evidence as to whether Onitsha lands were ever shared or not and the plaintiffs acquiring the “Okpoko,” “Woliwo,” and “Ani Ozala” lands, the learned trial Judge rightly, in my view, made use of evidence about the recent use of the lands so as enable him decide which of the two competing stories or accounts is the more probable, he said: *“The traditional history adduced was not of much assistance because the plaintiffs contention was that as they settled at Onitsha before the defendants the early settlers had shared out all the lands before the defendants group arrival, but that argument did not explain why they were using Woliwo land in common with the defendants group because I was fully satisfied from the evidence that the defendants were not tenants of the plaintiffs with regard to the Woliwo land.”* (Underlining is mine of emphasis).

The learned trial Judge having dispassionately considered the cases of both parties, had no difficulty in rejecting the story of the sharing of Onitsha lands, particularly in this case, the Woliwo land regarding which 1st plaintiff, Christopher Emodi who testified as PW.3, said as follows:-

“The entire Woliwo land has been developed. It was the plaintiffs and the defendants sections of Obikporo that jointly plotted out the Woliwo land and shared it out; one man to one plot among themselves.”

The Witness (PW.3) testified further as follows:-

“I know that part of Woliwo land was leased. The lease was in the name of Obikporo people. I signed for my own side of Obikporo Village, that is for the Oreze section. I think that the late Gbosa Kwentoh initialed for Ozomagala section. I am not quite sure. I know that the father of Bosah Azike signed for Isolo section of Obikporo. The father of Bosah Azike was called Azike Nweze. Gbosah Kwentoh was the father of 1st defendant... The four of us who signed the lease represented the entire Obikporo village in the transaction.”

Continuing his evidence-in-chief PW.3 further said:-

"The Metropolitan College, Onitsha is situated on a part of Woliwo land. After the Nigerian Civil War the Government of the then East Central State compulsorily acquired the Metropolitan College and paid compensation for the acquisition to the Obikporo Village. The defendants came to me at
 B *Enugu and we went to the Ministry responsible for payment and received the compensation and the defendants representatives took the money away. I did not partake in sharing it and what they did with the money I do not know."*

These admissions by the 1st plaintiff completely belied the plaintiffs story about the sharing of Onitsha lands. For, as the learned trial Judge aptly put it in his most unassailable language, *"that argument did not explain why they were using" "Woliwo" land in common with the defendants group"*. Certainly, no land owner would join his customary tenant in making joint grants of his land to third parties nor would he condescend to share the land equally with such a customary tenant on the basis of one man one plot. Be it noted that the defendants in the instant case tendered Exhibits 13 and 14 which were deeds of grants of the Woliwo land to sundry persons signed jointly by the plaintiffs and the defendants, signifying joint ownership thereof. It should also be borne in mind that the defendants contention which was most credible, was that even though they (defen-
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 dants) were late-comers to Onitsha, they still maintained that where they were first settled at Onitsha was at Ani Ozala land from where they were asked to move to Obikporo, the then abode of witches. That later the plaintiffs left the Okpoko land to join them at Obikporo from where they both used the "Woliwo" and "Ani Ozala" land in common. It is not surprising therefore that the learned trial Judge justifiably, in my view, arrived at the following inevitable conclusion, to wit:

"It seems to me, however, that the correct account was that on the arrival of the late-comers, the defendants group, they were settled at "Ani Ozala" but after displaying their long masquerade, the 'egugu', " they were assigned what was ostensibly the hard task of going to reside at Obikporo, the abode of old women who were considered to witches, because a group that displayed the "egugu" could face witches and that when they successfully settled down there, the plaintiffs group who had been residing at Okpoko and were constantly being harassed by the Obosi people, gradually moved over to Obikporo and joined the defendants group there. The two groups
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gradually became assimilated into each other."

Based upon the above finding on the traditional history, what the trial Judge did, in my view, was perfectly right and accords with the principle enunciated in *Kojo II v. Bonsie* (supra) as applied in the similar *Su-*

preme Court

cases of Samuel Adenle v. Michael Oyegebade (1967) NMLR 136 at 139; Thanni v. Saibu (1977) 2 SC 89 and Piaro v. Tenalo (supra). The learned trial Judge in his judgment further held:-

"I cannot find the evidence which supports the claim that the plaintiffs/appellants own the so-called Ani Ozala. It is also difficult for me to see in what way the land shown in the Survey plan No. MEC/12/811 tendered by the plaintiffs as Exhibit 1 is connected with the said Ani Ozala land." B

It is only pertinent to say that with the bulk of the plaintiffs case revolving around the issue of the 1910 acquisition by the Government of Onitsha lands and the payment of rents to various land owners as depicted in Exhibit 2, the latter which had nothing to do with the land in dispute, the proximity of the land acquired by the Government to the land in dispute is missing from the plaintiffs' plan, Exhibit 1, thus making their case unsustainable. The view held by the court below that the trial Judge had not resolved the competing histories as to the ownership of Ani Ozala land in accordance with established principles, cannot therefore be correct. Indeed, as at no time did the plaintiffs say that they had settled on Ani Ozala land but it was the defendants who had put up that story prior to their movement to Obikporo Village, the task before the learned trial Judge for coming to the conclusion that defendants traditional evidence of first settling on the Ani Ozala land before moving on to Obikporo Village becoming, as it ought to, more probable and inescapable, the court below ought to have so found. There was therefore no question of the trial Judge determining whether the plaintiffs had first settled on Ani Ozala land or not as that has never been their case. In fact, the conclusion arrived at by the learned Justices of the court below would still have been the same had the learned trial Judge straightforwardly and specifically held that he had applied *Kojo II v. Bonsie* (supra). This is the more so in that they had held that *"if the learned Judge had applied Kojo II v. Bonsie (supra), he would still have found nothing to commend the plaintiffs/appellants case."* It is enough if from the learned Judge's decision it could be inferred that that principle had been applied; which was what the learned trial Judge had done in this case. Of, Ogbuokwelu v. Umeanafunkwa (1994) 4 NWLR (Pt. 341) 676 at 694. C D E F G

It is necessary to emphasise, however, the fact that only the defendants gave evidence about farming the Ani Ozala land as clearly brought out and glaringly in the evidence of D.W.1. Based upon that piece of evidence by the defendants on the farming of Ani Ozala land, the learned trial Judge arrived at the following conclusion:- H

"Furthermore, I accepted as a more probable and reasonable ver

sion of the traditional history that, after the defendants group had settled at Obikporo, the abode of witches, they farmed around their Homestead at that village but the more enterprising among them moved further a field to "Ani Ozala" from where they went to Obikporo to farm there. When eventually the plaintiffs group moved out from Okpoko and joined the defendants at Obikporo, the enterprising ones amongst them joined the com-
B rades of the defendants' group in going to Ani "Ozala" to farm there as it was much safer so to do than at Okpoko where the regular forays of the Obosi people made fanning hazardous."

(Underlining is mine for emphasis).

As to the reason for the plaintiffs moving out of the Okpoko land, this is best illustrated by the averment in paragraph 19 of the Statement of
C Defence where the defendants averred:-

*"The defendants with further reference to paragraph 12 of the State-
ment of Claim also deny that Ani Ozala was ever the property of Uyamasi
but admit that the said Uyamasi owned Okpoko land where he settled with
D his ancestors before he subsequently joined the defendants in Obikporo.
The Uyamasi was driven from Okpoko land by the people of Obosi."*

Expatriating on the point in his evidence-in-chief, D.W.1 said inter
alia

*"The dispute between the plaintiffs and the Obosi people related
E only to Okpoko land; it did not concern the "Ozala" or "Woliwo" land. The
parcels of land granted by the plaintiffs to the late Chief Araka, Okolo and
others were at Okpoko, not at Woliwo or Ozala."*

Thus, it cannot be seriously argued that the learned trial Judge all
told, had not applied the principles enunciated in *Kojo II v. Bonsie* (supra)
F in resolving the conflicts, if any in the traditional evidence as to the owner-
ship of the Ani Ozala land.

On the question of issue Estoppel for which the plaintiffs relied on
the cases of *Kodilinye v. Odu* (supra) and *Philip Akunne Anatogu & anor.
v. Chief J.M. Kodilinye* (supra) for the proposition that the traditional his-
G tory of Onitsha people was judicially accepted or settled, this is but a far
cry. In *Kodilinye v. Mbanefo Odu* for example. The only reference made
therein to traditional history, generally, is where Webber, C.J. said as fol-
lows:-

*"In his (learned Judge of the court below) judgment which is the
H subject of this appeal he deals first with the evidence generally criticising the
evidence on both sides as conflicting and confused. Then he dealt fully with
the rival traditional stories and concluded that there was little to choose
between the two versions."*

(Underlining and parenthesis are mine for emphasis).

To impute from the above quotation in the instant case that the traditional

history was judicially settled and accepted, is nothing but fatuous imagination. As regards the *Anatogu v. Kodilinye Case* (supra) whose correct reference is *Chief J.M. Kodilinye v. anor v. Philip Akunne Anatogu & anor.* (1955) 1 WLR 231, nothing could be further from the truth that it settled or decided the traditional history of Onitsha people. The case was between an Onitsha family and the Obosi people (not among the Onitsha people inter se as in the instant case) and the only reference to the traditional evidence of the Onitsha people by Lord Tucker who delivered the judgment of the Privy Council, was at the stage when the facts of the case were being reviewed, when he said:-

“The Onitsha based their claim on traditional evidence as to the migration of their tribe from Benin and their conquest of the Ozeh people who were driven out by them. They said that having thus acquired the land, Orikagbue on their behalf transferred it to the National African Co. and that the Niger Co. by the instruments Exs. 53 and 54, and that the ownership of the land reverted to them on January 1, 1949.

“The trial Judge (Manson J.) granted the respondents a declaration of title to land, and also an injunction restraining the appellants “and their people of Obosi from interfering with or disturbing the plaintiffs” ownership and possession of the said land.” On appeal the West African Court of Appeal (Blackall P. Verity C. J. Nigeria and Lewey J.A.) affirmed that decision.”

See also *Samuel Fadiora & anor v. Festus Gbadebo & anor* (1978) 3 SC 219; *Obi Izediuno Ezewani v. Obi Nkadi Onwordi* (1986) 4 NWLR (Pt.33) 27 at 43; *Okonkwo v. Okolo* (1988) 2 NWLR (Pt.79) 632; (1988) 1 NSCC 909 at 1022; *Akuru v. Olubadan in Council* (1954) 14 WACA 523 and *Aro v. Fabolude* (1983) 1 SCNLR 58; (1983) 2 SC 75. In the instant case, the plaintiffs cannot avail themselves of the issues decided with respect to the traditional histories in the *Kodilinye v. Mbanefo Odu* and *Anatogu v. Kodilinye Cases* (supra) as they were not between the same parties as in the instant case; the issues are not the same and the lands in dispute are equally not also the same. Indeed, there is nothing to link affirmatively the plaintiffs with the traditional history they now invoke and rely upon.

Issues 1 and 4 are accordingly answered in the negative and affirmative respectively.

ISSUE 2:

The plaintiffs grouse here is that in spite of agreement between the parties in their pleadings and further, the definite finding of fact by the trial Judge, which was in no way faulted or challenged on appeal by any of the parties, the court below, suo motu, went ahead to hold that the plaintiffs

had not established the identity of the land they lay claim to. The plaintiffs further complained that *“this issue of identity had long been settled by the parties in their pleadings and evidence, and was never made an issue either at the trial court or Court of Appeal.”*

I respectfully adopt all I wish to say in respect of this issue my earlier consideration of issues 1 and 4 as well as issue 3 respectively.

The plaintiffs at page 18 of their Brief have asserted that *“It is true that they (defendants) raised it in their Brief at the Court of Appeal but that was too late in the day. The identity of the land in dispute was no longer a live issue at the said Court. It had been settled at the trial court.”*

The truth of the matter, as I shall seek to show hereafter, is that both at the trial court and at the court below, the defendants had always maintained that the land in dispute is not the area edged pink in the plan tendered in evidence by the plaintiffs, to wit: Exhibit 1. The defendants had always maintained that the whole of the land edged yellow in the plaintiffs plan, Exhibit 1, is the Ani Ozala land unacquired by the Government in 1910, and that the land in dispute in this case comprises the whole area edged yellow. It is not true therefore that the identity of the land in dispute had been settled at the trial court. Had that been so, the court below would not have held that -

“It is obvious that the plaintiffs have not only failed to show the land in dispute in relation to the land Government acquired in 1910, they have not been able to show that they are in exclusive possession of any land in Ani Ozala.”

Earlier, in their pleading, the defendants had averred in paragraph 37 of their Statement of Defence, thus joining issues with the plaintiffs as follows:-

“In answer to paragraph 23 of the Statement of Claim, the defendants admit that what remains of the Ani Ozala land (after the grant to the Colonial Government of Ani Ozala land in 1910) is correctly shown in the plaintiffs plan and verged yellow that is in dispute and not the area verged pink or red as shown in the reference column of the aforesaid plan.”

Evidence was led by both parties before the trial court and to show that the identity of the land in dispute was not settled therein, can be deciphered from what the learned trial Judge in his judgment said as follows:-

“From the evidence before me the Government acquired the “Ozala land” in 1910. The extent of the area acquired was not proved in this case because no plan of that area was tendered during the trial, therefore although the parties by their pleadings, and testimony agree that the land in dispute, as shown delineated and verged pink in Exhibit 1 was not acquired

in 1910, the admission inter se is not binding on the Anambra State Government which is not estopped from claiming it as part of the area granted to the colonial Government in 1910 and now vested in the State Government unless, of course, the contrary could be proved."

In as much as the plaintiffs contention is that the rest of the area within the area edged yellow less the area edged pink in Exhibit 1 is the plaintiffs Ani Ozala land acquired by the Government, and the defendants contention is that the Ani Ozala land acquired by the Government is completely outside the area verged yellow in Exhibit 1, and that the whole of the area verged yellow is the defendants unacquired Ani Ozala land, the plaintiffs and the defendants could not have agreed on the identity of the land in dispute. Since the plaintiffs made no attempt whatsoever (and the duty lay on them) to relate the land in dispute to the land acquired by the Government and no where in their plan (Exhibit 1) did they make any reference to the area acquired by the Government in 1910, the deed of grant of the land to Government (Exhibit 5) in that year, bears no nexus with the land acquired by the Government in that year. The plaintiffs called as witnesses P.W.4, P.W.6, P.W.7, P.W.8 and P.W.9 so as to show that various families in Onitsha were in receipt of rents from the Government through the Obi of Onitsha for their lands acquired by the Government in that year yet they made no attempt to relate the land in dispute to the plan attached to the deed of grant, Exhibit 5. This constitutes a fatal omission which destroys completely the plaintiffs case. See *Salawu Yoye v. Lawani Olubode & ors.* (1974) 10 SC 209 at 214 at 215; *Omorie v. Idugiemwanye* (1985) 2 NWLR (Pt.5) 41 at 54 and *Atanda v. Ajani* (supra). This is irrespective of the fact that it has been held that a plan is not a sine qua non in an adjudication of land matter especially where the parties knew the land in dispute. See *Olujinle v. Adeagbo* (1988) 2 NWLR (Pt. 75) 238. The argument proffered by the plaintiffs that in respect of the land in dispute they had been in possession and were in fact carrying out a layout project in their remaining and unacquired portion of their Ani Ozala land when the defendants trespassed is, in my view, non sequitur. My answer to this issue is accordingly rendered in the negative.

The issue of jurisdiction and/or competence of the trial court to overrule its earlier rulings premised on an additional ground of appeal, for which leave was sought and granted, posits as follows:-

"Was the learned trial Judge not in error when he proceeded to overrule his earlier rulings on an issue of which only the Court of Appeal was competent to entertain same under the provisions of the Constitution of the Federal Republic of Nigeria 1979."

On lack of jurisdiction, the submission on behalf of the plaintiffs was that in so far as the learned trial Judge purported to overrule his earlier rulings refusing the leave to the parties to recall and also call certain persons as witnesses in the proceedings, he acted without jurisdiction. It was then contended that the earlier rulings of 27th January, 1983, 23rd July, 1984 and 21st November, 1984 stood, rightly or wrongly, and could only be reviewed, corrected and/or set aside by an appellate court. It was not for the trial court, it is argued, to go back as it were and deliver what is tantamount to a ruling (notwithstanding the fact that the record of court reads “COURT NOTE”) and in doing so dissolve or annul its earlier orders.

The Supreme Court case of Akporue v. Okei (1973) 12 S.C. 137 at pages 145-146 was cited in support of the proposition. It does not matter, it is maintained, that in the instant case it was to set it aside. After the purports of sections 220 and 221 of the Constitution of the Federal Republic of Nigeria, 1979 as amended were adverted to, it was submitted that there cannot be any argument that the rulings of and orders made by the trial Judge on 27/1/83, 23/7/84 and 21/11/84 were decisions within the meaning of the word “decision” in section 227(1) of the Constitution. The case of Kalu v. Odili (1992) 5 NWLR (Pt.240) 130 was cited in support therefore.

It was therefore plaintiffs submission that the learned trial Judge lacked the competence of jurisdiction to deliver the “ruling” of 12th June, 1985 which set aside the orders earlier made by him, adding that it was an act of judicial review which only the Court of Appeal was competent to exercise. Section 258 of the Constitution and the liberty or latitude given to the lower courts by the Supreme Court in its interpretation of this section of the Constitution to re-open cases by calling for further address after the conclusion of their earlier address, where it is in the interest of justice to do so, it was maintained, would not avail the learned trial Judge to assume jurisdiction where he had none. The case of Ifezue v. Mbadugha (1984) 1 SCNLR 427 was called in aid.

It was then argued that granted that a trial court has discretion as to whether to recall a witness who had earlier given evidence in the proceedings, for which the case of Omoregbe v. Lawani (1980) 3-4 SC 108 and Willoughby v. I.M.B. Ltd (1987) 1 NWLR (Pt. 48) 105 were cited as authorities it was plaintiffs submission that once that discretion is exercised one way or the other by the trial court, it could no longer in law revisit the issue. To do so, it is said, would tantamount to a usurpation of the appellate jurisdiction of the Court of Appeal. Accordingly, it is argued, once the learned trial Judge had ruled refusing leave to both parties to recall

their respective witnesses on three different occasions pursuant to applications by the parties, he could not purport to exercise that same discretion again under the guise of interest of justice. He no longer had any discretion to exercise on the matter. It was entirely a matter for the Court of Appeal, it is maintained.

Again, it is further contended, that counsel on both sides succumbed to the invitation to open their cases would not suffice to confer jurisdiction on the trial court when in law it had none. The learned trial Judge, it is then stated, acted in error in exercising an act of judicial review when he had no jurisdiction so to do. The effect of this, it is finally submitted, is that the court having become *functus officio* could not re-open the case and whatever counsel did at the re-opened case was a nullity in that the court lacked jurisdiction.

True it is that it is not competent of a Judge to overrule the decision or ruling made by another Judge or sit in judgment over the decision of a brother Judge. The reason for this which is not far to seek, stems the fact that the Judges are of co-ordinate Jurisdiction, and no one Judge can therefore sit on appeal over the decision or ruling of his brother Judge. A glaring exception to the above principle of law is perhaps the power to set aside a judgment given in the absence of a party which power can be exercised by any Judge of the High Court, not necessarily the Judge who gave the judgment. See *Wimpey Ltd. v. Balogun* (1986) 3 NWLR (Pt.128) 324 at 338. Be it noted that the latter is restricted to default judgment. However, this principle of law cannot be extended to a Judge correcting a mistake he might have made during the course of trial. Indeed, a Judge, until he delivers his final judgment in a case is still seized of the matter and in the interest of justice, can rightly correct any mistakes he might have erroneously made during the trial. The law, of course, is clear that where a Judge has delivered his final judgment in a suit he becomes *functus officio* with respect to that suit. Except for the making of ancillary orders such as orders for stay of execution of judgment or for payment of a judgment debt by installments for which there are statutory provisions, once a Judge has delivered a final judgment in a matter pending before him, he ceases to be seized of that matter and he cannot alter or re-open it in an application made under a statute by one of the parties. This is what in legal parlance is called the "slip rule." See the case of *Asiyanbi v. Adeniji* (1967) 1 All NLR. 82. See also *Minister of Lagos Affairs Mines and Power v. Akin-Olugbade* (1974) 1 All NLR (Pt. 11) 226; *Commissioner of Lands, Mid-Western State of Nigeria v. Edo-Osagie* (1973) 6 SC. 155; *Bakare v. Apena* (1986) 4 NWLR (Pt. 33) 1 and *Berliet (Nig.) Ltd. v. Kachalla* (1995) 9 N.W.L.R.

(Pt. 420) 478 at 493. A trial Judge therefore need not wait for the case to go through the expensive process of an appeal before correcting his mistakes. Thus, once the Judge had drawn the attention of counsel on both sides to the error, omission or clerical mistake, it would be quite competent
 B for him to correct such error, omission or mistake in the interest of justice. A Judge ought not to go on with the case when an accidental slip, a mistake or error is apparent to him. See Michael Adebayo Agbaje v. Alhaji Lasis Adigun & 2 ors. (1993) 1 NWLR (Pt. 269) 261 at 272 where the issue was what the effect is in law of the admission in judgment, without afford-
 C ing the parties due hearing thereon, of a document which had already been rejected during the course of trial. It was held by this court (per Ogundare, J.S.C.) inter alia that-

*"The disputed document having been rejected in evidence cannot be made us of. The learned trial Chief Judge cannot sit on appeal on his own decision. It must be left with the Court of Appeal when the issue is
 D raised before that court to decide whether or not the said evidence was rightly rejected in evidence. I am therefore, of the view, with profound respect to the learned trial Chief Judge, that he was wrong in admitting the document in evidence when writing his judgment."*

The case in hand is distinguishable from the one exemplified above
 E because in the first place, the learned trial Judge gave his reasons for overruling his earlier rulings not to grant leave to the parties to recall some of their witnesses. Secondly, the counsel for both parties signified their readiness and did recall such of those witnesses they were earlier denied the right to recall and thirdly, as matters indeed turned out, it was in the interest of
 F justice that these witnesses were recalled.

Moreover, in matters of recall of witnesses, it is settled law that the trial court has a discretion. See Omoregbe v. Pendar Lawani (1980) 3-4 SC 108; Willoughby v. I.M.B. Limited (1987) 1 NWLR (Pt.48) 105 and Xtodeus Trading Co. Ltd. v. Vincent Standard Trading Company (Nigeria) Ltd. (1995)
 G 8 NWLR (Pt. 412) 244 at 255. Indeed, as to whether the trial Judge had a discretion to do what he did, is conceded to by both counsel for the parties in their Briefs. The only dispute which is more of academic value is, whether the discretion was exercised at the right time or not. If the learned trial Judge had not adopted a course of action that was inherently wrong, then
 H the exercise of the discretion, albeit, at the wrong time of moment cannot be faulted in as much as he had a discretion so to do. See Alade v. Olukade (1976) 3 SC 183 at 189 and Omonfoman v. Okoeguale (1986) 5 NWLR (Pt. 40) 179. Furthermore, if Exhibit 19 was wrongly admitted as submitted by the plaintiffs, the judgment of the learned trial Judge which the court below affirmed would

still not be faulted as the judgment would still stand without it, said the learned trial Judge:

“Even if I disregarded Exhibits 2 and 19, I am still satisfied that the groups, (i.e. plaintiffs and defendants) had common possession of “Ani Ozala”.”

Further down in his judgment, the learned trial Judge stated categorically, quite rightly, in my view that

“My findings in this case are based entirely on the evidence of user adduced which I have accepted as correct.”

When therefore, at page 10 of their Brief on the Additional Ground of Appeal learned counsel for the plaintiffs argued:-

“For how could he (learned trial Judge) have arrived at such a conclusion of common user without Exhibit 19 (which tended to show that both parties were using Ani-Ozala together) particularly as there was no other credible evidence of common user over Ani Ozala before him.”

he was unwittingly discountenancing the evidence of D.W.1 who gave credible evidence about such user and which the learned trial Judge fully reviewed and evaluated to arrive at the decision he did and which the court below, quite rightly, in my view, fully endorsed.

The issue herein is accordingly answered in the negative. Thus, this court as an appellate court sitting over the matter, will only interfere to set aside these concurrent findings by the two lower courts, if and only when it is clear that the same is inter alia perverse or not the result of a proper exercise of judicial discretion. As I do not find any of such attributes crowned in this case, I will decline to disturb these decisions, arrived at as it were, after a dispassionate consideration. See *Lucy Onowan & anor v. J.J. Iserhien* (1976) NMLR 263 at 265/266; *Kodilinye v. Odu* (supra); *Kuma v. Kuma* (1936) 5 WACA 4; *Dadzie v. Kojo* (1940) 6 WACA 139 and *Akinloye v. Eyiola* (1968) NMLR 92.

In the result, this appeal fails and it is accordingly dismissed. The decisions of the two lower courts are affirmed. I assess costs in this appeal in favour of the defendants in the sum of N1,000.00.

BELGORE JSC

This appeal is no more than an exercise in getting this Court revisit issues of facts already concurrently decided by the lower Courts. Though the grounds of appeal advert to error in law, I find none in this appeal. On the issues of fact, the findings of the trial Court and the Court of Appeal cannot be disturbed by this Court in the absence of improper exercise of discretion or finding being perverse or not in consonance with the evidence

in Court or based on wrongly received evidence. See *Nwaebonyi v. The State* (1994) 4 NWLR (Pt. 343) 138; *Ugbo v. Aburime* (1994) 8 NWLR (Pt. 360) 1; *Kotoye v. Saraki* (1994) 7 NWLR (Pt. 357) 414; *Otitoju v. Governor, Ondo State* (1994) 4 NWLR (Pt. 340) 518; *Okoya v. Santilli* (1994) 4 NWLR (Pt. 338) 256. To set aside the concurrent findings of the two Courts below will negate the principles upon which this Court decided the above cases. As well amplified in the judgment of my learned brother, Onu, J.S.C., there is no merit in this appeal and I agree with him that it deserves only dismissal. I also dismiss this appeal and make the consequential orders as contained in the judgment of my learned brother, Onu, J.S.C.

KUTIGI JSC

I agree with the conclusion in the lead judgment of my learned brother Onu, J.S.C. just delivered and which I read before now that this appeal fails and ought to be dismissed. Clearly the evidence showed that the appellants did not only fail to establish the identity of land they were claiming but they also failed to prove that they were in exclusive possession of any land in Ani Ozala. The appellants have clearly failed to show that the concurrent findings of the trial court and the Court of Appeal were not proper. The appeal is dismissed with N1,000.00 costs to the respondents.

OGWUEGBU JSC

I have had the advantage of reading in advance the draft of the judgment just delivered by my learned brother Onu, J.S.C. and I agree with him that the appeal be dismissed.

The plaintiffs had instituted this action in the Onitsha Judicial Division of the High Court of Anambra State against the defendants claiming various reliefs. They are representing Oreze family of Obikporo Onitsha and they sued the defendants for themselves and as representing Obikporo village excluding the plaintiffs family.

The plaintiffs claimed from the defendants jointly and severally, N50,000.00 general damages for trespass into the land known as Ani Ozala and injunction restraining the defendants, their servants or agents from trespassing or entering the said land or disturbing the plaintiffs exclusive rights and possession over it.

They lost in the trial court and appealed to the Court of Appeal, Enugu Division where they also lost. They were not satisfied with the decision of the court below and have further appealed to this court.

The first issue formulated by the plaintiffs/appellants is whether the court below was not in error when it failed to evaluate properly the

evidence of recent acts of possession adduced by the parties after it found that the learned trial Judge omitted to apply the principle enunciated in *Kojo II v. Bonsie* (1957) 1 WLR 1223.

The plaintiffs pleaded and relied on traditional evidence in proof of their case. The defendants agreed with the plaintiffs on the history of the migration of the plaintiffs from Benin: they contended that the plaintiffs originally lived at Okpoko land after crossing the river Niger; that they came from Igala during the reign of the 8th Obi of Onitsha who put their ancestors on Ani Ozala land. At a later date they were asked to move to Obikporo land and they did so. At the time they arrived at Obikporo land, only old women who were reputed to be witches lived in Obikporo and in the course of time the plaintiffs joined them from Okpoko. Thereafter, they and the plaintiffs were doing things in common.

While at Obikporo, the defendants were farming in Ani Ozala and the younger members of the plaintiffs family joined them in farming Ani Ozala. The defendants contended that the plaintiffs never lived on Ani Ozala land.

On the respective traditional histories of both parties, the learned trial Judge made the following findings of fact:

1. *"The traditional history adduced was not of much assistance because the plaintiffs contention was that as they settled at Onitsha before the defendants the early settlers had shared out all the lands before the defendants group arrived but that argument did not explain why they were using Woliwo land in common with the defendants group because I was fully satisfied from the evidence that the defendants were not tenants of the plaintiffs with regard to Woliwo land."*

2. *"It seems to me, however, that the correct account was that on the arrival of the late comers, the defendants group, they were settled at "Ani Ozala" but after displaying their long masquerade, the "egugu," they were assigned what was ostensibly the hard task of going to reside at Obikporo, the abode of old women who were considered to be witches*

The plaintiffs group who had been residing at Okpoko.....moved over to Obikporo and joined the defendants group there. The two groups gradually became assimilated into each other."

3. *"Furthermore, I accepted as a more probably (sic) and reasonable version of the traditional history that after the defendants group settled at Obikporo, the abode of witches, they farmed around their homestead at that village but the more enterprising among them moved further a field to "Ani Ozala" from where they went to Obikporo to farm. When eventually the plaintiffs' group moved out of Okpoko and joined the defendants' group*

at Obikporo, the enterprising ones amongst them joined the comrades of the defendants group in going to "Ani Ozala" to farm there."

4. "I am satisfied from the evidence before me and find as a fact that after the two groups had become integrated, as they were residing at Obikporo, the defendants kept away from Okpoko land but they in common with the plaintiffs were making use of the land at other places where no danger was looming as at Okpoko. That meant that the two groups were communally making use of the Woliwo land and also the land in their homestead at Obikporo and the farm land at "Ozala".

5. I have considered the receipts in Exh. 9 which were tendered to show that the plaintiffs group alone were receiving the rents for "Ani Ozala" from the Obi of Onitsha since 1971. No documentary proof of what was happening before Exh. 9 nor was the court told how the money received as rent was shared Even in disregarded exhs. 2 and 19. I am still satisfied that the two groups had common possession of "Ani Ozala". My findings in this case are based entirely on the evidence of user adduced which I have accepted as correct.

The learned trial Judge finally came to the conclusion that he was not satisfied that the plaintiffs were in exclusive possession of the land in dispute or that the defendant committed any acts of trespass on the land and no attempt was made to prove any damage suffered by the plaintiffs. He accordingly dismissed their claim.

The court below cannot be right where it criticized the manner the trial Judge resolved the competing traditional histories adduced by both parties.

The court below went on to hold:

"The plaintiffs/appellants appear to have complained generally about the way the learned trial Judge treated the evidence in grounds 2, 3 4 and 6 of their grounds of appeal. Ground 5 was abandoned and was accordingly struck out I have no doubt, however, that if the learned Judge had applied *Kojo II v. Bonsie (supra)* he would still have found nothing to commend the plaintiffs/appellants' case."

From the excerpts of the judgment of the learned trial Judge reproduced above, it is apparent that the learned trial Judge correctly applied the said test. He tested the traditional history by reference to the facts in recent years as established by evidence, and by seeing which of the two competing histories is the more probable.

There was in this case a proper assessment and evaluation of the evidence by the learned trial Judge. There was therefore nothing left for the court below to reevaluate. It was the court below which wrongly held that

the correct principle was not applied.

The plaintiffs contended before this court that one of the modes of proving title to land is by proof of possession of connected or adjacent land in circumstances which render it probable that the owner of such connected or adjacent land would, in addition, be owner of the land in dispute. We were referred to section 46 of the Evidence Act Cap. 112 Laws of the Federation of Nigeria, 1990 and the cases of Idundun v. Okumagha (1976) 9-10 SC 227 and Okafor v. Idigo (1984) 1 SCNLR 481. They based this argument on their assertions that there are two distinct and separate portions of Ani Ozala land, one acquired by the Government and the unacquired portion which is the land in dispute and that they received rent exclusively from the Government in respect of the acquired portion.

Section 46 of the Evidence Act 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 one piece of land is likely to be true of the other piece of land."

For the above provision of the Evidence Act to apply, the plaintiffs must prove the identity of the land which they claim and relate it to the land which is connected with it by locality or similarity and over which they exercise rights of possession and enjoyment. This they failed to do. On the identity of the land in dispute, the court below held as follows:

"I cannot find any evidence which supports the claim that the plaintiffs/appellants own the so-called Ani Ozala. It is difficult for me to see in what way the land shown in the survey plan No. MEC/12/81 tendered by the plaintiffs as Exhibit 1 is connected with the said Ani Ozala land. The most important document which, in my view, the plaintiffs relied on to prove an alleged act of ownership of Ani Ozala is a deed of lease (Exhibit 5) between The deed is dated 22 June, 1910. The plaintiffs claim that different families including their own are the beneficiaries of the lease.....But no families were mentioned in the deed and the Ani Ozala is no where referred to therein.....Surprisingly, there is nothing in Exhibit 1 showing any clear connection between the land shown there and the one shown or described in Exhibit 5."

The point I have tried to make clear is that the plaintiffs have not succeeded in showing that Exhibit 5 helps them in any way as evidence of act of ownership either by way of connection with the land shown therein or by inference or presumption as to their connection with the land in Exhibit 1 or indeed the so-called Ani Ozala land rent is

of no probative value. So are Exhibits 2, 3, 4, 13, 14, 16 and 19 in linking the land in Exhibit 5 with the land in Exhibit 1 or any land known as Ani Ozala.”

The land contained in the survey plan attached to the deed of lease Exhibit 5 failed to show any relationship with the land verged yellow in Exhibit 1 which the defendants claimed to be the land in dispute nor with the area verged pink in the same Exhibit 1 claimed by the plaintiffs to be the area in dispute.

The plaintiffs relied on two out of the five ways in which ownership of land may be proved namely:-

(1) Proof by traditional evidence. See *Abinabina v. Enyimadu* (1953) AC 207 at 215 - 216; and

(2) Proof by acts of ownership. This is normally provided by acts of person or persons claiming the land such as selling, leasing, renting out all or part of the land or farming on it or on a portion of it or otherwise utilising the land beneficially; provided they extended over a sufficient length of time and are numerous and positive enough to warrant the inference that he is the true owner. See *Ekpo v. Ita* (1932) II NLR 68 at 69.

The plaintiffs woefully failed to prove any of the methods. Most of the matters canvassed in this appeal were thoroughly examined by the courts below and were rejected for very good and cogent reasons. This court cannot interfere with the findings and decisions of the courts below.

For the above reasons, I too will dismiss the appeal with costs assessed at N1,000.00.

F

MOHAMMED JSC

I agree with my learned brother Onu, J.S.C. that the only time when this court will interfere and set aside two lower court's concurrent findings of fact is where the decision is perverse or made as a result of improper exercise of judicial discretion. If a substantial error is shown from the record of proceedings this court will interfere, particularly where failure to do so will occasion a miscarriage of justice. See *David Dawodu Lokoyi & ors v. Emmanuel Babalola Olojo* (1983) 2 SCNLR 127; (1983) All NLR 461 and *Afolabi Coker v. Moriamo Oguntola and ors.* (1985) 2 NWLR (Pt.5) 87; (1985) 2 NSCC 869 at 873. The appellants, in this case, have failed to establish such special circumstances which would warrant the interference of this court with the concurrent findings of the two lower courts.

H

I entirely agree that this appeal has failed. It is accordingly dismissed. I also award N1,000.00 costs in favour of the respondents.