

SUPREME COURT OF NIGERIA
TUESDAY 16TH APRIL, 1996. SC. 214/1993
CORAM:- M. L. UWAI, S. M. A. BELGORE,
M. E. OGUNDARE, U. MOHAMMED, S. U. ONU,
Y. O. ADIO, A. I. IGUH, JJSC

FREDERICK OLUYOLE BAMGBOYE APPELLANT
AND
ABEKE OLU SOGA RESPONDENT

APPEALS - *Finding of trial court - Where not challenged by Cross appeal or respondent's notice - Whether that finding must stand.*

LAND LAW - *Title - Possession - Where plaintiff failed to prove title - Whether he established possession.*

LAND LAW - *Title - Where claimed through a grant or inheritance - Need for clear evidence of traditional history.*

LAND LAW - *Title - Where a party relies on documentary title - Due execution must be proved*

LAND LAW - *Damages for trespass - Where plaintiff's claim for title failed and he was found to be in possession - Whether damages for trespass - Will be granted in plaintiff's favour.*

PRACTICE & PROCEDURE - *Lis pendens doctrine - Transfer of land during the pendency of a suit - Whether the document of transfer is admissible.*

SUPREME COURT - *Revisiting its past decision - In Jules v. Ajani - Whether necessary in the circumstances of this case.*

FACTS

Before the High Court of Lagos State the plaintiff/appellant filed an Action against the defendant/respondent claiming declaration of title, damages for trespass and injunction. Plaintiff traced his deed of conveyance to the family of Ojetola Ajao without clear traditional history of how the family came on the land. But he was able to establish being in possession of the land in dispute before the defendant trespassed thereon. The defendant traced her title to Oteniya family and tendered a deed of conveyance that was executed during the pendency of plaintiffs claim. Defendant

did not file any counter claim for title.

The trial court found that the plaintiff failed to prove his claim title though he established possession. It dismissed the plaintiffs claim and held that the defendant proved the execution of her title deed. Plaintiff appeal to the Court of Appeal was dismissed. Being dissatisfied he has further appealed to the Supreme Court raising six issues.

ISSUES FOR DETERMINATION

“Whether the decision of the Court of Appeal that the defendant proved title to the land in dispute was correct in law.

Whether the defendant’s title Exhibit 13 (deed of conveyance suit was pending in Court) relied on by the learned trial Judge in holding that the defendant proved a better title to the land in dispute was not void in law by the doctrine of lis pendens?

If so, can the Court of Appeal without a cross-appeal filed by the respondent now hold that the defendant proves title by virtue of a purchase receipt Exhibit 12 a document on which no finding of fact was made by the High Court. Etc., see p. 664

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

Finding of trial court

1. Thus it remains the question: What has the Court of Appeal made of the clear finding of the trial judge when he held *“Be that as it may though I hold 1st plaintiff’s witness was in possession of plots 40 and 41 and with consent of the plaintiff hold that he has possession against the whole world except a person who has a better title.”* and there is no cross-appeal or respondent’s Notice under Order 3 rule 14 Court of Appeal Rules? To my mind that decision, being unchallenged must stand and that error ought to have been spotted by the Court of Appeal to rectify the judgment of the trial Court on the issue of possession in favour of the plaintiff. (p. 665 D)

Where plaintiff failed to prove title

2. If the plaintiff failed to prove conclusively the title, he clearly established possession over the disputed land over a period of years, at least since 1955, a point that remains completely uncontradicted. Paragraphs 6, 7, 8, 9 and 10 of Amended Statement of Defence, to which the plaintiff filed a Reply, have no evidence led in proof. The evidence of Alhaji Raimi Isiba, D.W.2, is really at variance with these paragraphs concerned with serious issue of traditional history of the land. Whereas the plaintiff’s hinged on paragraphs 6 and 7 of Statement of Claim was equally weak and falls

short of proving the averments in them and this makes for the difficulty of finding title in his favour. (p. 665 F)

Title - Where claimed through a grant

3. However whenever title is claimed through a grant or inheritance there must be clear traditional history of how the family or community came on the land and this must be done through clear pleadings and evidence in support of genealogy as continuous exclusive possession. Without this, stating just simply that a grant is from a family without more may not be enough. (p. 665 H)

Where a party relies on documentary title

4. It must also be stated clearly that where a party relies on documentary title there must be evidence of due execution under s. 99 Evidence Act. As the defendant/respondent never counter-claimed at the trial Court it was the duty of the defendant to prove due execution. (p. 666 B)

Supreme Court revisiting its past decision

5. At any rate *Jules v. Aiani* (supra) has no relevance to this case and I shall not revisit it. Suffice to say it however that *Cardoso v. Daniel* (supra) is a sound and good judgment. It is always good to look at the legislation under which a decision is based before embarking on the request to reconsider that decision. Most of the decisions we are asked to reconsider are based on specific laws e.g. Land Instrument Registration Law (Lagos, Cap 54) and Act were hardly in play. (p. 666 F)

Transfer of land during the pendency of a suit

6. Transfer of a land during the pendency of a suit on it is against the law and the operation of a just trial of the suit, the more so when the purchaser has clear notice of the pending suit. Because when a case is pending, with either party claiming ownership or tile and neither has been declared owner or winner, nothing must interfere with status quo at the time of litigation. Thus no person can validly convey that land in dispute to any other person including the parties to the suit during the pendency of that suit Exhibit 13, I regret, was not given the attention it deserved by the Court of Appeal. It was a document, just cooked up so to say, to support Exhibit 12 (a receipt) immediately the Writ of Summons was taken out by the plaintiff and served on the defendant. I therefore on the doctrine of *lis pendens* hold that Exhibit 13 was not legally received in evidence. (p. 667 F)

Damages for trespass

7. What therefore remains is Exhibit 12 that is neither here nor there. But possession was all along with the plaintiff and I hold the plaintiff was in possession and the defendant trespassed on the land I so find against her. The appeal therefore succeeds on trespass. Automatically the injunction claimed must also succeed. I therefore grant injunction claim and the respondent, her servants and or agents are hereby restrained from further acts of trespass on the land in dispute. (p. 668 A)

NOTABLE POINTS OF INTEREST

OGUNDARE JSC

1. Sale under Customary law - Whether properly founded

As found by the learned trial Judge, the plaintiff was in possession. The learned trial Judge made no finding on sale under customary law in favour of the Defendant. Neither did she cross-appeal or file Respondent's Notice on the in the Court of Appeal seeking to retain the judgment of a trial court on the new ground of sale under customary law. The court below, therefore acted in excess of its jurisdiction to make the findings on sale under customary law. That finding must be set aside, as urged on us by the plaintiff. (p. 680 A)

ONU JSC

2. Failure to trace root of title to the original owner

In his own quest to establish his title to the land in dispute following his pleading, the plaintiff tendered the conveyance in favour of Ojetola Ajao (his vendor) by the Alago-Asalu family vide Exhibit 3 but led no evidence to establish the title of the latter family to the relative to apart only of the land in dispute. There being no averment in the plaintiff's pleading as to how Alago-Asalu came to own the land, he (plaintiff) had in effect not traced his root of title to the original owner of the land in dispute. And since the defendant was claiming that the original ownership of the land in Oteniya family rather than in Alago-Asalu family, for the plaintiff to succeed, he has the burden of proving or establishing the title of Alago-Asalu. (p. 685 H)

3. Lis pendens doctrine - What it means

The doctrine of lis pendens which has been pride into a number of decided cases by this Court is that if property was in question or dispute in a suit or action, it could not be alienated during the pendency of that suit or action even to a purchaser or mortgagee without notice. It ought to be noted that,

however, that in its application against any purchaser of such property the doctrine is not founded on the equitable doctrine of notice – actual or constructive – but upon the fact that the law does not allow litigant parties, during the pendency of the litigation involving any property, rights in such property which is in dispute so as to prejudice any of the litigating parties. B
The doctrine, as it were, is designed to prevent the Vendor from transferring any effective title to the purchaser by depriving the vendor of any rights over the property during the pendency of the litigation.
(p. 686 H)

REPRESENTATION

Mr. P. O. Jimoh-lasis, for the Appellant
Chief G. O. K. Ajayi, S. A. N. with Yomi Alokoara, Esq. for the Respondent

CASES REFERRED TO

Kodiliye v. Odu 2 WACA 336
Martin vs. Strachan (1944) Stermero 197n at 11on
Odojin v. Ayoola (1984) 11 S.C. 72-122
Mogaji v. Cadbury (1972) 2 S.C. 97 E
Okosun v. Aigbedion (1973) 1 NMLR 33
ACB v. NDR (1977) 5 S. C. 235
Adekele v. Akin-Olugbade (1987) 3 NWLR (Pt. 66) 214, 216
Ogwuma v. IBWA (1988) 1 NWLR (Pt. 73) 1NWLR (Pt 73) 658
Western Steel Work v. Iron & Steel Workers (1987) 1 NWLR (Pt. 48) 2841 F
Joel v. Osilaja (1962) 1 ALL NLR 104
Nwaokafor v. Udegbe (1963) 1 ALL NLR 104
Mogaji v. Cadbury (Nigeria) Ltd (1985) 2 NWLR 393 431
Elias v. Omo-Bare (1982) 5 SC. 25
Ogunleye v. Oni (1990) 2 NWLR 745, 782-783
Oluwi v. Eniola (1967) NMLR 339 G
Atunrase v. Sunmola (1985) 1 NSCC 115, 119-120 (1985) 1 NWLR 105
Udo v. Obot (1989) 1 NWLR 59
Ayinde v. Salawu (1989) 3 NWLR 297,316
Ebueku v. Amola (1988) 1 NSCC 582 (1988) 2 NWLR 128
Erinosho v. Owokoniran (1965) N. M. LR.479 H
Odubeko v. Fowler (1993) 11 KLR 106

STATUTE & RULES REFERRED TO

Court of Appeal Rules O.3 r. 14

Supreme Court Rule O.6 r. 5(4)

Evidence Act ss. 118, 46

B

LEAD JUDGMENT BY BELGORE JSC

The appellant was the plaintiff at the trial Court where his suit was dismissed and on appeal to the Court of Appeal, the decision of the trial Court was upheld. Thus he has appealed to this Court. The plaintiff's claim was for a declaration of title on a piece of land situate, lying and being at Obele Igbodo otherwise known as Papa Ajao in Mushin District of Lagos State also called Palm Avenue and described in the plan as No. AL.106.55 attached to a deed of conveyance dated 9th day of April, 1957, registered as No. 20 in Volume 196 at page 20 of Lands Registry, Ibadan.

D There was an alternative claim as follows:

"ALTERNATIVELY

A declaration that the plaintiff is the person entitled to the statutory right of occupancy in respect of the land described on Plan No. AL/106/55 attached to a Deed of Conveyance dated 9th day of April 1957 registered as No. 20 at Page 20 in Volume 196 of the Lands Registry, Ibadan ..

N45,000 special and general damages for trespass to the said piece of land known as Plots 40 and 41 of Chief J. A. Ajao's Layout at Palm Avenue Mushin, Lagos State.

An Order of injunction restraining the defendant, her servants and/or agents from committing further acts of trespass on the said land. Annual Rental Value is at least N20,000."

The defendant now respondent as she was in the Court of Appeal, simply defended the suit title and she never counter-claimed. In the statement of claim the Plaintiff averred that the land in dispute was a part of the land conveyed to Ojetola Ajao in 1953 by a deed of conveyance registered as No. 71 at page 71 in Volume 1028 of the Land Registry at Lagos on 24th December 1953, (Exhibit I). The land, according to the appellant devolved on Ojetola Ajao's children at his death. The eldest of the children, Amos Adetona Ajao was given a power of attorney (Exhibit 2) dated 9th day of April 1957 by the other children. Amos Adetona caused the land to be laid out into plots and numbered consecutively. Of these plots, averred the plaintiff, he purchased three, namely Nos. 3, 40 and 41 respectively and was on the 18th of August 1955 duly issued a receipt (Exhibit 4 at the trial Court). The plaintiff was put into possession of the three plots; now in dispute are plots 40 and 41. The plaintiff exercised acts of possession over

the land (plots 40 and 41) and remained in undisturbed possession all along

until 1976. He cleared the land of the bush, farmed on it by planting maize, vegetable, pepper, cassava and other crops and by 1957 had fenced the land in dispute. The plaintiff claimed that the sale of the plots was registered on a deed, Exhibit 3, in the Deeds Registry, Ibadan, on 9th April, 1957, as No. 20 page 20 in Volume 196 thereof. (It was Exhibit 3 at the trial Court). B

The plaintiff, by virtue of being in possession, gave permission to Albert Adeoye Onitiri, P.W.1, a motor mechanic to erect a workshop shed on the plots now in dispute. Mr. Onitiri duly erected a workshop on the land in 1974 and he had a thriving motor mechanic business there without let or hindrance up to 1976 when one morning he came to find that the workshop had been demolished and the spare parts store and the vehicles within the premises destroyed. His equipments were damaged and as a result of a complaint to the police by the defendant, he (P.W.1) was arrested and locked up until the plaintiff stood surety for him. This was too much for Mr. Onitiri and he had to emigrate to the United Kingdom to seek new pastures. C D

At the trial, Isaac Owode Ajao (P.W. 2) gave evidence and explained Exhibits 1, 2 and 3 aforementioned. He testified that Exhibit 3 forms part of the portion edged red in Exhibit 1. He tendered Exhibits 1, 2, and 3. The P.W.1, Mr. Onitiri saw the foundation of the two buildings dug on the ruins of his workshop on the plot which later developed into two blocks of flats and stores erected by the defendant. The plaintiff's witnesses testified in line with the statement of claim and he closed his case with the evidence of Marinho Egidio de Souza who identified his signature as a witness on Exhibit 1 when he was a clerk in the Law Chambers of O. S. F Thomas who prepared it. E F

The defendant claimed root of her title through Oteniya family and that she purchased the land in dispute through their attorney, Ali Isiba and tendered the power of attorney as Exhibit 11. She was given a receipt which the Court admitted as Exhibit 12 for the purchase of the two plots. It must be pointed out that Exhibit 12, the Receipt, was made in the form of a deed and duly stamped on 8th March, 1976 but not registered. It was prepared by a solicitor and it means nothing more than a receipt. It contained no plan of the land purchased and although it was signed by Alhaji Alii Isiba on 4th March, 1976. On the 8th day of November 1976 a conveyance was executed in her favour and it is Exhibit 13 which is certified true copy of the original. The survey plan attached to Exhibit 13 is about a single plot bound by beacons Nos 2346, 2347, 2348 and 2349, the land has the same shape as plots 40 and 41 on Exhibit 3, but the beacons on G H

these Exhibits are at true North OB2602, OB2603 and OB2604 and on

the true South OB2610, OB2609 and OB2608 respectively. However, by the evidence before the trial Court the plots on Exhibit 3 form the plot on Exhibit 13, which are one and the same land. The defendant gave evidence as D.W. 1 and tendered Exhibits 11, 12 and 13 and others not pertinent to this appeal but never went further than saying she acquired the title through Isiba (D.W. 2) the attorney of Oteniya family, Isiba in his evidence, for all the big issues raised in the pleadings was brief and only identified the power of attorney, Exhibit 11 and Exhibit 12, the receipt and cursorily Exhibit 13, the now contentious document.

The learned trial judge after reviewing the evidence and submissions of counsel, observed as I stated earlier in this judgment that the defendant (now respondent) did not set up a counter-claim and the onus was on the plaintiff to succeed on the strength of his case relying on *Kodilinye v. Mbanefo Odu* (1935) 2 WACA 336 and *Martins v. Strachan* (1744) *stermreo* 179n at 110n, *Vincent Bello v. Eweka* (1981) 1 S.C. 101, *Odofin v. Ayoola* (1984) 11 S.C. 72 - 122. The two parties relied entirely on their documents in their efforts to prove title. Learned trial Judge then reviewed most of the authorities on how title could be proved. He held that by Exhibit 13 the defendant's radical title could be traced under native law and custom and that Exhibit 13 was identified by D.W. 2 who confirmed his father's signature on the document. He finally held as follows:

"From the totality of the evidence adduced in this case and my consideration of them with the said onus cast on the plaintiff that he must succeed on the strength of his own case rule that the plaintiff fails woefully to discharge the burden by not establishing before me definitive certainty the land on which he prays the court to grant him declaration of statutory right of occupancy to plots 40 and 41 of J. A. Ajao's Layout as shown in Exhibit 3 and in respect of the land situate lying and being at Obele Igbodo, Mushin. (Although the defendant did not counter claim I hold that she proved due execution and authentication of her land at Palm Avenue, Mushin as shown in Exhibit 13.) I hold and find as a fact that the imaginary scale tilts in her favour unlike the plaintiff's case which is weak and unsustainable."

In the same breadth, however, learned judge held in applying the ratio decidendi in the cases of this Court e.g. *Mogaji v. Cadbury* (1972) 2 S.C. 97, *Okosun v. Aigbedion* (1973) 1 NMLR 33, *Odofin v. Ayoola* (1984) 11 S.C. 72 *Oladimeji & Anor. v. Oshode & Anor.* (1968) 1 All NLR and held:

"Applying the above to the facts of this case the plaintiff produced the 1st plaintiff's witness, and I believe his evidence. I therefore hold and

find as a fact that between 1974 and 1976 with the consent and permission of the plaintiff he established a mechanic workshop on plots 40 and 41 at Palm Avenue as stated by him in his testimony. I hold and find as a fact that he erect sheds for his workshop on the land which were destroyed by the defendant and her agents sometime in 1976. That the defendant got the Nigeria Police to arrest the 1st plaintiff witness on the land and the 1st plaintiff's witness was released on bail to the plaintiff. B

I also hold and find as a fact that the defendant erected three buildings on the land she drove away the 1st plaintiff's witness".

"In establishing the trespass by the defendant, the plaintiff relied on a composite plan Exhibit 8. I have already commented on the worthlessness of Exhibit 8 more also when no use was made of the survey plan attached to Exhibit 13, the land claimed by the defendant. C

The 4th plaintiff's witness testified that in compiling Exhibit 8 he used a survey plan made by him, which was not tendered in court and it is not the function of the court to speculate on the content of a document not tendered before it made me to hold that the plaintiff showed no nexus between Exhibit 1, his source or root of title and Exhibit 8 as the 4th plaintiff's was categorical that he did not make use of Exhibit 1 in producing Exhibit 8. D E

I relied on the case of Gbajor v. Ogunburegui (1961) 1 ALL NLR 853 that a court does not speculate on content of document not placed before it.

Applying the above authorities made me to hold and find as a fact that the land trespassed upon by the defendant has not been established with clear identity by the plaintiff as the land complained defendant trespassed upon. F

As stated above I held that the defendant proved better title to the land than the plaintiff therefore ascribe possession to the defendant. I hold the plaintiff cannot succeed by canvassing a defective title see Aromire v. Awoyemi (1972) 1 All NLR 101 at 112, Alhaji Adeshoye v. Siwoniku 12 WACA 86 at 87. G

Be that as it may though I held 1st plaintiff's witness was in possession of Plots 40 and 41 and with consent of the plaintiff holds that he has possession against the whole world except a person who has a better title." H

The learned trial judge then concluded, even in the light of his findings on trespass, that the plaintiff's claim must fail totally and he dismissed the claim.

On appeal to the Court of Appeal, the plaintiff lost because the

decision of the trial Court was affirmed. In doing so the Court of Appeal went a little further by holding:

B *"It is my view that on the fact of this case, the Appellant has woefully failed to prove the identity of the land over which he sought a declaration of title or a Statutory Right of Occupancy and the learned trial Judge rightly refused to grant him same."*

C This finding is curious in view of the absence of the cross-appeal or prayer by the respondent to vary the decision on the other grounds under Order 3 rule 14 Court of Appeal Rules. (See *ACB v. NDR & GW* (1977) 5 S.C. 235 (decided under the old Supreme Court Rules), *Adeleke v. Akin-Olugbade* (1987) 3 NWLR (Pt. 66) 214, 216, *Ogwuma v. IBWA* (1988) 1 NWLR (Pt. 73) 658, *Western Steel Works v. Iron & Steel Workers* (1987) 1 NWLR (Pt. 48) 284). Against the judgment of the Court of Appeal, there is D this appeal to this Court. Upon the grounds of appeal in Notice of Appeal the following issues were formulated for determination:

"2.1 Whether the decision of the Court of Appeal that the defendant proved title to the land in dispute was correct in law.

E *2.2 Whether the defendant's title Exhibit 13 (deed of conveyance suit was pending in Court) relied on by the learned trial Judge in holding that the defendant proved a better title to the land in dispute was not void in law by the doctrine of lis pendens?*

F *2.3 If so, can the Court of Appeal without a cross-appeal filed by the respondent now hold that the defendant proves title by virtue of a purchase receipt Exhibit 12a document on which no finding of fact was made by the High Court.*

2.4 Whether the decision of the Court of Appeal that the defendant established incidents of sale of the land under native law and custom by virtue Exhibit 12 a purchase receipt.

G *2.5 Whether the plaintiff having secured a finding possession in respect of the land in dispute was not entitled to judgment for damages for trespass and injunction against the defendant in this case.*

2.6 Whether the plaintiff established his title to the land in dispute?"

H As I have indicated earlier, the identity of the land in dispute is clear, it is only a question of double grant - one by Ajao family and the other by Isiba who claimed to be attorney to Oteniya family. Apparently the coordinates of beacons erected when the grant was made to the plaintiff in 1955 were no longer there in 1976 when the defendant claimed to acquire her own interest in the land. The Court of Appeal never found anything wrong with the clear findings of the trial court on possession by the plaintiff since

at least 1974, when he put Mr. Onitiri (PW.1) on the land to build a me

chanic workshop. The trial judge found Onitiri to be a truthful witness and believed him that he was put in possession by the plaintiff before the defendant purportedly acquire her title. The plaintiff put forward evidence that he had been in possession since 1955 and by his pleadings, amply supported by the evidence, that he farmed on the land and fenced it; this the trial court believed. Trial Court also believed the respondent, vi et armis, went on the land and destroyed PW.1's workshop, equipments and motor spare parts. There is a judgment in a case between one Bamigbele and the respondent in the High Court which the respondent won in respect of a parcel of land at Palm Avenue, Mushin, decided on 13th February, 1981, which is Exhibit 14 in this case. Exhibit 14 to all intent and purposes has nothing to do with the plaintiff/appellant, as it relates to Plot 54 in Ajao's Layout to which the plaintiff was not privy. Exhibit 14, I must reiterate shows only act of ownership by Oteniya family, no more no less. So there is nothing big as an issue between Exhibit 14 and this matter now appealed against. Thus it remains the question: what has the Court of Appeal made of the clear finding of the trial judge when he held:

"Be that as it may though I hold 1st plaintiff's witness was in possession of plots 40 and 41 and with consent of the plaintiff hold that he has possession against the whole world except a person who has a better title."

And there is no cross-appeal or respondents Notice under Order 3 rule 14 Court of Appeal Rules? To my mind that decision, being unchallenged must stand and that error ought to have been spotted by the Court of Appeal to rectify the judgment of the trial Court on the issue of possession in favour of the plaintiff. If the plaintiff failed to prove conclusively the title, he clearly established possession over the dispute land over a period of years, at least since 1955, a point that remains completely uncontradicted. Paragraphs 6, 7,8,9 and 10 of Amended Statement of Defence; to which the plaintiff filed a Reply, have no evidence led in proof. The evidence of Alhaji Raimi Isiba, D.W. 2, is really at variance with these paragraphs concerned with serious issue of traditional history of the land. Whereas the plaintiff's case hinged on paragraphs 6 and 7 of Statement of Claim was equally weak and falls short of proving the averments in them and this makes for the difficulty of finding title in his favour.

The defence mentions four branches of Oteniya family but led no evidence to this; in actual fact, D.W.1 gave the shortest evidence one would normally expect on the state of the pleadings, but that is the case for the

defence, the plaintiff must first prove his case as to title. However whenever title is claimed through a grant or inheritance, there must be clear traditional history of how the family or community came on the land and this must be done through clear pleadings and evidence in support of genealogy as continuous exclusive possession. Without this stating just simply that a grant is from a family without more may not be enough. (Alade v. Awo (1974) 5 S.C.; Piaro v. Tenalo & Ors. (1976) 12 S.C. 21, 411 .

It must also be stated clearly that where a party relies on documentary title, there must be evidence of due execution under s. 99 Evidence Act. As the defendant/respondent never counter-claimed at the trial Court it was the duty of the defendant to prove due execution. (Jobi v. Oshilaja (1963) 1 SCNLR 31; (1963) 1 All NLR 12; Nwaokafor v. Udegbe (1963) 1 SCNLR 184; (1963) 1 All NLR 104; Cardoso v. Daniel (1986) 2 NWLR (Pt. 20) 1, 36; Akeredolu v. Akinremi (1989) 3 NWLR (Pt. 108) 164, 172.

The appellant wants this Court to revisit the cases of Jules v. Ajani (1980) 5 - 7 S.C. 96 and Odubeko v. Fowler (1993) 7 NWLR (Pt. 308) 637, 659 F - G. The learned counsel for the appellant postulated that these cases support the view that once a certified true copy of a registered conveyance is received in evidence this will be sufficient proof of due execution. He now invites this Court to depart from these decisions relying on Order 6 rule 5(4) Supreme Court Rules, and to apply s. 99 Evidence Act which is a Federal Act in exclusive List under the Constitution. With respect, this submission has over laboured a simple matter, all the cases we are asked to depart from are those decided on specific legislations rather than general legislation and I cannot find how they are in conflict with the decisions in Jobi v. Osilaja (1963) 1 SCNLR 31; (1963) 1 All NLR 12; Nwaokafor v. Udegbe (1963) 1 SCNLR 184; (1963) 1 All NLR 104; Gbangbala v. Alade (unreported) SC. 327/1964 delivered on 11th March 1966. At any rate Jules v. Ajani (supra) has no relevance to this case and I shall not revisit it. Suffice to say it however that Cardoso v. Daniel (supra) is a sound and good judgment. It is always good to look at the legislation under which a decision is based before embarking on the request to reconsider that decision. Most of the decisions we are asked to reconsider are based on specific laws e.g. Land Instrument Registration Law (Lagos, Cap. 54) and Evidence Act were hardly in play. It must be borne in mind that the provisions of s. 118 Evidence Act save documents for admission by the following words:

"The Court shall presume that every document purporting to be a power of attorney, and to have been executed before and authenticated by a Notary Public or any counselor representative in Nigeria, or as the case may be, the President, was executed and authenticated. "

This Court has on previous occasion revisited *Jules v. Ajani* (supra) and

explained its punch, it is no use now squeezing again an already ever-squeezed lemon as it may produce no more juice.

As for Exhibit 13, a document registered after litigation had started in this matter, counsel for the appellant has asked this Court to consider seriously the Exhibit as void due to principle of *lis pendens*. The writ of summons was sealed on 17th August 1976 and served on the appellant (now respondent) on 7th October 1976. Exhibit 13 was executed on 8th November 1976 and presented for registration on 7th January 1977. Thus Exhibit 13 was executed and registered during the pendency of this case in the High Court. When a suit is filed it behoves each party not to change the nature of the action and evidence to support it so that the status quo must be maintained throughout unless the trial Court orders some things to be done to bring to light the real issues in controversy. This is so vital to our “jurisprudence so that the Court should not be taken for a ride. Exhibit 12 is the receipt issued on 12th May 1966 and it did not meet the Land Instrument. Registration Law which requires an instrument to be registered. Exhibit 12 was stamped but not registered, it is no more than what it says, i.e., a receipt. The instrument conveying the disputed land to the respondent was not prepared even up to the time she chased out PW. 1 from the land ten years after Exhibit 12 was made. The trial Court found the plaintiff/appellant was in undisputed possession up to when the defendant/respondent trespassed on it that must be from 1955. On being served the writ of summons, she (defendant) rushed to the Land Registry after executing Exhibit 13 also after the writ of summons. Exhibit 12 is no more than a receipt and it is vague as to the very land it mentions; certainly it cannot be linked with the land in dispute at least as it is on its face. The transfer of a land during the pendency of a suit on it is against the law and the operation of a just trial of the suit, the more so when the purchaser has clear notice of the pending suit. Because when a case is pending, with either party claiming ownership or title and neither has been declared owner or winner, nothing must interfere with status quo at the time of litigation. Thus no person can validly convey that land in dispute to any other person including the parties to the suit during the pendency of that suit. The fact of Exhibit 12, for all its vagueness as to the land in dispute, makes mandatory for either party to desist from doing anything to gain clandestinely evidential advantage not available at the time the writ of summons was taken out. The case of *Ojugbele v. Olasoji* (1982) 4S.C. 31,37 is distinguishable from the present case as in that case the registration was before a writ of summons was issued. Exhibit 13, I regret, was not given the attention it deserved by the Court of Appeal. It was a document, just cooked up so to say, to support

Exhibit 12 (a receipt) immediately the writ of summons was taken out by the plaintiff and served on the defendant. I therefore on the doctrine of *lis pendens* hold that Exhibit 13 was not legally received in evidence. What therefore remains is Exhibit 12 that is neither here nor there. But possession was all along with the plaintiff and I hold the plaintiff was in possession and the defendant trespassed on the land and I so find against her. The appeal therefore succeeds on trespass. Automatically the injunction claimed must also succeed. I therefore grant the injunction claimed and the respondent, her servants and /or agents are hereby restrained from further acts of trespass on the land in dispute, i.e. Plots 40 and 41 at Ajao Layout as claimed by the plaintiff. I award forty-three thousand and two hundred Naira (N43,200.00) damages as assessed by the learned trial Judge, for the trespass. As the plaintiff has not satisfactorily proved title, his appeal on title fails. The appeal therefore partially succeeds as enumerated above.

As Exhibit 13, is void, neither party has proved title. I award N1,000.00 as costs in this court. The costs in the lower courts, if already paid are to be refunded to the appellant. I award N500.00 as costs in the Court of Appeal and N300.00 as costs in the High Court against the respondent.

E

UWAIS CJN

I have had the opportunity of reading in draft the judgment read by my learned brother Belgore, J.S.C. I agree that the appeal succeeds.

It is clear from the evidence adduced before the learned trial judge and accepted by him that even though the Appellant, as plaintiff, failed to prove his title to the land in dispute, he succeeded in showing that he had been in undisturbed possession of the land from 1955 to 1976 when the Respondent, as defendant, disturbed the possession. Since the learned trial judge accepted the evidence establishing possession, then, the Appellant was entitled to judgment on his second and third arms of Claim, to wit, possession and trespass. However, the first arm of the claim, that is for the declaration of title to the land in dispute failed because the root of title of Ojetola Ajao, from whom the Appellant derived his own title, was not traced beyond 1953 when the former, by a deed of conveyance, was alleged to have come into ownership. This notwithstanding, the learned trial judge dismissed the Appellant's claim in its entirety. The Court of Appeal uphold the judgment of the trial court and compounded the error made by the latter by holding that the identity of the land in dispute was not established.

With respect, the identity of the land in dispute was shown by surveyor's plan No. AL. 106.55 which was attached to a conveyance dated the 9th day of April, 1957 and was registered as No. 20 in Volume 196 at page 20 of the Register in the Land Registry, Ibadan. Furthermore, the 3 plots purchased by the Appellant were averred to now be "plots 40 and 41 of Chief Ajao's Layout at Palm Avenue, Mushin, Lagos State "Evidence to this effect was led and accepted by the learned trial judge. B

The other issue worth mentioning is the contention by the Appellant that the deed of conveyance (Exhibit 13) relied upon by the Respondent was void by virtue of the doctrine of *lis pendens*. This cannot be assailed. The writ of summons in this case was taken out by the Appellant on the 17th day of August, 1976 and was served on the Respondent on the 7th day of October, 1976. Although it was the case of the Respondent that she purchased the land in dispute in 1976, the receipt for the purchase (Exhibit 12) was issued to her and duly stamped on the 8th day of March, 1976, it was not until the 8th day of November, 1976 that a deed of conveyance (Exhibit 13) was executed between the Respondent and her vendor-Alhaji Alli Isiba who acted on behalf of the Oteniyi family. Again the deed of conveyance (Exhibit 13) was not presented for registration until the 7th day of January 1977. Surely this is a case of what the doctrine of *lis pendens* seeks to stop. Neither the other party in the case nor the trial court should be over-reached. It is clearly against public policy. Exhibit 13 was, therefore, caught by the doctrine. It could not be relied upon by the Respondent to prove her title to the land in dispute. Consequently it is a piece of document, which cannot be of any significance in this case. It is obvious that the learned trial judge was in error to have relied on it in finding that the Respondent had proved her title over the land in dispute, since according to him the Exhibit established her radical title over the land which was traceable under native law and custom. The Court of Appeal was in the same error when it upheld the decision of the trial Court. C D E F

Finally, the Appellant had asked us to over-rule the decisions of this Court in the cases of *Jules v. Ajani*, (1980) 2 NWLR (Pt. 131) 154 and *Odubeko v. Fowler*, (1993) 1 NWLR. (Pt. 308) 637 at p. 5659 para. F - G., in preference to our earlier decisions in *Joel v. Osilaja*, (1962) 1 All N.L.R. 104; *Nwaokafor v. Udegbe*, (1963) 1 SCNLR 184; (1963) 1 All N.L.R. 12 and *Gbangbala v. Alade*. Suit No. Sc. 327/1964 (unreported) judgment delivered on the 11th day of March, 1966. These cases were decided on their peculiar facts. The facts of the present case do not call for a review of the decisions in question. There is no doubt that this could come about in appropriate cases as this Court is never shy of reversing itself where it is shown that the principles for doing so have been met. G H

In the result the appeal succeeds in part. The decisions of the lower courts are hereby set aside. In their place I enter judgment for the Appellant in respect of possession and injunction against the Respondent as well as her servants and agents restraining them from committing further acts of trespass on the land in dispute. I adopt the other orders contained in the lead judgment of my learned brother, Belgore, J.S.C.

OGUNDARE JSC

I have had the advantage of a preview of the judgment of my learned brother, Belgore JSC just delivered. I agree with him that this appeal ought to succeed on the claims for damages for trespass and injunction. I, however, wish to make the following contribution for the sake of emphasis.

The plaintiff who is now Appellant before us, had sued the defendant (now Respondent) in the High Court of Lagos State claiming, as per his further amended statement of claim, as follows:

"1. Declaration of title on a piece of land situate, lying and being at Obele Igboodo, Mushin District known as Palm Avenue and more particularly described on Plan No. AL/106/55 attached to a Deed of Conveyance dated 9th day of April 1957 registered as No. 20 at page 20 in Volume 196 of the Lands Registry, Ibadan.

ALTERNATIVELY,

A declaration that the plaintiff is the person entitled to the statutory right of occupancy in respect of the land described on Plan No. AL/106/55 attached to a Deed of Conveyance dated 9th day of April 1957 registered as No. 20 at page 20 in Volume 196 of the Lands Registry, Ibadan.

2. N45,000.00 special and general damages for trespass to the said piece of land known as Plots 40 and 41 of Chief J. A. Ajao's Layout at Palm Avenue, Mushin, Lagos State.

3. An Order of injunction restraining the defendant, her servants and/or agents from committing further acts of trespass on the said land."

He averred that he purchased the land in dispute from Ajao family whose ancestor, Ojetola Ajao, had earlier purchased it from the Alago-Asalu family. A deed of conveyance was executed in favour of Ojetola Ajao. He claimed that he went into possession in 1955 and in 1957 fenced the land; he farmed thereon. The land was conveyed to him in 1957. In 1974 he granted permission to one Onitiri a motor mechanic to erect a shed on the land for use as a mechanic workshop. Onitiri went on the land, built sheds thereon and was using the land as a workshop until late 1976

when the defendant came on the land, destroyed Onitiri's structures thereon and the plaintiff's fence. The plaintiff then instituted the action leading to this appeal.

The case for the defendant, on the other hand, is that the land B belonged originally to the Oteniya family and was sold to her by the family in 1976. A deed of conveyance was executed in her favour. She went into possession and erected buildings on the land.

The learned trial judge, at the close of evidence on both sides and addresses by learned counsel for the parties, in a written judgment found - C

(1) *"that due execution of the deed of conveyance from Alago Asalu family to Ojetola Ajao was not proved, therefore, plaintiff's title to the land in dispute was not established."*

(2) *"that between 1974 and 1976 the automobile engineer to whom plaintiff granted permission to occupy the land was on the land and established thereon a mechanic workshop, that the said engineer erected sheds D on the land and that in 1976 the defendant and her agents came on the land and destroyed the sheds."*

(3) *"that the defendant however, established a better title than the plaintiff to the land in dispute."*

Thereupon, the learned trial judge dismissed plaintiff's claims. E

It is against that judgment that the plaintiff appealed to the Court of Appeal which the latter Court dismissed the appeal. The plaintiff has now further appealed to this Court on a number of grounds. In his Brief the following issues are set down as calling for determination:

"1. Whether the decision of the Court of Appeal that the defendant F proved title to the land in dispute was correct in law.

2. Whether the defendant's title Exhibit 13 (deed of conveyance suit was pending in Court) relied on by the learned trial Judge in holding that the defendant proved a better title to the land in dispute was not void in law by the doctrine of *lis pendens*?

3. If so, can the Court of Appeal without a cross-appeal filed by the respondent now hold that the defendant proved title by virtue of a purchase receipt Exhibit 12 a document on which no finding of fact was made by the High Court. G

4. Whether the decision of the Court of Appeal that the defendant established incidents of sale of the land under native law and custom by virtue of Exhibit 12 a purchase receipt. H

5. Whether the plaintiff having secured a finding possession in respect of the land in dispute was not entitled to judgment for damages for

trespass and injunction against the defendant in this case.

6. *Whether the plaintiff established his title to the land in dispute?"*

B The defendant in her Brief summarised the six issues as follows:
 “(a) *The Sixth Issue raises the question whether the Plaintiff had established his own title.*

(b) *The 1st, 2nd, 3rd & 4th Issues have raised the question whether the Defendant had proved a Better title.*

C (c) *The 5th Issue merely poses a proposition of law which would produce a favourable answer which would depend on the Defendant being unable to prove a better title. It really is no proper issue for determination.*
 “

I agree with the above summary except that issue (5) goes along with issues (1) - (4). There are thus two broad questions upon which this
 D appeal is to be determined, that is to say:

1. Whether the plaintiff established his title to the land in dispute,
 and

2. Whether he is entitled to damages for trespass and injunction as
 claimed.

E Question 1:

The plaintiff in his further amended statement of claim averred,
 inter alia, as follows:

F “2. The land in dispute forms part of a large area of land belonging to Aboki Bada Family, Isape Family and Aiyegun Family all being branches of Alago Asalu Family.

3. The land in dispute forms part of an area of land conveyed to Ojetola Ajao (Deceased) by a Deed of Conveyance dated the 24th day of December 1953 and registered as No. 71 at page 71 in Volume 1028 of the Lands Registry at Lagos.

G 4. The said area of land conveyed to the said Ojetola Ajao (Deceased) later developed (sic) on her children viz: Amos Adetona Ajao, Joseph Adediran Ajao and Samuel Aderinto Ajao.

H 5. The said children appointed Amos Adetona Ajao (deceased) as their Attorney to deal with the said hereditament by virtue of the Power of Attorney dated the 23rd day of February 1954 and registered as No. 12 at Page 12 in Volume 984 of the Lands Registry, Lagos Nigeria.

6. By virtue of the said Power of Attorney the said Amos Adetona caused the said hereditament to be divided into building plots or allotments and numbered them consecutively.

7. The plaintiff purchased 3 plots of land from Amos Adetona Ajao

namely: Plots 3, 40 and 41 from Chief J. A. Ajao's layout at Palm Avenue Mushin now Lagos State and was given purchase receipt dated 18th August 1955.

(i) The plaintiff was put into possession of the plots 3, 40 and 41 immediately after purchasing the said plots of land from his vendor. B

(ii) The plaintiff avers that plots 40 and 41 is the land subject-matter of this action.

He tendered the conveyance executed in favour of Ojetola Ajao by the Alago Asalu family but led no evidence of any kind to establish the title of Alago Asalu to the land it sold to Ojetola Ajao of which the land in dispute is only a part. There is no averment in the plaintiff's pleadings as to how Alago Asalu came to own the land. C

In effect plaintiff has not traced his root of title to the original owner of the land. Having regard to the state of the pleadings where the Defendant is claiming that original ownership to the land was in Oteniya family rather than in Alago-Asalu family, it behoves the Plaintiff to establish the title of Alago-Asalu family if he is to succeed in his claim to title. See: Mogaji v. Cadbury (Nigeria) Ltd. (1985) 2 NWLR (Pt.7) 393, 431; Elisas v. Omo-Bare (1982) 5 Sc. 25, 58; Ogunleye v. Oni (1990) 2 NWLR (Pt.135) 745, 782 - 783. I agree with the court below, per Babalakin JCA E (as he then was), that -

"On the facts of this case it is for the Appellant (that is, Plaintiff) to prove that the land in dispute conveyed to him by virtue of Exhibit 3 forms portion of the land belonging to Alago family and not to Oteniya Family" (Words in bracket are mine) F

This he failed to do. I cannot therefore, see how in the circumstance, Plaintiff's claim to title could succeed. In my view that claim was rightly dismissed.

The learned trial Judge had observed:

".....the plaintiff fails woefully to discharge the burden by not establishing before me definitive certainty the land on which he prays the court to grant him declaration." G

And Babalakin JCA (as he then was) had in his lead judgment also said:

"It is my view that on the facts of this case, the Appellant has woefully failed to prove the identity of the land over which he sought a declaration of title or a Statutory Right of Occupancy and the learned trial Judge rightly refused to grant him same." H

With profound respect, I think these statements are erroneous. The Plaintiff had pleaded thus:

"8. (ii) The Plaintiff avers that plots 40 and 41 is the land subject-matter of this action."

x x x x x

10. The said Plots 40 and 41 were conveyed to the Plaintiff by a Deed of Conveyance dated the 9th day of April 1957 and registered as No. 20 at Page 20 in Volume 196 of the land Registry in the Office at Ibadan now transferred to Lagos and demarcated on the plan attached to the said conveyance."

The Defendant responded and pleaded:

"The land in dispute situate, lying and being at Palm Avenue Mushin, Lagos and it is the same piece or parcel of land with the land being claimed by the Plaintiff."

The identity of the land in dispute and being claimed by the Plaintiff was, therefore, never in issue. What appeared to be in issue was the extent of the land of Alago-Asalu family vis-a-vis the land in dispute. This is borne out by paragraph 19 of the Defendants's amended statement of defence wherein he pleaded:

"19. The Defendant avers that the Alago-Asalu Family is also the owner under Native Law and Custom from time immemorial of a very large area of land which was immediately adjacent to the land of the Defendant's Predecessor-in-title the Oteniya Family but the land in dispute did not form part of Alago-Asalu Family."

This error has however, not occasioned any miscarriage of justice as there are other reasons for refusing Plaintiff's claim to title.

On the whole and for reasons earlier given by me Issue (6) as formulated in Plaintiff's Brief is answered in the negative.

Question 2:

The failure of the Plaintiff to prove his claim to title, however, does not necessarily mean a failure of his claims in trespass and injunction as different considerations arise in regard to the latter claims. In *Oluwi v. Eniola* (1967) NMLR 339 this Court held that a claim for trespass is not dependent on the claim for declaration of title as the issues to be determined in the claim for trespass are whether the plaintiff has established his actual possession of the land and the defendant's trespass on it, issues which are quite separate and independent to that on the claim for declaration of title. See also: *Atunrase and Others v. Sunmola & Another* (1985) 1 NSCC 115, 119 - 1201 (1985) 1 NWLR 105; *Udo & Ors. v. Obot & Ors.* (1989) 1 NWLR 59.; *Ayinde v. Salawu* (2989) 3 NWLR 297,316. In the present case, the learned trial Judge found:

..... the plaintiff produced the 1st plaintiff's witness, an automobile engineer who impressed me as very truthful witness and believe his evidence. I therefore hold and find as a fact that between 1974 and 1976

with the consent and permission of the plaintiff he established a mechanic workshop on plots 40 and 41 at Palm Avenue as stated by him in his testimony. I hold and find as a fact that he erect sheds for his workshop on the land which were destroyed by the defendant and her agents sometime in 1976.” B

This finding of fact was not challenged in the Court below nor in this Court. This finding, which is amply supported by the evidence, firmly established that possession was in the Plaintiff at the time Defendant came on the land in 1976 following the sale to her of the same land by the Oteniya family. She has since erected buildings on the land. C

The law is succinctly expressed by Kawu JSC in *Atunrase & Ors. v. Sunmola & Anor.* (supra) when at pages 119 - 120 of the 1st Report the learned Justice of the Supreme Court observed:

“It is settled law, and this Court has so held times without number, that trespass is actionable at the suit of the person in possession of the land (Amakor v. Obiefuna. (supra); Adeshoye v. Shiwoniku 14 W.A.C.A. 86; Emegwara and others v. Nwaimo and others 14 W.A.C.A.; Tongi v. Kalil 14 W.A.C.A. 331). The slightest possession in the plaintiff enables him to maintain an action for trespass if the defendant cannot show a better title. D

In *Alhaji Fasasi Adeshoye v. J.O. Shiwoniku* (supra) the following E statement of the law appears:-

‘The appellant sought to defeat the respondent’s claim by setting up the conveyance dated 14th January, 1950, under which he claimed to be the owner in fee simple of the land in dispute. The validity of that conveyance was put in issue by the respondent, and, in my opinion, the learned F trial Judge was bound to determine the issue so raised. Once it became clear that the grantors had purported as they did to convey a title which they did not possess, the respondent being in possession of the land could successfully maintain an action for trespass against the appellant.’

Any form of possession is sufficient to maintain an action for trespass against a wrongdoer as long as it is clear and exclusive. It is not necessary, in order to maintain trespass, that the plaintiff’s possession should be lawful and actual possession is good against all except those who can show a better right to possession in themselves (see *Halsbury’s Laws of England*, 3rd Edition. Vol. 38. at page 743, paragraph 1213).” G

To defeat, therefore, Plaintiff’s right to succeed on the claim for damages for trespass, possession having been found to be in him, Defendant must show that she had better title to the land in dispute - *Fabunmi v. Agbe* (1985) 3 SC. 99; (1985) 1 NWLR 299. The learned trial Judge fully H

understood the law for he not only examined the nature of Defendant's title to the land in dispute but expressly found that she proved better title than the Plaintiff and dismissed Plaintiff's claims for trespass and injunction. The Court of Appeal affirmed this conclusion. This conclusion is vigorously challenged in this appeal on two main grounds:

(a) that Oteniya family was not proved to be the original owner of the land in dispute;

(b) that the conveyance Defendant relied on in proof of her title is void, having been caught by the doctrine of *lis pendens*.

The Defendant pleaded *inter alia*, as follows:

"5. The said land formed portion of a larger parcel of land originally owned and possessed by the Oteniya Family who have for several years been exercising thereon maximum rights of ownership from one generation to another without any hindrance or interruption whatsoever. The entire members of Oteniya Family having been farming on the said land including the land in dispute periodically until the land in dispute was sold to the Defendant.

6. The Defendant avers that her predecessor-in-title, one Oteniya first settled on the land including the land in dispute several years ago. The said Oteniya an Awori man exercised dominion time over a larger parcel of land including the plots in dispute throughout his life time and on his death the hereditaments developed (sic) on his three children namely: (i) Dosumu (ii) Aminatu Ayawo) (iii) Isiba.

7. Both Dosumu and Ayawo died intestate without any issue and were survived by their brother Isiba who inherited their shares of the land under Yoruba Native Law and Custom.

8. The Defendant avers that her predecessor-in-title, the Oteniya Family have been in exclusive and uninterrupted possession of a large parcel of land including the land in dispute from time immemorial.

9. The Defendant avers further that the said Oteniya Family unanimously appointed Aliu Isiba as their Accredited Representative and Attorney with full Powers and Authority to sell, convey, lease or mortgage any portion of the Family land including the land in dispute and by virtue of a Power of Attorney registered at the Lands Registry, Ibadan as No. 16 at Page 16 in Volume 908.

10. The Defendant avers that the Oteniya Family, their said Attorney sold and conveyed the land in dispute to her in fee simple absolute under and by virtue of a Deed of Conveyance registered as No. 100 at Page 100 in Volume of the Register of Deeds at the Lagos Land Registry and also sold several plots forming part of a larger area of land to other purchasers.

11. *The Defendant will, at the trial fortify her title to the said land by relying on the judgment in the Supreme Court - Suit No. SC/624/65 being a decision made on appeal from the High Court Suit No. IK/103/60 between Oteniya. Esikonbi Family in respect of a portion or part of larger area of land owned by the Oteniya Family from the time immemorial.*

(b) *The Defendant will also rely on the judgment in Suit No. ID/4/79 between Banigbale v. Abeke Olusoga in respect of a part or portion of the larger area of land owned and possessed by Oteniya Family.*

12. *The Defendant further avers that her predecessors-in-title gave her a Purchase Receipt before the execution of a Deed of Conveyance in respect of the land in dispute and cleared the grass on the portion sold to her without any interruption.*

13. *The Defendant avers further that the said Oteniya Family put her into a vacant possession of the land in dispute and she took effective physical possession thereof."*

The Defendant gave evidence and called one witness in support of her case. True enough, she did not counterclaim for title as rightly observed by Chief G. O. K. Ajayi, SAN, her learned leading counsel, but as she had the burden to prove better title, she must lead sufficient evidence from which such finding could be made. The evidence of Alhaji Raimi Isiba, a member of the Oteniya family, falls far short of the minimal evidence required to prove the averments in the statement of defence that that family originally owned the land that was subsequently conveyed by it to the Defendant. And for the reason that I gave earlier in this judgment in respect of the case of the Plaintiff, I must also hold that Defendant too has failed to establish Oteniya family's title to the land. It is noteworthy that the courts below did not make any finding as to original ownership of the Oteniya family to the land in dispute.

Defendant also relied on Exhibit 13, the deed of conveyance executed in her favour by the Oteniya family. Exhibit 13 was executed on 8th November 1976 when this case commenced by a writ of summons sealed on 17th August 1976, was pending. The Plaintiff contends (as he did in the court below) that Exhibit 13 is void being caught by the doctrine of lis pendens. That doctrine prevents the effective transfer of rights in any property which is the subject-matter of an action pending in court, during the pendency in court of the action. The court below rejected Plaintiff's submission to the effect that Exhibit 13 being executed pendente lite was void. That court, per Babalakin JCA (as he then was), observed:

"On lis pendens: the doctrine of lis pendens prevents the transfer

of land in dispute while litigation is going on in court about the said land. There is a conclusive proof that the land conveyed by virtue of Exhibit 13 - deed of conveyance held by Respondent was not purchased during the pendency of this action which was commenced on 17th August, 1976. The
 B *piece or parcel of land was purchased on 4th March, 1976 under native law and custom. There was evidence of the payment of the purchase price in the presence of witnesses. There was also evidence that the Respondent was put in possession of the land in dispute. These processes complete the incidents of a sale of land under native law and custom. The purchase*
 C *receipt, Exhibit 12 dated 4th March, 1976, put these matters beyond dispute. Subsequent registration of this sale of land by Exhibit 13 does not alter the position of things. I therefore hold that the doctrine of lis pendens does not apply to the fact of this case."*

I think the court below is wrong. Chief Ajayi, SAN rightly concedes it that Exhibit 13 is void but puts forward an alternative argument which I
 D shall consider presently. In *Osagie v. Oyeyinka* (1987) 3 NWLR 144 this Court had cause to consider the doctrine of lis pendens and its application in Nigeria. Oputa JSC at pages 155 - 156 had this to say:

"The old doctrine of lis pendens was that if property was in question or dispute in a suit or action it could not be alienated during the pendency
 E of that suit or action, even to a purchaser or mortgagee without notice. There was however a change, or slight modification of this doctrine brought about by the Judgments Act 1839. By Section 7 of that Act no lis pendens binds a purchaser or mortgagee without express notice thereof, unless a
 F Memorandum giving a description of the person whose estate is intended to be affected thereby, and particulars of the Suit, is registered in the Land Registry as a land charge (see Land Charges Act, 1925, S.3(1). One effect of such registration is to give intending purchasers or mortgagees notice of the litigation. By S.1(8) of the Land Charge Act of 1925 the registration ceases to have effect after five years unless renewed.

G The question now is - Are we in Nigeria bound by the doctrine of lis pendens? If the answer is yes then a further question arises - Are we also bound by the provisions of S. 7 of the Judgments Act of 1839 'a statute of general application' which will apply to us here in Nigeria? This Court per
 Idigbe, JSC answering the two questions posed above, in *Ogundaini v. Araba & Barclays Bank of Nigeria Ltd.* (1978) 6 & 7 S.C. 55 at p. 80 thus
 H (as it relates to registration of a lis pendens):-

'At common law it was not compulsory to register a lis pendens. The Statutes which later made registration of a lis pendens compulsory in England do not come within the definition (in the framework of our local

laws) of 'Statutes of general application' in any event, those statutes which require, in England, compulsory registration of a *lis pendens* have no force and effect in Nigeria There is no local statutory provisions requiring a *lis pendens* to be registered'.

As it relates to the doctrine itself this Court at p. 78 of Ogundaini's case (*supra*) stated categorically:-

'The doctrine of lis pendens prevents the effective transfer of rights in any property which is the subject matter of an action pending in Court during the pendency in Court of the action. In its application against any purchaser of such property the doctrine is not founded on the equitable doctrine of notice - actual or constructive - but upon the fact that the law does not allow to litigant parties or give to them, during the currency of the litigation involving any property rights in such property (i.e. the property if dispute) so as to prejudice any of the litigating parties.'

Simply put the doctrine of lis pendens operates to prevent the effective transfer of any property in dispute during the pendency of that dispute. It is quite irrelevant whether the purchaser has notice - actual or constructive. The doctrine is really designed to prevent the vendor from transferring any effective title to the purchaser by depriving him (the vendor) of any rights over the property during the currency of the litigation or the pendency of the suit. That being so the principle of nemo dat quod non habet will apply to defeat any sale or transfer of such property made during the currency of litigation or the pendency of the action."

See also *Ebueku v. Amola* (1988) 1 NSCC 582; (1988) 2 NWLR (Pt. 75) 128. The conclusion I reach on the facts of this case is that Exhibit 13 is void; it passed no title in the land in dispute to the Defendant. She could, therefore, not rely on it in proof of her title.

Chief Ajayi, SAN, has, in oral argument, submitted that although Exhibit 13, the Defendant's deed of conveyance was caught by the doctrine of *lis pendens*, the sale under customary law to her was not so caught. Learned Senior Advocate referred to the purchase receipt issued to the Defendant by her vendors and the fact that she was put in possession and submitted that there was a sale under customary law before action was taken and it did not matter that Exhibit 13 had not been executed. Mr. Jimoh-Lasisi, learned counsel for the Plaintiff, in reply, submitted that sale under customary law was not the basis of Defendant's case. He further submitted that in view of the learned trial Judge's finding that Plaintiff was in possession in 1976 through his agent or licensee, Mr. Onitiri, Defendant could not have been put into possession to effect a sale under customary law.

I agree with the submissions of Mr. Lasisi-Jimoh. It is clear from her pleadings and evidence in support that the Defendant relied solely on Exhibit 13 in proof of her title. Oteniya family was not in possession of the land in dispute in 1976 when it purportedly sold same to the Defendant and so could not have put the latter in vacant possession of the land. As found by the learned trial Judge, the plaintiff was in possession. The learned trial Judge made no finding on sale under customary law in favour of the Defendant. Neither did she cross-appeal or file Respondent's Notice in the Court of Appeal seeking to retain the judgment of the trial court on the new ground of sale under customary law. The court below, therefore, acted in excess of its jurisdiction to make the finding on sale under customary law. That finding must be set aside, as urged on us by the Plaintiff.

In view of my finding that Exhibit 13 is void, the question of its due authentication no longer arises for consideration. It is, therefore, unnecessary to consider and decide whether or not *Jules. v. Ajani* (1980) 5 - 7 Sc. 96, *Adelaja v. Fanoiki* (1990) 2 NWLR 154 and *Odubeko v. Fowler* (1993) 7 NWLR 637, 659 F - G are in conflict with *Cardoso v. Daniel* (1986) 2 NWLR (Pt.20) 1, 36; *Jobi v. Osilaja* (1962) 1 All NLR 12; (1962) 1 SCNLR 31; *Nwaokafor & Ors. v. Udegbe* (1963) 1 SCNLR 184; (1963)(unreported) 1 All NLR 104 and *Gbangbala v. Alade*, SC.327/1964 delivered on 11/3/66 as regards the law on proof of due execution of documents.

The net result of all I have been saying above is that the Defendant failed to prove that she had better title to the land in dispute than the Plaintiff who was in possession at the time she entered upon the land. Consequently, the two courts below are in error to dismiss Plaintiff's claim for damages for trespass. That case ought to succeed. The learned trial Judge assessed damages at N43,200.00. There has been no appeal against this assessment. I hereby allow this appeal and set aside the judgments of the two courts below dismissing Plaintiff's claim for damages for trespass. I enter judgment in his favour on this claim in the sum of N43,200.00.

The claim for trespass having succeeded, that for injunction must also succeed to protect Plaintiff's possessory right. I, therefore, enter judgment for the Plaintiff and order an injunction restraining the Defendant, her servants, agents and all those deriving title through her from committing further acts of trespass on the land in dispute. I, however, affirm the judgments of the courts below dismissing his claim for title.

I award to the Plaintiff costs as assessed in the lead judgment of my learned brother, Belgore JSC.

MOHAMMED JSC

I entirely agree with the opinion of my learned brother Belgore, J.S.C., in the lead judgment, just read, that appellant herein ought to succeed in his claim for damages for trespass and injunction. It is evidently clear that the claim on title has not been proved by the plaintiff/appellant. For the same reason I agree to dismiss the claim for title over plots 40 and 41 of the land in dispute. I have nothing more to add. I abide by all the consequential orders made in the lead judgment.

ONU JSC

I had the privilege of a preview of the judgment of my learned brother Belgore, J.S.C., just delivered and I agree with his reasoning and conclusions. I will allow the appeal in part in respect of damages for trespass and injunction but not as to declaration of title to the land in dispute.

It is my desire to add a few comments of mine on only issues 1 and 2 submitted for our consideration by the plaintiff, herein appellant, which standing poignantly jointly or severally, are enough, in my view, to dispose of this appeal as follows:-

On issue No. 1 as to whether the decision of the Court of Appeal that the defendant (respondent herein) proved title to the land in dispute was correct in law; the learned trial Judge giving judgment in favour of the defendant and dismissing the plaintiff's action had held as follows:-

"Applying the above facts of this case, the plaintiff produced the 1st plaintiff's witness, an automobile engineer who impressed me as very truthful witness and believe his evidence, I therefore hold and find as a fact that between 1974 and 1976 with the consent and permission of the plaintiff he established a mechanical workshop on plots 40 and 41 at Palm Avenue as stated by him in his testimony. I hold and find as a fact that he erect (sic) sheds for his workshop on the land which were destroyed by the defendant and her agents sometime in 1976. That the defendant got the Nigeria Police to arrest the 1st plaintiff's witness was released on bail to the plaintiff.

I also hold and find as a fact that the defendant erected three buildings on the land, then drove away the 1st plaintiff's witness"

The learned trial Judge further held:

"As stated above I hold that the defendant proved better title to the land than the plaintiff therefore ascribe possession to the defendant....."

Be that as it may though I held 1st plaintiff witness was in possession of Plots 40 and 41 and with the consent of the plaintiff holds that he has not established before me exclusive possession right to possession as defendant established better title. The claim for trespass is dismissed."

Now, it is not worthy that while this finding of prior possession made in favour of the plaintiff, appellant herein, was not challenged by way of cross-appeal or even a respondent's notice in the Court of Appeal (herein-
B after referred to as the court below), that finding subsists and is binding on both parties.

The court below albeit on totality confirmed the findings of the trial court and concluded that the defendant, herein respondent, proved a better title based on Exhibit 13 - Deed of Conveyance. Be it noted that the
C defendant never counter-claimed; she only defended the action and the duty to prove his case lay on the plaintiff. See *Kodilinye, v. Mbanefo Odu* (1935) 2 W.A.C.A. 336.

It is however pertinent to set out paragraphs 6, 7, 8,9 and 10 of the Amended Statement of Defence dealing with the traditional history relied on by the defendant to support her pleaded title upon which Exhibit 13
D hangs as follows:-

*"6. The defendant avers that her predecessors-in-title one Oteniya first settled on the land including the land in dispute several years ago. The said Oteniya an Awori man exercised dominion over a larger parcel of land including the plots in dispute throughout his life time and on his death the
E hereditaments devolved on his three children namely: Dosumu (ii) Aminatu Ayawo (iii) Isiba.*

7. Both Dosumu and Ayawo died intestate without any issue and were survived by their brother Isiba who inherited their shares of the land under Yoruba Native Law and Custom.

*8. The Defendant avers that her predecessor-in-title, the Oteniya
F Family have been in exclusive and uninterrupted possession of a larger parcel of land including the land in dispute from time immemorial.*

*9. The defendant avers further that the said Oteniya family unanimously appointed Aliyu Isiba as their accredited representative and attorney with full powers and authority to sell, convey, lease or mortgage any
G portion of the family land including the land in dispute and by a Power of Attorney registered at the Lands Registry, Ibadan as No. 15 at page 16 in Volume 908.*

*10. The defendant avers that the said Oteniya family their said Attorney sold and conveyed the land in dispute to her in fee simple absolute and by virtue of a deed of conveyance registered as No.100 at page 100 in
H Volume 1599 of the Register of Deeds at the Lagos Land Registry and also sold several plots forming part of a larger area of land to other purchasers."*

Before the defendant joined issues with the plaintiff based on the

above pleadings, he had pleaded, inter alia, in his Further Amended Statement of Claim on paragraphs 2, 3, 4, 5, 6, 7, 8, and 9 as follows:- “

“2. *The land in dispute forms part of a large area of land belonging to Aboki Bada Family; Isape Family and Aiyelegun Family all being branches of Alago Asalu family.*” B

3. *The land in dispute forms part of an area of land conveyed to Ojetola Ajao (Deceased) by a Deed of Conveyance dated the 24th Day of December, 1953 and registered as No. 71 at Page 71 in Volume 1028 of the Lands Registry at Lagos.*

4. *That said area of land conveyed to the said Ojetola Ajao (Deceased) late devolved (sic) on her children viz. Amos Adetona Ajao, Joseph Adeniran Ajao and Samuel Aderinto Ajao.* C

5. *The said children appointed Amos Adetona Ajao (deceased) as their Attorney to deal with the said hereditament by virtue of the Power of Attorney dated the 23rd day of February, 1954 and registered as No. 12 at Page 12 in Volume 984 of the Lands Registry, Lagos Nigeria.* D

6. *By virtue of the said Power of Attorney the said Amos Adetona caused the said hereditament to be divided into building plots or allotments and numbered them consecutively.*

7. *The plaintiff purchased 3 plots of land from Amos Adetona Ajao namely: Plots 3, 40 and 41 from Chief 1. A. Ajao's layout at Palm Avenue Mushin now Lagos State and was given purchase receipt dated 18th August, 1955.* E

8. (i) *The plaintiff was put into possession of the plots 3, 40 and 41 immediately after purchasing the said plots of land from his vendor.* F

(ii) *The plaintiff avers that plots 40 and 41 is the land subject matter of this action.*

9. *The plaintiff avers that he has exercised various acts of possession and ownership on the said land since 1955 without let or hindrance from any body whatsoever”* G

(Underlining above is mine for emphasis).

Exhibit 8 is the composite plan of Chief J. A. Ajao's layout at Palm Avenue, Mushin referred to in paragraphs 7, 8 and 9 respectively of the Further Amended Statement of Claim. Under no circumstances does Exhibit 12, being no more than a receipt on whose face the land concerned is not properly and specifically described, tally with Exhibit 13. Thus, plots 40 and 41 in Exhibit 8 (composite plan) being distinct parcels of land, cannot be such plots as averred and given in evidence by the defendant as those allegedly sold to her by the Oteniya family on Exhibit 13. Besides, it being admitted and established at the trial that Oteniya family had four H

branches and that only two of the four allege-

dly sold the plots of land to the defendant, the sale as made thereon is void and conveyed no title to the defendant whatsoever. This is the moreso, in that the plaintiff's criticism of the judgment of the court below on the issue of the proof by the defendant of a better title, hinged on her failure to prove the Traditional history pleaded in paragraphs 6, 7, 8, 9 and 10 of the Amended Statement of Defence. Besides, the defendant at paragraph 3.07 of her brief had conceded as follows:-

"(i) It is conceded that the Defendant did not prove averment of Claim to the effect that one Oteniya first settled on the land of which the land in dispute forms a part. It is also conceded that the genealogy of the descendants of Oteniya pleaded was not proved."

Despite the above concession, Chief Ajayi, S.A.N., in oral argument vehemently hung unto Exhibit 12 as evidencing or justifying the defendant's entitlement under Naive Law and Custom to the parcel of land in dispute. However, if it is borne in mind that the Exhibit 12, founded on paragraph 10 of the defendant's Amended Statement of Defence, is devoid of all the incidents of such a disposition under Yoruba Native Law and Custom (for which see *Erinosho v. Owokoniran* (1965) N. M. L. R. 479) and so bereft of the evidence of the person or persons who granted it and those who witnessed its handing over, that piece of evidence goes to no issue as it gave no valid title. In addition, the failure of the defendant to prove the traditional history she pleaded knocks the bottom off Exhibits 11, 12 and 13 as pleaded in paragraphs 6, 7, 8, 9 and 10 of the Amended Statement of Defence. See *Kalio v. Woluchem* (1985) 1 N.W.L.R. (Pt. 4) 610 at 628; *Piaro v. Tenalo* (1976) 12 S.C. 31 at 41-42 and *Ogunleye v. Oni* (1990) 2 N.W.L.R. (Pt. 135) 745 at 782 - 783, the latter in which *Nnaemeka-Agu, J.S.C.* said:

"This Court had made it clear in several decisions that if a party bases its title on a grant according to custom by a particular family or community that party must go further to plead and prove the origin of the title of that particular person; family or community unless that title has been admitted, see on this Mogaji v. Cadbury Nigeria Limited (1985) 2 N.W.L.R. (pt. 7) 399 at 431; Elias v. Omo-Bare (1982) 5 S.C. 25 at 57 - 58. The learned trial Judge was therefore in error to have accepted the mere production of a deed of grant as being equivalent to the proof of title when the origin of the title of the grantor was neither admitted nor established as he failed to prove the origin, nature and devolution of the title on his vendors it follows that he was bound to fail on his claim."

Thus, as Exhibit 8 (the plaintiff's composite plan) of the land in

dispute (Ajao's family land) would appear to bear no relationship to the defendant's land which she calls Oteniya Family land, section 46 of the Evidence Act which provides that -

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

would not, in my candid view, operate to confer a valid title or ownership in the defendant. Indeed, as the defendant failed to lead evidence to prove the traditional history pleaded in paragraphs 6, 7, 8, 9 and 10 of the Amended Statement of Defence aforementioned, this was fatal to the title pleaded by her. Besides, as the evidence of 2nd D.W. (Alhaji Raimi Isiba) was at variance with the facts pleaded in the above paragraphs of the Amended Statement of Defence in that he said under cross-examination that Oteniya family has four branches, the evidence thereon went to no issue and his testimony belied the case of title being canvassed by her in her defence. See *Emegokwue v. Okadigbo* (1913) 4 S.C. 113 at 117). Be it noted, as earlier pointed out, that the defendant was merely defending the action while not counterclaiming for any reliefs. The conclusion arrived at by the court below that the defendant proved title to the land in dispute, is in my respectful view, therefore incorrect and erroneous. The purport of Exhibit 14 (a decision of 13th February, 1981 between the defendant and one Bamigbele in relations to Plot 54 in Ajao Family layout also reflected on Exhibit 8) having nothing to do with the plaintiff as privy, equally has no connection with the case in hand except as an act of ownership by Oteniya family vis-a-vis the defendant. Thus, the trial court's finding of fact to the effect that -

"Be that as it may though I held 1st plaintiff's witness was in possession of plots 40 and 41 and with consent of the plaintiff holds that he has possession against the whole world except a person who has a better title."

which the court below left undisturbed by way of neither a cross-appeal nor a respondent's Notice vide Order 3 Rule 14 Court of Appeal Rules, must perforce be taken as establishing plaintiff's possession of Plot 40 and 41 for which he could successfully maintain an action against the defendant in trespass and a fortiori injunction follows as ancillary relief.

In his own quest to establish his title to the land in dispute following his pleadings, the plaintiff tendered the conveyance in favour of Ojetola Ajao (his vendor) by the Alago-Asalu family vide Exhibit 3 but led no

evidence to establish the title of the latter family to the former relative to a part only of the land in dispute. There being no averment in the plaintiff's pleadings as to how Alago-Asalu came to own the land, he (plaintiff) had in effect not traced his root of title to the original owner of the land in dispute. And since the defendant was claiming that the original ownership of the land was in Oteniya family rather than in Alago-Asalu family, for the plaintiff to succeed, he has the burden of proving or establishing the title of Alago-Asalu. See *Mogaji v. Cadbury* (supra); *Olaniyi v. Aroyehun* (1991) 5 N.W.L.R. (Pt. 194) 652 and *Ogunleye v. Oni* (supra). This he failed to do and I cannot see how his claim to title could have succeeded. That claim was therefore rightly dismissed. My answer to issue 1 is thus rendered in the negative.

On the second issue which is whether the defendant's title (Exhibit 13- deed of conveyance) relied on by the learned trial Judge in holding that the defendant proved a better title to the land in dispute was not void in law by the doctrine of *lis pendens*; needless to say that it was not controverted that Exhibit 13 was executed during the pendency of the suit giving rise to the appeal herein.

In this wise, if it is remembered that the plaintiff had acquired the land constituting plots 40 and 41 vide Exhibit 3 (deed No. 20 at Page 20 in Volume 196 of 9th April, 1957) which was part of the larger parcel of land conveyed to Ojetola Ajao in 1953 by a deed of conveyance registered No. 71 at page 71 in Volume 1028 of the Land Registry, Lagos on 24th December, 1953, to wit: Exhibit 1, the plaintiff who showed that the sale was made to him pursuant to a power of attorney (Exhibit 2) given to Adetona Ajao, the eldest of Ojetola Ajao's children and who issued to him a receipt on 18/8/1955 before putting him in possession of the said plots) must have been first in time on the land in dispute before the defendant who in 1976 chased out P.W. 1 therefrom after the latter was given the use of the two plots by plaintiff as mechanical workshop in 1974. The writ in the case giving rise to the appeal herein was issued on 17/8/76. A careful study of Exhibit 13 reveals that it was purported to have been executed on 8/11/76 and presented for registration on 7th January, 1977. As can be noticed too, the defendant was served with a copy of the writ on 7th October, 1976 while a further look at the record would disclose that the writ was executed on 8th November, 1976. The doctrine of *lis pendens* which prevents any of the parties from acquiring an interest in the property during the period accordingly applies, thus rendering Exhibit 13 proffered by the defendant as her document of title to the land in dispute as void and of no effect.

The doctrine of *lis pendens* which has been pried into in a number

of decided cases by this Court is that if property was in question or dispute in a suit or action, it could not be alienated during the pendency of that suit or action even to a purchaser or mortgagee without notice. It ought to be noted, however, that in its application against any purchaser of such property, the doctrine is not founded on the equitable doctrine of notice - actual or constructive - but upon the fact that the law does not allow litigant parties, during the pendency of the litigation involving any property, rights in such property which is in dispute so as to prejudice any of the litigating parties. The doctrine, as it were, is designed to prevent the vendor from transferring any effective title to the purchaser by depriving the vendor of any rights over the property during the pendency of the litigation. That being so, the principle of *Nemo Dat Quod Non Habet* will apply to defeat any sale or transfer of such property made during the currency of the litigation. See *John A. Osagie v. Alhaji S. O. Oyeyinka* (1987) 3 N.W.L.R. (Pt 58) 144 at 156; *Ogundiani v. Araba & Anor.* (1978) 6/7/ S.c. 55 at 78; *Steven Omo Ebueku v. Sunmola Amola* (1988) 2 N.W.L.R. (Pt. 75) 128; *Ikeanyi v. A.C.B. Ltd.* (1991) 7 N.W.L.R. (Pt. 205) 626 and *Barclays Bank of Nigeria Ltd. v. Ashiru* (1978) 6/7/ S.c. 99 at 124.

Thus, the customary sale of the land in dispute founded on the receipt 12 dated 12th May, 1966 - upon which the defence now falls to sustain its right to title cannot be countenanced. This is because the attempt to link it to Exhibit 13 being faulty, I find it preposterous and perverse the defence submission that Exhibit 13 was not caught by the doctrine of *lis pendens*, when it is known that the deed of conveyance held by the defendant on the land in dispute was so acquired during the pendency of this action which as I earlier pointed out, commenced on 17/8/76. The case of *Ojugbele v. Olasope* (1982) 4 S.C. 31 at 31 relied upon by the defendant in which execution of the conveyance took place before the commencement of the case is distinguishable and not apposite to the case in hand.

In view of all I have said above I see no necessity to consider and decide whether the cases of *Jules v. Ajani* (1980) 5 - 7 S.C. 96; *Adelaja v. Fanoiki* (1990) 2 N.W.L.R. 154 and *Odubeko v. Fowler* (1993) 7 N.W.L.R. 637,659 in this regard, are in conflict with *Cardoso v. Daniel* (1986) 2 N.W.L.R. 1,36; *Jobi v. Osilaja* (1963) 1 All N.L.R.12; *Nwokafor & Ors. v. Udegbe* (1963) 1 All N.L.R. 104 and *Gbangbala v. Alade*, S.C. 327/1964 delivered 11/3/66 (unreported). This issue is also answered in the negative and resolved in the plaintiff's favour.

For these and the fuller reasons set out in the judgment of my learned brother Belgore, J.S.C., with which I indicated I entirely agreed, this appeal partly succeeds in trespass and injunction but not for the declaration sought.

I too make the same consequential orders contained in that judgment inclusive of those regarding costs.

B

ADIO JSC

I have had a preview of the judgment just read by my learned brother, Belgore, J.S.C., and I entirely agree with his reasoning and conclusion, which I adopt as mine. The appeal partially succeeds and I allow it to the extent stated in the lead judgment.

C

IGUH JSC

I have had the privilege of reading, in advance, the lead judgment just delivered by my learned brother, Belgore, J.S.C. and I agree with the reasoning and conclusion, therein.

D

It seems to me clear, on the issue of title, that the appellant was unable to establish his claim as found by the trial court and affirmed by the court below. The onus is on the plaintiff/appellant to satisfy the court that he is entitled on the evidence brought by him to the declaration claimed.

E

See *Kodilinye v. Mhanefo Odu* (1935) 2 WACA 336 at 337; *Frempong v. Brempong* 14 WACA 13; *Mogaji v. Cadbury (Nigeria) Ltd.* (1985) 2 NWLR 745 at 782 etc. This onus, on the findings of both the trial court and the court below, the appellant failed to discharge. I have myself examined the findings of both courts on the issue and confess that I can find no reason to interfere with the same. See *Enang v. Adu* (1981) 11-12 S.C. 25 at 42; *Nwadike v. Ibekwe* (1987) 4 NWLR (Pt.67) 718; *Woluchem v. Gudi* (1981) 5 S.C. 291 at 326 etc.

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On the issue of damages for trespass, it is the finding of the learned trial Judge, after a careful evaluation of the evidence before him, that the appellant was at all material times in possession of the land in dispute. Trespass is actionable at the instance of a person in possession of land in dispute.

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The respondent relied inter alia on Exhibit 13 to defeat the appellant's claims in trespass and injunction. Exhibit 13 was however executed on the 8th November, 1976 during the pendency of this action which, from the records, was filed in August, 1976.

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The doctrine of *lis pendens* affects a purchaser, who buys property, the subject matter of litigation during the pendency of such litigation, not because the purchaser is caught by the equitable doctrine of notice but

because the law does not allow the litigant parties, and give to them pending the litigation, rights in the property in dispute so as to prejudice the other party. Where, therefore, there is a conveyance, sale or transfer of land, even though the alienation be for the best consideration, yet if made Pendente lite, the alienation will be caught by the doctrine of lis pendens and is null and void. See Barclays Bank of Nigeria Ltd. v. Alhaji Ashiru and others (1978) 6 & 7 S.C. 99 at 123-125, 128-129, Ehueku v. Amola (1988) 2 NWLR (Pt. 75) 128; (1988) 1 N.S.C.C. 582; Wigram v. Buckley (1894) 3 Ch. 483 etc. I am therefore satisfied that Exhibit 13 which was executed Pendente lite is caught by the principle of lis pendens and is null and void. C

On the invitation to decide whether or not the decision of this court in Jules v. Ajani (1980) 5-7 S.C. 96 and the other cases decided along its ratio decidendi are in conflict with the decision of this court in Cardoso v. Daniel (1986) 2 NWLR (Pt. 20) 1 at 36 with its sister cases, on the question of the due execution of Exhibit 13, it is plain that this exercise cannot now arise in view of the fact that Exhibit 13 is a nullity. D

It is for the above and the more elaborate reasons contained in the lead judgment that I, too, partially allow this appeal to the extent stated in the lead judgment.

I endorse the orders as to costs therein made.

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