

SUPREME COURT OF NIGERIA
2ND APRIL, 1996. SC. 290/1990.
CORAM: A. B. WALI, I. L. KUTIGI, E. O. OGWUEGBU,
Y. O. ADIO, A. I. IGUH, JJSC.

EGBUCHULEM MADUMERE & 2 OTHERS

(For themselves and on behalf of members of APPELLANTS
Umunnam Kindred in Ogberuru, Orlu Judicial Division)

AND

OLE OKAFOR & 4 OTHERS

..... RESPONDENTS

APPEALS - Arguments in a brief - Must be based on issues arising and related to ground of appeal - Where not so - It is incompetent.

APPEALS - Concurrent findings of fact - Supreme Court will not interfere - to disturb concurrent findings of facts - Where there are no grounds for so doing.

APPEALS - Issue for determination - Should arise and relate to a ground of appeal.

EVIDENCE - Witnesses - Inconsistency - In previous statement of a witness - Can be put to the witness - For the purpose of testing his credibility.

EVIDENCE - Statement in previous proceedings - Whether the requirements of s. 119 E.A. - For admission of statement of a witness in previous proceedings - Were complied with.

EVIDENCE - Credibility of a witness s. 119 E.A. - Essential requirements of the section - When a party intends to impeach the credibility of a witness - With regard to statement in previous proceedings.

EVIDENCE - Admissibility - Statements made out of Court - By a party to the proceeding - Is admissible against that party.

EVIDENCE - Hearsay - Exhibit that was properly admitted - Whether appellants can complain it was hearsay.

EVIDENCE - Admissibility - Document properly rejected - Whether any

evidence could be led to prove same – Where the document was not pleaded.

STATUTES - *Evidence Act s. 46 - Whether properly applied in favour of respondents - In view of all the findings.*

FACTS

The case leading to this appeal which has had a chequered history, was instituted by the appellants as plaintiffs. The appellants claimed a declaration of title to the land in dispute, damages for trespass and injunction restraining the respondents, as defendants in the High Court of the then East Central State, Okigwe. During its course, this case which had once reached the Court of Appeal, Enugu Division, which ordered its retrial, was transferred to the High Court of Imo State, Orlu, at the creation of Imo State. The case was part heard by Uche, J., but was heard de novo and concluded by Johnson, J. At the trial before Johnson, J. both parties led evidence in support of their claims and defence respectively.

The respondents called for and tendered in their evidence the testimony of the 3rd appellant in the earlier part heard trial for being inconsistent with his testimony in the proceedings before Johnson, J. The respondents also tendered and relied on a book written by one of the appellants' witnesses. These were all admitted in evidence. Upon these and other evidence led, the trial judge at the conclusion of trial, dismissed appellants' claims. The appellants' appeal to the Court of Appeal, Port Harcourt Division, was dismissed. They have further appealed to the Supreme Court raising 7 issues. The Supreme Court adopted appellants' issues but first disposed of the preliminary issues raised by the respondents in their brief.

ISSUES FOR DETERMINATION:

"1. Whether the Court of Appeal was not wrong in upholding the decision of the High Court that Exhibit 'C' does not bind the defendants even in the face of the overwhelming evidence before the court.

2. Whether the Court of Appeal was right when it upheld the use by the High Court of Exhibit 'G' which is evidence in a previous proceeding to contradict the evidence of the 3rd Appellant and as such declare him an unreliable witness when it was not tendered to contradict him during cross-examination, but was only tendered and admitted through D.W.I at the opening of the defendants' case when the defendants have lost the opportunity to confront the 3rd appellant with the exhibit and cross examine him therewith. Etc, see p. 563

HELD (Unanimously dismissing the appeal per lead judgment of

OGWUEGBU JSC)***ISSUES for determination***

1. It is trite law that an issue for determination should arise and relate to a ground of appeal. An argument in a brief should also be based on an issue formulated from the ground of appeal. In paragraph 4.7 of the appellants' brief, the argument canvassed therein does not relate to any ground of appeal let alone to an issue formulated therefrom. The appellants did not raise any complaint against the Amala Arbitration or Exhibit "H". The trial court made specific and exhaustive findings of fact based on the pleadings and evidence on the Amala Arbitration and Exhibit "H". The court below upheld those findings. No ground of appeal questioned the findings. (p. 564 E)

Arguments in a brief

2. Arguments in a brief must be based on issues arising and related to the grounds of appeal. Where this is not so, such argument is incompetent and should be ignored. I agree with the learned respondents' counsel that the argument in paragraph 4.7 of the appellants' brief is not based on any issue for determination in the appeal. It is incompetent and the said paragraph is expunged from the appellants' brief. (p. 564 H)

Inconsistency - In previous statement of a witness

1. A previous inconsistent statement can be put to a witness in cross-examination for the purpose of testing his credibility. The statement is not admissible for the purpose of proving the truth of its contents. The fact that the statement was made and is inconsistent with the witnesses' testimony in the present proceedings is significant. (p. 569 F)

S. 199 Evidence Act complied with

4. After a careful consideration of the notes made by the learned trial judge before Exhibit "G" was admitted in evidence, I am satisfied that the attention of the 3rd plaintiff was specifically drawn to those parts of his evidence which were to be used for the purpose of contradicting him and he was reminded of what he said on that occasion. Those portions of his evidence were even read out to him. Counsel for the defendants brought up Exhibit "G" in cross-examination of the witness to discredit him and the learned trial judge did not make any illegitimate use of Exhibit "G". The words in section 199 of the Evidence Act are clear and were complied with by the learned trial judge. (p. 569 G)

Statement in previous proceedings

5. In my view, the essential requirements of section 199 are that where a party intends to impeach the credit of a witness by showing that what the witness has said in present proceedings contradicts his evidence in the previous proceedings, his attention must specifically be drawn to those parts of his evidence which are to be used for the purpose of contradicting him, he must be reminded of what he said on that previous occasion and he must also be given an opportunity of making an explanation. All these were complied with in the present proceedings and I agree with the court below that there is no provision in the said section of the law as to the exact time the statement should be tendered. However, the statement should be put in evidence by the defendant as part of their case either immediately or in the ordinary cause of the case. (p. 570 A)

Statements made out of the court

6. The learned trial judge and the court below rightly treated Exhibit “D” as an admission. The contents of exhibit “D” being statement made out of court by a party to the proceedings is admissible in evidence against that party and in this case, the appellant. Exhibit “D” is an admission which amounts to estoppel. The respondents had believed the statement contained therein to wit, that they are descendant of Ogberuru to be the true and had acted upon such belief. The appellants will not be allowed to deny the truth of the statement. Furthermore the admission made in Exhibit “D” was confirmed by P. W. 6 when he agree in answer to cross-examination that the defendants are descendants of Ogberuru and the learned appellants’ counsel made similar concession during his final address in the trial court. (p. 572 F)

Hearsay – Exhibit that was properly admitted

7. I agree with the court below that it is too late in the day for the appellants to complain that the statement of P.W. 8 which is contained in Exhibit “D” on their traditional history is hearsay. His evidence was weighed against that of D. W. 3 and the learned trial judge who saw, heard and watched them as they testified preferred the evidence of D. W. 3. I am of the same view with the court below that Exhibit “D” was properly admitted in evidence and the use made of it by the learned trial judge was legitimate. (p. 573 A)

Proper application of s.46 Evidence Act

8. In view of the above findings that the respondents live and own portions of land north and south of the land in dispute, I find it very difficult to

understand the complaint of the appellant's counsel that section 45 of the Evidence Act wrongly applied in favour of the defendants (respondent). It seems to me that section 45 (now 46) is most applicable to the portion of land verged pink in either Exhibit "A" or "B" which is the land in dispute in favour of the respondents. The courts below found that the defendants live and or own the lands north and south of the land in dispute. (p. 574 H) B

Document - Properly rejected

9. The court below rightly held that a deed of conveyance made in 1977 to ratify a grant made in 1922 was properly rejected and any other evidence to prove the alleged conveyance which was not pleaded went to no issue. (p. 575 E) C

Concurrent findings of fact

10. All these findings of fact were confirmed by the court below. I have myself considered and weighed carefully the whole evidence before the trial court. I am unable to find any error committed by the court of trial or the court of Appeal. The learned trial judge put the appellants' case in the imaginary scale and found it wanting. This court is most reluctant to disturb the concurrent findings of facts by the courts below more so when there are no grounds for such interference. (p. 577 A) D E

REPRESENTATION

D. O. Lijadu for the Appellants
Respondents absent and not represented

F

CASES REFERRED TO

Ndiwe v. Okocha (1992) 7 N.W.L.R. (Pt. 252) 12-9 at 139-140
Elukpo v. Federal Housing Authority (1991) 3 N. W.L.R. (Pt. 179) 322
Colonial Development Board v. Joseph Kamson (1955) 2 N.L.R. 75 G
Chukwuogor v. Obuora (1987) NSCC 1063 at 1073/74 ,
Chikwendu v. Mbamali (1980) 3 S.C. 31 at 53
Brown v. Dunn (1894) 6 R. 67 (H.L.)
Kumar v. Narayan (1923) A.L.R. 7
Ariku v. Ajiwogbo (1962) 1 All N.L.R. 629 H
Agu v. Atuagwu (1955) 21 N.L.R. 83 at 84 H
Okechukwu v. Okafor (1961) All N.L.R. 685
Mogaji v. Odojin (1978) 4 S.C. 91
Ogundairo v. Okanlawon (1963) All N.L.R. 358

Umesie v. Onuaguluchi (1995) 12 KLR2166

STATUTES REFERRED TO

Constitution of the Federal Republic of Nigeria, 1979, s. 258(2)

B Evidence Act, Cap. 112, LFN 1990, ss. 20, 26, 46, 58, 76, 132, 150 and 199.

BOOK REFERRED TO

“Traditional History of Ogberuru” by Mr. S. Power Ofor

C

LEAD JUDGMENT BY OGWUEGBU JSC

This case started about twenty three years ago. It started its journey in the Okigwe Judicial Division of the High Court of the former East Central State. The case was in 1975 transferred to the Orlu Judicial Division of the High Court of East Central State when that Judicial Division was created. The case passed through many Judges of that Judicial Division and at a stage got to the Court of Appeal, Enugu Judicial Division which ordered a retrial.

In the course of its history, Imo State was created and Orlu Judicial Division became one of the Judicial Divisions of the High Court of Imo State. The case was subsequently determined by Johnson J. on 27:6:85. The plaintiffs claims were dismissed. Their appeal to the Court of Appeal, Port Harcourt Division, also failed hence the further appeal to this court.

F In the Imo State High Court, Orlu Judicial Division, the plaintiffs who are appellants in this court claimed in a representative capacity on behalf of Umunnam kindred in Ogberuru against the defendants of Umuduruogu Umuegbe Ogberuru who are the respondents in this appeal.

They claimed as follows:-

1. A declaration of title to that piece of land known as and called “Ala Uzo Ulo Onumbara” situate at Umunnam, Ogberuru, Orlu.
- G 2. N100 (One hundred Naira) damages for trespass.
3. Injunction restraining the defendants, their servants and/or agents from further entering into the said land.

H The case was tried on pleadings filed and exchanged by both parties. The 3rd plaintiff and eight witnesses testified for the plaintiffs. The 1st defendant and three witnesses testified for the defendants. As stated earlier, the claims of the plaintiffs were dismissed by the learned trial Judge and their appeal to the court below failed.

In their appeal before us, the following seven issues are identified as arising for determination:-

"1. Whether the Court of Appeal was not wrong in upholding the decision of the High Court that Exhibit "C" does not bind the respondents even in the face of the overwhelming evidence before the court.

2. Whether the Court of Appeal was right when it upheld the use by the High Court of Exhibit "G" which is evidence in a previous proceeding to contradict the evidence of the 3rd appellant and as such declare him an unreliable witness when it was not tendered to contradict him during cross-examination, but was only tendered and admitted through D.W.1 at the opening of the defendants case when the defendants have lost the opportunity to confront the 3rd appellant with the exhibit and cross examine him therewith.

3. Whether the alleged contradictions are material enough to merit the great emphasis placed on them by the High Court and the Court of Appeal so as to have so much sway on the decisions of the courts against the appellants.

4. Whether the Court of Appeal was right when it upheld the High Court's decision that the fact that Exhibit "D" was written by a member of the appellant's family constitutes an admission of the contents therein by the appellants when evidence abound that the appellants refused to recognise the work and when the Author in fact confirmed their refusal to recognise the work. And as such whether Exhibit "D" could be relied upon as establishing the traditional history of Ogberuru.

5. Whether the Court of Appeal was right when it upheld the application of section 45 of the Evidence Act in favour of the respondents when in fact, no circumstances exist for the application of the section in defendants favour and whether the section ought not to have been applied in favour of the plaintiffs instead.

6. Whether the Court of Appeal should not have considered the issue of the grant of land to the Mission and whether a finding one way or the other on who really made the grant would not have helped the Court of Appeal to determine the actual owner of the land in dispute.

7. Whether the judgment is not against the weight of evidence."

The respondents in their brief of argument identified six issues for determination. They overlap with those formulated by the appellants and there is no need to reproduce them.

The plaintiffs/appellants case is that the land in dispute called "Uzo Ulo Onumbara" and verged pink in their survey plan Exhibit "A" belongs to them - the people of Umunnam. The defendants/respondents maintain that the land in dispute which they call "Ala Okpu Umuduruogu" and verged pink in Exhibit "B" descended to them by inheritance from their

original ancestor called Duruogu.

Before I proceed to consider the appeal, I would like to dispose of two preliminary issues raised in the respondents brief of argument. The first touches on ground two of the grounds of appeal filed by the appellants.

B They complained that the judgment of the court below is a nullity because it is not in conformity with the provisions of section 258(2) of the Constitution of the Federal Republic of Nigeria, 1979. No issue was formulated on the said ground of appeal and no argument was advanced in support of it. The said ground of appeal must be deemed to have been abandoned and it is hereby struck out.

C The second refers to paragraph 4.7 at pages 21-22 of the appellants brief headed "*The Amala Arbitration - Exhibit 'H' Was Not Proved.*" The learned respondents counsel has urged us to strike out the argument in paragraph 4.7 because the learned Judge and the court below made specific finding of fact that the Amala Arbitration pleaded by both parties was proved. Learned respondents counsel submitted that no ground of appeal was raised on Exhibit "H" and no issue for determination was raised on it in this appeal. He urged us to expunge the appellants' submission on it because it cannot be covered by the omnibus ground. He cited the case of *Ndiwe v. Okocha* (1992) 7 NWLR (Pt.252) 129 at 139-140 and *Elukpo & Sons Ltd. v. Federal Housing Authority* (1991) 3 NWLR (Pt.179) 322 at 337.

F It is trite law that an issue for determination should arise and relate to a ground of appeal. An argument in a brief should also be based on an issue formulated from the ground of appeal. In paragraph 4.7 of the appellants' brief, the argument canvassed therein does not relate to any ground of appeal let alone to an issue formulated therefrom. The appellants did not raise any complaint against the Amala Arbitration or Exhibit "H". The trial court made specific and exhaustive findings of fact based on the pleadings and evidence on the Amala Arbitration and Exhibit "H". The court below upheld those findings. No ground of appeal questioned the findings.

G There are specific complaints against other exhibits such as Exhibits "C", "D" and "G" in grounds 3B, 4 and 7 of the grounds of appeal and issues arising in the appeal are formulated from them. This is not the case with Exhibit "H". Since there is no complaint against the findings on the arbitration and Exhibit "H", no argument can be raised on them.

H Arguments in a brief must be based on issues arising and related to the grounds of appeal. Where this is not so, such argument is incompetent and should be ignored. I agree with the learned respondents counsel that the argument in paragraph 4.7 of the appellants brief is not based on any

issue for determination in the appeal. It is incompetent and the said paragraph is expunged from the appellants brief.

I now turn to the issues for determination in the appeal. In the first issue it is contended by the appellants counsel that the court below was wrong in upholding the decision of the trial court that Exhibit "C" does not bind the respondents in the face of the overwhelming evidence before the court. B

Exhibit "C" was tendered by the appellants. Counsel maintained that it is the result of an arbitration by Barrister Obioha when P.W.7 (Uba Unigwe) representing Umunnam Ogberuru kindred sued Okereke Emerole (2nd defendant) in the Native Court in Suit No. 70/61 and the case was later withdrawn. The preamble to Exhibit B "C" reads:- C

"This Agreement made the day of 21st September, 1964 BETWEEN Uba Unigwe of Umunnam, for himself and on behalf of his family AND Okereke Emerole (sic) of Umuegbe for himself and as representing his entire family all of Ogberuru in Orlu Division." D

Exhibit "C" was thumbprinted by Uba Unigwe and Okereke Emerole and witnessed by Eze Nnadozie, I.Nhakanya and Nwokeji Ikpo. It is the contention of the learned appellants counsel that the wording of the above preamble expressed the fact that the parties therein entered into the agreement as representatives of their respective families. E

He further stated that by the provision of Section 131 of the Evidence Act, it is totally improper for the learned trial Judge and the Court of Appeal to have gone outside the clear wording of Exhibit "C" to rely on extraneous evidence for the purpose of construing it. We were referred to the case of Colonial Development Board v. Joseph Kamson (1955) 2 NLR F 75 and Section 75 of the Evidence Act. He criticised the inferences drawn by the court below from the cross-examination of the P.W.7 in supporting the findings made by the learned trial Judge that Exhibit "C" did not operate as estoppel against the respondents.

Counsel maintained that there is abundant evidence on the record to show that the 2nd defendant (now deceased) was a very important member of the respondents family and that his acts bind the respondents. It was also contended that the respondents acknowledged the capacity of Okereke Emerole to make grant of their land to Uba Unigwe and also the capacity of Uba Unigwe to receive the land on behalf of the people of Umunnam. H

The learned respondents counsel submitted that the findings of fact made by the learned trial Judge on Exhibit "C" and upheld by the court below should not be disturbed by this court unless they are "tainted with miscarriage of justice" or are based on inadmissible evidence. He cited the

cases of *Adeleke v. Aserifa* (1990) 5 SCNJ 104 at 108; (1990) 3 NWLR (Pt.136) 94. *Chukwuogor v. Obuora* (1987) NSCC 1063 at 1073/74; (1987) 3 NWLR (Pt.61) 454 and *Chikwendu v. Mbamali* (1980) 3 S.C. 31 at 53.

B He further submitted that the appellants claim that they are in possession of any portion of the land in dispute was rejected both by the trial court and the court below and contrary to their claim, Exhibit "C" does not give them possession of the land in dispute or any land at all. We were urged to reject Exhibit "C" as a worthless evidence in relation to the present proceedings and that it is a personal agreement between P.W.7 and the deceased 2nd defendant.

C On Exhibit "C", the learned trial Judge found as follows:-

"As regards item 11 I am convinced that the dispute in Exhibit "C" was personal between P.W.7 Uban Unigwe and the deceased 2nd defendant Okereke Emerole and the result therefore was not binding on the defendants. Similarly, the plaintiffs cannot claim any benefit or advantage D from the proceedings in Exhibit "C" because P.W.7 Uba Unigwe did not enter into the dispute as a representative of the plaintiffs' Umunnam people but in his (P.W.7's) private capacity....."

There is nothing to establish that (sic) fact that Obioha arbitration was indeed true. Since Obioha is dead, yet the plaintiff failed to call the E chairman of the Obioha arbitration one Michael Ohabuchi to give evidence, and no reason was given for his non-appearance."

The Court of Appeal while dealing with Exhibit "C" considered the answers given by P.W.7 to cross-examination by the learned defendants counsel in the trial court. P.W.7 admitted under cross-examination that in F the Native Court Suit No. 70/64, he claimed the land as his own while Okereke Emerole also claimed it as his own. The court below then held:-

"From the above, even though Exhibit "C" began by stating:

"THIS AGREEMENT made..... BETWEEN Uba Unigwe of Umunnam, for himself and on behalf of his family AND Okereke Emerole G of Umuegbe for himself and as representing his entire family "

The evidence coming from the horse's (P.W.7's) mouth as it did that 2nd appellant was claiming the land in dispute as his own (he was equivocal as to whether he claimed it as his own or on behalf of his Umunnam community) the learned trial Judge was right, in my view after evaluating the evidence before him, to arrive at the conclusion he did when he said at H page 370, lines 12 - 22 thus:

"....." I cannot but agree with these findings on the facts. True, it is that both P.W.7 and

the 2nd appellant are/were important members of the appellants and respondents communities, but in the light of what I have found above, I do not agree with the learned Senior Advocate that all the respondents and appellants should be regarded as parties and afortiori, privies to Exhibit "C".

It has not been shown by the learned appellants counsel that these concurrent findings of fact are perverse.

In this case, the learned trial Judge found that the alleged arbitration by Barrister Obioha was not true.

Furthermore, the learned trial Judge and the court below rejected the assertion by the appellants that they are in possession of any portion of the land in dispute. The court of trial found that the appellants failed to prove any act of ownership and possession over the disputed land and that the allegation by the plaintiffs that the land was partitioned in 1964 into two equal parts as stated in Exhibit "C" was not established. The learned trial Judge also found that the appellants did not plead their root of title and did not even allege that the land was communal property of Umunnam people before they came to sue in a representative capacity. The court below also accepted the above findings.

If the appellants did not prove any acts of ownership and possession of the land in dispute as found by the courts below, Exhibit "C" which purports to share the land into two equal parts between the two parties by way of concession by the appellants cannot be true and would have been procured for the purpose of this case. Such acts of ownership or possession if proved could have formed the basis of Exhibit "C" but they were not proved. Sections 76, 132 and 150 of the Evidence Act, Laws of the Federation of Nigeria, 1990 do not apply having regard to the facts found by the courts below.

As regards the use made by the High Court of Exhibit "G" and upheld by the Court of Appeal, it was submitted on behalf of the appellants that Section 198 of the Evidence Act made ample provisions regulating the use of, the procedure and the condition upon which evidence or statement of a witness in a previous proceedings may be used to contradict him. It was his contention that enough foundation was not laid for the admissibility of the evidence of the 3rd plaintiff in the previous proceedings - (Exhibit "G") and that it was admitted in evidence at the opening of the case for the defendants and after the close of the case for the plaintiffs and long after the 3rd plaintiff had given evidence. Counsel stated that Exhibit "G" is a piece of inadmissible evidence and that it was a record in a part-heard matter before another Judge. He referred the court to the cases of

Brown v. Dunn (1894) 6 R. 67 (H.L.); Naba Kumar v. R. Narayan (1923) A.L.R. 7; Ariku & Or. v. Ajiwogbo (1962) 1 All NLR 630; (1962) 2 SCNLR 369; Alade v. Aborishade (1960) 5 FSC 167 at 171; (1960) SCNLR 398 and Ogunnaike v. Ojayemi (1987) 1 NWLR (Pt.53) 760.

This case was part-heard by Uche, J. of the blessed memory. The 3rd plaintiff testified before him as PW.1. When the case was heard de novo by Johnson, J., the 3rd plaintiff also testified. It is his evidence before Uche, J. that was admitted in evidence as Exhibit "G".

Mr. Ogbuli for the respondents submitted that at the trial before Johnson, J. It became necessary for the defendants to cross-examine the 3rd plaintiff on the statements he had earlier made on oath before Uche, J. which contradicted the evidence he was giving before Johnson, J. and that the 3rd plaintiff was reminded of what he said before Uche, J. which he denied before the defendants tendered a certified true copy of the evidence for the purpose of discrediting him. He further submitted that the learned trial Judge complied strictly with the provisions of section 198 of the Evidence Act before Exhibit "G" was tendered and admitted in evidence.

In reply to the submission that Exhibit "G" was tendered after the plaintiffs had closed their case and at the defence stage, he submitted that Section 198 of the Evidence Act did not provide for the time when Exhibit "G" is to be proved and tendered. He cited the cases of Agu v. Atuagwu (1955) 21 NLR 83 at 84; Alade v. Aborishade supra; Mozie v. Mbebie & Or. (1966) NMLR 167 at 168; Ogunnaike v. Ojayemi supra; Sonekan v. Smith (1964) 1 All NLR 168 and Romaine v. Romaine (1992) 4 NWLR (Pt.238) 650 at 669.

The complaint on Exhibit "G" is that the provisions of Section 198 of the Evidence Act was not strictly followed by the learned trial Judge before it was received in evidence. Section 198 of the Evidence Act now Section 199 of the Evidence Act Cap. 112 Laws of the Federation of Nigeria, 1990 provides:-

"A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question in the suit or proceeding in which he is cross-examined without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

The 3rd plaintiff was asked under cross-examination whether he gave evidence in court on a particular day before late A. K. Uche, J. He agreed that he did and was further asked whether in that earlier evidence he had agreed that the defendants were living on the land in their hundreds.

The 3rd plaintiff replied that he could not remember having said so. At that stage, learned respondents counsel applied to tender the certified true copy of the earlier proceedings to contradict the witness. The learned trial Judge advised counsel to complete the cross-examination of the witness so as to lay enough foundation.

As the cross-examination continued, the following notes were made by the learned trial Judge:-

"Put: Listen to your evidence on 15:2:83 (15th February, 1983). When you said that the Chiefs and elders of Ogberuru looked into the case but did not reach any decision.

Ans. No, I did not say so."

Exhibit "G" was subsequently tendered by D.W.1 (Rev. E. E. Onwochei), the Assistant Chief Registrar of the High Court and it was admitted in evidence as Exhibit "G".

The learned trial Judge had this to say about the 3rd plaintiff:

"In cross-examination, 3rd plaintiff Michael Okereke denied most of the statement he had earlier made in the previous proceedings touching on fundamental issues in this dispute hence the need arose to contradict him by tendering copy of his previous statement."

On the evidence of the 3rd plaintiff the learned trial Judge said:-

"There are numerous contradictions in the evidence of the 3rd plaintiff Michael Okereke which make him an unreliable witness. I do not intend to go into the details at this stage."

The court below held that Exhibit "G" was used only to impugn the testimony of the 3rd plaintiff, that it is immaterial when it was tendered and that the learned trial Judge rightly used the exhibit to cast doubt on the credibility of the 3rd plaintiff.

A previous inconsistent statement can be put to a witness in cross-examination for the purpose of testing his credibility. The statement is not admissible for the purpose of proving the truth of its contents. The fact that the statement was made and is inconsistent with the witnesses testimony in the present proceeding is significant. After a careful consideration of the notes made by the learned trial Judge before Exhibit "G" was admitted in evidence, I am satisfied that the attention of the 3rd plaintiff was specifically drawn to those parts of his evidence which were to be used for the purpose of contradicting him and he was reminded of what he said on that occasion. Those portions of his evidence were even read out to him.

Counsel for the defendants brought up Exhibit "G" in cross-examination of the witness to discredit him and the learned trial Judge did not make any illegitimate use of Exhibit "G". See

Alade v. Aborishade supra; Agu v. Atuagwu supra; Ogunnaike v. Ojayemi supra; and Ariku & Or. v. Ajiwogbo supra. The words in section 199 of the Evidence Act are clear and were complied with by the learned trial Judge.

In my view, the essential requirements of section 199 are that where a party intends to impeach the credit of a witness by showing that what that witness has said in the present proceedings contradicts his evidence in the previous proceedings, his attention must specifically be drawn to those parts of his evidence which are to be used for the purpose of contradicting him, he must be reminded of what he said on that previous occasion and he must also be given an opportunity of making an explanation. All these were complied with in the present proceedings and I agree with the court below that there is no provision in the said section of the law as to the exact time the statement should be tendered. However, the statement should be put in evidence by the defendants as part of their case either immediately or in the ordinary cause of the case. See *Maurice Cameron v. Anderson* (1930) 21 Cr. Ap.R 178 at 181.

The learned trial Judge found that there are numerous contradictions in the evidence of 3rd plaintiff Michael Okereke which rendered his evidence unreliable. He proceeded to enumerate the various contradictions. Some showed that the evidence of the 3rd plaintiff in the present proceedings are at variance with the pleadings or not pleaded at all. Others showed that the evidence in the previous proceedings contradicted the 'evidence in the present proceedings. In the light of my conclusions above, issues two and three are answered in the positive.

Issue four is whether the court below was right when it upheld the finding of the learned trial Judge that Exhibit "D" written by a member of the appellants' family is an admission of its contents by the appellants when there is abundant evidence of the appellants' refusal to recognise the work.

Learned counsel appearing for the appellants submitted in his brief that Exhibit "D" is not such a book or manuscript contemplated by Section 58 of the Evidence Act. He referred to the cases of *Adeseye v. Taiwo* (1956) 14 WACA 84; (1956) SCNLR 265 and *Idundun & Ors. v. Okumagba* (1976) 9-10 S.C. 227. He further submitted that the appellants denied that the book was ever recognised by them as the traditional history of Ogberuru and so it is not binding on them and that the author of Exhibit "D" who testified as P.W.8 also stated that the book was not accepted by his people.

The learned trial Judge disbelieved the testimony of P.W.8. It was submitted that he did not give any reasons for doing so, that P.W.8 was not shown to be a person having special knowledge of the native law and custom of Ogberuru and that the contents of Exhibit "D" should have been

disregarded by the court below since the source of information of the informants of P.W.8 were not ascertained.

It was contended that if the learned trial Judge had not used the contents of Exhibit “D” to discredit the appellants and held it to have constituted an admission by them and had considered the traditional history of the appellants with evidence of recent history of the land, he would have found for them. B

The learned respondents’ counsel reminded the court that one of the live issues before the learned trial Judge was: “Whether the defendants were strangers or non-indigenous members of Ogberuru clan.” He referred to paragraphs 5a, 6, 6a, 7 and 8 of the statement of claim where the appellants averred that the respondents’ ancestor, Egbe was a stranger from Amaifeke who received no share of Ogberuru’s land but was given a portion of land by the appellants’ ancestor after Ogberuru’s lands had been shared. C

Counsel referred to paragraph 17 of the statement of defence where the defendants pleaded thus:- D

“17. The defendants say that all the traditional history of Ogberuru, the customary ethnic grouping and other matters posited by the plaintiffs are in direct conflict with the “Traditional History of Ogberuru” as written in a book by a prominent Umunnam (plaintiffs) son. This book was written by a Mr. S. Power Ofor upon information supplied by five other prominent members of the plaintiffs’ family. The defendants will rely on the relevant admissions made by the plaintiffs in the said book.” E

Learned counsel submitted that this admission in Exhibit “D” contradicted the pleadings of the plaintiffs that the defendants ancestor was a stranger in Ogberuru and that it was tendered through P.W.8 without objection. It was further submitted that when D.W.3 (Igwebe Mkpo) testified that he and five others of the plaintiffs family supplied P.W.8 with the information with which he produced Exhibit “D” and that it was untrue that Ogberuru people rejected the book, not even one question was put to him in cross-examination to dispute these facts. F G

The court was urged to hold that Exhibit “D” was properly admitted in evidence as admission by the appellants concerning one of the matters in dispute within sections 19, 20 and 150 of the Evidence Act and that Exhibit “D” supports the respondents’ case that they are the descendants of Ogberuru and not strangers as pleaded by the appellants. H

The court was referred to page 382 lines 15-23 and page 386 lines 10-23 of the record of appeal. It was submitted that Exhibit “D” was not tendered under section 58 of the Evidence Act to prove the native law and

572 Madumere v. Okafor (1996) 4 KLR Ogwuegbu JSC
custom of Ogberuru because no native law and custom was pleaded by the appellants and having admitted in Exhibit "D" that the respondents are descendants of Ogberuru, the appellants are estopped from proving that the respondents are strangers. We were referred to sections 20, 26 and 150 of the Evidence Act.

Counsel further stated that the learned counsel for the appellants in his final address in the trial court conceded the fact that both parties are descendants of Ogberuru from one ancestor.

Exhibit "D" is contained at pages 382 to 419 of the record of appeal. At page 382 lines 15-23, P.W.8 recorded thus:-

"ACKNOWLEDGEMENTS

C *I am grateful to the following for supplying me with all necessary information about the Historical past of Ogberuru, on mytology , customs and traditions, namely David Ndubuisi Okaform (sic) Igwegbe Mgbo, Idii Omokwe, Ezike Dike. On the history of the Churches by Okorie Nwokike, Benjamin Ezike (Alias Dimkpanawu) Johnson Ebonine and Peter Nwosu. D And to Samuel Oguekusi, for having devoted his time to read over the manuscript."*

At page 386 lines 10-23 P.W.8 wrote:-

E *"After the death of Ochasi, Ogberoru being the first son of the father occupied the father's "Isi Obi" and had nine children which represents (sic) the nine villages of Ogberuru namely, Ubalia" Eziam, Azala, Enwerem, Nnam, Elele, Nnem, Isiakpu, Egbeand (Amuji)."*

The appellants did not plead any native law and custom in paragraphs 5(a), 6, 6(a), 7 and 8 of their amended statement of claim and the respondents did not also plead any native law and custom in paragraph 17 of their statement of defence. Section 58 now section 59 of the Evidence F Act, Laws of the Federation of Nigeria, 1990 has no application to Exhibit "D". If the parties had pleaded native law and custom and Exhibit "D" is tendered to prove it, section 59 of the Evidence Act would have been relevant.

The learned trial Judge and the court below rightly treated Exhibit G "D" as an admission. The contents of Exhibit "D" being statements made out of court by a party to the proceedings is admissible in evidence against that party and in this case, the appellants. Exhibit "D" is an admission which amounts to estoppel. The respondents had believed that the statement contained therein to wit, that they are descendants of Ogberuru to be H true and had acted upon such belief. The appellants will not be allowed to deny the truth of that statement.

Furthermore, the admission made in Exhibit "D" was confirmed by P.W.6 when he agreed in answer to cross-examination that the defendants are descendants of Ogberuru and the learned appellants counsel made

similar concession during his final address in the trial court.

I agree with the court below that it is too late in the day for the appellants to complain that the statement of P.W.8 which is contained in Exhibit “D” on their traditional history is hearsay. His evidence was weighed against that of D.W.3 and the learned trial Judge who saw, heard and watched them as they testified preferred the evidence of D.W.3. I am of the same view with the court below that Exhibit “D” was properly admitted in evidence and the use made of it by the learned trial Judge was legitimate. B

The learned appellants counsel submitted that the Court of Appeal, was wrong to have upheld the application of section 45 of the Evidence Act by the learned trial Judge in aid of the respondents. He contended that from the record of appeal it is clear that the land north of the land in dispute was given to the respondents by the appellants forefathers and that the court below found that to be so. C

It was further submitted that it was only the appellants that gave evidence relating to the ownership of the land immediately south of the land in dispute, pleaded grant of land to the church and called witnesses to testify as to this grant when the respondents called no witness to testify as to their claim to the grant of the land to the same church. D

Counsel concluded that section 45 of the Evidence Act was wrongfully applied in favour of the respondents instead of the appellants because the land north of the land in dispute was given to the respondents by the appellants and the land south of it is owned by the appellants. He cited the case of Okechukwu v. Okafor (1961) All NLR 685; (1961) 2 SCNLR 369. E

On the issue of grant of land to St. Peter’s C.M.S. Church, it was the contention of the appellants counsel that the appellants boundary men to the West, East and South of Ala Uzo Ulo Onumbara testified that the land belongs to the appellants, that they have been sharing common boundaries with the appellants and that they had not been seeing the respondents on the land. F

It was argued that since the only boundary man called by the respondents is D.W.3, whose evidence was expunged by the court below, the trial court should have considered the evidence of P.W.6 - the church warden who testified that it was the appellants who gave the land south of the one in dispute to the church in 1922. Since the land immediately south of the land in dispute belongs to the appellants, the trial Judge should have applied section 45 of the Evidence Act in favour of the appellants, he argued. G H

Mr. Ogbuli for the respondents submitted in his brief that the land south of the pink area in both Exhibits “A” and “B” is in issue from the pleadings and evidence before the trial court. He contended that on this

issue the 1st defendant and D.W.3 testified and at the end, the learned trial Judge found that the plaintiffs/appellants had neither ownership nor possession of the land they are claiming.

On whether the area north of the land in dispute where the respondents live and farm came to them by grant from the appellants ancestors, respondents counsel submitted that the learned trial Judge found that the respondents did not prove any grant or payment of tribute and that the respondents are indigenes of Ogberuru. He further submitted that the trial Judge also found that the land south of the land in dispute belongs to the respondents and accordingly applied the provision of Section 45 of the Evidence Act. Counsel referred to that part of the judgment of the court below dealing with the application of Section 45 of the Evidence Act and that court came to the same conclusion as the trial court.

The area verged pink in Exhibits "A" and "B" is the land in dispute in this case. The question is whether the Court of Appeal was right when it upheld the application of the provisions of Section 45 of the Evidence Act to the case.

The learned trial Judge found as a fact that the respondents are indigenes of Ogberuru and therefore descendants of Ogberuru. He also found that the defendants live north of the land in dispute and also own the land south of the land in dispute hence the application of Section 45 of the Evidence Act.

On the application of Section 45 by the learned trial Judge, the Court of Appeal said in part:-

"Secondly, there is no dispute that the respondents live in good number on the land immediately north of and adjoining the land in dispute....."

Thirdly, there is abundant evidence that the respondents ancestors occupied the land immediately south of the land in dispute....."

The features described above are shown on Exhibit "B" whereas they are not depicted on exhibit "A""

It is little surprise then that the learned trial Judge after a dispassionate evaluation of the evidence adduced held, quite unassailably, in my view, at pages 372-375 as follows:-

I find the following as sufficient acts of ownership and possession by the defendants.....

Evidence which is admitted by the plaintiffs that the defendants live north of the land in dispute and own also south of the land in dispute. I consider this a good case in which Section 45 of the Evidence Act ought to be applied in favour of the defendants. See *Okechukwu v. Okafor (1961) (Pt.4) All NLR 685*.

In view of all the above findings that the respondents live and own

portions of land north and south of the land in dispute, I find it very difficult to understand the complaint of the appellants counsel that Section 45 of the Evidence Act was wrongly applied in favour of the defendants (respondents).

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

“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 the 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. “

It seems to me that Section 45 now (46) is most applicable to the portion of land verged pink in either Exhibits” A” or “B” which is the land in dispute in favour of the respondents. See Okechukwu & Ors. v. Okafor & Ors. (1961) 2 SCNLR 369; (1961) 1 All NLR 715(Reprint). The courts below found that the defendants live and/or own the lands north and south of the land in dispute.

It was argued that the grant of adjoining land to the C.M.S. Mission by the appellants would have attracted the application of Section 46 of the Evidence Act in their favour since the respondents led no evidence in respect of the grant and that the evidence of PW.6 (the Church warden) remained unchallenged.

The court below rightly held that a deed of conveyance made in 1977 to ratify a grant made in 1922 was properly rejected and any other evidence to prove the alleged conveyance which was not pleaded went to no issue.

The learned trial Judge in my view fully considered the totality of the evidence adduced before determining which had weight and which had no weight at all. He found that none of the following acts alleged by the appellants was proved:-

“1. Alleged sale of timber by the plaintiffs in the land to PW.4 Ihitteowerre man Clement Eze was contradicted by PW.8 who issued receipts for the alleged sale. Consequently, this sale was not proved.

2. No Ihioma man was called by plaintiffs to support their story that they gave Ihioma man part of the land.

3. Dr. Uzoma was not called by plaintiffs to support that plaintiffs gave him any land.

4. No Awka man was called by plaintiffs to support the alleged sale of their timber to an Awka man.

5. PW.5 Dominic Amaechi a professional palm fruits cutter could not state when last he cut palm fruits for the plaintiffs on the land. He has

been cutting palm fruits since 60 years ago. The allegation by plaintiffs that the land was partitioned in 1964 into two equal parts was not established. The plaintiffs houses are not on the land; they do not farm on it and they do not make use of the land."

On the other hand, he found the following as sufficient acts of ownership and possession exercised by the respondents:-

B *"1. That the defendants and their family members are living on the land e.g. Okereke Emerole and his family and Frank Okafor to the exclusion of the plaintiffs and admitted by the plaintiffs, who live somewhere.*

C *2. That the defendants keep in their custody the traditional "Uhie ozo gong" and their exclusive right to initiate proceedings for anybody in Ogerburu who applies for an Ozo title.*

3. That in 1973, the defendants uprooted yams planted inside the land by one Raphael Udungwo and no action was taken by the plaintiffs.

D *4. The ruins of old houses of the defendants on the land as (sic) shown in their plan Exhibit "B".*

5. The defendants bury their dead on the land.

6. The defendants juju shrines (sic) on the land.

E *7. The defendants farming activities on the land e.g. in 1973 the defendants farms were on the land which were destroyed by plaintiffs which led to the charge in Exhibit "J" as confirmed by the Amalas during their visit to the land in the course of the arbitration.*

8. The defendants successfully cancelled the sale of part of the land by P.W.7 Uba Unigwe from plaintiffs family and chased Dr. Uzoma the alleged purchaser.

F *9. Evidence that defendants cut and cart away timber from the land.*

10. That the body of P.W.7's mother was buried in the land owned by defendants.

G *11. Evidence which is submitted by the plaintiffs that defendants live north of the land in dispute and own also south of the land close to the land in dispute."*

The learned trial Judge went on:-

"1. The question at this stage is have the plaintiffs proved their claim?

H *The answer is emphatically No..... In this case, the plaintiffs have failed to prove their root of title to the land the ownership of which he (sic) claims (sic). In this case, the plaintiffs have failed to prove their root of title to the Uzo Ulo Onumbara land they are claiming.....No where in their pleadings was it averred "the origin of the land in dispute and how*

it has passed to them (plaintiffs),.....” Their root of title was never pleaded

Their traditional history is very weak and unreliable.

All these findings of fact were confirmed by the court below. I have myself considered and weighed carefully the whole evidence before the trial court. I am unable to find any error committed by the court of trial or the Court of Appeal. The learned trial Judge put the appellants’ case in the imaginary scale and found it wanting. See *Mogaji v. Odojin & Ors.* (1978) 4 S.C. 91. B

This court is most reluctant to disturb the concurrent findings of facts by the courts below moreso when there are no grounds for such interference. This appeal therefore fails and is hereby dismissed with N1,000.00 costs in favour of the respondents. C

WALI JSC

I have had the privilege of reading the draft judgment of my learned brother Ogwuegbu, J.S.C. and I am in full agreement with the views expressed therein, both on matters of law and fact. And for those views ably expressed which I hereby endorse, I also hereby dismiss the appeal. D

The judgment by the lower court and the court below are hereby affirmed with N1,000.00 costs in favour of the respondents against the appellants. E

KUTIGI JSC

I read before now the judgment just delivered by my learned brother Ogwuegbu, JSC. I agree with him that the appellants failed to prove any error committed by the lower courts in their concurrent findings in favour of the respondents. The appeal therefore fails and it is accordingly dismissed with N1,000.00 costs in favour of the respondents. F

ADIO JSC

I have had the opportunity of reading, in draft, the judgment just read by my learned brother, Ogwuegbu, J.S.C., and I agree that the appeal failed and should be dismissed. I too dismiss it and abide by the order for costs. G

I, however, wish to make some comments. My learned brother has, in the lead judgment, fully set out the facts of this case and it is not really necessary for me to repeat them. The appellants’ claim was for a declaration of title to the land in dispute, damages for trespass, and injunction H

restraining the respondents, their servants and/or agents from further entering into the land in dispute. Somehow, the case had to be heard *de novo* in that there had been earlier proceedings before another Judge which, for certain reasons, could not be completed. The 3rd appellant gave evidence in the earlier proceedings. As his testimony, on the same points, in the present case was different or inconsistent with his testimony in the earlier proceedings, the learned counsel for the respondents, relying on the provisions of Section 198 of the Evidence Act, drew the attention of the 3rd appellant to the relevant portions of the record of proceedings of the earlier part-heard trial to show that his evidence in this case was unreliable. The aforesaid record of proceedings of the earlier part-heard trial was Exhibit "G" and one of the complaints was that the provisions of Section 198 of the Evidence Act were not complied with before it was admitted in evidence. In particular, the argument was that Exhibits "G" was not tendered at the appropriate stage, it was tendered by or through D.W.1.

I have carefully read the record of proceedings, and the relevant portions of Exhibits "G" to which the attention of the 3rd plaintiff was drawn during the proceedings in the present case. The learned trial Judge made a proper use of the result of the exercise and the court below properly upheld the aforesaid use of the result or the effect of the exercise. The complaint that Exhibits "G" was not tendered at a particular stage was, at best, a mere technicality because the relevant portions of the record (Exhibits "G") were already on the record of the present case. The learned trial Judge had made use of them for the determination of the question whether the evidence given in this case by the 3rd appellant was reliable and he had drawn the necessary inference, that is, that the 3rd appellant was not a reliable person and very little or no weight should be attached to his evidence.

The appellants made some averments in their pleading, in relation to certain alleged acts of possession or of ownership exercised by them but failed to prove them. Above all, the appellants never pleaded their root of title and generally the evidence led by them on the traditional history was very weak. Where that is the case, the law is that the plaintiff's case should be dismissed because it had not been proved. The situation is the same where the defendants is able to discredit by evidence, oral or documentary, the evidence of the plaintiff. That was one of the ways in which the respondents successfully resisted the appellants' case. See *Ogundairo v. Okanlawon & Ors.* (1963) All NLR 358; (1963) 2 SCNLR 328 of 2/12/63 and *Umezio v. Onuaguluchi* (1995) 9 NWLR (Pt.421) 515. The respondents pleaded and proved their several acts of possession or of ownership in relation to the land in dispute.

It was for the foregoing reasons and the detailed reasons given by

my learned brother, Ogwuegbu, J.S.C., in the lead judgment that I agreed that this appeal failed. I too dismiss it and abide by the order for costs.

IGUH JSC

I have read in advance the lead judgment just delivered by my learned B
brother, Ogwuegbu, J.S.C. and I am in complete agreement with his rea-
soning and conclusion.

The appeal is devoid of substance and I, too, dismiss it. I abide by
the order for costs contained in the judgment.

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