

SUPREME COURT OF NIGERIA
TUESDAY 7TH MAY, 1996. SC. 71/1990
CORAM:- A. B. WALI, I. L. KUTIGI, M. E. OGUNDARE,
E. O. OGWUEGBU, A. I. IGUH, JJSC

1. CHIEF G. O. OBATOYINBO
2. RAIMI IDIRISU APPELLANTS

AND

1. EMMANUEL TOBOLA OSHATOBA
2. OTO BABALOLA RESPONDENTS

APPEALS - *Grounds of Appeal - Where leave was not obtained - Grounds of fact or mixed law and fact - Will be struck out for being incompetent.*

APPEALS - *Grounds of appeal - That did not arise from lower court's decision appealed against - Whether competent.*

APPEALS - *Grounds of appeal - That went far beyond the issues decided by into lower court - Are not competent,*

APPEALS - *Grounds of appeal - Court of Appeal's finding that certain grounds - Were of fact or mixed law and fact - Whether proper.*

FACTS

Before an Upper Area Court in Kwara State, plaintiffs'/appellants' claim for a declaration of title to a piece of land and injunction, only succeeded in part in respect of title. Both parties appealed to the High Court which allowed the defendants' main appeal and dismissed the plaintiffs' cross appeal.

Plaintiffs appealed to the Court of Appeal which found that most of their grounds of appeal being of fact or mixed law and fact, were incompetent as no leave was obtained. Those grounds were struck out. Plaintiffs have further appealed to the Supreme Court on nine grounds of appeal. Preliminary objection raised against all the grounds were successful in respect of eight of them thereby leaving plaintiff with only one ground and one issue.

ISSUE FOR DETERMINATION

"Are grounds 1, 2, 5 and 6 before the Court of Appeal, grounds of law or of fact or of mixed law and fact?"

HELD (Unanimously dismissing the appeal per Lead Judgment of **OGUNDARE JSC**)

Where leave was not obtained

1. The conclusion I reach is that Grounds (2) and (3) are grounds of fact or, at best grounds of mixed law and fact. It is not in dispute that the Plaintiffs did not seek nor obtain leave to appeal on these two grounds. That being so, the grounds are incompetent and are hereby struck out by me. Ground (1) is competent and it is accordingly sustained. (p. 870 A)

Grounds that did not arise from lower court's decision

2. There can be no doubt that groups 4, 5, 8 and 9 raise the same complaints as raised in grounds 1, 2, 5 and 6 struck out by the Court below when the appeal was before them. For obvious reasons the issues raised in the latter set of grounds of appeal could not have been decided by the Court of Appeal. Consequently grounds 4, 5, 8 and 9 could not have arisen from that Court's judgment against which there is the present appeal to this Court. As grounds of appeal, to be competent, must arise from the judgment appealed against, it follows that grounds 4, 5, 8 and 9 are incompetent and are accordingly struck out by me. (p. 870 B)

Grounds that went far beyond the issues

3. Had the two grounds been confined to questioning the decision of the Court below on the two issues on which it made findings, they would have been competent. But the grounds went far beyond those issues and in the Appellants' Brief the issues formulated do not embrace any of these two issues. Consequently I am left with no choice but to agree with the Defendants that these two grounds, too, are incompetent and should be struck out. I must mention that the appellants have not sought nor obtained the leave of this Court to raise new issues not raised in the court below. In sum, The preliminary objection succeeds in relation to all the grounds of appeal. (p. 871 B)

Findings that certain grounds were of fact

4. Bearing in the mind the principle enunciated in the various cases earlier considered in the this Judgment on when a when a ground is one of law, mixed law and fact or of facts simpliciter and after perusing the grounds herein under consideration I have come to the conclusion that the Court below was right to strike them out. They are in no way grounds of law but rather of mixed law and fact or of fact only. This conclusion disposes of the only question left to be considered in this appeal. And that question having failed it follows that the appeal itself fails. (p. 872 D)

NOTABLE POINT OF INTEREST

OGUNDARE JSC

1. Right of appeal - When leave must be obtained

Section 213(2)(a) of the 1979 Constitution confers a right of appeal as of right where the grounds of appeal, that is, the complaints of defects in the judgment appealed against, are of law alone. Where however the grounds of appeal are of mixed law and fact or of facts simpliciter, leave of the Court below or of this Court must be sought and obtained before there can be a valid appeal to this Court - see section 213(3) of the Constitution. It is not the label given to a particular ground that determines its nature, that is, whether of law alone, of mixed law and fact or of facts simpliciter. (p. 867 H)

REPRESENTATION

A. Salman, SAN with A. Amuda for the Appellants.

Chief W. Olanipekun SAN with E. A. Ihensekhien for Respondents

CASES REFERRED TO

Owuda v. Lawal (1984) 4 SC. 145 at pp. 145, 146, 147 - 148

Nwadike v. Ibekwe (1987) 4 NWLR 718 at pp. 728, 730 & 743

Ewharieme v. The State (1985) 3 NWLR 272.

Olumola v. LSDPC (1983) 5 SC 1

The State v. Omeh (1983) 5 SC. 20

Fadiora v. Gbadebo (1978) 3 SC. 219, 248

Ejiofodomi v. Okonkwo (1982) 11 SC. 74

STATUTE REFERRED TO

Constitution of the Federal Republic of Nigeria 1979 s. 221(1)

LEAD JUDGMENT BY OGUNDARE JSC

This matter now on appeal to this Court has a chequered history. It originated in Iyara Area Court II where the title was:

"Sule Bakare-Iyamoye

vs.

(1) Samuel Oshatoba

(2) Otitonaiye Babalola - Ekinrin Adde"

After hearing evidence of both parties, the Court transferred the case to the Divisional Area Court Grade I, Kabba. The latter court too heard the evidence on both sides and, like the first court, transferred it to the Upper Area Court Lokoja for hearing and determination. The case was heard and determined by the Upper Area Court Lokoja. An appeal went to the High Court

Lokoja which ordered a rehearing before the Upper Area Court, Omu-Aran. There was a hitch as a result of which the High Court directed that the case be transferred to the Upper Area Court Ilorin. As the assessor failed to show up at Ilorin, the case was again redirected to the Upper Area Court Omu-Aran which finally heard and determined it.

The Plaintiffs claimed before the trial court a declaration that the piece or parcel of land known as Onikoko/Obada/Oke-ewu/Ogbokewe lying at Omi Osoun in Iyamoye Oyi Local Government area of Kwara State belonged to his family called Tegba and an order ejecting the Defendants from the said land. The Defendants also counter-claimed for title to the said land. Evidence was led on both sides and many exhibits including documents were tendered. The trial court inspected the land in dispute and drew a sketch-map. In a reserved judgment the Upper Area Court Omu-Aran reviewed and evaluated the evidence, ascribed credibility or otherwise to witnesses and made findings of fact mostly in favour of the Plaintiffs. It finally adjudged as follows:

"We sustain the claim of the plaintiffs for declaration of title from Odoye on Iyamoye end to Omi Osoun/Ogbokewe on Ekinrin end - the land in dispute as verged red on our sketch map. But the plaintiffs shall remain as allodial land owners of Ogbokewe/Osoun river courses where the defendants have their huge cocoa and kolanut plantation."

In effect the plaintiffs succeeded on title but lost on injunction.

Being dissatisfied with particular aspects of this decision, both parties appealed to the High Court holden at Omu-Aran. The appellate High Court (Adeniyi & Orilonise JJ.) allowed the Defendants main appeal, set aside the decision of the trial Upper Area Court and granted the Defendants counter-claim deeming them *"grantees of a customary right of occupancy in respect of the land in dispute which has been and is being used for agricultural purposes in a non-urban area."* The Plaintiffs cross-appeal was dismissed.

The Plaintiffs were unhappy with the judgment of the appellate High Court and appealed to the Court of Appeal on the following grounds of appeal:

"1. The learned Judges of the High Court who did not see and hear the witnesses who gave evidence and who did not visit the locus in quod errated in law in setting aside the trial Upper Area Court's decision to the effect that the plaintiffs occupied and/or effectively controlled a part of the land in dispute while the defendants occupied a part of the land in dispute.

Particulars of error-in-law

i. An appellate court who did not see and hear the witnesses and

did not visit the locus in quo must not disturb findings of fact based on credibility and the visit.

ii. The High Court fell into grave error because it lumped together the entire land in dispute.

B 2. *The learned Judges of the High Court erred in law in setting aside the trial Upper Area Court's decision after the High Court had held:*

C *"The trial court heard the parties, inspected the land in dispute, drew its own sketch - map, painstakingly reviewed or evaluated the available evidence as best as it could and came to its findings and decision in favour of the Respondents at pages 103 (6 - 10) and 105 (13 - 18) of the record of proceedings in particular."*

Particulars of error in-law

D i. *The function of an appellate court is to determine whether or not a trial court has properly tried a case and it must not substitute its own views with those of the trial court.*

ii. *The High Court, Omu-Aran has exceeded its jurisdiction as laid down by the Supreme Court in several cases, including B.O.C. (sic) E. v. Alhaji Ibrahim Barau (1982) 10 SC. 48 especially at pages 79 - 83.*

E 3. *The Omu-Aran High Court misdirected itself in law in not properly understanding the present counsel's submission as to the effect of the Land Use Act on allodial title."*

Particulars of misdirection-in-law

i. *The Land Use Act does not expropriate people's interest in land but converted the interests to rights of occupancy.*

F ii. *Madam S. Salami & Ors. v. S.E. Oke (1987) 4 NWLR (Pt.63) 1 S.C.; (1987) 9 - 10 SCNJ 27 was misconstrued.*

4. *The High Court erred in law in holding:*

G *"In our view, in so far as the trial Upper Area Court awarded Allodial title over this portion of land in dispute to the respondents its judgment cannot be anything but erroneous on point of law on the ground that it is the person who was in possession and occupation of the land in dispute on 29/3/78 that the law deems the grantee of customary right of occupancy over it. Thus S. 36(1) of the Act settles the matter in favour of the appellants (defendants) who were, by evidence and upon the findings of the court, immediately before the Act, the occupiers of the land in dispute which is admittedly situated in a non-urban area, subject of a customary right of occupancy and being used for Agricultural purposes. They (appellants) are entitled to continue to use the land for agricultural purposes as if a right of occupancy has been granted to them as the occupiers of same by Oyi Local Government in whose jurisdiction the land in dispute is situated."*

H

Particulars of error-in-law

i. Assuming the High Court was right in its view of the effect of the Land Use Act on the plaintiffs/appellants 'allodial title', which we vehemently deny, the High Court can only award to the respondents herein the portion of the land in dispute i.e. Ogbokewe/Osoun River courses, where the respondents herein "*have their large cocoa and kolanut plantation,*" B allodial title of which was awarded to the plaintiffs/appellants by the trial Upper Area Court.

ii. The High Court was wrong to have awarded to the respondents herein the entire land in dispute, which included the farms of Tegba family members and their tenants.

iii The doctrine in Okon Owon v. Eto Ndon & Ors. (1946) 12 WACA 71; Josiah Sebanjo v. Adeshina Oke & Anor. 14 WACA 593; Titus Sogunle & Ors. v. Amusa Akerele & Ors. (1967) NMLR 58 and Ajide Arabe v. Ogunbiyi Asanlu (1980) 5-7 SC 78 is applicable and ought to be applied. C

5. The High Court erred and/or misdirected itself in law in holding that present counsel, Mr. J. O. Ijaodola, conceded that the plaintiffs/appellants herein were not relying on the principle of 1st settlement. D

Particulars of error and/or misdirection in law

i. What counsel conceded, if a concession, was that the plaintiffs/appellants herein were not relying on the principle of 1st settlement alone.

ii. Idundun & Ors. v. Okumagba & Ors. (1976) 9-10 S.C. 227 (1976) 1NMLR 200 which was applicable was misconceived and not applied. E

6. The High Court erred in law in awarding the total land in dispute to the respondents herein after it had held that the respondents occupied only a part of the land in dispute.

Particulars of error-in-law

i. Assuming that all the grounds of appeal argued rightly succeeded (which we deny) and assuming that the High Court was also right in its view of the law (which we also deny) the High Court is only competent to award to the respondents herein the portion of the land in dispute where the respondents have their cocoa and kolanut plantation i.e. Ogbokewe/Osoun River courses. F G

ii. The High Court did not fully understand the case before the trial Upper Area Court."

When the appeal came before the latter court, the Defendants as respondents took objection to grounds 1, 2, 5 and 6 above on the ground that as they were, at best, grounds of mixed law and fact leave to appeal was required before the Plaintiffs could canvas them on appeal, and as leave to appeal had not been sought and obtained the grounds were incompetent. H

After submissions by learned counsel for the parties, the Court upheld the objection and struck out the said grounds 1, 2, 5, and 6. The appeal to the Court of Appeal was then argued on the issues predicated on grounds 3 and 4 only. The appeal failed and was dismissed. The Court, however, observed:

B *“There is however some confusion about the actual boundary of the land in dispute. It is not quite clear, from the judgment of the High Court, upon which area of land it declared that the respondents are deemed grantees of a customary right of occupancy. The area which the trial Upper Area Court declared the land in dispute includes the land in which the Court found the respondents to have large cocoa and kolanuts plantation. That land is what the court called Ogbokewe/Osoun river courses. It was this land which the court ordered that the appellants shall remain as allodial land owners.*

D *The High Court did not make any specific finding on the boundaries of the land in dispute. I think it is important that it should do so. Under Section 36(1) & (2) of the Land Use Act, 1978, the respondents shall only be entitled to be deemed the holders of a customary right of occupancy over the land which has been proved to be under their occupation, for agricultural purposes, before the commencement of the Act. That land, E from the record is Ogbokewe/Osoun river courses and the land where the trial Upper Area Court said, in its judgment, at page 108, as follows:*

F *“We saw the 1st defendant farm along Ogbokewe along Osoun and also at Elewu and he has a farm land near Oyi. And nobody in that area could boast that he is in use of the land up to the extent 1st defendant is occupying the land.”*

This is the land upon which the respondents is deemed the holders of the customary right of occupancy. I therefore hereby declare the respondents to be the sole holders of that land. The area I have declared shall be what the High Court should have declared in favour of the respondents.

G *Subject to the clarification given in this judgment on the area of land upon which the respondents are deemed holders of the customary right of occupancy, this appeal fails and it is dismissed.”*

H It is against this judgment that the Plaintiffs have again appealed, this time to this Court. With leave of the court below, they appealed on the following grounds:

“GROUND ONE

The learned justices of the Court of Appeal erred in law and on facts when they upheld the decision of the High Court which did not see or

hear the witnesses, and yet set aside the findings of the trial Upper Area Court which saw and heard the witnesses and evaluated the evidence before making its findings.

PARTICULARS OF THE ERROR IN LAW ON FACTS

(i) An Appellate Court like the Court of Appeal and the High Court which did not see and hear the witnesses, and did not watch the demeanour of the witnesses, nor visit the locus in quo must not disturb the findings of a trial Court (Upper Area Court in this case) which were based on credibility of witnesses it saw and heard and after inspection of the land in dispute. B

(ii) An Appeal court should not proceed to assume the role of a trial court or engage in assessing and evaluating the evidence of witnesses it had not seen or heard, it should attach greatest weight to the opinion of the trial judge who had seen and heard the witnesses. C

(iii) The duty of making finding of fact is essentially the preserve of the trial court.

(iv) The Appellant before the High Court who was the Respondent before the Court of Appeal failed to show in any form whatsoever that the findings of the trial court were perverse or against the natural drift of the evidence or that the trial court failed to make correct findings. D

(v) There was nothing shown before the Court of Appeal or the High Court that the trial court did not make proper primary findings on facts. E

(vi) Whereas an appellate court can evaluate facts on primary findings made by the trial court, it itself cannot make primary findings on facts as did by the Court of Appeal and the High Court in this case.

GROUND 2

The learned justices of the Court of Appeal erred in law and on facts in upholding the decision of the High Court that set aside the decision of the trial court which was based on credibility of witnesses before that trial court. F

PARTICULARS OF ERROR IN LAW AND ON FACTS

(i) The defence witnesses were not believed by the trial court which heard and saw them and gave reasons why it disbelieved the defence. G

(ii) It is trite law that a witness who is not believed by the trial court is as good as no witness at all.

(iii) The trial court believed the evidence of the Plaintiff's witnesses and gave reasons why it believed them. It is trite law that all submissions before an appellate court should be based on the evidence that was in fact believed by the trial court and not on evidence that appellant submit should have been believed but was not in fact believed. H

(iv) The Court of Appeal was wrong to have awarded the land to the defendants/Respondents when the evidence and findings of the trial court showed that the land belonged to the Plaintiffs/Appellants who put the defendants on the land.

GROUND 3

B The learned justices of the Court of Appeal erred in law and on facts in awarding the total land in dispute to the respondents herein after they have held that:

(1) The respondent only occupied a part of the land in dispute.

C (2) That it was not clear from the judgment of the High Court upon which area of land the High Court declared that the respondents are deemed grantees of a customary right of occupancy;

(3) That there was however some confusion about the actual boundary of the land in dispute.

D (4) That the High Court did not make any specific finding on the boundaries of the land in disputes.

PARTICULARS OF ERROR IN LAW AND ON FACTS

E (i) Since the Court of Appeal gave its judgment based on the alleged occupation by the Respondent of a portion of the land in dispute, the Court of Appeal should not have awarded the whole land in dispute to the Respondent which include portions of land not shown or claimed to have been occupied by the Respondents.

F (ii) Having held that the High Court failed to make it clear in its judgment the area of land declared to have been occupied by the Respondents and on which the Respondents would be deemed to be grantees of customary right of occupancy, the Court of Appeal should not have awarded an undefined and unascertained land to the Respondents.

GROUND 4

The learned justices of the Court of Appeal erred in law and on facts when they held per Uthman Mohammed JCA as follows:-

G *"This is the land upon which the Respondents are deemed the holders of the customary right of occupancy. I therefore declare the respondents to be the sole holders of that land."*

PARTICULARS OF ERRORS

H (i) The findings of the trial court as quoted by the learned Justice Uthman Mohammed J.C.A., on page 9 of his judgment was that the defendants (Respondents) have farmland of cocoa of 50 - 60 years old on the land and that the defendants had their seasonal crops in that area, but that the Plaintiffs (Appellants) told the trial court that the farm belongs to the defendants but the land belongs to the Plaintiffs.

(ii) Having relied on the above findings that the land belongs to the Plaintiffs but the farm belongs to the defendants/Respondents the deemed holders of the customary right of occupancy at the expense of the original owners of the land.

(iii) The Court of Appeal should have declared the Appellants as the deemed holders of the customary right of occupancy since the Land Use Act has divested them of the radical title and limits their claims to a right of occupancy. The Land Use Decree did not expropriate people's interests in land or extinguish them on the ground that before the Land Use Decree came into being the land was on loan to a third person. B

(iv) The evidence of boundary men who gave evidence as PW 3, 4 and 5 and the evidence of PW 6 who were tenants to the Plaintiffs/Appellants showed clearly that the defendants/Respondents are tenants of the Plaintiffs/Appellants and such tenants could not graduate to ownership or holders of the customary right of occupancy held by the Plaintiff/Appellants. C

GRUOND 5 D

The learned justices of the Court of Appeal erred in law and on fact when they awarded the whole of the disputed land to the Defendants/Respondents against an overwhelming credible evidence before the trial court in favour of the Plaintiffs/Appellants as the customary overlordship or owner or occupier of the land in dispute and the adjoining pieces or parcels of lands which evidence the trial court accepted. E

PARTICULAR OF ERROR

There was preponderance of credible evidence before the trial court in proof of possession, ownership and occupation of the land by the Appellants as contained in the findings of the trial court from:- F

(a) The evidence virtually received from parties and witnesses at the locus in quo.

(b) The evidence of Ebira Isa a leader of the Ebira tenants farming on the land put thereon by the Appellants and to whom they paid yearly tribute. G

(c) Evidence of payment by Banjoko & Co.

(d) Payment made by Baptist Church to Tegba family.

(e) The uncontroverted and unchallenged evidence of DW 7 that Memo was a caretaker.

(f) The contradictions in the evidence of defendants witnesses. H

(g) Evidence from boundary men PW 3, 4 and 5 from three fronts or comers of the land supporting Plaintiffs/Appellants ownership and possession.

GROUND 6

That the decision of the Court of Appeal is against the weight of evidence adduced before the trial court.”

They filed yet another Notice of Appeal without leave of court (but within time) containing three grounds of appeal, to wit:

B “GROUND ONE

That the learned justices of the Court of Appeal erred in law when they held that grounds 1, 2, 5 and 6 of the grounds of appeal before them are grounds of fact and mixed law and facts which would not be filed and argued without the leave of the High Court or the Court of Appeal and they therefore struck out those grounds as incompetent.

C PARTICULARS OF ERROR

i. All grounds of Appeal nos. 1, 2, 5 and 6 are grounds of law and not of fact or mixed facts and law within the judgment of the Supreme Court in *Ogbechie v. Onochie* (No.1) (1986) 2 NWLR (Pt. 23) page 484 which was followed and applied in *Nwadike v. Ibekwe* (1987) 4 NWLR (Pt. 67) page 718.

ii. Ground One contended that the learned judges of the High Court not having the opportunity of seeing and hearing witnesses who gave evidence before the trial court and not having visited the locus in quo as did the trial Upper Area Court, erred in law in setting aside the trial courts decision thereon.

iii. The ground of appeal No. 1 as couched on the record was not complaining about the facts of the case but about the principles of law that a Court of Appeal not having seen or heard the witnesses should not set aside the findings of the trial court which heard and saw the witnesses.

F iv. The above ground of appeal complained about the misunderstanding by the lower court of the law applicable pertaining to the different duties of trial court and Court of Appeal in respect of finding of facts and not on the facts themselves.

G v. A ground of appeal can only be regarded as a ground of mixed law and fact if it questions the evaluation of facts before the application of the law - *Ogbechie v. Onochie* (supra).

H vi. Ground 2 also contended that the High Court having conceded and held that the trial court heard the parties, inspected the land in dispute, drew its own sketch map painstakingly reviewed or evaluated the available evidence as best as it could and came to its finding and decision in favour of the Respondents/Plaintiffs, erred in law in setting aside the said decision of the trial court.

vii. The above ground 2 of the appeal is complaining on the same thing as ground one. It is a complaint on the mis-application of the law to

the facts proved. The facts proved are the findings of the trial court, the law applicable is that an appeal court should not or ought not interfere with those findings. This is in line with the decision of the Supreme Court in *Ogbechie v. Onochie* (supra).

viii. On the same principle, grounds 5 and 6 are also grounds of law. Ground 5 complained that the principle of law laid down by *Idundun & Ors. v. Okumagba & Ors.* (1976) 1 NMLR 200; (1976) 9-10 S.C. 227 was misconceived and was not applied. This is a point of law. Ground 6 complained of the competence of the High Court in awarding more land to the Defendants/ Respondents than they occupied. This is also a ground of law.

GROUND 2

The learned justices of the Court of Appeal erred in law in awarding the land to the Defendant/Respondents solely on the mere use of the word “allodial” by the trial Upper Area Court in its judgment.

PARTICULARS OF ERROR

i. It is trite law that in considering proceedings in area court or native tribunals like the trial Upper Area Court in this case, the Court of Appeal should look at the substance of an action and not the form as decided by the Supreme Court in *Otaru v. Oturu* (1986) 3 NWLR (Pt. 26) page 14 followed in *Salami v. Oke* (1987) 4 NWLR (Pt.63) 1 S.C.; (1987) 9 - 10 Sc. 27. (3) *Iyaji v. Eyigede* (1987) 3 NWLR (Pt.61) 528 S.C.; (1987) 7 SCNJ 48.

ii. It is trite law that a counsel’s blunder should not be blamed on their clients, afortiori a trial court’s blunder in using wrong word should not be blamed on a party who did not ask for it.

1. *Ojikutu v. Odeh* (1954) 14 WACA 640 at 641.

2. *Doherty v. Doherty* (1964) NMLR 144.

3. *Ibodo & Ors. v. Enarofia* (1980) 5-7 SC 42 per Aniagolu JSC at 52 - 53.

iii. It is against the principle of justice for party to lose the benefits of his case on the ground that the court awarded to him what he has not asked for or that the court used a wrong word.

iv. It is trite law that the courts are enjoined to do substantial justice and not to allow mere technicalities to affect the course of justice. *Sukuratu v. Nigerian Housing Development Society* (1981) 4 SC. 26.

v. A mere misdescription of the title or right accruable to the Plaintiffs/Appellants committed by the trial court should not be a licence to deny the Plaintiffs/Appellants of their title or right allowed under the Land Use Decree.

GROUND 3

The learned justices of the Court of Appeal erred in law in holding

that “under section 36(1) and (2) of the Land Use Act 1978 the respondents shall only be entitled to be deemed the holders of a customary right of occupancy over the land which has been proved to be under their occupation for agricultural purposes before the commencement of the Act.”

PARTICULARS OF ERROR

- B *i. The Land Use Decree 1978 does not expropriate peoples interest in land as held by the Court of Appeal. Even though the Land Use Decree vested the radical title in the Military Governor of the State, an occupier still retains his customary holding or right of occupancy.*
- C *ii. In law ownership includes possession.*
- iii. It is trite law that where two parties claim to be in possession of land, the law ascribes possession to the one of them with better title.*
- iv. Long possession of a party cannot stand before another party with better title of ownership before the commencement of the Decree.*
- v. The Land Use Act is not intended to transfer the possession of the*
- D *land from the owner to the tenant by whom the owner is in possession. ”*

It has become necessary for me to set out, in extenso, the grounds of appeal canvassed by the Plaintiffs in the court below and as contained in their two Notices of Appeal to this Court, because of the course the appeals took here. The parties filed in this Court their respective Briefs of argument in respect of both appeals which are taken together as one appeal; the Plaintiffs also filed a Reply Brief. In the Respondents Brief, the Defendants took objection to the nine grounds of appeal on the ground that they were either incompetent or not available to the Plaintiffs to canvass in this Court. I may here mention that the Plaintiffs in their Brief renumbered the grounds of appeal in the two notices of appeal such that the 3 grounds contained in the second notice of appeal are numbered 1 - 3 while the 6 grounds contained in the first notice of appeal are numbered 4 - 9. It is this numbering that is adopted in the Respondents Brief. I, too, shall follow the same numbering in this judgment to avoid any confusion.

It is submitted in the Respondents Brief that grounds 1, 2 and 3 though couched as grounds of law simpliciter are nevertheless grounds of mixed law and fact. We are referred to a number of authorities among which are Braimoh Owuda v. Babalola Lawal (1984) 4 SC. 145 at pp. 145, 146, 147 -148; Nwadike v. Ibekwe (1987) 4 NWLR (Pt. 67) 718 at pp. 728, 130 & 743.

It is also submitted that grounds 4-9 are mere reproductions of grounds 1, 2, 5 and 6 filed before the lower court but which the said Court struck out on the ground, inter alia that since the grounds are at best of mixed law and fact, the appellants should have sought the leave of either the

High Court or the Court of Appeal before filing them pursuant to section 221 (1) of the 1979 Constitution. It is argued that as the Court below did not entertain them, they are fresh issues which cannot be entertained in this Court. It is further submitted that even if the leave of this Court is sought to raise them the application would not be granted because the lower Court would be in a more advantageous position to deal with the issues raised by them. Reliance for the submission is placed on *Fadiora v. Gbadebo* (1978) 3 S.C. 219; *Ewharieme v. The State* (1985) 3 NWLR 272.

The Plaintiffs replied to the above submissions in their Reply Brief. On grounds 1- 3 it is submitted that the grounds are of law and, therefore, the objection is misconceived. It is strenuously argued that the complaints raised in those grounds involve principles of law and that they are issues within the province or jurisdiction of a judge rather than that of a jury. *Metal Construction v. Migliore* (1990) 1 NWLR (Pt.126) 299; (1990) 2 SCNJ 20, 26 is cited in support.

In respect of grounds 4-9, it is pointed out that leave of the court below was sought and obtained to appeal on them; defendants did not object to leave being granted. It is submitted that these grounds are different to those struck out by the Court below and the issues raised by them were before that Court. It is further submitted that the issues raised by these grounds are weighty and substantial and this Court should allow them to be argued. We are referred to a number of authorities. It is finally urged that:-

“.....in order to do substantial justice in this case (the appellants urge) the Supreme Court (to hold) that this is a proper case where the rules should be relaxed and appellants granted permission to argue all the grounds of appeal filed as contained in the Brief of Argument. It has not been shown that the Respondents will suffer any disadvantage thereby or that they will be prejudiced.”

Learned leading counsel for the parties advanced oral arguments in further elucidation of the submissions advanced in their respective Briefs of arguments. In the course of oral arguments learned leading counsel for the Defendants, Chief Olanipekun SAN conceded it that Ground 1 is a ground of law and is, therefore, competent. He maintains his stance in respect of the other grounds of appeal.

GROUND 1-3

The objection taken to these grounds is of importance in determining whether the second notice of appeal filed by the Plaintiffs is competent. Section 213(2)(a) of the 1979 Constitution confers a right of appeal as of right where the grounds of appeal, that is, the complaints of defects in the judgment appealed against are of law alone. Where however the grounds of appeal are of mixed law and fact or of facts simpliciter, leave of the

Court below or of this Court must be sought and obtained before there can be a valid appeal to this Court - See section 213(3) of the Constitution. See also Oluwole v. LSDPC (1983) 5 SC 1; The State v. Omeh (1983) 5 S.C. 20; Nwadike v. Ibekwe (supra); Ogbechie v. Onochie (1986) 1 NWLR (Pt. 70) 370; Ifediorah v. Ume (1988) 2 NWLR (Pt. 74) 5; Metal Construction (West Africa) Ltd. v. Migliore and Ors. (supra). These cases show how difficult it has been for counsel drafting grounds of appeal. It is not the label given to a particular ground that determines its nature, that is, whether of law alone, of mixed law and fact or of facts simpliciter- see: Nwadike v. Ibekwe (supra) at p. 743, the dictum of Nnaemeka-Agu, JSC to the effect:

C “..... it is a recognised fact that the line of distinction between law simpliciter and mixed law and fact is a very thin one. But one does not convert a ground of mixed law and fact into a ground of law.”

Eso, JSC in his illuminating dictum in Ogbechie v. Onochie (supra) at p.491 observed:

D “There is no doubt that it is always difficult to distinguish a ground of law from a ground of fact but what is required is to examine thoroughly the grounds of appeal in the case concerned to see whether the grounds reveal a misunderstanding by the lower tribunal of the law or a misapplication of the law to the facts already proved or admitted, in which case it would be question of law, or one that would require questioning the evaluation of facts by the lower tribunal before the application of the law in which case it would amount to question of mixed law and fact. The issue of pure fact is easier to determine.”

F As to what is a question of law with which a ground of law is concerned Karibi-Whyte JSC opined thus in Metal Construction (W.A.) Ltd. v. Migliore (supra) at pp. 149-150:

G “Generally considered, the term “question of law” is capable of three different meanings. First it could mean a question the Court is bound to answer in accordance with a rule of law. This excludes the exercise of discretion in answering the question as the court thinks fit in accordance with what is considered to be the truth and justice of the matter. Concisely stated, a question of law in this sense is one predetermined and authoritatively answered by the law.

H The second meaning is as to what the law is. In this sense, an appeal on a question of law means an appeal in which the question for argument and determination is what the true rule of law is on a certain mater. The question of law in this sense arises out of the uncertainty of the law. A question of the construction of statutory provision falls within this

meaning.

The third meaning is in respect of those questions which are committed to and answered by the authority which normally answers questions of law only. Thus any question which is within the province of the Judge instead of the jury is called a question of law even though in actual sense it is a question of fact. The cases which readily come to mind are the interpretation of documents, often a question of fact, but is within the province of a Judge. Also the determination of reasonable and probable cause for a prosecution in the Tort of malicious prosecution, which is one of fact, but is a matter of law to be decided by the Judge."

And as to what is a question of fact, the learned Justice of the Supreme Court added at p. 150.

"Now turning to what is a question of fact? It is easy to postulate that it is anything which falls outside the meaning of question of law. That will not be entirely correct, because there are exceptions. Like question of law, question of fact has more than one meaning. The first meaning is that a question of fact is any question which is not determined by a rule of law. Secondly, it is any question except a question as to what the law is. Thirdly, any question that is to be answered by the jury instead of by the Judge is a question of fact."

In construing a ground of appeal, the ground as formulated and its particulars are to be considered together.

Turning now to the grounds of appeal complained of in this appeal I agree with both learned Senior Advocates that Ground (1) is a ground of law. It is clearly an issue of law whether a particular ground of appeal is a ground of law or of fact or of mixed law and fact. Any ground of appeal questioning a determination of such an issue as ground (1) does, must necessarily be a ground of law.

After a careful perusal of ground (2), however, I am of the view that it is at best, a ground of mixed law and fact. The ground enjoins the doing of substantial justice. How else can substantial justice be done without a consideration of the totality of the facts adduced in evidence on both sides? And if disputed facts had to be looked into for a decision to be taken, the ground is no longer a ground of law but of fact or, at best, of mixed law and fact.

I find ground (3) rather difficult to comprehend. Reading both the ground and its particulars one is at a loss to understand what the complaint really is. I sought assistance in the Appellants' Brief. It would appear from the arguments proffered on Issue 3 on which this ground is predicated that the complaint of the Plaintiffs is in the finding of title in the Defendants, as

against the Plaintiffs, to the land in dispute. Such complaint is undoubtedly a question of fact. That being so I do not find that Ground (3) is a ground of law as it is labelled.

The conclusion I reach is that Grounds (2) and (3) are grounds of fact or, at best, grounds of mixed law and fact. It is not in dispute that the Plaintiffs did not seek nor obtain leave to appeal on these two grounds. That being so the grounds are incompetent and are hereby struck out by me. Ground (1) is competent and it is accordingly sustained.

 GROUNDS 4 - 9:

There can be no doubt that grounds 4, 5, 8 and 9 raise the same complaints as raised in grounds 1, 2, 5 and 6 struck out by the Court below when the appeal was before them. For obvious reasons the issues raised in the latter set of grounds of appeal could not have been decided by the Court of Appeal. Consequently grounds 4, 5, 8 and 9 could not have arisen from that Court's judgment against which there is the present appeal to this Court. As grounds of appeal to be competent, it must arise from the judgment appealed against, it follows that grounds 4, 5, 8 and 9 are incompetent and are accordingly struck out by me. See *Babalola v. The State* (1989) 7 SCNJ 127, 152; (1989) 4 NWLR (Pt.115) 264, 294 - 295:

The appeal in the Court below was fought on only one issue as formulated by Plaintiffs and based on grounds 3 and 4 before it, that is to say -

“What was the effect” of the Land Use Act on the Plaintiffs (now appellants) Allodial title?”

The Defendants broke the issue into two, to wit,

“Whether by virtue of the provision of Section 1 of the Land Use Act of 1979, a Court can still award allodial title to a party before it. Whether by virtue of Sections 34 and 36 of the Land Use Act of 1978, a declaration of title can still be awarded in favour of the Appellants in respect of a parcel of land which had been occupied by the Respondents and being used by them for agricultural purposes long before the promulgation of the said Act.”

The learned Justices of the Court of Appeal found as contained in the passage earlier quoted by me. It would appear that that Court found:-

(1) that the Defendants as persons in possession on the coming into force of the Land Use Act, are the persons deemed to be holders of a customary right of occupancy over the land in dispute by virtue of section 36(1) & (2) of the Act, notwithstanding that the trial court found that the land belonged to the Plaintiffs; and

(2) that there is some confusion about the actual boundary of the land in dispute.

Grounds 6 and 7 appear to question the correctness of the findings of the Court below on the two issues canvassed before it. The grounds, from their particulars and issues formulated on them, appear, however, to go beyond the judgment of the Court below; they, in effect, seek to impugn certain aspects of the judgment of the appellate High Court in a manner that would have been achieved by the grounds of appeal struck out in the Court of Appeal. Had the two grounds been confined to questioning the decision of the Court below on the two issues on which it made findings, they would have been competent. But the grounds went far beyond those issues and in the Appellants' Brief the issues formulated do not embrace any of these two issues. Consequently I am left with no choice but to agree with the Defendants that these two grounds, too, are incompetent and should be struck out. I must mention that the Appellants have not sought nor obtained the leave of this Court to raise new issues not raised in the court below -Fadiora v. Gbadebo (1978) 3 SC. 219, 248; Ejiofodomi v. Okonkwo (1982) 11 SC. 74.

In sum, the preliminary objection succeeds in relation to all the grounds of appeal except ground (1). Consequently, grounds (2) - (9) are hereby struck out by me. The appeal of the Plaintiffs will now be considered in the light of the issues formulated on ground (1) alone. And the only question predicated on that ground reads:

"Are grounds 1, 2, 5 and 6 before the Court of Appeal, grounds of law or of fact or of mixed law and fact?"

The grounds of appeal the Plaintiffs sought to canvas before the Court of Appeal have earlier been set out in this judgment. That Court struck out grounds 1,2,5 and 6 as not being grounds of law and were therefore incompetent as leave to appeal on those grounds was never sought nor obtained. That decision is now being questioned in this appeal. The plaintiffs contend that grounds 1 and 2 were grounds of law in that the 1st ground challenged the competence of the High Court, sitting in its appellate jurisdiction in setting aside the findings of the trial Upper Area Court. It is submitted that a ground can only be regarded as a ground of mixed law and fact or of fact only if it questions the evaluation of facts or the findings of the trial court. It is the contention of the Plaintiffs that that was not the purpose of ground (1). It is submitted that the complaint in ground (2) is the misapplication of the law to the facts proved and that ground, therefore, was a ground of law. Similar submissions are made in respect of grounds 5 and 6.

The Defendants analyse the said grounds in these words:-

"The resume of the first ground of appeal on page 194 is to the

effect that the High Court, having not seen the witnesses nor visited the locus in quo should not have disturbed “findings of fact based on credibility and the visit.”

B The purport of ground 2 is that once the High Court said that the trial Upper Area Court conducted the case painstakingly, then the High Court was not right to have upset portions of the findings of facts made by that court and that the High Court substituted its own views of the facts for that of the trial court.

C The Complaint in ground 5 was to the effect that the appellant counsel did not admit a material fact as to whether or not the case of the appellants was based solely on the act of 1st settlement.

 Lastly ground 6 alleged that the High Court was actually wrong to have awarded the land in dispute to the respondents because the High Court *“did not fully understand the case before the trial Upper Area Court.”*

D and submit that the grounds are of facts or, at best, of mixed law and facts.

 Bearing in mind the principles enunciated in the various cases earlier considered in this judgment on when a ground is one of law, mixed law and fact or of facts simpliciter and after perusing the grounds herein under

E consideration I have come to the conclusion that the Court below was right to strike them out. They are in no way grounds of law but rather of mixed law and fact or of facts only. This conclusion disposes of the only question left to be considered in this appeal. And that question having failed, it follows that the appeal itself fails and it is hereby dismissed with N1,000.00
F costs to the Defendants.

WALI JSC

G I have the privilege of seeing in advance, the lead judgment of my learned brother Ogundare JSC, and I agree with his reasoning and conclusion for dismissing the appeal.

 For these same reasons contained in the lead judgment I also hereby dismiss this appeal with N1,000.00 costs to the defendants.

KUTIGI JSC

H I read before now the judgment just delivered by my learned brother Ogundare J.S.C. I agree with the conclusion that the appeal lacks merit and ought to be dismissed. It is accordingly dismissed with N1,000.00 costs to the respondents.

OGWUEGBU JSC

I have had the advantage of a preview of the draft, of the judgment just delivered by my learned brother Ogundare, J.S.C.

For the reasons stated therein, grounds (2) - (9) of the grounds of appeal are incompetent and are hereby struck out. The leave of the court below or of this court was not obtained before they were filed contrary to section 213(3) of the 1979 Constitution of the Federal Republic of Nigeria.

The remaining ground of appeal (Ground 1) questions the correctness of the decision of the court below striking out grounds (1), (2), (5) and (6) of the grounds of appeal filed before that court. The court below struck out those grounds of appeal as incompetent and held that they were of facts or mixed law and facts and leave to appeal on them was not obtained by the appellants. A decision whether a ground of appeal raises question of law alone or of mixed law and fact certainly involves an examination of the ground of appeal as framed together with the particulars thereof. See *Welli & Or. v. Okechukwu & Ors.* (1985) 2 NWLR (Pt. 5) 63; *Nwadike v. Ibekwe* (1987) 4 NWLR (Pt.67) 718 and *Metal Construction (W.A.) Ltd. v. Migliore* (1990) 1 NWLR (Pt.126) 299. I have myself critically examined the said grounds of appeal and I agree with the learned respondents' counsel that they are at best grounds of mixed law and facts or facts alone.

The appeal therefore fails and it is accordingly dismissed. I endorse the order as to costs contained in the judgment of my learned brother Ogundare, J.S.C.

IGUH JSC

I have had the opportunity of reading in draft the lead judgment just delivered by my learned brother, Ogundare, J.S.C. I entirely agree that this appeal has no merit and should be dismissed.

Consequently, and for all the reasons adequately set out in the lead judgment which I adopt as mine, I, too, dismiss this appeal. I abide by the order for costs therein made.

H