

SUPREME COURT OF NIGERIA
7TH MAY, 1996. SC. 164/1991
CORAM:- A. B. WALI, M. E. OGUNDARE,
E. O. OGWUEGBU, S. U. ONU, A. I. IGUH, JJSC.

ADEBAYO OJO PLAINTIFF/APPELLANT
(For himself and on behalf
of Banjoko family)

AND
MRS. F. IGHODALO DEFENDANT/RESPONDENT

APPEALS - *Grounds of appeal - Need to obtain leave to argue facts or mixed law and facts.*

APPEALS - *Issue - That does not flow from any ground of appeal - Whether to be struck out.*

EVIDENCE - *Effect of plaintiff's evidence - Plaintiff's conception that the court agreed to a certain effect of his evidence - When found to be misconceived.*

EVIDENCE - *Conflict - Where evidence is at variance with pleadings - It ought to be rejected.*

LAND LAW - *Traditional evidence - Of settlement on the land in dispute - Whether properly rejected by the two lower courts.*

LAND LAW - *Title - Is put in issue in a claim for trespass and injunction - And to be ascribed to the party that proved same.*

LAND LAW - *Acts of possession - Where plaintiff founded his title on settlement and not possession - Whether he can turn round to rely on acts of possession.*

LAND LAW - *Acts of possession - It is when both parties fail to prove title - That acts in recent times will be resorted to.*

FACTS

Before the Ibadan High Court, the plaintiff/appellant on behalf of his family claimed damages for trespass and perpetual injunction against

the defendant/respondent. Plaintiffs case on the pleadings was that his family owned the land in dispute through settlement by one Ojo, his ancestor after Jalumi War. However, Plaintiff's evidence during the trial was in conflict with his pleadings. The defendant joined issue with the plaintiff, traced her root of title by purchase in 1960 from the Akatapa Family whose title was by settlement over 100 years ago.

In a well considered judgment, the trial court dismissed the plaintiff's claims in their entirety. The plaintiff's appeal to the Court of Appeal was also dismissed. Being dissatisfied, plaintiff has further appealed to the Supreme Court raising four issues.

ISSUES FOR DETERMINATION

"(i) Having regard to the finding that the Appellant's ancestor Ojo was the original owner of the land, was the Court of Appeal entitled to hold that the traditional evidence of the Appellant was unsatisfactory?

(ii) Did the fact that the Respondent was able to prove purchase from the Akatapa family amount to proof which could defeat the Appellant's traditional history?" Etc, see p. 880

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

Grounds of appeal

1. In the first place, a cursory look at grounds 1,2,3 and 4 shows palpably that they are grounds of either facts or of mixed law and facts (certainly not of law) for which leave of the court below or of this court ought to have been sought and obtained. Such leave not having been obtained to argue them, they are unarguable and incompetent. In the result, grounds 1, 2, 3 and 4 are accordingly struck out. Secondly, in respect of grounds 5 and 6, prior leave having been shown to have been obtained to argue the former and learned counsel for the defendant having conceded in argument that the latter is a good ground the fact that both grounds are adequately related to the issues, renders neither of them incongruous nor unarguable. The two grounds being competent and arguable, the objection thereto is accordingly overruled. (p. 881 C)

Effect of plaintiff's evidence

2. It is therefore wrong, if not mischievous and misleading to suggest that that was the finding of the court. Indeed, it was not and it is therefore inconceivable for the plaintiff to say that the court below agreed with the plaintiff's submission that the evidence led by him plaintiff was to the effect that the land in dispute belonged to Ojo. Afortiori, it is preposterous to

contend that the finding disposed of the only reason given by the learned trial Judge for rejecting the traditional evidence of the plaintiff. There was nothing of the sort. This is because of the highly irreconcilable contradictions in the pleadings and testimony of the plaintiff and 2nd P.W. on traditional history. (p. 882 C)

Where evidence is at variance with pleadings

3. No tribunal worthy of its name would accept conflicting statements such as postulated by the plaintiff. Indeed, evidence was at variance with the pleadings and as the evidence of witnesses for the plaintiff clearly contradicted one another, it ought to be rejected off hand or deemed not established. Such conflicting statements that the plaintiff allowed to be perpetuated in this case cannot be both true but could both be false. (p. 883 A)

Traditional evidence - Of settlement on the land in dispute

4. In the light of the above, the learned trial Judge rightly, in my view, rejected the traditional evidence of settlement on the land in dispute put forward by the plaintiff and the court below was justified, in my view, to have affirmed that finding. Furthermore, as the court below, as I have pointed out elsewhere in this judgment, nowhere stated it accepted the plaintiffs traditional evidence as claimed by the plaintiff in his brief and proffered orally before us, the decisions of the two lower courts constitute concurrent findings by them. As a matter of practice, this court will be loath to disturb such concurrent findings of fact by the two lower courts except in special circumstances e.g. the commission of error in substantive or procedural law none of which I can discern in the instant case at the plaintiffs prompting. (p. 883 C)

Land law - Title

5. The principle of law is that where there is a claim for trespass and injunction, title to the land involved is put in issue, and this makes it incumbent on the trial Judge to consider the issue of title to the land or exclusive possession to it. In the instant case, the trial court having accepted the defendant's account as to her title and exclusive possession, the law ascribes title to the land in her who had proved same. (p. 883 F)

Whether plaintiff can rely on acts of possession

6. With due respect the issue here has become irrelevant - in fact a non issue in that the plaintiff founded his title on settlement and not on possession. The plaintiff having failed to prove his title, it is wrong of him to turn

round to rely on acts of possession which acts only smack of the radical title pleaded. It is unnecessary therefore to consider the plaintiff's acts of possession as such acts by him on the land in dispute rather than being viewed as acts of possession become acts of trespass. (p. 884 D)

When acts of possession will be resorted to

7. The plaintiff's action being that for trespass and injunction, he (plaintiff) would ordinarily need to prove exclusive possession but because of the nature of the defence, he (plaintiff) has to show better title or right to possession. It ought to be borne in mind that it is when both plaintiff and defendant failed to prove title that resort is had to acts in recent times. The proposition of law that if the evidence of tradition is inconclusive the case must rest on question of fact has no sway here in that the plaintiff having put his title in issue and possession rested on traditional history that failed, then acts of possession become irrelevant and should not be considered in granting a declaration of title to him. (p. 884 G)

Issue - That does not flow from any ground

8. I do not think that in formulating the plaintiff's issues in the case in hand learned counsel for him gave much thought and care to his use of the words to attest which in this instance are inappositely used. Since the issue would appear not to flow from any ground of appeal it ought to be struck out. I accordingly strike it out. (p. 885 H)

NOTABLE POINTS OF INTEREST

ONU JSC

1. Was the trial court's judgment rightly affirmed?

In concluding my consideration of the issues raised in this appeal, I agreed with learned counsel for the defendant that only one single issues would have been sufficient to dispose of this appeal, to wit: Whether having regard to the case of the parties before the trial High Court, was the court below right in affirming the judgment of that court? My answer, with due respect, had it been asked would have been in the positive to the effect that, in view of the pleadings and the evidence proffered by the parties, the court below rightly and justifiably dismissed the plaintiff's case, affirming the judgment of the trial court and I so hold. (p. 886 A)

IGUH JSC

2. Trespass - How successfully maintained

It is a basic principle of law that only a person in possession of the land in

dispute at all material times that can maintain an action in damages trespass. And where two parties are both on a piece or parcel of land, claiming possession thereof, the possession being disputed trespass will lie at the suit of the one who can show that title is in him. Similarly, in a trespass action, the real issue is one of title to the land, the plaintiff to succeed, must establish a better title to the land in dispute than that of the defendant.
B (p. 896 E)

REPRESENTATION

Mrs. Ayo Obe for the appellant
C Chief Matthew Adepoju for the respondent

CASES REFERRED TO

Amuda v. Adelodun (1994). 12 KLR 399
Bereyin v. Gbobo (1989) 1 NWLR (Part 97) 373
Udozor v. Egosionu (1992) 2 N.W.L.R. 460
D Nwakuche v. Azubuike 15 W. A.C. A 46
Adimora v. Ajufo (1988) 3 N.W.L.R. (Part 80) 11
Balogun v. Akanji (1988) 1 N.W.L.R. (Part 70) 301
Uredi v. Dada (1988) 1 N.W.L.R. (Part 69) 237 at 246
Atanda v. Ajani (1989) 3 N.W.L.R. (Part 111) 511
E Craig v. City Press Ltd. (1975) 1 W.S.C.A. 100 AT 113
Mogaji v. Cadbury Nig. Ltd. (1985) 2 N.W.L.R. (Part 7) 393
Onyido v. Ajemba (1991) 4 N. W.L.R. (Part 184) 203 at 223
Ogundairo v. Gbadamosi (1974) 4 W.S.C.A. 27 at 31
Hudson v. Parker 1 Rob. Ecc. 26
F Ehimare v. Emhonyon (1985) 1 NSCC 163
Fasoro v. Beyioku (1988) 1 NSCC 705

LEAD JUDGMENT BY ONU JSC

G The Appellant as plaintiff in the Ibadan High Court for himself and on behalf of Banjoko Family claimed damages for trespass and perpetual injunction against the Defendant/Respondent, her agents, servants and/or privies in respect of their land at Olomi Area Olojuoro Road, Ibadan, and for perpetual injunction restraining her from further acts of trespass.

H Pleadings were ordered, filed and exchanged.
The plaintiff's case on the pleadings was that his family owned the land in dispute through settlement by one Ojo, his ancestor after the Jalumi War. The same pleadings averred that the land in dispute formed only a portion of land shared between two brothers, Ojo and Onikeola as farm

land, popularly called Banjoko. In his testimony, however, plaintiff said that that piece of land was called Elewu and that his grandfather Ojo, settled on the land in dispute during and after the Jalumi War as pleaded. In his evidence in support of the plaintiff's case, 2nd P.W. Yesufu Onikeola, said that the plaintiff's grandfather was Odewale and not Ojo as pleaded and finally that Onikeola, his grandfather, was the original owner of the land in dispute and not Ojo as pleaded. The plaintiff also finally claimed in his pleadings and testified in support thereof that his family had been in possession of the land in dispute through various acts, mostly farming, but further still by granting a portion of the land to one Raji Ogundiran who even though died a long time ago and was unknown to him, he still allowed his descendants to remain on the land as customary tenants. He called four of their boundary men who supported his case. The cause of the dispute in the instant case was the complaint of the plaintiff that the defendant had trespassed on the land in dispute; there having been an earlier trespass some fifteen years before, leading to the challenge of the defendant with a fight ensuing that culminated in the prosecution and conviction of two persons from both sides.

The defendant on the other hand, joined issues with the plaintiff in her Statement of Defence wherein she pleaded by tracing her root of title by purchase in 1960 from Akatapa Family whose title was by settlement over 100 years ago. She also claimed to have been farming on the land in dispute for several years; that she purchased several different portions of land at different times and supported them by conveyances vide Exhibits "A", "C2" and "C1" respectively.

In a well considered judgment Adekola, J., on 20th June, 1985, dismissed the plaintiff's claims in their entirety. The plaintiff being dissatisfied with the said judgment appealed to the Ibadan Division of the Court of Appeal which also on 18th July, 1988, in affirming the trial court's decision held, inter alia, thus:

"The traditional evidence led in this case clearly appears to be completely unsatisfactory for any reasonable tribunal to have said that the burden of proof had been discharged. Issues (i) and (ii) posed by the learned counsel for the Appellant above must therefore be answered in the negative, the Appellants did not prove their title to the land in dispute by traditional evidence nor did they prove that they were in possession of the land. This appeal has undoubtedly come to an end and after arriving at those conclusions as I have done."

Being further aggrieved by this decision the plaintiff has now appealed to this court, having obtained leave to do so on issues of fact on the

18th of October, 1988, premised on the six grounds of appeal earlier filed attacking the decision. The parties exchanged briefs of argument in accordance with the rules of court. Two issues were submitted at the plaintiff's instance - the second of which has been subdivided into two - for our determination thus:

"(i) Having regard to the finding that the Appellant's ancestor Ojo was the original owner of the land, was the Court of Appeal entitled to hold that the traditional evidence of the Appellant was unsatisfactory?"

"(ii) Did the fact that the Respondent was able to prove purchase from the Akatapa family amount to proof which could defeat the Appellant's traditional history?"

The two sub-issues of issue (ii) above are renumbered by me as follows:-

"(iii) Did the Appellant need to prove any acts of possession, and did they prove sufficiently such acts?"

"(iv) Were the acts of possession attested by the Respondent and her witnesses of any probative value?"

The defendant who did not formulate any issues for our determination, both in her brief and by oral submission of her counsel, attacked all four issues filed by the plaintiff in that the grounds from which they were distilled are incompetent; that being no grounds of law they be struck out since they are grounds of facts, mixed law and facts for which no leave of the court below or this court was sought. Besides, it has been contended, the issues are wrongly and inappropriately couched or worded in breach of the principles laid down by the court below and this court in the cases of *Amuda v. Adelodun* (1994) 1 NWLR (Pt. 360) 26 and *Bereyin v. Gbobo* (1989) 1 NWLR (Pt. 97) 372. For instance, argument is proffered how in defiance of decided cases, issue No.1 on whether the plaintiff proved his title by traditional evidence and issue No. 3 on whether the plaintiff needed to prove sufficient acts of possession, were lumped together with the issue relating to delay, laches and acquiescence which was not one of the issues posed by the plaintiff for the determination of this appeal in ground 1. As issues must flow or arise from grounds of appeal it is further contended, it is wrong to distil several issues from a single ground as done here where three issues were predicated on only one ground i.e., ground 1, adding that both the ground and the issues together with arguments canvassed therein should be struck out. The defendant further contends that ground 5 for which the plaintiff obtained leave of the court below is also incompetent and should be struck out because it alleged both a misdirection on the fact and arrived at a wrong conclusion in law, thus rendering the ground incon-

gruous and defective vide *Udozor v. Egosionu* (1992) 1 NWLR.(Pt. 218) 458-460. As the ground did not disclose what wrong legal conclusion the Court of Appeal arrived at to enable the defendant know the real complaint or which aspect of the judgment is being attacked on point of law, we were urged to strike out the appeal. The case of *Shell Petroleum v. Otoko* (1990) 6 NWLR. (Pt. 159) 693 at 707 was called in aid. In respect of ground 6, it is argued that although it is a good ground but since no issue related to or flowed therefrom, it is irrelevant to the appeal and should also be struck out. If grounds 1, 2, 3, 4 and 5 are declared incompetent and ground 6 as irrelevant, it is finally contended, the Notice of Appeal becomes a nullity and should be struck out.

I see the force in the objection raised by learned counsel for the defendant, the ruling in which we said we would embed in this judgment. In the first place, a cursory look at grounds 1,2,3 and 4 shows palpably that they are grounds of either facts or of mixed law and facts (certainly not of law) for which leave of the court below or of this court ought to have been sought and obtained. Such leave not having been obtained to argue them, they are unarguable and incompetent. In the result, grounds 1,2,3 and 4 are accordingly struck out.

Secondly, in respect of grounds 5 and 6, prior leave having been shown to have been obtained to argue the former and learned counsel for the defendant having conceded in argument that the latter is a good ground, the fact that both grounds are adequately related to the issues, renders neither of them incongruous nor unarguable. The two grounds being competent and arguable, the objection thereto is accordingly overruled.

I shall now proceed to consider the issues seriatim as follows:-

Issue No. 1 simply put, asks: Was the plaintiff's traditional evidence unsatisfactory? I will answer it by firstly pointing out that for his convenience, the plaintiff distorted the findings of the court below when he submitted in his brief as well as in oral submission that the writer of the lead judgment (*Kutigi J.C.A.*, as he then was) held at page 112 of the Record that both the plaintiff and 2nd P.W. agreed that the land in dispute belonged to Ojo either by settlement or by a grant to him (Ojo) by his senior brother, Onikeola. For the avoidance of doubt what the learned Justice said is reproduced hereunder thus:

"Apart from the boundarymen, only the appellant and P.W. 2 gave traditional evidence in accordance with the pleadings. The appellant said that the area is called Elewu farm and not Banjoko as pleaded. P.W. 2 on the other hand said the land originally belonged to his father Onikeola. And that it was Onikeola who gave the land to Ojo

..... I am therefore inclined to agree with the submission of Mr. Ogunsola for the appellant that both the appellant and P.W. 2 ultimately agree that the land in dispute belonged to Ojo either by settlement or by a grant to him by his senior brother Onikeola. But my worry is that the learned trial judge did not reject the appellant's claim for that reasons (sic) of "inconsistency in the appellant's and P.W.2's evidence alone "

What the learned justice, said in the above statement is no more than that he was inclined to agree with the submission of Mr. Ogunsola for the appellant that both the appellant and P.W. 2 ultimately agreed that the land in dispute belonged to Ojo either by settlement or by a grant to him by his senior brother Onikeola. His (the learned Justice's) worry, however, was that the learned trial Judge did not reject the appellant's claim for reasons of "inconsistency" in the appellant's and P.W. 2's evidence alone. It is therefore wrong, if not mischievous and misleading to suggest that that was the finding of the court. Indeed, it was not and it is therefore inconceivable for the plaintiff to say that the court below agreed with the plaintiff's submission that the evidence led by him (plaintiff) was to the effect that the land in dispute belonged to Ojo. Afortiori, it is preposterous to contend that the finding disposed of the only reason given by the learned trial Judge for rejecting the traditional evidence of the plaintiff. There was nothing of the sort. This is because (the highly irreconcilable contradictions in the pleadings and testimony of the plaintiff and 2nd P.W. on traditional history, part of which I highlight below to underscore the point I am making.

Firstly, the plaintiff pleaded that Ojo was the original owner by settlement of the land in dispute vide paragraph 4 of the Statement of Claim. The evidence of 2nd P.W. was that Onikeola was the original owner of the land by settlement. Secondly, the pleadings disclose that the time of the alleged settlement was after the Jalumi War. However, the evidence led in court points to the fact that the land in dispute was settled upon during the Jalumi War.

Thirdly, the period of Jalumi War is unknown as that War was a local war of which no judicial notice could be nor was taken of its timing at the trial. Fourthly, the time of the alleged settlement remains unknown and is therefore a matter of conjecture. Compare the defendant's pleading and evidence to the effect that the time of her vendor's settlement on the land in dispute was some 100 years ago, thus making it more ascertainable and predictable. Fifthly, the pleadings, aver that the land in dispute is known and called Banjoko but evidence led in court was that it is known and called Elewu. Sixthly, it was pleaded that Ojo was the ancestor of the

plaintiff whereas in his testimony he told the trial court that Ojo was his grandfather, 2nd PW., on the other hand, in his evidence gave the name of the plaintiff's grandfather as Odewale. No tribunal worthy of its name would accept conflicting statements such as postulated by the plaintiff. Indeed, evidence was at variance with the pleadings and as the evidence of witnesses for the plaintiff clearly contradicted one another, it ought to be rejected offhand or deemed not established. See *Nwakuche v. Azubuike* 15 WACA 46; *Adimora v. Ajufo* (1988) 3 NWLR (Pt. 80) 1; *Balogun v. Akanji* (1988) 1 NWLR (Pt. 70) 301; *Uredi v. Dada* (1988) 1 NWLR (Pt. 69) 237 at 246 and *Atanda v. Ajani* (1989) 3 NWLR (Pt. 111) 511. Such conflicting statements that the plaintiff allowed to be perpetuated in this case cannot be both true but could both be false. See *Craig v. City Press Ltd.* (1975) 1 W.S.C.A. 100 at 113. B C

In the light of the above, the learned trial Judge rightly, in my view, rejected the traditional evidence of settlement on the land in dispute put forward by the plaintiff and the court below was justified, in my view, to have affirmed that finding. Furthermore, as the court below, as I have pointed out elsewhere in this judgment, no where stated it accepted the plaintiff's traditional evidence as claimed by the plaintiff in his brief and proffered orally before us the decisions of the two lower courts constitute concurrent findings by them. As a matter of practice, this court will be loath to disturb such concurrent findings of fact by the two lower courts except in special circumstances e.g., the commission of error in substantive or procedural law none of which I can discern in the instant case at the plaintiff's prompting. See *Egonu v. Egonu* (1978) 11/12 S.C. 111 at 129; *Mogo Chinwendu v. Nwanegbo Mbamali* (1980) 3/4 S.C. 31 at 53; *Ogiesoba Otubu & 2 Ors. v. B.A.A. Guobadia* (1984) 10 S.C. 130 and *Balogun v. Amubikanhun* (1989) 3 NWLR. (Pt. 107) 18. The principle of law is that where there is a claim for trespass and injunction, title to the land involved is put in issue, and this makes it incumbent on the trial Judge to consider the issue of title to the land or exclusive possession to it. See *Okorie v. Udom* (1960) 5 FS.C. 162; (1960) SCNLR 326 *Amakor Obiefuna* (1974) 3 S.C. 67 at 75, 76; (1974) 1 All N.L.R. (Pt. 119) at 128; *Kponuglo v. Kodadja* (1934) 2 WACA 24; *Ogunde v. Ojomu* (1972) 4 S.C. 105 at 106 and *Nzekwu v. Nzekwu* (1989) 2 NWLR (Pt. 104) 373. In the instant case, the trial court having accepted the defendant's account as to her title and exclusive possession the law ascribes title to the land in her who had proved same. See *Aromire v. Awoyemi* (supra) and *Kareem v. Ogunde* (1972) 1 S.C. 182. Issue 1 is accordingly resolved against the plaintiff. D E F G H

Issue No.2 queries whether the fact that the defendant was able to

prove purchase from the Akatapa family amounted to proof which could defeat the plaintiff's traditional history. As held elsewhere in this judgment, the plaintiff having relied on settlement as his root of title to the land in dispute but his evidence dilated between settlement and grant, his evidence
 B which at the end of the day became conflicting and contradictory ought to be dismissed as unsatisfactory. See *Mogaji v. Cadbury (Nig.) Ltd.* (1985) 2 NWLR. (Pt. 7) 393 and *Ajani v. Ladepo* (1986) 3 NWLR. (Pt. 28) 276. Of *Onyido v. Ajemba* (1991) 4 NWLR. (Pt.184) 203 at 223. The trial court held as much and the court below upheld the finding. See also *Fasoro v.*
 C *Beyioku* (1988)2 NWLR. (Pt. 76) 263. Besides, the two lower courts accepted proof of the title of the defendant to the land in dispute through sale and conveyance vide Exhibits A, 01 and 02 respectively as against the plaintiff's failure to aver facts relating to the founding of the land in dispute, the persons who founded it and exercised original acts of possession
 D and/or title but rather equivocated as to its devolution and founding: See *Kalio v. Woluchem* (1985) 1 NWLR (Pt. 4) 610 at 628. See also *Piaro v. Tenalo* (1976) 12 S.C.31 at 41. Where he fails to satisfy this requirement, his case fails on that, particularly where the defendant proves good title. See *Da Costa v. Ikomi* (1968) 1 ANLR 191. With due respect the issue here
 E has become irrelevant in fact a non-issue in that the plaintiff founded his title on settlement and not on possession. The plaintiff having failed to prove his title, it is wrong of him to turn round to rely on acts of possession which acts only smack of the radical title pleaded. It is unnecessary therefore to consider the plaintiff's acts of possession as such acts by him on the land in dispute rather than being viewed as acts of possession become acts
 F of trespass, See *Da Costa v. Ikomi* (supra), *Amakor v. Obiefuna* (supra) and *Fasoro v. Beyioku* (supra).

The third issue posed by the plaintiff is whether he (plaintiff) would need to prove acts of possession and whether he proved sufficient such
 G acts. The plaintiff's action being that for trespass and injunction, he (plaintiff) would ordinarily need to prove exclusive possession but because of the nature of the defence, he (plaintiff) has to show better title or right to possession. It ought to be borne in mind that it is when both plaintiff and defendant failed to prove title that resort is had to acts in recent times. The
 H proposition of law that if the evidence of tradition is inconclusive the case must rest on question of fact vide *Ekpo v. Ita* (193234) 11 N.L.R. 68; *Omogrebe v. Edo* (1971) 1 All NLR. 282; *P. M. Alade v. Lawrence Awo* (1975) 4 S.C. 215 at 228 and *Ogundairo v. Gbadamosi* (1974) 4 W.S.C.A. 27 at 31, has no sway here in that the plaintiff having put his title in issue

and possession rested on traditional history that failed, then acts of possession become irrelevant and should not be considered in granting a declaration of title to him. See *Ogungbemi v. Asamu* (1986) 3 NWLR. (Pt. 27) 161. The issue is accordingly answered in the negative.

The fourth and final issue which like issue No. 3, is an off-shoot of issue No.2 asks: Were the acts of possession attested by the defendant and her witnesses? B

In order to sustain this issue, which as I seek to demonstrate hereunder is vague and confusing, the plaintiff at page 13 (paragraph 5.08) and page 15 (paragraph 6.03) of his brief referred to what he claimed to be "clear and cogent evidence" proffered by him in support of his acts of possession as follows: C

"The Defendant had been farming on the land in dispute within the last five years. She destroyed our own orange trees and palm trees before she planted her own."

The above piece of evidence is part of other pieces of evidence given by the plaintiff and his 5th witness (P.W. 5) and relied upon by him but which the defendant had urged the two lower courts at pages 61 and 103 of the Record to be expunged for going to no issue because they constituted pieces of evidence upon which there was no pleading. The piece of evidence referred to at page 2 of the plaintiff's Brief (paragraph 1.03) says: About seventeen years ago the four of them were found guilty and fined." E This is another piece of evidence, it is urged, that merits to be expunged.

There is merit in the application of the defendant to expunge these pieces of evidence as one is at a loss to decipher from what ground of appeal they emanate or flow. Furthermore, no ground of appeal alleged that certain acts were attested (whatever that nomenclature connotes) by the defendant and her witnesses. Besides, one does not know whether or how acts of possession which were attested by a person or persons have probative value. Stroud's Judicial Dictionary of Words and Phrases, 4th Edition, Volume 1 defines the words to attest inter alia as: " 'To attest' is to bear witness to a fact. Take a common example: a notary public attests a protest: he bears witness not to the statements in that protest but to the fact of making of those statements: so, I conceive, the witnesses in a will bear witness to all that the statute reassures attesting witnesses to attest, namely that the signature was made or acknowledged in their presence" (per Dr. Lushington, *Hudson v. Parker*, 1 Rob. Ecc. 26. I do not think that in formulating the plaintiff's issues in the case in hand learned counsel for him gave much thought and care to his use of the words to attest which in this instance are inappositely used. Since the issue would appear not to flow from any ground F G H

of appeal it ought to be struck out. I accordingly strike it out. See Nwadike v. Ibekwe (1987) 4 NWLR (Pt. 67) 718.

In concluding my consideration of the issues raised in this appeal. I agree with learned counsel for the defendant that only one single issue would have been sufficient to dispose of this appeal, to wit: whether having regard to the case of the parties before the trial High Court, was the court below right in affirming the judgment of that court? My answer, with due respect, had it been asked would have been in the positive to the effect that, in view of the pleadings and the evidence proffered by the parties, the court below rightly and justifiably dismissed the plaintiff's case, affirming the judgment of the trial court and I so hold.

For all I have been saying, this appeal lacks merit and it is accordingly dismissed. The decision of the Court of Appeal, Ibadan dated the 18th July, 1988 is accordingly affirmed. I award N1,000 costs to the defendant.

D

WALI JSC

I have had the privilege of reading in advance the draft lead judgment of my learned brother Onu JSC and I agree with his reasoning and conclusion for dismissing the appeal.

The traditional evidence adduced by the plaintiff to prove his case was both contradictory and unsatisfactory as well as at variance with the pleadings. Whereas the pleading averred in paragraph 4 of the Statement of Claim that the appellant's family owned the land part of which is the subject of the present litigation, through settlement by one Ojo, their ancestor paragraphs 5 and 6 seem to suggest that the land, part of which is now in dispute was jointly first settled by two maternal brothers Onikeola and Ojo, which they later shared.

The traditional evidence given by the plaintiff reads:-

"Ojo is my grandfather. Ojo came to Ibadan from Ido-Oshun near Oshogbo. My grandfather settled on the land during Jalumi War. Onikeola came with my grandfather from Ido-Oshun. They first settled in Ile-Olodo in Idi-Aro area, Ibadan. Ojo settled on the land in dispute. Ojo planted Cocoa trees, Kolanut trees, Orange trees, banana and palm trees on the land on which he settled. Nobody disturbed Ojo on the land in dispute during his life time."

P W 2 who described himself as junior brother to plaintiff testified thus:

"I know the land in dispute. The land in dispute originally belonged

to Ojo. Onikeola is the senior brother to Ojo. The land in dispute does not belong to Akatapa family."

When cross-examined, P.W. 2 said:-

"Onikeola was the original owner of the land in dispute. He gave the land in dispute to Ojo."

Both P.W's 3 and 4 are boundary witnesses. None of them said the land in dispute belongs to the plaintiff. It was only the plaintiff that gave scanty traditional evidence as regards the ownership of the land in dispute. PW 2 did not give any traditional evidence on the ownership of the land, but contradicted himself as to the original ownership of the same. In the evidence in chief he said *"The land in dispute originally belonged to Ojo while under cross-examination"* he said: *"Onikeola was the original owner of the land in dispute"* and that *"He gave the land in dispute to Ojo."*

The learned trial Judge while reviewing in his judgment the evidence adduced by the plaintiff remarked as follows:-

"It is the duty of the plaintiff in this case to show a better title than the defendant's title. The evidence led by the plaintiff in support of their title to the land is rather conflicting and contradictory. In the course of the plaintiff's evidence he stated that Ojo his grandfather settled on the land in dispute during the Jalumi war whereas the 2nd P.W. when he gave evidence, stated that the land originally belong to Ojo. But under cross-examination 2nd PW stated in evidence that Onikeola was the original owner of the land in dispute that Onikeola gave the land in dispute to Ojo."

By the type of contradiction in the evidence of 1st and 2nd PWs it is very difficult to conclude whether or not Ojo or Onikeola actually settle on the land in dispute."

After this review, he rightly concluded thus:-

"It is my findings having regard to the totality of the evidence led by the plaintiff in this case that the burden of proof which is on the plaintiff to establish his title or that of his family to the land dispute has not been substantiated by preponderance of evidence. The plaintiff has failed to establish a better title to the land in dispute."

The Court of Appeal rightly affirmed the finding by the learned trial Judge wherein it said in its unanimous judgment:

"The traditional evidence led in this case clearly appears to be completely unsatisfactory for any reasonable tribunal to have said that the burden of proof had been discharged."

The plaintiff had woefully failed to prove his claim of title to the land in dispute and it was rightly dismissed by both the trial Court and the Court of Appeal. See *Kate Enterprises Ltd. v. Daewoo (Nig.) Ltd. (1985) 2*

NWLR (Pt. 5) 116; Nwokafor & Ors. v. Nwankwo Udegbe & Ors. (1963) 1 SCNLR 184 and Kodilinye v. Odu & Ors. 2 WACA 336.

It is for these and the more detailed reasons in the lead judgment of my learned brother Onu, JSC that I also hereby dismiss this appeal and adopt the order of costs in the lead judgment.

B

OGUNDARE JSC

I have had the advantage of a preview of the judgment of my learned brother Onu JSC just read. I agree with him that this appeal is totally lacking in merit. I, however, wish to comment briefly on the objection taken to the grounds of appeal and say a few words on the appeal itself.

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Following the dismissal of his appeal to the Court of Appeal, the Plaintiff applied to that Court for leave to appeal to this Court. He annexed to the affidavit in support a copy of the Notice of Appeal containing the following 6 grounds of appeal:

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"Grounds of Appeal:

(1) Error in Law

The Court of Appeal erred in law in dismissing the Appellant's appeal when:

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(a) It had accepted the Appellant family's traditional evidence that the land in dispute originally belonged to their ancestor, Ojo;

(b) It had rejected the finding of the learned trial judge that the Appellant's family was barred from bringing the action by reason of delay, laches and acquiescence;

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(c) The only remaining basis for refusing the Appellant judgment was the Court of Appeal's finding that the Appellant did not adduce evidence of acts of possession;

(d) The appellant had in fact adduced evidence of acts of possession on the land in dispute, namely:-

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(i) the unchallenged and uncontradicted evidence of a grant to Raji Ogundiran and his descendants;

(ii) evidence of harvesting crops and fruits trees on the land in dispute;

(e) The Appellant's evidence that its fruit trees on the land in dispute were destroyed by the Respondent were substantiated by the Respondent herself in that:-

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(i) her plan showed that there were in fact fruit trees on the land in dispute;

(iii) the (sic) admitted harvesting from fruit trees on the land in 1960-1962, when even if she had planted fruit trees on the land In dispute in

1960, the same would not have been mature enough to produce fruit by 1962.

(2) Error in Law

The Court of Appeal erred in law in stating that there was no evidence to substantiate the Appellant's claim to have granted land to Raji Ogundiran or any other acts of possession on the land in dispute by the Appellant family when:-

(a) The Appellant himself testified as follows:- I do not know Raji Ogundiran but I know his children. The children of Ogundiran are farming on a portion of the land granted to their father by Banjoko.

(b) Such testimony was indeed evidence;

(c) The said evidence was neither challenged by the Respondent in cross examination nor contradicted by her when she came to present her own case;

(d) In the circumstances the Court of Appeal was bound to accept and act upon such evidence;

(e) There was evidence from the Appellant and the Appellant's boundary men that the Appellant family had been farming on the land themselves, planting and harvesting crops and citrus fruits;

(3) Error in Law

The Court of Appeal erred in law when it stated as follows:-

"Moreover the learned trial judge in his judgment made the following finding of facts amply supported by evidence and then proceeded to set out twelve such findings and adopt them as its own findings of fact when:

(a) The Court of Appeal failed to give any basis for its assertion that the said findings were amply supported by evidence;

(b) The Appellant had shown both in its written and oral submissions that:-

(i) the title of the persons who conveyed large area of land to the Respondent was not better than the title of the Appellant in so far as the actual land in dispute;

(ii) there was nothing to tie the evidence of the Respondent's alleged acts of possession in respect of the whole area owned by her to the actual land in dispute;

(c) The Court of Appeal failed to consider these submissions before deciding to accept wholesale the findings of facts made by the learned trial judge;

(d) If the Court of Appeal had considered the arguments against

the said findings, it would have rejected the same.

(4) Error in Law

The Court of Appeal erred in law when it held in effect that mere proof by the Respondent that the Akatapa and Aboleja families has (sic) conveyed land to her amounted to proving that she had a better title to the land in dispute than the Appellant.

B (a) Such conveyances to the Respondent would only confer a better title than the Appellant on the Respondent if her vendors themselves had better title to the actual land in dispute than the Appellant;

(b) The learned trial judge had not made any finding whatsoever that the Akatapa family had been the original owners of the land in dispute;

C (c) The Court of Appeal had rejected the only reason given by the learned trial judge for his rejection of the Appellant's claims that his family were the original owners of the land in dispute - namely an alleged conflict in the traditional evidence - when it held as follows:-

D 'I am therefore inclined to agree with the submission of Mr. Ogunsola for the appellant that both the appellant and P.W. 2 ultimately agree that the land in dispute belonged to Ojo either by settlement or by a grant to him by his senior brother Onikeola.'

E (d) The Respondent had not filed any Respondent's Notice asking that the judgment of the court below be affirmed on other grounds, e.g., on the basis that the Akatapa family had been shown to be the original owners of the land in dispute.

(e) The only reason being supported or advanced by the Respondent had therefore failed;

F (f) In the circumstances mere proof of purchases from such third parties could not defeat the Appellant's own properly established original title.

(5) Misdirection on the facts and in law

The Court of Appeal misdirected itself on the facts when it adopted as its own findings the following findings of fact by the learned trial judge, namely:-

G '6. That the Respondent planted economic and cash crops on the land shown in Exh. E for over 20 years.

7. She also planted cocoa trees on a ten acre of land within the area.

H 8. That she established piggery, palm oil industry and a Gari processing project on the land.

9. That D.W. 5 was her caretaker on the farm located on the land from 1966 - 1976.

10. That D. W. 9 has been her caretaker of the farm on the land from 1976 to date.

11. That the plaintiff/appellant was aware that the respondent has

been on the land and had erected buildings thereon and had maize and cassava plantations all on the land in dispute.’ and thereby came to a wrong conclusion in law.

Particulars

(a) The said findings were based upon evidence which related only to the whole vast area which the Respondent claimed to have purchased from the Akatapa and Aboleja families; B

(b) There was no evidence to show that the evidence of the caretakers related to the particular land in dispute;

(c) There was no evidence to show that the alleged piggery, cocoa plantation or other alleged acts of possession by the Respondent were related to the land in dispute in particular, rather than to the vaster area which was not in dispute; C

(d) The Respondent’s own plan showed that the only buildings on the land in dispute were still under construction, thereby contradicting her claim to have erected such buildings in 1960.

(6) The judgment is against the weight of evidence.” D

Paragraphs 4 and 5 of the said affidavit read as follows:

“4. That two of the grounds of appeal, namely, grounds (5) and (6) raise issues of fact or of mixed law and fact.

5. That in the circumstances the Appellant respectfully seeks the leave of this Honourable Court to appeal on the said issues of fact for the reasons set forth in the Motion paper delivered herewith.” E

It is clear from the above depositions that the Plaintiff sought leave to appeal in respect of grounds (5) and (6) only and the court below understood the application for leave as such. For in his lead ruling, (with which the other Justices agreed) Akanbi JCA. (as he then was) said: F

“In the Circumstances I am inclined to the view that it is in the interest of justice to grant leave to applicant who has already four grounds of Law for which he requires no leave to argue, set out in the notice of appeal.” G

Leave was granted accordingly.

Now in this Court the Defendant has raised an objection to the competence of grounds (1) - (4). In her Brief she states:

“8. Appellant got leave of the Court of Appeal to argue grounds 5 & 6 which, according to paragraph 4 of the affidavit in support of the Application for leave at page 125 of the Record raise issues of fact or mixed law and fact.” H

“9. The appellant at page 6 of his Brief formulated 4 issues as

follows:

1. Having regard to the finding that the Appellant's ancestor Ojo was the original owner of the land, was the Court of Appeal entitled to hold that the traditional evidence of the Appellant was unsatisfactory?
2. Did the fact that the Respondent was able to prove purchase from Akatapa Family amount to proof which could defeat the Appellant's traditional history?
3. Did the Appellant need to prove any acts of possession, and did they prove sufficiently such acts?
4. Were the acts of possession attested by the Respondents and her witnesses of any probative value?
10. The Respondent hereby contends that grounds 1, 2, 3 and 4 of the grounds of appeal are incompetent being not grounds of law and applies that they be struck out. They are grounds of facts, mixed law and facts in respect of which no leave of either the Court of Appeal or the Supreme Court was obtained.
- Besides, they are wrongly and inappropriately couched or worded. They contain particulars which are not related to the grounds. Both the Court of Appeal and the Supreme Court have, in many cases, held that such grounds are liable to be struck out. See (i) *Amuda v. Adelodun* (1994) 8 NWLR (Pt. 360) 26; (ii) *Bereyin v. Gbobo* (1989) 1 NWLR (Pt. 97) 327.
- In defiance of decided cases, issue number 1 on whether the appellant proved his title by traditional evidence and issue number 3 on whether the appellant needed to prove sufficient acts of possession were lumped together with issue of delay, laches and acquiescence which was not one of the issues posed by the appellant for the determination of this appeal in ground 1. Issues must flow or arise from grounds of appeal. It is wrong to pose several issues in a single ground as done here where three issues were predicated on only one ground - Ground 1. Both the ground and the issues together with the arguments canvassed therein should be struck out.
11. The Respondent contends that ground 5 for which the appellant obtained leave of the Court of Appeal is also incompetent and should be struck out because it alleged both a misdirection on the fact and arrival at a wrong conclusion in law. It is submitted that this is similar to a ground which complains of misdirection of law and on the facts which is incongruous and defective according to the decided authorities. See *Udozor v. Egosionu* (1992) 2 NWLR 460. The ground did not disclose what wrong of legal conclusion the Court of Appeal arrived at to enable the respondent know the real complaint or which aspect of the judgment is being attacked on point of law. See *Shell v. Otoko* (1990) (Pt. 159) NWLR 707.

12. Although ground 6 is a good ground but no issue related to or flew from this ground. It is, therefore, of no relevance to this appeal and should be struck out.

13(a). If ground 1,2,3,4 and 5 are declared incompetent and ground 6 is irrelevant, the Notice of Appeal becomes a nullity and should be struck out. All the arguments based on them collapse and the appeal should be dismissed.

13(b). If bad ground is argued together with good ground(s), the arguments canvassed amount to a nullity."

The Plaintiff did not file a Reply Brief in answer to the contentions above nor did Mrs. Obe learned counsel appearing for him at the oral hearing of the appeal proffer any oral arguments in reply.

It cannot be disputed that the leave to appeal granted by the court below is in respect of grounds (5) and (6). Plaintiff was of the view in that court that grounds (1) - (4) were grounds of law and hence did not seek leave to appeal in respect of them.

But are they ground of law? I have perused the 4 grounds of appeal and I am satisfied that they cannot, by any stretch of imagination, be described as grounds of law-simpliciter. They are mostly grounds of fact simpliciter or, at best, grounds of mixed law and fact. In either event, Plaintiff requires leave of court to appeal.

And as he obtained no such leave in respect of those grounds I uphold Defendant's objection to their competence and I strike them out accordingly. I find no substance in the objection raised to ground (5) and I accordingly uphold that ground as being competent.

It is not contended that ground (6) is incompetent; what is contended is that no issue for determination has been raised on it and it should, therefore, be deemed abandoned. I regret I do not share this view. Although the issues as formulated in the Appellant's Brief cannot be described as product of good draftsmanship, the sum total of these issues is the question: whether in the light of the evidence adduced at the trial judgment ought not to have been entered in Plaintiff's favour?

This question is well covered by grounds (5) and (6). I will treat the appeal accordingly.

For his root of title to the land in dispute, the Plaintiff/Appellant pleaded as follows:

"4. The land in dispute was first settled upon by one Ojo, the ancestor of the Plaintiff after the Jalumi War.

5. Two brothers Onikeola and Ojo both of the same mother, left Ido-Oshun near Ede for Ibadan during the Jalumi war, fought on the side of Ibadan and after the said war came to settle in Ibadan.

6. *The place they first settled on in Ibadan is still called Ile Oba'do in Idi Aro area of Ibadan.*

7. *The land in dispute forms only a portion of land shared between Onikeola and Ojo as farmland."*

B In his evidence in support the plaintiff deposed:

"Ojo is my grandfather. Ojo came to Ibadan from Ido-Oshun near Oshogbo. My grandfather settled on the land during Jalumi War. Onikeola came with my grandfather from Ido-Oshun. They first settled in Ile-Olodo in Idi -Aro Area, Ibadan. Ojo settled on the land in dispute. Ojo planted Cocoa trees, kolanut trees, orange trees, banana and palm trees on the land on which he settled. Nobody disturbed Ojo on the land in dispute during his life time. Ojo has died."

C Plaintiff called as his witness one Yesufu Onikeola who testified thus:

"I know the plaintiff. He is my junior brother. My grandfather is Onikeola. Plaintiff's grandfather is Odewale. Ojo is my uncle."

D *I know the land in dispute. The land in dispute originally belonged to Ojo. Onikeola is the senior brother to Ojo."*

Cross-examined, the witness deposed -

"Onikeola was the original owner of the land in dispute. He gave the land in dispute to Ojo."

E That is all the evidence in support of plaintiff's traditional history of the founding of the land in dispute. That the evidence is contradictory is self-evident. It is not surprising, therefore, that the learned trial Judge remarked in his judgment as follows:

"It is the duty of the plaintiff in this case to show a better title than the defendant's title. The evidence led by the plaintiff in support of their title to the land is rather conflicting and contradictory. In the course of the plaintiff's evidence he stated that Ojo, his grandfather settled on the land in dispute during the Jalumi war whereas the 2nd PW. when he gave evidence, stated that the land originally belonged to Ojo. But under cross examination 2nd PW. stated in evidence that Onikeola was original owner of the land in dispute that Onikeola gave the land in dispute to Ojo."

G *By the type of contradiction in the evidence of 1st and 2nd PW's it is very difficult to conclude whether or not (sic) Ojo or Onikeola actually settled on the land in dispute."*

H The learned Judge then found:

"It is my findings having regard to the totality of the evidence led by the plaintiff in this case that the burden of proof which is on the plaintiff to establish his title or that of his family to the land in dispute has not been

substantiated by preponderance of evidence. The plaintiff has failed to establish a better title to the land in dispute."

And concluded:

"The plaintiff cannot therefore succeed in an action for trespass against the defendant in this case."

The Court of Appeal, to which the Plaintiff appealed after losing at the trial, held, per Kutigi JCA (as he then was):

"The traditional evidence led in this case clearly appears to be completely unsatisfactory for any reasonable tribunal to have said that the burden of proof had been discharged."

On the evidence as it stands, I have no reason to distort these concurrent findings of the two courts below. Plaintiff pleaded settlement by Ojo as his root of title but his witness spoke of grant by Onikeola to Ojo. In such circumstance it cannot be said that Plaintiff has proved the case he set out to establish; his case was, therefore, rightly dismissed *Ehimare and Another v. Emhonyon* (1985) 1 NSCC 163; (1985) 1 NWLR (Pt. 2) 717; *Fasoro & Another v. Beyioku & Ors.* (1988) 2 NWLR (Pt. 76) 263. Having failed to prove his root of title as pleaded, Plaintiff cannot fall back on acts of possession that were not relied on in proof of his title - *Fasoro & Anor. v. Beyioku & Ors.* (supra).

There is overwhelming evidence, accepted by the trial Judge, in support of the findings of fact made by him and affirmed by the court below. The twelve findings of fact made by the learned trial judge and listed in the lead judgment of Kutigi J.C.A., are amply supported by the evidence. The two courts below rightly, in my view, found that Plaintiff's case was not made out. His case was rightly dismissed. Consequently, I too dismiss this appeal and affirm the judgment of the court below. I award to the Defendant/Respondent costs as assessed in the lead judgment of my learned brother, Onu JSC

OGWUEGBU JSC

I have had the opportunity of reading in draft the judgment read by my learned brother Onu, J.S.C. I agree with him that this appeal be dismissed and I accordingly dismiss it.

The learned trial judge found that the evidence led by the plaintiff in support of his title to the land in dispute is conflicting and contradictory. On the issue of possession, he found that neither the plaintiff nor any member of his family was in possession of the land in dispute for the past twenty years and that the plaintiff himself admitted under cross-examination that the defendant had been farming on the land in dispute for the past twenty three years and that the defendant had cassava and maize on the land.

The court below rightly in my view affirmed the findings of fact made by the learned trial judge.

I see no justification in disturbing the concurrent findings of the courts below. On the evidence before the courts below, no reasonable tribunal could have come to a different conclusion. The findings are devastating. I endorse the order as to costs contained in the lead judgment.

IGUH JSC

C I have had the privilege of reading in draft the lead judgment just delivered by my learned brother Onu, J.S.C, and I agree entirely that this appeal is devoid of substance and ought to be dismissed.

D The plaintiff's claim before the trial court against the defendant was for damages for trespass and perpetual injunction. The plaintiff, now appellant, had based his root of title to the land in dispute on settlement by one Ojo, his ancestor, after the Jalumi war. The defendant, now respondent, on the other hand, claimed ownership of the land in dispute by purchase from both the Akatapa and Aboleja families in the years 1960 and 1962. Both parties also claimed possession of the land in dispute.

E It is a basic principle of law that only a person in possession of land in dispute at all material times that can maintain an action in damages for trespass. See *Olaghemiro v. Ajagunbade* (1990) 3 N.W.L.R. (Pt. 136) 37, *Adebanjo v. Brown* (1990) 3 NWLR (Pt. 141) 661 etc. And where two parties are both on a piece or parcel of land, claiming possession thereof, F the possession being disputed, trespass will lie at the suit of the one who can show that title is in him. *Awooner Renner v. Daboh* 2 WACA 258 at 259 and 263, *Umeobi v. Otukoya* (1978) 4 S.C. 33 etc. Similarly, if in a trespass action, the real issue is one of title to the land, the plaintiff, to succeed, must establish a better title to the land in dispute than that of the defendant. See *Samuel Nelson-v. Ammah* 6 WACA 134, *Alhaji Aromire and Others v. J.J. Awoyemi* (1972) 1 All N.L.R. (Pt. 1) 101, *Vincent Okorie and Others v. Philip Udom and Others* (1960) 5 F.S.C 162 etc.

G Generally speaking, a claim for trespass being rooted in exclusive possession of the land in dispute, all a plaintiff needs to prove is that he had exclusive possession or the right to such possession of the land. But H once, as in the present case, the defendant claims to be the owner of the land in dispute, title to it is automatically out in issue and the plaintiff, to succeed, must establish a better title to the land in dispute than that of the defendant. See *Pius Amakor v. Benedict Obieifuna* (1974) 3 S.C 67 at 78, *Alhaji Aromire and Others v. J.J. Awoyemi and Others* (1972) 1 All N.L.R.

(Pt. 1) 101. The appellant in the present case, to succeed, therefore, must establish a better title to the land in dispute than the defendant.

With regard to the appellant's claim as to his root of title, the learned trial Judge found as follows:- .

"The evidence led by the plaintiff in support of his title to the land is rather conflicting and contradictory

By the type of contradiction in the evidence of 1st and 2nd PW's, it is very difficult to conclude whether or not Ojo or Onikeola actually settled on the land in dispute

It is my finding, having regard to the totality of the evidence led by the plaintiff in this case that the burden of proof which is on the plaintiff to establish his title or that of his family to the land in dispute has not been established by preponderance of evidence. The plaintiff cannot therefore succeed in an action for trespass against the defendant in this case."

On the issue of possession of the land in dispute, the learned trial Judge observed thus -

"There is another aspect of this case which the court should dilate on. By the evidence before the court, it cannot be said that the plaintiff or any member of his family was in possession of the land in dispute for the past twenty years. The plaintiff himself has admitted under cross examination that the defendant had been farming on the land in dispute for the past twenty three years and that the defendant has cassava and maize plantations on the land in dispute. With that type of evidence coming out from the mouth of the plaintiff in this case, it is my view that the defendant cannot be said to have dispossessed the plaintiff who had earlier on been in lawful possession of the land in dispute. I quite agree with the submission of learned counsel for the defendant that the plaintiff has brought a wrong action because someone who is not in possession cannot bring an action for damages for trespass."

Earlier on in his judgment, the trial Judge had found as follows:

"Having considered the whole evidence before me together with the pleadings and the final addresses of both counsel, I hold that the following points have been established as facts:

(a) That the defendant in this case bought a vast piece of land from Akatapa family in 1960 and that a deed of conveyance Exhibit C2 was executed in her favour and in favour of her husband.

(b) That again in 1962 another portion of land was sold by Akatapa family to the defendant and her husband and a deed of conveyance, Exhibit C1 was executed in their favour by Akatapa family.

(c) That apart from purchasing portions of land from Akatapa

family as evidenced by Exhibits C1 and C2, the defendant and her husband in addition bought portion of land from Aboleja family as evidenced by the deed of conveyance, Exhibit A.

(d) That the total area bought from both the Akatapa family and Aboleja family is as shown by the composite plan tendered and admitted as Exhibit E.

(e) That the defendant had been in possession of the land sold to her by virtue of Exhibit C2 as far back as 1960 and had also been in possession of the land sold to her by virtue of Exhibit C1 since 1962.

(f) And that she had planted crops (both economic and cash crops) on the land as shown in Exhibit E as far back as over twenty years ago.

(g) That the defendant planted cocoa trees on a ten acre of land within the land in dispute.

(h) That the defendant established piggery, palm oil industry and a Gari processing project on portion of the land in dispute.

(i) That between 1966 and 1976, 5th DW was the caretaker in the defendant's farm which was located within the land in dispute.

(j) That the 9th DW became the caretaker of the defendant's farm as from 1976 and he is still her caretaker up till today.

(k) That the plaintiff was aware that the defendant has been farming on the land for the past twenty three years.

(l) That the plaintiff was aware that the defendant had erected building on portion of the land in dispute and that her labourers were staying in the said building.

(m) That the defendant (sic) was also aware that the defendant has cassava plantation, and maize plantation on the land in dispute. My finding of facts as contained in paragraphs (k)-(m) has been confirmed by the defendant (sic) when he was being cross-examined by learned counsel for the defendant.

By reason of my findings of fact as contained in (a) - (m) above there is no doubt in my mind that the plaintiff was not speaking the truth when he stated that the defendant only started to farm on the land only about five years ago. It cannot be true also that the plaintiff only left the farm just about five years ago when the defendant trespassed on the land to farm on the said land now in dispute."

The above findings are amply supported by copious evidence on record. They were also confirmed by the Court of Appeal, per the lead judgment of Kutigi, J.C.A., as he then was, with which Sulu-Gambari and

Omololu-Thomas JJ.C.A., agreed. Concluding its judgment the Court of Appeal observed as follows:

“The traditional evidence led in this case clearly appears to be completely unsatisfactory for any reasonable tribunal to have said that the burden of proof had been discharged. Issues (i) & (ii) posed by the learned B counsel for the appellant above must therefore be answered in the negative. The appellants did not prove their title to the land in dispute by traditional evidence nor did they prove that they were in possession of the said land. This appeal has undoubtedly come to an end after arriving at these conclusions as I have done.”

The principle is well settled that this court will not interfere with C concurrent findings of fact made by both the trial High Court and the Court of Appeal where there is sufficient evidence in support of such findings and where there is no substantial error apparent on the record of proceedings such as some miscarriage of justice or a violation of some principle of law D and procedure. See *National Insurance Corporation of Nigeria v. Power and Industrial Engineering Co. Ltd.* (1986) 1 NWLR (Pt. 14) 36, *Enang v. Adu* (1981) 11 - 12 SC 25 at 42, *Mora v. Okonkwo* (1987) 3 NWLR (Pt. 60) 314 at 321, *Igwego v. Ezeugo* (1992) 6 NWLR (Pt. 249) 561 at 574 etc. I have no reason whatever to interfere with the above concurrent findings of E both courts below and I must therefore accept them as fully established.

This appeal is without substance and it is for the above and the more elaborate reasons contained in the lead judgment of my learned brother, Onu, J.S.C., that I, too dismiss this appeal. I abide by the order for costs therein made.

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