

SUPREME COURT OF NIGERIA
 25TH JUNE, 1996. SC. 291 1991
CORAM:- M. L. UWAIJS CJN, A. B. WALL,
M. E. OGUNDARE, S. U. ONU, A. I. IGUH, JJSC.

DAVID AKPAN AND ANOTHER APPELLANTS
(For themselves and as representatives of	
Nung Inyang Ekok Akwang Ede in Ikot Ede Village)	
AND	
UDO UTIN AND 19 OTHERS RESPONDENTS

APPEALS - Findings of fact - Appellate court's power of interference with findings of fact of trial court - Is confined within narrow and limited dimensions.

EVIDENCE - Evaluation of Evidence - Whether court of Appeal failed - To properly evaluate the totality of evidence.

EVIDENCE - Admissibility - Whether Exhibit E is admissible - As evidence of act of ownership by plaintiffs.

JUDGMENTS - Findings on possession - By trial court - Is not based on proceedings in district court suit alone - But other evidence adduced before the court.

JUDGMENTS - Reliefs sought - Plaintiffs are entitled to reliefs sought - If allegations in their statement of claim are established.

PLEADINGS - Cause of action - Where no cause of action is disclosed in the pleadings - Trial court can not suo motu dismiss a case in limine - Without application by the defendant.

PRACTICE & PROCEDURE - Proceedings of court - In an earlier District Court suit - The importance and relevance thereof - Not exaggerated by trial judge.

FACTS

Appellants sued the respondents in the High Court of the former South Eastern State, Etinam Division (now in Akwa Ibom State) claiming Declaration of title to the land in dispute, General damages for trespass and perpetual injunction against the respondents. The case proceeded to trial. At the

conclusion of hearing, the learned trial judge found and entered judgment for the appellant in terms of their claims but reduced the amount awarded as damages.

Dissatisfied, the respondents appealed to the Court of Appeal. The Court of Appeal allowed the appeal and set aside the judgment of the trial court. The appellants have now appealed to the Supreme Court against the decision of the Court of Appeal formulating 4 questions for determination by the Court

ISSUES FOR DETERMINATION

(1) Whether the learned justice of the Court of Appeal who delivered the lead judgment which was concurred in by the other two Justices was correct when he held that this is one clear instance in which the trial Judge would have been right to have dismissed the Appellants' claims on the pleadings and without taking evidence on the alleged ground that the Appellants failed to state how they came to be entitled to the piece of land claimed by them.

(2) Whether the Court of Appeal was not in error in allowing the Respondents' appeal on the alleged ground that the learned trial Judge made a wrong use of the Record of the proceedings in the District Court in Suit No. 60/71, Exhibit E., in this case. - See p. 1186

HELD (Unanimously allowing the appeal per lead judgment of **OGUNDARE JSC**)

Plaintiffs entitled to reliefs sought

1. It cannot, in my respectful view, be correct to say that, on the allegations contained in the statement of claim if established, Plaintiffs would not be entitled to the declaration sought nor to damages for trespass and injunction. Their case, as pleaded, is simply this: Since the founding of the Ikot Ede village by Ede the land in dispute had been in the undisturbed possession of their ancestor Akwang Ede and his descendants known as Nung Edok Akwang Ede Family and that when in 1968 one Sunday Moses from another family in the village came on the land to build, they challenged him and Moses reported them to the Village Council which found in their favour and ordered Moses to quit the land. Surely, this case, if established, would suffice to entitle the Plaintiffs to the reliefs sought by them. (p. 1190 H)

Dismissing a case in limine

2. And for a case to be dismissed in limine on the ground that the pleadings do not disclose a cause of action it must have been on the application of the defendant and not by the trial court suo motu. The Defendants made no such

application in this case. The observation made by the court below is to say the least, rather unfortunate. Not only is it not justified by the pleadings, it tended to close the mind of the Court to the merit of the adjudication made by the trial court. In conclusion I answer question (1) in the negative. (p. 1191 D)

Use of District court proceedings

3. From these passages, the learned Judge cannot, in my respectful view, be said to have “exaggerated the importance, effect and relevance of the evidence” relating to the proceedings in the District Court as was uncharitably suggested, with respect, by the Court below. I am satisfied that all that the learned trial Judge did was to state the factual situation arising from the evidence. Indeed, the Defendants did not contest the title given to the Plaintiff in that case. They only contended that the land to which that case related, and which they conceded to the Plaintiffs, was a small part of OKIMKIM land and not the whole now claimed by the Plaintiffs. (p. 1195E)

Exhibit E is admissible in evidence

4. In any event Exhibit E would be admissible as evidence of act of ownership by the Plaintiffs in that they (through 1st Plaintiff) once defended their right to at least part of the land in dispute against an intruder - Sunday Moses. In addition Suit No. 60/71 becomes relevant in view of the admissions made therein by the Defendants - see: sections 19&20 of the Evidence Act. I answer Question (2) in the affirmative. (p. 1196 D)

Finding on possession

5. With profound respect to their Lordships of the court below they seemed rather impatient in their consideration of the judgment on appeal before them. In my respectful view, the learned trial Judge did not base his finding of possession on suit No. 60/71 alone but also on other evidence adduced before him. On the area covered by the Suit. No. 60/71, there was no dispute that the Plaintiffs were in possession. The Defendants conceded as much. (1197 B)

Evaluation of evidence

6. If the Court below had properly adverted its mind to the totality of the evidence adduced for the Plaintiffs, it would not have found, as it did, that the finding on possession was unjustified nor that “there was no evidence of possession by the Plaintiffs worthy of assessment.” I answer Question (3) in the negative. (p. 1198 A)

Findings of fact

7. From the principles enunciated above it is crystal clear that interference by an appellate court with respect to findings of fact is confined within narrow and limited dimensions. After a careful consideration of the judgment now on appeal before us, I am of the clear view that the Court below was mistaken as to the limits of its power and duty when it embarked, as it did, on a fresh appraisal of the evidence; it had not the advantage of seeing and listening to the witnesses but relied only on the cold sullen print of the records before it. It purposely, with the clear intention evinced at the beginning of the lead judgment, set out, not only to arrive at a conclusion different from that of the trial court but also to dismiss Plaintiffs' claims because according to it, "they failed to state how they came to be entitled to this particular parcel of land." I have no hesitation in restoring the findings of fact of the learned trial Judge. (p. 1201 F)

NOTABLE POINTS OF INTEREST**ONUJSC***1. Appeal court not to decide on issues not raised*

It was not the province of the court below to act suo motu in dismissing the suit. It was therefore wrong of the learned Justice of Appeal to have based his decision on issues which were never before the trial court in the pleadings or to have misconceived them when he impetuously or hastily and without caution, found against the Appellants on what he suo motu raised himself. (p. 1207 H)

2. Appeal court to look at substance of case in customary court

The above finding, in my view, is wrong in many respects and seems firstly, to overlook the fact that in determining whether the issue and the subject matter of the previous suit were the same as those in the present suit, the court was obliged to look into the substance rather than the form of the earlier case if it was instituted in the native or customary court. See *Ikpong & ors. v. Edoho & anor* (1978) 2 L.R.N. 29 at 35/36 in which it was held, inter alia, that in considering a plea of res judicata in relation to claims determined by native or customary courts, it is necessary to look at the substance of the claims rather than their form, and subject to the over-riding principle of fairness an Appeal Court should not look too critically at the procedure adopted by those courts. In order to determine what issues were involved in any case before those courts it is necessary to look at the entire proceedings including both the evidence and the judgments. (p. 1209 G)

IGUHJSC

3. Where demurrer is not raised court cannot dismiss action suo motu

In the circumstances of this action, it is my view that the respondents not having raised, whether directly or indirectly, a case of demurrer or that the statement of claim disclosed no cause of action but filed their Statement of Defence, joining issue with the appellants' in respect of several material issues of fact in the case, it cannot be the duty of the trial court to dismiss the appellants' action suo motu in the absence of any application to that effect. I agree that such a course of action will be in clear contradiction of the well established principle that it is counsel conducting a civil case and not the court that is as a matter of law and procedure in complete control of his case. (p. 1217 F)

4. Methods of establishing title to land

The Court of Appeal further based its finding that the appellants' claim should have been dismissed in limine on the pleadings on the ground that it did not show how the said appellants came to own the land in dispute. With the greatest respect, I am unable to accept this proposition as well founded. In my opinion, the appellants from their pleadings fully averred ownership of the land in dispute by settlement through traditional evidence as well as by acts of long possession and enjoyment of the land. These two methods of establishing title to land, among others, are each fully recognized by law. (p. 1218 D)

5. Pleadings - Raising issue of fact

It is long settled that in order to raise an issue of fact, there must be a propel traverse. If a defendant refuses to admit a particular allegation in the statement of claim, he must state so specifically and he does not do this satisfactorily by pleading that the defendant is not in a position to admit or deny a particular allegation or that he will put the plaintiff to strict proof thereof. (p. 1221 F)

6. When appellate should not interfere

With profound respect, the court below should not reverse a trial court on the ground that if the facts were before it, it would not have come to the same conclusion as the trial court. An appellate court should not ordinarily interfere with the findings of fact made by a trial court except in circumstances such as where the trial court made no proper use of the opportunity of seeing and hearing the witnesses at the trial or where it drew wrong conclusions from accepted credible evidence or has taken an erroneous view of the evidence

adduced before it or its findings of fact are perverse in the sense that they do not flow from the evidence accepted by it. (p. 1225 D)

REPRESENTATION

Kehinde Sofola, S.A. N. with E. O. Oyelahan, Miss for the appellants
Respondent absent and unrepresented

B

CASES REFERRED TO

Johnson v. Williams (1935) 2 WACA 248

Kisiedu v. Dampreh (1935) 2 WACA 281286 PC

Ebba v. Ogodo (1984) 1 SCNLR 372.378-9

C

Onowan v. Iserhien in Re Lucy Onowan Appellant (1976) 9 - 10 SC 95

Idundun v. Okumagba (1976) 9-10 S.C. 227

Dyson v. Attorney-General (1911) 1 K.B. 410

Welli v. Okechukwu (1985) 6 S.c. 1

Ikpang v. Edoho (1978) 2 L.R.N. 29 at 35/36

D

Boadu v. Fosu 8 W.A.C.A. 187

Fadiora v. Gbadebo (1978) 7 S.C. 219

Owosho v. Dada (1984) 7 S.c. 149 at 163-164

Ajibade v. Pedro (1992) 5 N.W.L.R. (Part 241) 257 at 267

Odivo v. Obor (1974) 2 S.C. 23

E

Ekeogun v. Aliri (1990) 1 N.W.L.R. 345

Davey v. Bentinck (1893) 1 Q.B. 185

Elike v. Nwankwoala (1984) 12 S.C. 301 at 311-312

Chukwunta v. Chukwu 14 W.A.C.A. 341

Akerodolu v. Akinremi (1989) 2 N.W.L.R. (Part 108) 164 at 172 Balogun v.

F

Agboola (1974) 10 SC III

STATUTES & RULES REFERRED TO:

Evidence Act cap 112 L.F.N. 1990, ss. 19,20,53,54, 198

High Court (Civil Procedure) Rules of Western Nigeria, Order 14, Rule 19 Civil

G

Procedure Rules of South Eastern state of Nigeria (applicable to Cross Rivers State) Order 29, Rule I, 2, Order 33, rule 19

LEAD.JUDGMENTBYOGUNDAREJSC

H

By a Write of Summons issued on the 21st day of January 1975, Akpan and Stephen Inyang, for themselves and as representing the family of NUNG INYANG EDOK AKWANG EDE of Ikot Ede Village in Western Nsit Clan, Etinam Divisions, of the former South-Eastern State (Akwa-Ibom State), sued

the 20 defendants above named in their individual capacity claiming:

“(a) Declaration of title to that piece or parcel of land known as and called ‘OKIMKIM MBAK OKPONGO’ situate and lying at Ikot Ede Village in Western Nsit Clan in Etinan Division, South-Eastern State of Nigeria, within the Jurisdiction of this Honourable Court. Annual value N10.00 (ten naira).

(b) N40, 000. 00 (forty thousand naira) general damages for trespass for that sometime in or about the month of November, 1974, the Defendants by themselves or servants or agents broke in and entered upon the aforementioned piece or parcel of land, that is to say, ‘OKIMKIM MBAK OKPONGO’ situate and lying in Ikot Ede Village aforesaid, within the Jurisdiction of this Honourable Court, while still in the possession of the Plaintiff and cut down and destroyed and damaged economic trees such as oil palm trees and raffia palms and dug up the soil and wasted it and Defendants still persist in the trespass on the said piece or parcel of land.

(c) Perpetual injunction restraining the Defendants, their servants and/or agents from committing further acts of trespass on the said piece or parcel of land.”

Pleadings were ordered, filed and exchanged. The Defendants filed a joint defence. At the subsequent trial, evidence was led on both sides. At the conclusion of the trial, and after addresses by learned counsel for the parties, the learned trial Judge in a reserved judgment, found for the Plaintiffs and entered judgment in their favour in terms of their claims except as to the quantum of general damages which was reduced to N500.00.

Being dissatisfied with the trial court’s judgment, the defendants appealed to the Court of Appeal on a number of grounds. The appeal succeeded and the trial court’s judgment was set aside. Plaintiffs’ claims were dismissed with costs. The Plaintiffs have now appealed to this Court against the judgment of the Court of Appeal.

In accordance with the rules of this Court the Plaintiffs on 13/11/91 filed their Brief of Argument and served same on the Defendants. Up to date, however, the Defendants did not file a Respondents’ Brief and the appeal being set down for hearing, it was argued on Appellants’ Brief. The Defendants were absent at the oral hearing of the appeal and were not represented by counsel either. The Plaintiffs, in their Brief, formulated four questions as arising for determination in this appeal, to wit:

“(1) Whether the learned Justice of the Court of Appeal who delivered the lead judgment which was concurred in by the other two Justices was correct when he held that this is one clear instance in which the trial

Judge would have been right to have dismissed the Appellants' claims on the pleadings and without taking evidence on the alleged ground that the Appellants failed to state how they came to be entitled to the piece of land claimed by them.

B

(2) *Whether the Court of Appeal was not in error in allowing the Respondents' appeal on the alleged ground that the learned trial Judge made a wrong use of the Record of the proceedings in the District Court in Suit No. 60/71, Exhibit E., in this case.*

(3) *Whether the learned Justice of the Court of Appeal who delivered the lead Judgment, concurred in by the other two Justices, was not in error when he held that there was no evidence of possession before the trial court worthy of assessment by that Court.*

C

(4) *Whether the Court below was right to have substituted its own views of the facts as regards the ownership of the land for those of the trial Court which heard the case and saw the witnesses, and having thus substituted its own views for those of the trial court, to have allowed the appeal of the Respondents based upon those views."*

D

At the oral hearing, Kehinde Sofola Esquire, SAN learned leading counsel for the Plaintiffs proffered oral arguments in further elucidation of the submissions made in the Brief. I shall deal with the facts of the case as I consider the issues raised in this appeal.

E

QUESTION(1):

Uwaifo, JCA who delivered the lead judgment of the court below had, in his judgment, after setting out some paragraphs of the parties' pleadings, observed;

F

"Both the plaintiffs and the defendants are on common ground that Ikot Ede Village was founded by Ede but they differ widely as to who his children were and how each party is related to them. In short the plaintiffs regard the defendants as strangers while the defendants regard the plaintiffs as strangers.

G

Looking at the plaintiffs' averments already set out above as to their trust substance and import, this is one clear instance where the case might have been decided even upon the pleadings alone without the bother to have evidence in support as observed by Oputa JSC in Chief Mrs. F. Akintola & Anor. v. Mrs. C.F.A.D. Solano (1986) 2 NWLR (Pt. 24) 598 at 623 as follows:

H

'It is high time our trial courts began looking critically at the pleadings and where appropriate giving judgment on the pleadings if no triable issue of fact has been raised.'

The case should have been dismissed as the plaintiffs failed to state

how they came to be entitled to this particular parcel of land. The mere fact that they claim to be descendants of the founder of the village does not show why they should be the owners of the said area of land. Paragraph 11 merely
 B *says inter alia. The land in dispute has been the property of NUNG INYANG EDOK AKWANG EDE (i.e. one of the three families alleged to have immediately descended from Ede) from such early times as the village of Ikot Ede was founded.....' This is meaningless. It does not show whether it was by inheritance or by apportionment or partition. Indeed the entire pleadings fail*
 C *to show whether Ede came with his said three children to found the village in which case if they were already adults it might be they jointly founded it; or contemporaneously with the founding by their father, the said Nung Inyang Edok Akwang Ede took possession of the land in dispute. On the other land if they were born after the founding. Paragraph 11 will be obviously unten-*
 D *able."*

This passage has come under attack in this appeal. It is submitted as follows:

(i) That there is a complete misapplication of the principle enunciated by Oputa JSC in Akintola & Anor. v. Salano (supra) relied upon by the learned
 E Justice of Appeal in that it was difficult to see how the trial Judge could have dismissed plaintiff's claims merely on the pleadings.

(ii) That having regard to paragraphs 2, 6, 11 and 12 of the Statement of Claim and paragraphs 5, 11 and 12 of the Statement of Defence, a number of triable issues of fact had been raised by the plaintiffs and denied by the
 F Defendants. In such circumstance, a trial court would have no right to dismiss Plaintiffs claims without taking evidence.

(iii) That it is the erroneous view taken by the court below that beclouded its views in respect of the whole case before it.

(iv) That there were sufficient averments in the Statement of Claim
 G showing, at least prima facie, how the plaintiffs came to be entitled to the land. It is contended that in paragraphs 8, 11 and 12 of the Statement of Claim the plaintiffs alleged ownership of the land in dispute (a) by settlement through traditional evidence and (b) by acts of long possession and enjoyment of the land, which two methods are usually intricately connected.

(v) That the Defendants not having raised the issue in their pleadings
 H or in any other way, it could not have been open to the trial Judge to, suo motu dismiss Plaintiffs' claims on their pleadings.

All the points raised above are well taken. In their statement of claim the Plaintiffs averred, inter alia, as follows:

case was that the Plaintiffs' land was no more than the area on which Sunday Moses built and did not extend to the area being claimed by the Plaintiffs.

In the light of the state of the pleadings, it is difficult to see how any trial court could have dismissed Plaintiffs' case in limine as suggested by the court below.

B In Akintola v. Solano (supra), (1986) Oputa JSC had in his concurring judgment, observed at page 422 of the latter Report:

"It is high time our trial courts (and counsel for the Plaintiffs especially) begin looking critically at the pleadings and where appropriate giving judgment on the pleadings if no triable issue of fact has been raised. There, the plaintiff's case should be considered on his pleadings and the applicable law. Where the plaintiff's Statement of Claim does not disclose a cause of action - that is where, even if all the allegations of fact therein averred are established, yet still the plaintiff would not be entitled to the relief sought there. Instead of filing a Statement of Defence, the defendant should move the court to have the case dismissed. Alternatively where the Statement of Defence does not answer, deny, or admit, the essential facts on which the plaintiff's case rests, the Plaintiff should be courageous enough to ask for judgment on his Statement of Claim. The parties will then address the court on the applicable law (the facts averred in the Statement of Claim being at the close of pleadings deemed to have been established. This is so, because, even if all the facts pleaded in the Statement of claim are admitted, there may still arise issues of law to be settled before judgment is delivered. A mere dispute about fact may in loose form of speech be called an issue but no court settles a case on the facts alone divorced from their legal consequences. That too is an issue - call it an issue of law to distinguish it from issues of fact settled at the close of pleadings:- Fidelitas Shipping Co. Ltd. v. V/C Exportchleb (1965) 2 ALL E.R. 9 at p. 10."

It is part of this passage (which is no more than a restatement of Order 14, rule 19 of the High Court (Civil Procedure) Rules of Western Nigeria applicable in the case and which was in pari materia with Order 33 rule 19 of the High Court Rules of Eastern Nigeria applicable in the present case) that the court below relied for the observation under attack in this appeal. With profound respect to their Lordship of the court below, they clearly misconceived the purport of the dictum of Oputa, JSC in their application of it to the present case. The dictum is self-explanatory. For it to apply in context of the present case, the Plaintiff's pleadings must not have disclosed a cause of action, that is, if the allegations therein were taken as established yet still the Plaintiffs would not be entitled to the reliefs sought.

It cannot, in my respectful view, be correct to say that, on allegations

contained in the statement of claim if established, Plaintiffs cannot be entitled to the declaration sought nor to damages for trespass and injunction. Their case, as pleaded, is simply this: Since the founding of the Ikot Ede Village by Ede the land in dispute had been in the undisturbed possession of their ancestor Akwang Ede and his descendants known as Nung Edok Akwang-Ede Family and that when in 1968 one Sunday Moses from another family in the village came on the land to build, they challenged him and Moses reported them to the Village Council which found in their favour and ordered Moses to quit the land. That some of the Defendants were members of the Village Council that decided in their favour. That when Moses would not quit the land as ordered by the Council, the Plaintiffs sued him to the District Court where some of the Defendants again testified in their favour and Moses again lost. That members of the Village community, including all the Defendants, confirmed to the District Court on inspection, that the land belonged to the Plaintiffs. That the Defendants subsequently went on the land without the permission of the Plaintiffs and started building thereon. Surely, this case, if established, would suffice to entitle the Plaintiffs to the reliefs sought by them.

And for a case to be dismissed in limine on the ground that the pleadings do not disclose a cause of action it must have been on the application of the defendant and not by the trial Court suo motu. The Defendants' made no such application in this case. The observation made by the court below is, to say the least, rather unfortunate. Not only is it not justified by the pleadings, it tended to close the mind of the Court to the merit of the adjudication made by the trial court.

In conclusion I answer question (1) in the negative.

QUESTION(2):

Again, Uwaifo JCA in his judgment with which the other Justices agree, held:

"It is beyond argument that the trial judge exaggerated the importance, effect and relevance of the evidence adduced by the plaintiffs. In respect of the proceedings in the District Court, he should have realized (1) that the decision there cannot bind the defendants or even inure to the plaintiff because the said Sunday Moses is not a party to the present case and the 1st plaintiff brought that action in his personal capacity, not in a representative capacity as in the present case,' (2) the subject-matter in that case is not the same as in the present case; (3) the issues are also different: SC.; Paulina A. Daniel & Anor. v. A.A. Iroeri (1985) 1 NWLR (Pt. 3) 541 H W.; (4) the so-called evidence given by Akpan Edem Idiong (17th defendant) could only at best have been used to cross-examine him as to credit if he had testified in the present case but it is of no higher value than that: See Alade v. Aborishade (1960) 5

FSC 90 at 173; Folarin v. Durojaye (1988) NWLR (Part 70) 351 at 369 S.C.”

It is submitted that the court below was in error in the views it held on the usefulness, in the present proceedings, of Exhibit E, the proceedings in the District Court in Suit No. 60/71 between the Plaintiffs and Sunday Moses. It is contended that the court below overlooked the fact that in determining whether the issue and the subject-matter of the previous suit were the same: as those in the present suit, the Court should consider the substance and not the form of the earlier case that was brought in a native/customary court. It is also contended that the court below did not avert its mind to sections 20(3) and 54 of the Evidence Act and to the meaning of “parties”. It is finally submitted that the court below was in error not to hold that the Defendants were estopped from denying plaintiffs’ title to the land known as “OKIMKIM”.

Exhibit E was admitted in evidence at the trial without objection, The Plaintiffs had pleaded in paragraph 15 of their statement of claim thus:

“15. In or about 1968 one Sunday Moses of Ikot Ede Village aforesaid without leave or licence from the Plaintiffs built a house somewhere on the land in dispute and started to dwell therein. The 1st Plaintiff on record took objection to the act on the part of the said Sunday Moses and took the matter before the Ikot Ede Village Council in 1969.”

A summary of the pleadings on both sides relating to the dispute with Moses runs as follows:

Statement of Claim

Paragraph 16 - decision of Village Council is regarded by all persons subject to its jurisdiction as binding.

Paragraph 17 - those who adjudicated in it included 1st, 5th, 12th 13th and 17th Defendants.

Paragraphs 18 and 19 - after several deliberations the Council decided that the land known as OKIMKIM belongs to the 1st Plaintiff on record.

Paragraph 20 - the 13th Defendant was Secretary to the Council and as such issued the decision of the Council and got it served on Sunday Moses.

Paragraph 21 - the Village Council found for the 1st plaintiff on Record in this case.

Paragraph 22 - Sunday Moses appealed as regards the time he should quit.

Paragraph 23 - Village Council extended the time to September 8, 1870.

Paragraph 24 - August 31 the 13th Defendant as Secretary to the

Council served the 'Order' on Sunday Moses.

Paragraph 25 - On September 18, 1969, the 13th Defendant communicated the decision of the Council to the 1st Plaintiff on Record.

Paragraph 27 - On all occasions, the Council had confirmed that the 1st Plaintiff was the owner of the land in dispute, and all the Defendants had approved of the decision and had acknowledged the Plaintiffs as owners. B

Paragraph 28 - the family of NUNG INYANG EDOK AKWANG EDE had been behind the 1st Plaintiff on Record and had demonstrated its interest in the land in dispute to the knowledge of the Village Council” C

Paragraph 34 - at the trial of the suit, the 1st, 6th and 17th Defendants appeared as witnesses for the 1st Plaintiff on Record. The 17th Defendant gave evidence on behalf of the others to the effect that 'the disputed land 'OKIMKIM' is the Plaintiff's land in truth.' D

Paragraph 35 - after that evidence, Sunday Moses admitted liability.

Paragraph 37 - at the inspection, the village community including all the Respondents turned up. E

Statement of Defence

Paragraph 15 - the Respondents admit paragraph 16, Plaintiff on Record was only permitted to enjoy the piece of land given to his mother by his stepfather.

Paragraph 16 - the Respondents admitted paragraph 29 above.

Paragraph 17 - the Respondents said that they can neither admit nor deny the averments in paragraphs 21, 22, 23, 24, 25, 26, 27 and 28 above. F

Paragraph 22 - the Respondents admitted paragraphs 34, 35 and 36 of the Statement of Claim.

Evidence was led in support of the averments in the pleadings.

The 1st Plaintiff, in his evidence at the trial, deposed thus: G

“At Itreto District Court, Akpa, Edem Idiong, Udo Isong, Udo Utin, James Etuk Udo appeared as my witnesses. These witnesses are now defendants in this suit. Ekan Edem Idiong is the 17th Defendant, Udo Isong is the 8th Defendant. Udo Utin is the 1st Defendant. James Etuk Udo - is the 12th. They all gave evidence on my behalf. The Court members came to inspect the land. When the land inspection was carried out, all the defendants were there and other members of the Community were present. They raised an objection when I showed the members of Itreto District Court round the land in dispute H

with particular reference to where Sunday Moses erected his house upon.”
The 12th Defendant, James Etuk Udo who gave evidence for all the Defendants testified thus:

“We have three families in Ikot Ede and these are:

- B (1) Nung Umo Etuk
(2) Nung Eka Ide
(3) Nung Inyang Akpaodu.

All the Defendants come from the three families of Ikot Ede.”

On Sunday Moses, he deposed:

“I know of one Sunday Moses. Sunday Moses is from Nung Umo Edok Ede C family of Ikot Ede famiiy.”

On the pleadings and evidence, the following facts emerge:

1. That there was a dispute over part of the land in dispute between the 1st plaintiff and one Sunday Moses
2. That Sunday Moses is a member of one of the Defendants’ three D families, that is, Nung Umo Edok Ede family.
3. That of the Village Council that first adjudicated over the dispute at the instance of Sunday Moses, 1st, 5th, 8th, 12th and 17th Defendants were members.

4. That at the Itreto District Court that adjudicated upon suit No. E 60/ E 71 between the 1st Plaintiff and Sunday Moses, 1st, 8th, 12th and 17th Defendants appeared as witness for the 1st Plaintiff.

5. That all the Defendants and other members of the Ikot Ede Village were present when the District court inspected the land and they all confirmed that the land in dispute in that case belonged to the 1st Plaintiff.

F Of what use did the learned trial Judge make of Exhibit E? The learned Judge said:

“It has been agreed by both the plaintiffs and the Defendants that there was a dispute between the Plaintiff and one Sunday Moses involving part of the land now in dispute and that the case went to Itreto District Court G which gave title of that piece of land to the Plaintiff. There is also a plethora of evidence in the proceedings to show that most of the Defendants in the present case gave evidence in that case (Suit No. 60/71 in favour of David Akpan (the 1st Plaintiff-on-record). There are also in evidence resolutions of Ikot Ede Village Council ordering Sunday Moses to quit the land over which H declaration of title was granted to David Akpan in Itreto District Court case.

It has however been contended by the Defendants involved in the Itreto District Court case and it did not involved (sic) the entire land now in dispute in this case. And there was no plan filed in the Itreto District case - Suit

No. 60/71.

In the Plaintiff's plan Exhibit's A 'OKIMKIM MBAK OKPONO' is represented as one piece of land whereas in EXHIBIT F plan filed by the Defendants two portions of land. And that it is only OKIMKIM or OKIMKIM land that is in dispute and not the area labelled 'MBAK OKPONO'.

The plans EXHIBIT A and EXHIBIT F are drawn to the same scale - 1 in to 200ft. If EXHIBIT A is superimposed on EXHIBIT F, it will be noticed that the land which the Plaintiff sued Sunday Moses for in Suit No. 60/71 in Ireto District Court is apart of the land presently in dispute i. e. the subject matter of this case as shown in both plans EXHIBIT A and EXHIBIT F almost tally position wise, although one may tend to be larger than the other. And it must be remembered that the Defendants and the Village Council of Ikot Ede supported the Plaintiff in that Contest (EXHIBIT B, C, D and E refers).

If as it has been attested to by the Defendant, the Plaintiff was in possession and occupation of OKIMKIM land by the decision of Ireto District Court case Suit No. 60171, and Mbak Okpono land is quite adjacent to Okimkim land it can safely be said that the Plaintiff also exercised acts of ownership and possession of MBAK OKPONO land as well."

Again, the learned Judge said:

"There is evidence from the Plaintiffs and the Defendants that the Plaintiff was in possession of the dispute land (following Suit No. 60/71 of Ireto District Court)."

From these passages, the learned Judge cannot, in my respectful view, be said to have "exaggerated the importance, effect and relevance of the evidence" relating to the proceedings in the District Court as was uncharitably suggested, with respect, by the Court below. I am satisfied that all that the learned trial Judge did was to state the factual situation arising from the evidence. Indeed, the Defendant did not contest the title given to the Plaintiff in that case. They only contended that the land to which that case related, and which they conceded to the Plaintiffs, was a small part of OKIMKIM land and not the whole now claimed by the Plaintiffs.

In view of the conclusion I have just reached I do not consider it necessary to determine whether the Defendants were bound by the decision in Suit No. 60/71. The Defendants' position at the trial was clearly stated by the 12th Defendant when, in his evidence, he deposed:

"It was only one piece of land that was involved in the dispute between Sunday Moses and the 1st Plaintiff on record. The piece of land that was involved in that dispute is known as and called 'OKIMKIM'. The 1st Plaintiff is not claiming the same piece of land which he did in his dispute with

Sunday Moses in the present action. But he is claiming the entire village of Ikot Ede. The one piece of land which the Plaintiff claimed against Sunday Moses is now owned and possessed by the 1st Plaintiff-on-record. There is no dispute between the plaintiffs and the Defendants over that one piece of land which was the subject matter of the dispute between Sunday Moses and the

- B *1st Plaintiff-on-record. 'OKIMKIM' is a name given to a very large area of the Village land and the one piece of land that was in dispute between the 1st plaintiff and Sunday Moses is only a part of the OKIMKIM and Sunday Moses is only a part of the OKIMKIM land. Barring the only one piece of land which the Plaintiff no other piece or pieces of land in 'OKIMKIM' LAND."*
- C This piece of evidence brings out more positively the issues between the parties at the trial, that is, the extent of the land owned by the Plaintiffs and how they came to own such extent of land. It was not disputed that they owned some land in OKIMKIM.

In any event Exhibit E would be admissible as evidence of act of ownership by the Plaintiffs in that they (through 1st Plaintiff) once defended their right to at least part of the land in dispute against an intruder - Sunday Moses. In addition Suit No. 60/71 becomes relevant in view of the admissions made therein by the Defendants - see: sections 19&20 of the Evidence Act.

I answer Question (2) in the affirmative.

E QUESTION(3)

The learned trial Judge found:

"There is evidence from the Plaintiffs and the Defendants that the Plaintiff was in possession of the disputed land (following Suit No. 60/70 of District Court). There is evidence also that the Defendants had entered the

- F *land in dispute and had erected buildings and other structures thereat without the consent and authorization of the Plaintiffs. That was clearly a wrongful act done in disturbance of the possession of the Plaintiffs.*
- G *I had therefore that the Defendant did trespass on to the land that is in dispute. The Plaintiffs have proved this arm of their claim. I find the Defendants jointly and severally liable for trespassing on the disputed land."*

Commenting on this finding, the Court below, per Uwaifo, JCA observed:

"This was an unjustified finding. There was no evidence of possession by the plaintiffs worthy of assessment. The piece of land in Suit No. 60/70 could by no means be evidence of possession of this land in dispute. Even the plan

- H *No. ESA/2254 LD (exhibit A) produced and tendered by the plaintiff clearly betrays that finding and their claim. They admit that the land is almost entirely occupied by the defendants except the small portion which is in the possession of the 1st Plaintiff. As for the defendants' plan no. RIMI4903 (LID) (exhibit F)*

the area shown as being in dispute excludes where the 1st Plaintiff has his house. But all the portion verged red as being in dispute is heavily built up, even as land in a rural area. It is therefore a matter for concern which part of the land in dispute the defendants were restrained from and how the Plaintiffs could ever have had title declared in them in respect of the entire land in dispute."

With profound respect to their lordships of the Court below they seemed rather impatient in their consideration of the judgment on appeal before them. In my respectful view, the learned trial Judge did not base his finding of possession in suit No. 60/71 alone but also on other evidence adduced before him. On the area covered by the Suit No. 60/71, there was no dispute that the Plaintiffs were in possession. The Defendants conceded as much.

P. W. 2, Sunday Inyang testified thus:

"I am a farmer. I know the Plaintiff in this case. Plaintiffs and Defendants in this case are from Ikot Ede. Ikot Ede and Ikot Enwang are neighbouring villages.

I know the piece of land known as and called 'OKIMKIM MBAK OKPONO'. This piece of land is situated in Ikot Ede which is the village of the parties. I know that 'OKIM (sic) MBAK OKPONO' is a large piece of land, because the dispute Iko Ede and Ikot Enwang. We have a piece of land at Ikot Enwang called 'Itigede' I and my members of my family have some pieces of land in 'Itigede' land. I knew Akpan Akpan Ukpe. He is now dead. Akpan Akpan Ukpe used to work on some portions of the land in dispute. 'OKIMKIM MBAK OKPONO.' One Stephen Inyang -the 2nd plaintiff to my knowledge, used to farm on parts of the disputed land 'Okim Okim Mbak Okpona, Edem Inyang, the junior brother of the 1st plaintiff used to work on this land. 1st Plaintiff and family members used to go work on the land in dispute. I have never witnessed an occasion when any person or persons had stopped or prevented those I have named above from working on or cultivating the disputed land OKIMKIM MBAK OKPONO.

The Defendants are now working on the land in dispute. Since the Defendants started working on the land in dispute - it is 2 years.

The land in dispute is the property of the Plaintiffs in this case. The Plaintiffs have been farming on the disputed (sic) for upwards of 50 years to my knowledge. Apart from farming in the disputed land, the Plaintiffs generally collect palm fruits from the disputed land."

P. W. 3, Adam Udo a member of Plaintiffs' family also gave evidence of possession by his family. He concluded his evidence-in-chief in these words:

"The Defendants came upon this land to erect their houses on the land since the institution of this action to give the impression that they had occupied the land for a long time."

If the Court below had properly adverted its mind to the totality of the evidence adduced for the Plaintiffs, it would not have found, as it did, that the finding on possession was unjustified nor that "there was no evidence of possession by the Plaintiffs worthy of assessment."

I answer Question (3) in the negative.

QUESTION(4)

The learned trial Judge found -

1. That the Plaintiffs' account of traditional evidence is more satisfactory than the Defendants.

2. That the Plaintiffs have given copious and detailed account of how the land in dispute devolved on them over the years.

3. *"The Plaintiffs by their traditional evidence and preponderance of evidence adduced in these proceedings are entitled to customary right of occupancyto that piece or parcel of land known as and called 'OKIM MBAK OKPONO'"*

The Court below, per Uwaifo J.C.A. observed:

"The evidence led by the plaintiffs was obviously in disarray. Surprisingly, the trial Judge said he was satisfied with it. He relied on it to declare title in the plaintiffs over the land. He also concluded, upon this unreliable evidence and some evidence of land litigation which was not admissible against the defendants, that the plaintiffs were in possession of the land. He relegated the numerous and positive acts of possession of defendants to acts of trespass."

(Underlining are mine)

How the evidence was in "disarray" was not explained. Nor why the evidence was unreliable.

The judgment of the Court below raises yet once again the poser: who determines, as between the trial court and an appellate court unreliability of evidence adduced at the trial? And which court determines credibility or otherwise of witnesses? What are the functions of the court as regards findings of fact and the functions of an appellate court as regards thereto? Authorities are not wanting in this country on these issues.

It is laid down in a long line of cases beginning with Williams (1935) 2 WACA 248; 2 WACA 253 PC (following Colonial Curities Trust Coy vs. Massey (1896) 1 QB per Lord Esher M.R.) reversal of the findings of fact of a judge who has tried a case with assistance of a jury is well within the competence of an appellate Court, who are in fact rehearing the case, howbeit on the printed

record; but the presumption is that the decision of the Judge on the facts was right and that presumption must be displaced by the appellant. See also: Kisiedu & Ors. vs. Dampreh & Ors. (1935) 2 WACA 281, 286 PC; Kalu Ekpezu vs. Kalu Ndem (1991) 1 NWLR 228. In Ebbav. Ogodo (1984) 1 SCNLR 372, 378-9Eso, JSC stated the functions of the trial and appellate courts in these words:

"In this country, trial is usually, unlike in England, without a jury and the trial judge has the singular experience and duty of taking a lone decision on the evidence for the purpose of determining the facts, from his advantage of seeing and hearing simultaneously the witnesses. Unless the trial Court has failed to make use of this singular advantage, and for that reason thereof the Court of Appeal finds that the decision is perverse, the Court of Appeal, whose opportunity is confined to the finding of facts, by the trial court, the greatest weight and due respect. That indeed is the division of labour, and a sensible one at that, between the trial court and the appellate Courts."

The learned Justice of the Supreme Court added:

"But this division end, or, rather does not exist, Where the question does not affect the issue of credibility of witnesses; in other words, the Court of Appeal itself will obviously, be in as good a position as the trial court, for in such a case, the trial court has not advantage really over the evaluate, as the trial court, the evidence which has been given in the case, for in such cases the matter in dispute has been completely narrowed down by the rigour of credibility of witnesses. When we have this type of cases, the Court of Appeal should not shrink from the task of such evaluation or be inhibited therefrom, just because it is a Court of Appeal. See Benmax v. Austin Motor Co.Ltd. (1955) A.C.370. See also Lion Buildings Ltd. v. M.M.Shodipe (1976) 12 S.C. 135 as per Sir Udo Udoma J.S.C. at 153."

There is a water of decided cases laying down the following principles among others:-

(1) The appraisal and ascription of probative values to oral evidence is the primary duty of a court of trial and a Court of Appeal would only interfere if the trial court had made an improper use of the opportunity of hearing and seeing the witnesses or had drawn wrong conclusions from proved facts. See Balogun v. Agboola (1974) 10 SC. 111; Iwenofu v. Iwenofu (1975) 9-11 SC 79.

(2) A Court of Appeal should not disturb a finding of fact by a trial court unless that Court is satisfied that there has been a misconception of facts in evidence or that such finding is unsound. See: Rosenje v. Bakare (1973) 5 SC.

131; Sanyaolu v. The State (1976) 5 Se. 37.

(3) Findings of fact by a trial court supported by evidence rightly accepted by the court should not be disturbed on appeal by an appellate court on the ground that it would have come to a different conclusion on the facts - see: Ogundulu v. Phillips (1973) 2 SC. 71; Egri v. Uperi (1973) JSC. 299; Ono B wan v. Iserhien (1976) 9-10 Se. 95; Nasiru v. C.O.P. (1980) 1-2 SC. 94; Woluchem v. Gudi (1981) 5 SC 291.

(4) Unless the Court of Appeal finds that the decision is perverse, it, because the opportunity it has is confined to the printed record, is obliged to, and must accord to the finding of fact, by the trial court, the greatest weight and C due respect.

(5) Where the question does not affect the issue of credibility of witnesses, the Court of Appeal itself will obviously be in as good a position as the trial court, for in such a case, the trial court has no advantage over the Court of Appeal.

D In Ebba v. Ogodo (supra) Eso JSC suggested what all appeal Court should consider when applying these principles. The learned Justice of the Supreme Court opined at page 381 of the Report:

“An appeal Court, in applying these principles should, I venture to suggest –

E *(a) start with an attitude to the trial court, as the only court which has, principally, the duty to make findings of fact from the evidence ‘oral’ and or documentary’ before it, also that the trial court is the court that has been specially suited, by its peculiar constitution, setup and rules, so to do. (The trial judge sees the witnesses and has the exclusive advantage to observe their F demeanour;*

(b) then find out whether the conclusion which has been arrived at by the trial court is justifiable, when it is re-examined against the very premise and or the controversy vel non which formed the basis of the conclusion arrived at by the trial court;

G *(c) Where the conclusion is arrived at without any real controversy e.g. in the case of documentary evidence, or where it does involve controversy the controversy is limited only to number, complexity of contradiction or interpretation of the document of further where there is an evidence but it involves merely an admission by the adversary or there is an unchallenged piece of oral H evidence, the court of appeal should consider itself to be in as good a position as the trial court, in so far as the evaluation of such evidence as aforesaid in this paragraph is concerned;*

(d) Where the decision is arrived at, after there has been an examination of controversy (and this is the commonest aspect) as where the opposing

parties witnesses in the case to contradict each other by oral evidence, then the court of appeal should appreciate that the following will be relevant:

(i) Credibility of Witnesses based on demeanour of the witnesses only:-

Here, the trial court is the sole Judge as the observation of the demeanour of witnesses has to be peculiar and exclusive to the trial court which advantage is not and can never be available to the appellate court.

B

(ii) Credibility of Witnesses based on factors other than demeanour:-

The court of appeal should examine those factors which the trial court examined as a result of which it made the inference which led to its finding and determine whether that trial court has made use of its singular advantage of seeing and hearing the witnesses before making its finding especially having regard to the inference that could reasonably be made by a just and reasonable tribunal from the same factors.”

C

In his Judgment in the said case Obaseki JSC observed at pages 388-389:

“This court has times without number emphasized that it is no business of the appeal court to substitute its view of the evidence for that of the learned trial Judge and I find it again necessary to point out that miscarriage of justice will definitely result from adopting such a course of action when it is unwarranted. The need to ensure that justice is not miscarried should always dominate the attitude and thinking of appeal courts when dealing with appeals raising questions of fact. See Victor Woluchem & Ors. at 326; Akinloye v. Eyiola (1968) NMLR 92 at 95 SC.; Obisanya v. Nwoko (1974) 6 SC. 69 at 80 SC., Lawal v. Dawodu (1972) 1 All NLR (Part 2) 270 at 286; Kakarah v. Imonihe (1974) 4 SC. 158; Mogaji v. Odofin (1978) 4 SC.91.

D

E

From the principles enunciated above it is crystal clear that interference by an appellate court with respect to findings of fact is confined within narrow and limited dimensions. After a careful consideration of the Judgment now on appeal before us I am of the clear view that the Court below was mistaken as to the limits of its power and duty when it embarked, as it did, on a fresh appraisal of the evidence; it had not the advantage of seeing and listening to the witnesses but relied only on the cold sullen print of the records before it. It purposely, with the clear intention evinced at the beginning of the lead Judgment, set out not only to arrive at a conclusion different from that of the trial court but also to dismiss Plaintiffs’ claim because according to it, they failed to state how they came to be entitled to this particular parcel of land.” I have

F

G

H

no hesitation in restoring the findings of fact of the learned trial Judge.

In conclusion, all the issues canvassed before us having succeeded, I

allow this appeal and set aside the judgment of the Court of Appeal given on 29th day of November, 1988, together with the order for costs made therein. In its stead, I restore the judgment of the trial High Court given on 18/3/83.

I award to the Plaintiffs N1,000.00 costs of this appeal and N500.00 costs of the appeal in the Court below.

B _____

UWAISCJN

I have had the privilege of reading in advance the judgment read by my learned brother Ogundare, J.S.C. I agree with it and do not wish to add anything. Accordingly the appeal succeeds, and it is hereby allowed. The decision of the Court of Appeal is hereby set aside and the judgment of the trial court is hereby restored with costs as assessed by my learned brother Ogundare, J.S.C.

D _____

WALIJSC

I have had a preview of the lead judgment of my learned brother Ogundare JSC and I subscribe to his reasoning and conclusion that the appeal has merit and must therefore succeed.

E As found by Nkereuwem, the learned trial Judge, there was cogent and comprehensive traditional evidence adduced by the plaintiffs as to how their progenitor one Ede founded and occupied Ikot Ede Village, which the land in dispute, described as Okimkim forms part of.

F On both the traditional evidence and that of acts of possession, the learned trial Judge made very sound and unimpeachable findings in support of the plaintiff's claim that Okimkim land belong to their family.

The issues raised in the pleadings were triable and the Court of Appeal was wrong in its observation that:

G *"Looking at the plaintiff's averments already set out above as to their true substance and import, this is one clear instance where and case might have been decided even upon the pleadings along without the bother to have evidence in support as observed by Oputa JSC in Chief Mr. Akintola & Anor. v. Mrs. C.F.A.D. Solano(1986) 2 N. W.L.R. (Part 24) 98 at 623 as follows:*

H *"It is high time our trial courts.....begin looking critically at pleadings and where appropriate giving judgment on the pleadings if no*

triable issue of fact has been raised."

The case should have been dismissed as the plaintiffs failed to state how

they came to be entitled to this particular parcel of land.”

After considering the evidence on both tradition and possession the learned trial Judge rightly in my view, arrived at the following conclusion:

“On traditional evidence it would appear that the Plaintiffs’ account is more satisfactory than the negative approach presented by the Defendants in this respect. I am of the view that Plaintiffs’ family exists, therefore traditional evidence is relevant (See the case of Stool of Abina Abina vs. Chief Kojo Emyimadu 12 WACA p. 174 where it was observed:-

“That the court would have accepted the Plaintiff’s title solely on the basis of traditional evidence.” Section 44 of the Evidence Law states as follow:-

“Where the title to or interest in family land is in issue, oral evidence of family or communal tradition concerning such title or interest is relevant.” And I have mentioned the fact that the disputed land is claimed by the Plaintiffs as their family land and they have given copious and detailed account of how the land devolved on them over the years.

It has been agreed by both the plaintiff and the Defendants that there was a dispute between the Plaintiff and one Sunday Moses involving a part of the land now in dispute and that the case went to Itreto District Court which gave title of that piece of land to the Plaintiff. There is also a plethora of evidence in the proceedings to show that most of the Defendants in the present case gave evidence in that case (Suit No, 60/71 in favour of David Akpan the 1st Plaintiff-on-record). There are also in evidence resolutions of Ikot Ede Village Council ordering Sunday Moses to quit the land over which declaration of title was granted to David Akpan in Itreto District Court case. It has however been contended by the Defendants that it was only the piece of land that was involved in the Itreto District Court case and it did not involve the entire land now in dispute in this case. And there was no plan filed in the Itreto District Court case suit No. 60/71.

In the plaintiffs plan Exhibit A “OKIMKIM MBAK OKPONO” is represented as one piece of land whereas in Exhibit F plan filed by the Defendants “OKIMKIM MBAK OKPONO” land is represented as being two portions of land. And that it is only OKIMKIM or “OKIMKIM land that is in dispute and not the area labelled “MBAK OKPONO”.

The plan EXHIBIT A and EXHIBIT F are drawn to the same scale - 1 in, to 200ft EXHIBIT A is superimposed on EXHIBIT F it will be noticed that the land which the plaintiff sued Sunday Moses for in suit No. 60/71 in Itreto

District Court is a part of the land presently in dispute i.e. the subject matter of this case as shown in both plans EXHIBIT A and EXHIBIT F almost tally

position wise, although one may tend to be larger than the other. And it must be remembered that the Defendants and the Village Council of Ikot Ede supported the plaintiff in that Contest (EXHIBIT B, C, D and E refer). If as it has been attested to by the Defendant, the plaintiff was in possession and occupation of OKIMKIM land by the decision of Ireto District Court case suit B No. 60/71, and Mbak Okpono land is quite adjacent to Okimkim land it can safely be said that the plaintiff also exercised acts of ownership and possession of MBAK OKPONO land as well."

Had the Court of Appeal properly considered the evidence adduced by the plaintiffs, it would not have misdirected itself both on the issues of law and fact raised and contested in the case by setting aside the judgement of the trial court.

Where the entire appeal revolves on issues of fact and there is nothing wrong on the record of the trial court to show that its findings are erroneous, the court of Appeal is duty bound to affirm them and dismiss the appeal. See Lucy Onowan & Anor. V. Iserhien in Re Lucy Onowan Appellant [1976] 9-10 D SC 95 and Idundun v. Okumagba (1976) NMLR 100.

It is for this and the more detailed reasons given in the lead judgement of my learned brother Ogundare JSC, that I also hereby allow the appeal set aside the judgement and order of the Court of Appeal and in place thereof restore the judgement of the trial Court.

I subscribe to the order of costs made in the lead judgement.

ONUJSC

I have had the advantage of reading in draft the judgment of my learned brother Ogundare, J.S.C. just read. I am in entire agreement that if there was an appeal that merit allowed, here was one.

In making a brief comment on the case by way of emphasis, I wish to say that my learned brother has so ably stated the facts that I do not find it necessary to repeat them here. It will suffice for me to set out hereunder the four G issues formulated at the Appellants' instance which query-

"1. Whether the learned Justice of the Court of Appeal who delivered the lead judgment which was concurred in by the other two Justices was correct when he held that this is one clear instance in which the Judge would have been right to have dismissed the Appellants' claims, the pleadings and H without taking evidence on the alleged ground that the appellants failed to

state how they came to be entitled to the piece of land claimed by them.

2. Whether the Court of Appeal was not in error in allowing the

showing the correct and real families of Ikot Ede Village to expose the falsity of the Plaintiffs assertion. “

(Underlining is by me for emphasis and comment)

With regard to the disposition of land ownership and or acquisition of the neighbouring families, the Appellants pleaded in paragraphs 6 and 7 of the Statement of Claim as follows –

“6. *There are other families in Ikot Ede Village aforesaid, to wit, NUNG UDO EDE who at times chose to be called NUNG UMO ETOK. NUNG INYANGAKPAN ODU and IKOTEKA EDE. These other families own stretches of land elsewhere in Ikot Ede Village but they have no share in the land in dispute which is exclusively the property of the Plaintiff.”*

7. None of the defendants is of the Plaintiffs’ Family, that is, the family of NUNG INYANG EDO KAKWANG EDE.

Of the traditional evidence of the founding of the land in dispute the history of settlement by the Appellants and later by their neighbours as well as Appellants’ maximum exercise of acts of ownership and possession thereon, these are copiously pleaded in paragraphs 8, 9, 10 and 11 of the Statement of Claim. Then came the Appellants’ pleading in paragraphs 12, 13, 14 and 15 as to how the Respondents committed trespass on the Appellant’s own portion of the land in dispute and how in 1966 one Sunday Moses in particular without leave or licence from the Appellants built a house on some part thereof and started to dwell therein.

It is note-worthy that the Respondents in their Statement of Defence denied the Appellants’ averments by not only putting them “*to the strictest proof thereof*” but asserted that when the two Appellants left home for elsewhere, their elder brother (Akpan Akpan Ukpe) and father (Udo Eno Idem) respectively, whom they left behind never laid claim to Okimkim and Mbak Okpongo and that the Village Council when the dispute over the land arose, arbitrated over the matter, resulting in the Appellants’ portion of the land granted to them being still left intact.

Thus, with issue properly joined by the parties in all their ramifications on the pleadings (See Ehimare v. Emhonyon (1985) 2 N.W.L.R 177 at 183 and Olale v. Ekwelendu (1989) 4 N.W.L.R. (Part 115) 326) trial in the case herein on appeal duly commenced on 12th January, 1981 before Nkereuwem, J. It is therefore palpably erroneous for the learned Justice to have impatiently jumped to conclusion when he held as follows-

“*Looking at the Plaintiffs averments already set out above as the true substance and import, this is one clear instance where the case might have been decided even upon the pleadings alone without the brother to have evidence in Chief Mrs. F. Akintola & anor. v. Mrs. C. A. D. Solano (1986) 2*

N. W.L.R. (Part 24) 598 at 623 as follows-

'It is high time our trial courts ... begin looking critically at the pleadings and where appropriate giving judgment on the pleadings if no triable issue of fact has been raised.'

The case should have been dismissed as the plaintiffs failed to state how they came to be entitled to this particular parcel of land."

See the provisions of Order 29 Rule 1 or Order 33, Rule 19 Civil Procedure Rules of South Eastern State of Nigeria (applicable to Cross-River State). Rule 2 of the above Rules enables a party to raise by way of a motion that the Appellants' pleading be struck out on the ground that it discloses no cause of action. See Thomas v. Olufosoye (1986) 1 N.W.L.R. (Part 18) 669 at 682-683.

The appellants having pleaded and adduced traditional evidence of his derivation of the land in dispute by settlement supported by acts of long possession and enjoyment of the land and which if accepted was enough to decree title in them (See Idundun v. Okumagba (1976) 9 - 10 S.C. 227 and Bello v. Eweka (1981) S.C. 101), it was wrong of the court below to have prematurely driven the Appellants "from the judgment seat." See Dyson v. Attorney-General (1911) K. B. 410.

As there were clear averments that the appellants pleaded traditional evidence and the trial court resolved the point in their favour because they gave copious and detailed accounts in line with their pleadings of how the land in dispute devolved on them, the approach adopted by the court below in lightly toppling that decision by dismissing it is, in my firm view, wrong. Here below is what the trial court said in that regard-

"On traditional evidence it would appear that the plaintiffs' account is more satisfactory than the negative approach presented by the Defendants in this respect. I am of the view that the Plaintiffs' family exists, (See the case of Stool of Abinabina v. Chief Kojo Enyimadu 12 W.A.C.A. P. 174 where it was observed-

'That the court would have accepted the Plaintiff's title solely on the basis of traditional evidence.'

Section 44 of the Evidence Law states as follows -

'Where the title to or interest in family land is in issue, oral evidence of family or communal tradition concerning such title or interest is relevant.'

It was not the province of the court below to act suo motu in dismissing the suit. It was therefore wrong of the learned Justice of Appeal to have based his

decision on issues which were never before the trial court in the pleadings or to have misconceived them when he impetuously or hastily and without

caution, found against the Appellants on what he suo motu raised himself. See Ibanga & ors. v. Chief Edet Usanga (1982) 5 S.C. 103 at 124; Yakasai v. Incar Motors (Nig.) Ltd. (1975) 1 All N.L.R. (Part 1) 287.

As Oputa, J.S.C. rightly put it in Ehimare v. Emhonyon (supra)-

“When parties to an action have answered one another’s pleadings

B in such a manner that they have arrived at some material point or matter of fact, affirmed on one side and denied on the other, the parties are said to be “at issue”; they have joined issue and the question thus raised is called the issue.”

See also F. H. A. v. Sommer (1986) N.W.L.R. (Part 17) 533 at 541; Sommerv. F.

C H. A. (1992) 1 N.W.L.R. (Part 219) 248; Harrison Welli v. Charles Okechukwu & ors. (1985) 6 S.C. 132 at 145 - 146; Ozibe & ors. v. Chief Ile Aigbe & ors. (1977) 7 S.C. 1 and Overseas Construction Co. Ltd. v. Creek Enterprises Ltd. (1985) 3 N.W.L.R. 407.

As in the instant case the parties were “*at issue*” and trial commenced
D onto finality in favour of the Appellants what the learned Justice who wrote the lead judgment said and concurred in by the two others, amounted to gross misdirection and the decision arrived at by the court ought not to be allowed to stand. The learned Justices of Appeal after taking the erroneous view that the Appellants’ claims should have been dismissed on the pleadings could
E hardly have been expected to dismiss the appeal and sustain the claims which they thought should have been dismissed. It is this erroneous view taken by the court below of the Appellants’ case that beclouded their views in respect of the whole case. They also based their views on the allegation that the Appellants did not state how they came to be entitled to the land in dispute. The
F averments I have set out hereinbefore and more, in my view, were sufficient in the Appellants’ Statement of Claim showing at least *prima facie* how they came to be entitled to the land. Thus, in the instant case where the Appellants were alleging ownership by settlement through traditional evidence as well as by acts of long possession and enjoyment of the land vide paragraph 8 of the Statement
G of Claim, it would be erroneous to say that the Appellants did not show by their pleadings and evidence of how their ancestor, Ede, came to live thereon. See also the Appellants’ pleading in paragraphs 11 and 12 of their Statement of Claim. The Appellants having clearly stated in their pleadings how they came to be entitled to the particular parcel of land in dispute, it was wrong of the court
H below to have taken the erroneous view on the point that they did not since that

finding invariably led it to allow the appeal of the Respondents. The Respondents neither having raised the issues in their pleadings nor in any other way,

the learned trial Judge could have been so placed as to have dismissed all the Appellants' claims. If the Respondents were firmly of the belief that they had a case and were prepared to file and indeed did file a Statement of Defence, then it was not the responsibility nor the duty of the trial Judge to say he was going to dismiss the Appellants' claim where the Respondents wanted to put up a defence. And that in my view, would clearly contradict the well known principle B that:

"Counsel conducting a case is, as a matter of law and civil procedure, in complete control of his case" and that "he is master in his own house." as laid down in Nwafor Elike v. Ihemereme Nwankwoala & ors. (1984) 12 S.C. 301 at 311 - 312. See also Bakare v. African Continental Bank Ltd. (1986) 3 N. W.L.R. C (Part 26) 47. For the learned Justices of the Court below therefore to have thought that this was a case that could be dismissed on the pleadings outright amounted to a complete misconception and is utterly erroneous. In consequence, this issue is answered in the negative.

ISSUE2

In his consideration of Exhibit E i.e. Suit No. 60/70 the learned Justice of Court of Appeal observed as follows -

"It is beyond argument that the trial Judge exaggerated the importance, effect and relevance of the evidence adduced by the plaintiffs. In respect of the proceedings in the District Court, he should have realized (1) that the decision there cannot bind the defendants or even inure to the plaintiffs because the said Sunday Moses is not a party to the present case and the 1st plaintiff brought that action in his personal capacity, not in a representative capacity as in the present case; (3) the issues are also different: See Paulina A. Daniel & anor. v. A. A. Iroeri (1985) 1 N. W.L.R. (Part 3) 541; (4) the so-called evidence given by Akpan Edem Idiong (17th defendant) could only at best have been used to cross-examine him as to credit if he had testified in the present case but it is of no higher value than that: See Alade v. Aborishade (1960) 5 F.S.C. 90 at 103; Folann v. Durojaiye (1988) 1 N. W.L.R. (Part 70) 351 at 369 S.C." F G

The above finding, in my view, is wrong in many respects and seems firstly, to overlook the fact that in determining whether the issue and the subject matter of the previous suit were the same as those in the present suit, the court was obliged to look into the substance rather than the form of the earlier case if it was instituted in the native or customary court. See Ikpan & ors. v. Edoho & anor. (1978) 2 L.R.N. 29 at 35/36 in which it was held, inter alia, that in considering H

a plea of res judicata in relation to claims determined by native or customary courts, it is necessary to look at the substance of the claims rather than their

form, and subject to the over-riding principle of fairness an Appeal Court should not look too critically at the procedure adopted by those courts. See also Okuma v. Isutsu 10 W.A.C.A. 89 and Udofia v. Afia 6 W.A.C.A. 216 at 218. In order to determine what issues were involved in any case before those courts it is necessary to look at the entire proceedings including both the evidence and the judgments. See also Boadu v. Fosu 8 W.A.C.A. 187, Okuma v. Isutsu (supra), Udofia v. Afia (supra) and Ajayi v. Afia (1942) 16 N.L.R. 67.

Secondly, the learned Justice of Appeal failed completely to advert his mind to the provisions of section 54 of the Evidence Act when he erroneously thought that it was either that the judgment in the previous case was applicable as the basis of the plea of res judicata under section 53 of the same Act, or could only be used to cross-examine the Respondent in that earlier case if he gave evidence under Section 198 of the Act. Section 54 of the Act provides as follows

“(1) If a judgment is not pleaded by way of estoppel, it is as between parties and privies deemed to be a relevant fact, whenever any matter, which was, or might have been decided in the action in which it was given, is in issue, or is deemed to be relevant to the issue, in any subsequent proceeding.

(2) Such a judgment is conclusive proof of the facts which it decides, or might have decided, if the party who gives evidence of it had no opportunity of pleading it as estoppel.”

Thirdly, the learned Justice of Appeal failed to advert his mind to the principle of “privies” in this aspect of the law, especially as applied to the Respondents’ family vis-a-vis the part played by some of their members in their earlier suit. Be it noted that a privy is a person whose title derives from and who claims through a party. See Coker v. Sanyaolu (1976) 9 10 S.C. 203 at 223 and Odieta v. Okotie (1973) 1 N.M.L.R. 975.

Fourthly, the learned Justice of Appeal erroneously failed to treat the evidence of the 7th Respondent and the parts played by him and the 8th Respondents during Exhibit ‘E’ as an admission under Section 20(3) of the Evidence Act from which they could not resile without sufficient reason. “Parties” under the law of estoppel per rem judicatam includes not only the parties named on the writ but includes their privies. For the purpose of estoppel per rem judicatam, a party means not only a person named as such but also one ... who, being cognizant of the proceedings allows his battle to be fought for him. See also Amancio Santos v. Okosi Industries Ltd. & anor. (1955) 15

W.A.C.A. 63 at 65; Appoh Ahabio Doku Kanga 1 W.A.C.A. 253 at 254; Bankole v. Pelu (1991) 8 N.W.L.R. 523; Fadiora v. Gbadebo (1978) 7 S.C.

219 and Udo v. Obot (1989) N. W.L.R. (Part 95) 59. Thus, if a dispute was actually a dispute between two families, the fact that the suit was conducted and fought by two individuals will not prevent the court from treating it as if it is actually a dispute between two families. See Nzekwu v. Nwakobi (1960) E.N.L.R. 59 and Ojiako v. Ogueze (1962) 1 All N.L.R. 58. In the Ojiako case (supra) one Osakwe of Ifite Okija, personally brought an action against three known persons personally, claiming a declaration of title to a piece of land. Judgment was given in favour of Osakwe in terms that the land was for him and his family. In a later action, the three Defendants in the earlier proceedings were made Defendants along with others as representatives of their community. The suit was in the name of the Plaintiff in the earlier action and other persons as representatives of their own community. The Federal Supreme Court held that the judgment in the earlier case operated as estoppel per rem judicatum.

In so far as Exhibit “E” between the 1st Appellant and Sunday Moses is concerned, the pleadings of the parties (both in the Statement of Claim and Statement of Defence) it must be held that Exhibit “E” fought between 1st Appellant and Sunday Moses, was so fought by the 1st Appellant and him on behalf of his family which is one of the families sued in this case. Therefore, the respondents herein, cannot now be heard to say that the land known as OKIMKIM belongs to them. Indeed, the Appellants in paragraph 34 of their Statement of Claim averred that the 17th Respondent told the court on oath in Exhibit ‘E’ that “*the disputed Land OKIMKIM is the Plaintiffs’ land in truth.*” The said statement being an unqualified formal admission is binding on all three families on whose behalf he was testifying and on it no further evidence was necessary. See Section 74 of the Evidence Act. All the other evidence given by or for the Respondents tending to contradict that by alleging that only a piece of the same land known as OKIMKIM belonged to the 1st Plaintiff on record or to the Appellants must be disregarded. See Udofia v. Afia (supra); Okparaeké v. Egbuonu (1941) 7 W.A.C.A. 53; Lawal Owosho v. Adebowale Dada (1984) 7 S.C. 149 at 163-164 and Pioneer Plastic Containers Ltd. v. Commissioner for Customs and Excise (1967) C.L. 597. The court below was therefore in error when it held that the trial Court was in error to have placed any reliance on Exhibit “E” which was a Suit in a Customary Court. The learned trial Judge was within his right to have held that the admission in the pleadings i.e. that “*OKIMKIM*”, land

was the Appellants’, was in itself sufficient proof of that fact.

My answer to Issue 2 is also in the negative.

For the reasons given by me and the fuller ones contained in the judgment of my learned brother, Ogundare, J.S.C, I too allow the appeal, set aside the decision of the court below and restore the decision of the trial court. I make the same consequential orders including those relating to costs as set out in that judgment.

B _____

IGUH JSC

I have had the privilege of reading in draft the leading judgement just delivered by my learned brother Ogundare, J.S.C, and I entirely agree with the reasoning and conclusion therein and adopt the same as mine. I wish, however, to say some words of my own by way of expatiation only.

The plaintiffs/appellants had before the High Court of the then South-Eastern State of the Federal Republic of Nigeria claimed against the defendants/respondents as follows

- D 1. A declaration of title to a piece of land known as and called
OKIMKIM MBAK OKPONGO situate and lying at Ikot Ede village in Western
Nsit Clan in Etinam Division of the then South Eastern State.
E 2. N40,000 as general damages for trespass committed by the Defendants
on the said land in or about the month of November 1974.
E 3. Perpetual injunction.

At the conclusion of trial, the learned trial judge, Nkereuwem, J. after an extensive review of the pleadings and the evidence before the court entered judgement for the plaintiffs on the 18th March, 1983, holding, as follows.

F *"I have come to the conclusion that the plaintiffs by their traditional
evidence and preponderance of evidence adduced in these proceedings are
entitled to customary right of occupancy, to a decree of declaration of title,
to that piece or parcel of land known as and called "Okim Mbak Okpono"
situate and lying at Ikot Ede village which piece or parcel of land is delineated
in plan No. ESA 225 LD (Exhibit A) filed by the plaintiffs....."*

G

*There will also be a perpetual injunction to restrain the defendants,
their servants and/or agents from committing further acts of trespass on the
piece or parcel of land.....*

H *I hold that the defendants did trespass into the land that is in dispute.
The plaintiffs have proved this arm of their claim. I find the defendants jointly
and severally liable for trespassing on the disputed land I award*

the sum of N500.00 general damages in favour of the plaintiffs."

Dissatisfied with this judgement, the defendant on the 3rd June, 1988

filed an appeal to the Court of Appeal against the same. On the 29th November, 1988, the court of Appeal, Enugu Division, per the leading judgement of Uwaifo, J.C.A., with which Macaulay and Oguntade, JJ.C.A., agreed, allowed the appeal and dismissed the plaintiffs' claims in their entirety.

The four issues raised by the appellants for the determination of this court run thus-

"1. Whether the learned justice of the court of Appeal Who delivered the lead judgement Which was concurred in by the other two justices was correct when he held that this is one clear instance in which the trial judge would have been right to have demised the Appellants' claims on the pleadings and without taking evidence on the alleged ground that the Appellants failed to state how they came to be entitled to the piece of land claimed by them.

2. Whether the court of Appeal was not in error in allowing the Respondents' appeal on the alleged ground that the learned trial judge made a wrong use of record of the proceedings in the District Court in suit No. 60/70, Exhibit E, in this case.

3. Whether the learned justice of the court of Appeal Who delivered the lead judgement concurred in by the other two justices, was not in error when he held that there was no evidence of Possession before the trial Court worthy of assessment by that Court.

4. Whether the Court below was right to have substituted its own views of the facts as regards the ownership of the land for those of the trial court which heard the case and saw the witness, and having thus substituted its own views for those of the trial Court to have allowed the appeal of the respondent based upon those views."

The respondent, although served with the appellants brief of argument filled no respondents brief in reply thereto and did not therefore formulate any issues for the resolution of this Court. The respondents, in the circumstances must be taken to have adopted the issues identified by the appellants by the determination of this appeal. See Ajibade v. Pedro (1992) 5 N. W.L.R. (Part 241) 257 at 267.

The first issue is whether the Court of appeal was Correct when it held that this is one clear instance in which the trial court ought to have dismissed the appellants' claims on the pleadings and without taking evidence.

The Court of Appeal, quite early in its judgment, had stated thus-

"Looking at the Plaintiffs' averments already set out above as to

their true substance and import, this is one clear instance where the case might have been decided even upon the pleadings alone without the bother to have

evidence in support as observed by Oputa, J.S. C. in Chief Mrs. F. Akintola & anor v. Mrs. C.F.A.D. Solano (1986) 2 NWLR (Part 24) 598 at 623 as follows: *‘It is high time our trial courts ... begin looking critically at the pleadings and where appropriate giving judgment on the pleadings if no trial issue of fact has been raised.*

B The case should have been dismissed as the Plaintiffs failed to state how they came to be entitled to this particular parcel of land.”

With the greatest respect, I find it difficult to accept that this is an appropriate case in which the learned trial court, has rightly dismissed the appellants’ claims on their pleadings. In the first place the appellants who C prosecuted this action for themselves and as representing the Nung Inyang Edok Akwang Ede family in Ikot Ede Village averred in paragraphs 2, 5 and 6 of their statement of claim that they are members of the said Nung Inyang Edok Akwang Ede family and that they are the “real and exclusive owners” of the land in dispute.

D The appellants also averred in paragraph 11 of their statement of claim that –

“The land in dispute has been the property of Nung Inyang Edok Ede from such early times as the village of Ikot Ede was founded and the plaintiffs and other members of their family have exercised maximum acts of ownership E and possession in and over the land in dispute such as farming thereon, cutting palm fruits and tapping wine palms therein, building houses and living thereon and burying their dead there.”

In paragraph 12 of their statement of claim, the appellants pleaded thus

–
F “Since the days of the founding father of Ikot Ede Village the Plaintiffs’ Family have been in effective and peaceable possession of the land in dispute.”

They further pleaded the arbitration proceedings of 1969 between the 1st plaintiff and one Sunday Moses of Ikot Ede village in respect of title to a part G or portion of the land in dispute by the Village Council of Ikot Ede. They pleaded the Itreto District Court suit No. 60/71 between the 1st appellant and the said Sunday Moses for possession of the said part or portion of the land in dispute. These two proceedings were averred to have ended in favour of the appellants. The pertinent question now must be how, in the face of the above averments, H even though they were denied by the defendants/respondents, it can be

suggested that no triable issues of fact were raised or that no cause of action was disclosed by the appellants in their statement of claim.

As was indicated, quite rightly, by the learned counsel for the appellants, Mr. Kehinde Sofola, S.A.N., the learned Justice of the Supreme Court, Oputa, J.S.C. by his orbiter dictum above mentioned was making clear reference to the provision of Order 29, Rule 1 of the High Court Rules of Cross River State then applicable in the area of jurisdiction of the trial court in this case. This Rule of court which dealt with the issue of demurrer provided as follows –

“Where a Defendant conceives that he has a good legal or equitable defence to the suit, so that even if the allegations of the Plaintiff were admitted or established, yet the Plaintiff would not be entitled to any decree against the Defendant, he may raise this defence by a motion that the suit be dismissed without any answer upon questions of fact being required of him.” Order 29, Rule 2, however, went on to stipulate that for the purposes of the application, the defendant shall be taken as admitting the truth of the plaintiff’s allegations of fact in his statement of claim.

I think it ought to be pointed out that an application by way of demurrer to have a suit dismissed shall be made before issues are joined in the suit, that is to say, after the filing of the statement of claim but before the filing of the statement of Defence. See Odiye v. Obor (1974) 2 S.C. 23, Lasisi Fadare and Others v. Attorney-General of Oyo State (1982) 4 S.C. 60 at 75-78 etc. In doing so, however, the defendant in a case of demurrer, shall base his application for a dismissal of the suit on the assumption that all the facts as alleged by the plaintiff in his statement of claim are true, admitted or established. See Fidelis Oguchi and Another v. Federal Mortgage Bank of Nigeria Ltd and Others (1990) 6 N.W.L.R. (Part 156) 330, Irona Nwadiaro and Others v. Shell Petroleum Development Co. of Nigeria Ltd. (1990) 5 N.W.L.R. 322 etc. He is not permitted under the law to contest, whether directly or indirectly, the truth or otherwise of such facts pleaded in the statement of claim and if the defendant has filed a statement of Defence, the same must be discountenanced. See Edokpolo & Co. Ltd. v. Sem-Edo Wire Industries Ltd and Others (1984) 7 S.C. 119, John Ekeogun v. Elizabeth Aliri (1990) 1 N.W.L.R. 345 etc. But so long as the statement of claim discloses some cause of action or raises a triable issue before the court, the mere fact that it appears the case is weak or unlikely to succeed is no ground for striking out or dismissing the suit. See Irene Thomas and Others v. Timothy Olufosoye (1986) 1 N.W.L.R. (Part 18) 669 at 682-683.

In addition to the various averments of the appellants as above set out, they also went on to allege that the respondents trespassed on their land in dispute and erected buildings thereon and, when confronted, begged and promised to pull down the mud houses. Upon a close study of all the facts above set out as pleaded by the appellants in their statement of claim, it cannot, in my

view, be seriously argued that, if they are admitted as true and established or undenied and uncontroverted, the appellants would not have been entitled to judgment on all the items of their claim.

Attention may also be drawn to the provision of Order 33, Rule 19 of the High Court Rules of Cross River State in force at all material times which B provides thus –

‘The Court may at any time on the application of either party strike out any pleading or any part thereof, on the ground that it discloses no cause of action, or no defence to the action, as the case may be’

Under Order 53, Rule 19, it is clear that the court may at any stage of C a proceeding, on the application of either party, strike out any pleading or any part thereof on the ground, inter alia, that it discloses no cause of action, or no defence to the action as the case may be. Unlike in the case of a demurrer, the court may exercise its powers under this Rule at any stage of the proceeding on the application of either party. In the case of a defendant, he may bring this D application on the ground, inter alia, that the plaintiff’s statement of claim or any part thereof discloses no cause of action. But as pointed out by the West African Court of Appeal in John Mills v. Franklin Beatrice Awoonor Remler (1940) 6 W.A.C.A. 144 at 145 *“It would be manifestly absurd to suggest that a court was bound to proceed with the taking of lengthy E evidence of the parties to a suit where it appeared that the whole suit could be decided upon the pleading without any evidence being called.”* See too Everet v. Ribbands (1952) 2 O.B. 198 at 206 and Yeoman Credit Ltd v. Latter (1961) 1 W.L.R. 828 at 835.

The court, again, will not act under Order 33, Rule 19 unless the F defendant is able to establish that even if the facts as alleged by the plaintiff in his pleading are true, there will nevertheless, be no cause of action or that at any event there can be no question of the plaintiff succeeding in his claim. See Bello Adegoke Foko and Others v. Oladokun Agboola Foko and others (968) N.M.L.R. 441. Such an application will not succeed if the claim is obviously bad G and unsustainable. See Attorney-General of the Duchy of Lancaster v. London and North Western Railway (1892) 3 Ch. 274, Moore v. Lawson (1915) 31 T.L.R. 418, Dyson v. Attorney-General (1911) 1 K.B.419 etc. But so long as the statement of claim discloses some cause of action or raises some question of fact or a point of law which requires serious argument to be decided by the court H

and the case is within the jurisdiction of such a court, an application to dismiss or strike out the action in limine cannot succeed on the mere ground that the case is weak and unlikely to succeed, See too Davey v. Bentinck (1893) 1 Q.B.

185. Hubbuck v Wilson Heywood and Clark 1899 1 Q.B. 86 at 91 Moore v. Lawson *supra*, Irene Thomas and others v. Timothy Olufosoye 1986 1 N.W.L.R. 669 at 682 - 683 etc. As above indicated, for the purpose of deciding whether there is a cause of action, the court at that stage must accept the averment in the plaintiff's statement of claim as established. See Joseph Ayanboye and others v. Oladipupo Balogun (1990) 5 N.W.L.R. 398.

B

The point that ought to be stressed, whether under Order 29 Rule 1 or Order 33 Rule 19 as aforesaid is that the suit or pleading, where in the latter case it is a statement of claim that is under attack, may be dismissed or struck out as the case may be on the application of the defendant but not suo motu by the court itself. No such application was at any stage of the proceeding made before the trial court by the defendants/respondents in this case. I think that the learned Senior Advocate, Mr. Sofola is absolutely right in his Submission that if the respondents thought this was a case for dismissal or striking out on the pleadings, they would have taken the appropriate steps or procedure to get the suit dismissed or the statement of claim struck out. They should not have filed their Statement of Defence if they had intended to raise a demurrer against the appellants' action. But having filed their Statement of Defence and their case was that the appellants' Statement of Claim disclosed no cause of action and should be struck out, the law enjoined them to make the necessary application to that effect. This they failed to do.

C

D

E

In the circumstances of this action, it is my view that the respondents not having raised, whether directly or indirectly, a case of demurrer or that the statement of claim disclosed no cause of action but filed their Statement of Defence, joining issue with the appellants' in respect of several material issues of fact in the case, it cannot be the duty of the trial court to dismiss the appellants' action suo motu in the absence of any application to that effect. I agree that such a Course of action will be in clear Contradiction of the well established principle that it is counsel conducting a civil case and not the court that is as a matter of law and procedure in complete control of his case. See Nwafor Elike v. Ihemereme Nwankwoala and Others (1984) 12 S.C. 301 at 311-312 and Bakare v. African Continental Bank Ltd (1986) 3 N.W.L.R. (Part 26) 47.

F

G

I think I need to point out that the court below, having at an early stage of its judgment, wrongly held that this is a proper case for disposal on the pleadings, unfortunately persisted in this error when in considering the most

H

vital issue in controversy between the parties it stated thus-

"What is the evidence of tradition as presented by the plaintiff in this

case? Strictly speaking it is unnecessary to look at it in view of the inadequacy in the plaintiffs' pleading. But the evidence is even worse than the pleading." In this regard, learned counsel for the appellants in his brief commented as follows –

- "The learned Justice of Appeal after taking the erroneous view that
 B the Appellant's claims should have been dismissed on the pleadings could hardly have been expected to dismiss the appeal and sustain the claims which he thought should have been so dismissed. It is respectfully submitted that it is this erroneous view taken by the Justice of Appeal of the Appellants' case that beclouded his views in respect of the whole case."
 C I agree entirely with the above submission of learned Senior Advocate which, in my view, is well founded.

- The Court of Appeal further based its finding that the appellants' claim should have been dismissed in limine on the pleadings on the ground that it did not show how the said appellants came to own the land in dispute. With the
 D greatest respect, I am unable to accept this proposition as well founded. In my opinion, the appellants from their pleadings fully averred ownership of the land in dispute by settlement through traditional evidence as well as by acts of long possession and enjoyment of the land. These two methods of establishing title to land, among others, are each fully recognized by law. See Idundun v. Okumagba (1976) 9-10 S.C. 227, Okonkwo v. Okolo (1988) 2 N.W.L.R. (Part 79) 632 at 656, Nwosu v. Udeala (1990) 1 N.W.L.R. (Part 125) 188 etc. The claim of
 E the appellants that their ancestor Ede founded and first settled on the land in dispute, exercising various acts of ownership and possession in and over the same with members of his family and their descendants till this day. They
 F pleaded that they are the descendants of the said Ede. The copious traditional evidence adduced before the court by the appellants was assessed by the learned trial Judge as follows-

- "On the whole he (meaning P. W.1, David Akpan) gave very reprehensive account of how their ancestor came to occupy Ikot Ede Village. All
 G throughout the lengthy and rigorous cross-examination of P.W.1 defendants' counsel, the traditional evidence as presented by the plaintiffs in this case was never demolished or challenged. They only countered his traditional evidence by asserting that P.W.1 - David Akpan - is a native of Atan Village and not an indigene of Ikot Ede village
 H On traditional evidence, it would appear that the plaintiffs' account

is more satisfactory than the negative approach presented by the defendants in this respect. I am of the view that the plaintiffs' family exists, therefore

traditional evidence is relevant”

(Words in brackets supplied)

A little later in his judgment, the learned trial Judge went’ on-

“*I have come to the conclusion that the plaintiffs by their traditional evidence and preponderance of evidence adduced-in these proceedings are entitled to declaration of title to that piece or parcel of land known as and called “OKIM MBAK OKPONO” situate and lying at Ikot Ede village Which piece or parcel of land is delineated on plan No. ESA 2254 LD (EXHIBIT A) filed by the Plaintiffs in this suit and therein verged PINK.*” Even the Court of Appeal would appear to have recognized the appellants’ evidence in respect of the founding of the land in dispute by their ancestor. Said the Court of Appeal-

“*But the evidence is even worse than the pleading. After the plaintiffs’ 1st Witness, Chief David Akpan (i. e. 1st plaintiff on the record) had said how the village of Ikot Ede was founded by Ede, and traced this lineage from the said Ede down to himself, he then said: “My family of Nung Inyang Edok Akwang Ede is No. 1 family i.e. Akpan traditionally called Akpan Ekpuk. The 1st son of Ede was Akwang Ede. That is why I claimed the premiership of Ekpuk structure in the village.”*”

Reference was earlier made in this judgment on the appellants’ averments in paragraphs 11 and 12 of their statement of claim on the same issue of how the appellants came to own the land in dispute. I think, with respect, the Court below was in definite error when it held that the appellants did not show how they came to own the land in dispute in the face of clear averments on the issue in the appellants’ statement of claim and the cogent evidence accepted by the trial Court in support thereof.

To summarize on issue one, it seems to me from the facts of the case as pleaded that the appellants’ statement of claim, without doubt, disclosed a definite cause of action. It is also clearly not demurrable. In my view the Court below, with respect, was in error by holding that this is a case in which the trial Judge should have dismissed the appellants’ claims in limine on the pleadings. Accordingly the answer to issue one must be in the negative.

On issue No. 2, the learned trial Judge after a consideration of the Ireto District Court Suit No. 60/71, Exhibit E, together with the other relevant evidence of title, parties observed as follows –

It has been agreed by both the Plaintiffs and the Defendants that there was a dispute between the plaintiff and one Sunday Moses involving a part

of the land now in dispute and that the case went to Ireto District Court which gave title of that piece of land to the Plaintiff. There is also a plethora of

evidence in the proceedings to show that most of the Defendants in the present case gave evidence in that case (Suit No. 60171 in favour of David Akpan (the 1st Plaintiff-on-record). There are also in evidence resolutions of Ikot Ede Village Council ordering Sunday Moses to quit the land over which declaration of title was granted to David Akpan in Itreto District Court case.”

B After referring to the plaintiffs/appellants’ survey Plan of the land in dispute, Exhibit A, and the defendants/respondents’ plan, Exhibit F, the learned trial Judge went on thus-

“The plans EXHIBIT A and EXHIBIT F are drawn to the same scale -1 in. to 20ft. If EXHIBIT A is superimposed on EXHIBIT F, it will be noticed
C that the land which the Plaintiff sued Sunday Moses for in Suit No. 60/71 in Itreto District Court is a part of the land presently in dispute i.e. the subject matter of this case as shown in both plans EXHIBIT A and EXHIBIT F, almost
D tally position-wise, although one may tend to be larger than the other. And it must be remembered that the Defendants and the Village Council of Ikot Ede supported the plaintiff in that contest (EXHIBIT B, C, D, and E refers).”

The court below, however, rejected the above findings of the trial court claiming that –

E “It is beyond argument that the trial Judge exaggerated the importance, effect and relevance of the evidence adduced by the plaintiffs.”

According to that court, Exhibit E could not bind the respondents or even inure to the plaintiffs for reasons inter alia that Sunday Moses is not a party to the present case, that the 1st plaintiff/appellant brought that action in his personal capacity and not in a representative capacity, that the subject matter
F in that case is not the same as in the present case and that the issues are also different.

The point cannot be overemphasized that the form of an action in a customary court or tribunal must not be stressed where the issue involved is clear and decisions on such issues should not be disturbed without very clear
G proof that they are wrong. See Kwamin Akyin v. Essie Egyma 3 W.A.C.A. 65. Solomon Jonah v. Kojo Owu 3 W.A.C.A. 170 at 171, Chukwunta v. Chukwu 14 W.A.C.A. 341. Accordingly in considering plea of res judicata or estoppel in relation to claims determined by the Native or Customary Courts, it is desirable
H to scrutinize the substance of such claims as closely as possible rather than their form and, subject to the over-riding principle of fairness, an appellate court should not look too critically at the procedure adopted by those Courts. See Ikpang and Oiliers v. Edoho and Another (1978) 2 L.R.N. 29.. The principle is firmly established that in order to determine the real issues that were involved in any case before the Native or Customary tribunal or Court, it is necessary to

examine the entire proceeding including the evidence and the judgment. See Boadu v. Fosu 8 W.A.C.A. 89. Udofia v. Afia 6 W.A.C.A. 216 at 218. Ajayi v. Aina (1942) 16 N.L.R. 67 etc.

In the Itreto District Court suit No. 60/71, Exhibit E, David Akpan, the 1st plaintiff in the present suit, who is the head of the appellants' family, had sued Sunday Moses, also of Ikot Ede "*for the defendant to quit from the plaintiff's land known and called Okim Okim situate at Ikot Ede*" "It is clear from a close study of the proceedings that the real issue in dispute between the parties was ownership of the land. Indeed following the defendant's plea of title to the land, the District Court ordered him to take a cross-action for declaration of title against the plaintiff within 7 days. The original suit ended in favour of the plaintiff and the defendant was ordered to quit the land in dispute. It was also established before the trial court that the land in dispute in Exhibit E is substantially the same as the land now in dispute although the latter appeared slightly larger than the former." B C

By paragraph 28 of the appellants' statement of claim, it was averred that their family of Nung Inyang Edok Akwang Ede "*had been behind the Plaintiff in his claims*" in Exhibit E and "*had demonstrated its interest in the land in dispute to the knowledge of the Village Council throughout the deliberations.*" The appellants further pleaded that "*Sunday Moses had knowledge of the ownership of the land in dispute as being vested in the first plaintiff and his family.. and he had accepted the decision of the Village Council.*" D E

The respondents by paragraph 17 of their statement of Defence claimed they could "*neither admit nor deny*" the above averments but would "*put the plaintiffs to the strictest proof thereof.*" F

It is long settled that in order to raise an issue of fact, there must be a proper traverse. If a defendant refuses to admit a particular allegation in the statement of claim, he must state so specifically and he does not do this satisfactorily by pleading that the defendant is not in a position to admit or deny a particular allegation or that he will, put the plaintiff to strict proof thereof. See Lewis and Peat N.R.I. Ltd. v. A. E. Akhimien 1976 7 157 Nwadike v. Ibekwe 1987 4 N.W.L.R. Part 67 718 at 741 Law Owosho v. Dada (1984) 7 S.C. 149 at 163 etc. G

It is clear in the present case that the averments in paragraph 28 of the appellants' statement of claim were not specifically or properly traversed by the respondents. The court below, with respect, was in error by holding that Exhibit H

E could not inure to the appellants because the 1st plaintiff brought that action in his personal capacity and not in a representative capacity as in the present

action.

The court below was also of the view that the decision in Exhibit E could not bind the respondents as Sunday Moses is not a party to the present case. The point here however is not whether Exhibit E operated as res judicata against the respondents but whether, as contended by the applicants, it is

B relevant in the present suit.

There can be no doubt that Exhibit E is clearly relevant as found by the trial Judge in this proceeding. Paragraph 34 of the appellant's statement of claim avers as follows –

C *"Indeed, at the trial of the afore-mentioned Itreto District Court suit No. 60/71, Akpan Edem Idiong, Udo Utin, 17th Defendant, 8th Defendant and 1st Defendant respectively appeared as witnesses for the 1st plaintiff. Akpan Edem Idiong 17th Defendant giving evidence for himself and on behalf of all his co-witnesses stated on oath that "the disputed land "OKIMKIM" is the plaintiff's land in truth."*

D These averments were admitted by the respondents in paragraph 22 of their statement of Defence. It cannot, therefore be seriously argued that this admission which is fully supported by evidence accepted by the trial court is neither relevant nor operated as an estoppel against the respondents in the present case. After all, an estoppel may arise where a party such as the
E respondents in the present case, are not allowed to say that a certain statement of fact they had made is untrue. They had, in Exhibit E, testified that the land then in dispute which is part and parcel of the land now in dispute belonged to the present appellants. In my view, Exhibit E is vitally relevant and of significant importance in the present case as it must operate: as an estoppel against the
F respondents who testified therein that the land in dispute belonged to the plaintiffs. They cannot now be heard to say that the land in respect of which they testified in Exhibit E and which is part of the land now in dispute belongs to them. I think the court below, with respect, was wrong here and consequently
G placed any reliance on the proceedings, Exhibit E which was a suit in a customary court. I will accordingly resolve issue 2 in favour of the appellants.

On the 3rd issue, it was the view of the Court of Appeal that "there was no evidence of possession by the plaintiffs worthy of assessment." Again, with respect, the Court of Appeal was in error here. In the first place, evaluation and/
H or assessment of evidence led in a case and the ascription probative value to such evidence are the primary functions of the trial court which saw, heard and

assessed the witnesses. See Amadi v. Nwosu (1992) 5 N.W.L.R (Part 241) 273 at 280, Akpagbue v. Ogu (1976) 6 S.C. 63 etc

Failure or refusal to assess or evaluate the evidence led by a party by a court because such evidence appears weak will amount to a definite misdirection in law. See Azeez Akerodolu and Others v. Lasisi Akinremi and Others (1989) 2 N.W.L.R. (Part 108) 164 at 172.

Secondly, it is the finding of the learned trial Judge that the appellants *“by their traditional evidence and preponderance of evidence adduced in these proceedings are entitled to customary right of occupancy”* to the land in dispute. The trial court also found in clear terms that the appellants were in possession of the land in dispute. Dealing with entry by the defendants on the land in dispute to erect *“buildings and other structures thereon without the consent and authorization of the plaintiffs”* the learned trial Judge found- *“That was clearly a wrongful act done in disturbance of the possession of the plaintiffs.”*

The next question must be whether there is evidence of possession of the land in dispute by the appellants from which the trial court arrived at its finding.

The evidence of the appellants’ possession of the land in dispute which the trial Court relied upon in making its finding came mainly from P.W. 1, P.W. 2 and P.W. 3 among others. P.W. 1, Chief David Akpan who is the 1st plaintiff testified as follows-

“There is a very old palm tree on the land. The palm tree is very tall - taller and older than any other palm tree on the land. It was under this palm tree that my father made a shed. The shed was used for slicing yam seedling for planting. I used to sit in this shed; other children used to sit in this shed. There is a shrine known as “Iso Obot Udia. “ This is a place where sacrifices are offered so that the people may have good yield of yam tubers. I live on this land. My house is on the land. My senior brother lived and died on this land. My senior brother’s name was Akpan Akpan Ukpe Inyang Edok Akwang Ede. My late brother’s grave can be found on the land in dispute. The ruins of my late brother’s house can still be found on the disputed land. My mother lived and died on this land. She was buried on this land. Her tombstone is on this land now. My junior brother - Udo ikpan Ukpe Inyang Edok Akwang Ede lived and died on this land. The ruins of his house can still be seen on the land in dispute. Apart from the ruin of dwelling house of my late brother - Akpan Akpan Ukpe there are coconuts and other fruit trees.”

There is next, the evidence of P. W. 2, Sunday Inwang whose family owns land contiguous to the land in dispute. Apart from his evidence that the land in dispute belonged to the appellants, he testified thus -

“One Stephen Inyang - the 2nd Plaintiff to my knowledge, used to

farm on parts of the disputed land” Okim Okim. Mbak Okpono, Edem Inyang - the Junior brother of the 1st Plaintiff used to work on this land. 1st plaintiff and family members used to go to work on the land in dispute. I have never witnessed any occasion when any person or persons had stopped or prevented those I have named before from working on or cultivating the disputed land, “OKIMKIM” MBAK OKPONO.”

He went on-

The land in dispute is the property of the Plaintiffs in this case. The Plaintiffs have been farming on the disputed land for upwards of 50 years to my knowledge. Apart from been farming in the disputed land, the Plaintiffs generally collect palm fruits from the disputed land.”

P.W. 3, Adem Udo also from Ikot Ede, testified as follows -

“The case was decided in the year 1974 After the decision ... the Defendants then went on the disputed land and set fire on the disputed land we had cleared They similarly cut down palm fruits, pear trees, cola nuts and palm wine trees. All these economic trees were property of members of our family who had lived on the land previously Other members of our family live on “OKIMKIM” land. The 1st Plaintiff is now living on the land in dispute.”

There can be no doubt, therefore, that there is abundant cogent evidence on record from which the learned trial Judge found, as he did, that the appellants were in possession of the land in dispute. That being so, it seems to me crystal clear, if I may again say with respect, that the Court of Appeal was in gross error when it held that *“there was no evidence of possession by the plaintiffs worthy of assessment”* I agree misconception, could not but arrive at its mistaken conclusion that the learned trial Judge was in error to have found for the appellants on the issue of possession of the land in dispute. In my view, had the learned trial Judge failed to evaluate the evidence led by the appellants on the issue of possession and to make findings thereupon, the Court of Appeal might have had no option in law than to set aside his judgment. In the circumstance, the answer to issue three must be in the affirmative.

The 4th issue is primarily concerned with whether the Court of Appeal was right to have substituted its own views of the facts as regards the ownership of the land in dispute for those of the trial court which heard the case and saw the witnesses. The learned trial Judge after a comprehensive review of the evidence in respect of traditional history and acts of long possession and enjoyment of the land made findings of facts following which he entered judgment for the appellants. These findings the Court of Appeal

overturned, holding as follows-

"The evidence led by the Plaintiffs was obviously in disarray. Surprisingly, the trial Judge said he was satisfied with it. He relied on it to declare title on the Plaintiffs over the land. He also concluded upon this unreliable evidence and some evidence of land litigation which was not admissible against the Defendants that the Plaintiffs were in possession of the land. He relegated the numerous and positive acts of possession of the Defendants to acts of trespass."

I have already held that the court below was in error when it held that the evidence of the earlier litigation in respect of the land in dispute was not admissible against the respondents. On the issue of facts as found by the trial court, it seems to me that these were reversed by the court below on the ground that the trial court ought not to have accepted the facts it found established.

With profound respect, the court below should not reverse a trial court on the ground that if the facts were before it, it would not have come to the same conclusion as the trial court. See Odofin v. Ayoola (1984) 11 S.C. 72. An appellate court should not ordinarily interfere with the findings of fact made by a trial court except in circumstances such as where the trial court made no proper use of the opportunity of seeing and hearing the witnesses at the trial or where it drew wrong conclusions from accepted credible evidence or has taken an erroneous view of the evidence adduced before it or its findings of fact are perverse in the sense that they do not flow from the evidence accepted by it. See Okpiri v. Jonah (1961) All N.L.R. 102 at 104. Woluchem v. Gudi (1981) 5 S.C. 291 at 295 - 296, 326 - 329 etc. The appellate court may take the view that without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence on record. See Lawal v. Dawodu (1972) 8 - 9 S.C. G 83 at 114 - 115, Balogun v. Agboola (1974) 10 S.C. 111 at 118-119 etc. What an appellate court ought to do is to ascertain whether there is evidence on which the trial court could have arrived at the conclusion it reached. Once there is such evidence on record from which the trial court made its findings of fact, the appellate court cannot interfere. See Okpagbue v. Ogu (1976) 6 S.C. 63 Odofin v. AyooJa and Amadi v. Nwosu, supra;

In the present case, there is no legal justification whatever on the part of the court below to interfere with the findings of fact made by the trial court. The appellants have contended that the views of the Court of Appeal were beclouded by its overriding stand that the appellants' claims should have been dismissed in limine on the pleadings, that there was no evidence of possession before the trial Court worthy of assessment and that it is unnecessary to look

at the appellants evidence on tradition “*in view of the inadequacy the plaintiffs pleading*” and I find myself in complete agreement with this submission. I entertain no doubt that the court below was, with respect, in definite error by interfering with the findings of fact of the trial court when there was no justification in law for doing so. Issue 4 is again resolved in favour of the B appellants.

It is for the above and the more elaborate reasons contained in the leading judgment of my learned brother, Ogundare, J.S.C. that I too, allow this appeal. I abide by the consequential orders including those as to costs therein made.
C

D

E

F

G

H