

**SUPREME COURT OF NIGERIA**  
**TUESDAY 4TH JUNE, 1996. SC. 207/1992**  
**CORAM:- A. B. WALI, I. L. KUTIGI, S. U. ONU,**  
**Y. O. ADIO, A. I. IGUH, JJSC**

OBA E.A. IPINLAIYE II ..... PLAINTIFF/APPELLANT  
 (The Oloje of Igasi)  
 For himself and on behalf of the  
 entire Igasi Community)

AND

CHIEF JULIUS OLUKOTUN .....DEFENDANT/RESPONDENT  
 (By Substitution)  
 For himself and on behalf of the  
 entire Ahan Community.

***APPEALS*** - Issues - Whether Court of Appeal was wrong - In considering the issues raised - Instead of the grounds.

***APPEALS*** - Slip in judgment - Must be substantial - To warrant allowing the appeal.

***EVIDENCE*** - Findings of Court - Supported by evidence on record - Enabled court of Appeal to dismiss appellant's appeal.

***EVIDENCE*** - Admissibility - Exhibit - Whether rightly held admissible by Court of Appeal - For the purpose of discrediting evidence of appellant. ,

***EVIDENCE*** - Admissibility - Document that is not inadmissible by law - Where not objected to when tendered in evidence - Whether admissible.

***EVIDENCE*** - Admissibility - Document admissible in law - Is properly received in evidence - Where objection to its admissibility is not raised - Immediately it is offered in evidence.

***LOCUS IN QUO*** - Visit to locus - Court's decision suo motu to visit Locus in quo - Without application by either party - Whether in order.

***LOCUS IN QUO*** - Visit to locus Judge's observation at locus in quo -Not to be substituted for sworn testimony.

**LOCUS IN QUO** - Visit to locus - Trial judge was in order in visiting the locus in quo - No miscarriage of justice was occasioned thereby.

**PLEADINGS** - Material facts - To be admissible in evidence - Must be pleaded - Where not pleaded - They are inadmissible.

**PLEADINGS** - Evidence - Documentary evidence need not be specifically Pleded - To be admissible in evidence - It is sufficient to aver the effect thereof briefly - In any pleadings.

**PLEADINGS** - Exhibits - Statement of Defence - Where pleaded facts con- Constitutes the main contents of Exhibit - That Exhibit is pleaded.

**PLEADINGS** - Material facts - Covered by an Exhibit - Where expressly and fully pleaded - That Exhibit cannot be said not to be pleaded.

**STATUTES** - Evidence Act s. 210 - Admissibility of document in evidence - Whether document is admissible under s. 210 - To discredit appellant.

**STATUTES** - Coverage - Ondo state High Court Rules 0.14, r. 15 - Provision thereof has wide coverage - Under which Exhibit A, A1 becomes admissible.

### **FACTS**

The appellant as plaintiff, in the High Court of Ondo State, Ekiti, instituted an action against the respondent, then defendant, claiming (a) Declaration of title to the land in dispute, (b) General damages for trespass and (c) Injunction restraining the Respondent from further trespass on the said land. The case proceeded to trial after filing and exchange of pleadings. The learned trial judge upon evidence led at the trial, visited the locus in quo in the presence of both parties. The trial judge also admitted in evidence a letter written by the appellant to the respondent as Exhibit A, A1.

Upon the available evidence, the learned trial judge at the conclusion of hearing, found in favour of the respondent and dismissed the entire claim of the appellant. Appellant's appeal against the decision of the trial court was dismissed by the Court of Appeal, Benin Division which affirmed the learned trial judge's judgment. The appellant aggrieved by that decision has further appealed to the Supreme Court raising seven issues, which issues, the apex court considered as sufficient in the determination of the appeal.

***ISSUES FOR DETERMINATION***

*2.1 Whether the appellant taking into consideration the onus of proof in civil cases has not proved his case?*

*2.2 Whether Exhibit A was an admissible evidence in law?*

*2.3 Whether the admissibility of Exhibit A under cross-examination was proper for the lower court to have heavily relied on the contents of same in determining the traditional evidence? Etc., see p. 1009*

***HELD*** (Dismissing the appeal per lead judgment of ***IGUH JSC, Kutigi JSC*** dissenting)

***Material facts must be pleaded***

1. It is a cardinal rule of pleadings that material facts, to be admissible in evidence, must be pleaded. As a result, neither party will be allowed to raise at the trial of a suit, an issue of fact which he has not pleaded. Where therefore, such facts are not pleaded, they are in law inadmissible in evidence and, where wrongly admitted, go to no issue and should be discounted as irrelevant to the issues properly raised by the pleadings. (p. 1013 C)

***Documentary evidence - How pleaded***

2. Documentary evidence, however, need not be specifically pleaded to be admissible in evidence so long as facts and not the evidence by which such a document is covered are expressly pleaded. Consequently, where the contents of a document are material, it shall be sufficient in any pleading to aver the effect thereof as briefly as possible without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material, such as in cases of libel. (p. 1013 F)

***Contents of Exhibit A, Al pleaded***

3. It seems to me indisputable that the above paragraphs of the respondent's statement of Defence pleaded the facts that the appellant's people farmed on the land in dispute as tenants after appealing to the respondent's people for parts thereof. These same material facts constitute, in the main, the contents of Exhibit A, Al. With profound respect, I am unable to accept the view that the document, Exhibit A, Al, can be said not to have been pleaded as was held by the Court of Appeal. This is because the material facts covered by the exhibit were expressly and fully pleaded by the respondent. I think that the Court of Appeal was in error when it held that the contents of Exhibit A, Al were not pleaded in the respondent's Statement of Defence and that the document would be inadmissible in evidence for the purpose

of disproving the appellant's case. (p. 1014 B)

***Admissibility of Exhibit A, A1 rightly upheld***

4. The Court of Appeal, however, upheld the admissibility of Exhibit A, A1 quite rightly, in so far as it was for the purpose of discrediting the evidence of the appellant that he did not write a letter to the Alahan in 1972. That court went further to hold that the conduct of the appellant before the trial court by not only failing to raise an objection to the admissibility of the document for any other purpose than discrediting the testimony of the appellant but helping in the translation of Exhibit A into the English language, would make it almost unconscionable to uphold his objection to the admissibility of the document. In this regard, I must say that I find myself in complete agreement with the Court of Appeal in this view. (p. 1014 F)

***Document admissible in law***

5. In the present case, Exhibit A, A1 when it was tendered was not objected to by the appellant; it was fully cross-examined upon and its admissibility was not put in issue at any stage of the trial. The document itself does not belong to the category which by law, is inadmissible in any court of law and in all circumstances although I will later in this judgment deal more fully with this aspect of the matter. It suffices at this stage to say that the court below was right in overruling the appellant's submission on the inadmissibility of the document (p. 1015 B)

***Document properly received in evidence***

6. It is the cardinal rule of evidence and practice in civil as well as in criminal cases that an objection to the admissibility of a document sought to be tendered in evidence is immediately taken when it is offered in evidence. Barring some exceptions where by law certain documents are rendered inadmissible (consent or no consent of the parties notwithstanding) for failure to comply with the provisions of such law the rule remains inviolate that where objection has not been raised by the opposing party to the reception in evidence of a document or other evidence, the document or evidence would be admitted and the opposing party cannot afterwards be heard to complain about its admission. In all the circumstances of Exhibit A, A1, I am in complete agreement with the Court of Appeal that the document was admissible in law and was properly received in evidence by the trial court. (p. 1017 D)

***Exhibit A, A1 admissible under Evidence Act***

7. A close study of the above sections of the Evidence Act clearly discloses that the admission in evidence, under cross-examination, of Exhibit A, A1 by the trial court was completely permissible and unimpeachable as a statement previously made in writing by the plaintiff to contradict or discredit his evidence on oath before the court. In my view, it is beyond question that in so far as the document was to discredit the evidence of the appellant that he did not write a letter to the Alahan in 1972 and to impeach his claim of ownership of the land in dispute it was clearly admissible in evidence and was properly so admitted. (p. 1018 E)

***Exhibit A, A1 admissible under High Court Rules***

8. There can be no doubt that the above Rule is as wide as it is all embracing and I agree entirely with the court below that it provides a wide cover under which Exhibit A, A1 became admissible in the proceeding since it sought to disprove the ownership of the land in dispute by the appellant, a claim set up by the said appellant in his pleadings and expressly denied by the respondent. In the result, it seems to me that from whatever angle issues 2, 3 and 4 are examined, the answers thereto must be in the affirmative and I so hold. (p. 1019 B)

***Court's decision to visit locus in order***

9. There can be no room for any doubt, therefore, that a trial court will be perfectly in order where, in the face of conflicts in the evidence of the parties, it decides *Suo motu* to visit the locus in quo with a view to clearing any doubts or ambiguities that may arise in the evidence or to resolve any conflict in the evidence as to physical features as aforesaid. The appellant's complaint to the effect that the decision and subsequent visit to the locus in quo in the present case was made *suo motu* by the learned trial Judge and not at the instance of the parties or their counsel cannot, therefore, be any matter of great moment, particularly as the trial Judge gave adequate and cogent reason for the visit. This, he observed, was for the purpose of resolving "the conflict in the evidence of the plaintiff on the one hand, and the defence on the other, as to the existence of cocoa and coffee plantations on the land in dispute ....." I think the learned trial Judge was quite right in his decision *suo motu* to visit the scene without an application for such a visit coming from the parties or counsel on their behalf. (p. 1020 C)

***Judge's observation at Locus in quo***

10. The real point, in my view, is that in all civil cases, where a visit to the

locus in quo is made, the trial Judge should be careful to avoid placing himself in the position of a witness and arriving at conclusions based upon observations of which there is no evidence in support upon the record. In other words, it is not open to him to substitute the result of his own observation for the sworn testimony nor to reach conclusions from his observations at the scene in the absence of any sworn testimony to the existence or non-existence of the facts he had observed. To do so would tantamount to converting himself as a witness at the trial, a position which he cannot, by law, assume and if his decision is materially affected by such conclusions, this may result in the reversal of his judgment or the order of a new trial. (p. 1021 E)

***Visit to locus - Trial judge in order***

11. The learned trial Judge was, in my view, in order by his visit to the locus in quo and I can find no error on his part which is capable of occasioning any miscarriage of justice in the case. Issue number five must accordingly be resolved against the appellant. (p. 1022 G)

***Findings supported by evidence***

12. In the face of the above findings which, in my view, are clearly damaging and fully supported by evidence on record, the Court of Appeal had no option but to dismiss the appellant's appeal. I have myself given very close consideration to the matters raised on issues 1 and 6 and must resolve the same against the appellant. (p. 1023 H)

***Whether appeal court is to consider the grounds or issues***

13. The Court of Appeal is obliged to consider issues raised in an appeal and not the grounds of appeal filed. This is because it is firmly settled that it is the issues raised from the grounds of appeal that are argued and not the grounds of appeal. The court below was therefore not in error if it confined itself only to the issues raised in the appeal. Secondly, it cannot be disputed that the four issues raised by the appellant for the determination of the Court of Appeal were fully and exhaustively considered by the court below and I can find no reason for the present complaint of the appellant. (p. 1024 A)

***Slip in judgment***

14. Thirdly, it is not every slip in a judgment, and I can find no substantial one in the judgment appealed against, that will result in the appeal being allowed. It is only when such a slip or error is substantial in that it has occasioned a miscarriage of justice that the appellate court is bound to

interfere. The appellant, had not been able to establish any miscarriage of justice or that the court below would have found otherwise had there been no error as alleged by him. In the circumstance issue 7 must also be resolved against the appellant. (p. 1024 D)

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## **NOTABLE POINTS OF INTEREST**

### **IGUH JSC**

#### ***1. Consenting to a procedure at trial***

In the first place, it ought to be emphasized that Exhibit A, A1 was tendered in evidence by the respondent without any objection by the appellant. In general, where a party in a civil proceeding has consented to a procedure at the trial which is neither unconstitutional nor a nullity but merely wrong or irregular and in fact suffers no injustice and no miscarriage of justice is thereby occasioned, it would be too late to complain on appeal that the wrong procedure was adopted simply because he lost the case in the trial court. (p. 1014 H)

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#### ***2. Objection to admissibility of document - When not allowed***

In other words, in the cases where the evidence complained of is not, by law and in all circumstances inadmissible a party may by his own conduct at the trial be precluded from raising objection to such evidence on appeal. In this category of civil cases, if the evidence was admitted in the trial court without objection or by the consent of the parties or was used by the opposite party (e.g. for the purpose of cross-examination) then it would be within the competence of the trial court to act on it and the Court of Appeal will not entertain any complaint on the admissibility of such evidence. (p. 1016B)

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F

#### ***3. Purpose of an inspection of a locus in quo***

The point cannot be over-emphasized that the purpose of an inspection of a locus in quo by a court of law is not to substitute “the eye for the ear” but rather to clear any doubts or ambiguities that may arise in the evidence or to resolve any conflict in the evidence as to physical features, (p. 1019 E)

G

#### ***4. Need to note purpose of visit to locus in the record book***

The one point that needs be stressed, however, is that in all cases of such visits, it is desirable that the purpose should be noted in the court’s record book before the inspection is undertaken and all parties, with their counsel should be invited to attend as it must not be lost sight of that the visit is a continuation of the court hearing of the case. This procedure was fully complied with by the learned trial Judge in the present case. (p. 1020 F)

H

**5. In Visit to Locus -judge not to substitute “the eye for the ear”**

The trial judge must therefore arrive at his decision not on the impressions die visit to the locus in quo of which there is no sworn evidence in ‘it hut upon its impression from the sworn evidence in court thus avoiding substituting “the eye for the ear” as earlier on observed. (p. 1021 G)

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**6. Procedures for inspection of locus**

Since the learned trial judge was of the view that an inspection of the prop- was material to the proper determination of the case before him, he ought to have followed the procedures laid down in proviso (ii) of section the Evidence Act above. There are two procedures laid down therein. The learned trial judge opted for the second procedure. After the view, the court ought to have reassembled at the court room again; and places pointed ml and everything said by witnesses at the locus must be confirmed by evidence on oath in the court, otherwise the learned trial judge cannot act on in h statements which are not part of the evidence in the case vide SEIS- MOGRAPH SERVICES LTD. v ONOKPASA. (p. 1030 A)

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D

**7. Miscarriage of justice occasioned**

The learned trial judge having tailed to observe or comply with these basic elements or principles of an inspection cannot in my view, be said to have acted correctly. I think the omissions were fatal in this case. They are capable of resulting and indeed resulted, in a miscarriage of justice and I so hold. (p. 1030 D)

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**8. Failure to observe requirements of visit to locus**

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I think the Court of Appeal having properly found that the learned trial judge had failed to observe the requirements of a visit to the locus in quo particularly when there was no evidence that the learned trial judge made .my notes at the locus and or that the court resumed hearing before judgment was delivered, had no alternative but to set aside the judgment of the learned trial judge. Again, I have no hesitation in coming to the conclusion that the procedure adopted and followed by the learned trial judge on his inspection visit has occasioned a miscarriage of justice. The appeal therefore succeeds and it is hereby allowed. (p. 1030 E)

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**REPRESENTATION**

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H. A. Lardner SAN for Appellant  
Chief J.O. A. Adebo for Respondent



**CASES REFERRED TO**

- Ajayi v. Fisher 1 F.S.C. 90  
 Ogboda v. Adulugha (1971) 1 All N.L.R. 68  
 Akunne v. Ekwuno 14 W.A.C.A. 59  
 B Paul v. George (1959) 4 F.S.C. 198  
 Idahosa v. Oronsaye (1959) 4 F.S.C. 166  
 N.I.P.C. Ltd v. Thompson Organisation Ltd (1969) 1 All N.L.R. 138  
 Ejidike v. Obiora 13 W.A.C.A. 270  
 R. v. Martins 12 Cox C.C. 204  
 C Yeku v. I.G.P. (1959) L.L.R. 138  
 George v. U.B.A. Ltd (1972) 8 - 9 S.C. 264 at 274  
 Oke-Bola v. Molake (1975) 12 S.C. 61 at 62  
 Olukade v. Alade (1976) All N.L.R. 56 at 61-62  
 Owoniyin v. Oniotosho (1961) All N.L.R. 304 at 308

**D STATUTE & RULES REFERRED TO**

Evidence Act cap. 112 L.F.N., 1990, ss. 76, 199, 209 & 210  
 High Court (civil Procedure) Rule 1977, Ondo State: Order 14. Rule 15

**E LEAD JUDGMENT BY IGUH JSC**

In the Ekiti Judicial Division of the High Court of Justice, Ondo State, the plaintiff, who is now appellant, for himself and on behalf of the entire Igasi community instituted an action against the defendant, now respondent, for himself and on behalf of the entire Ahan community, claiming as follows-

- (a) *Declaration of title to a piece or parcel of land situate, lying and being at ULOGO FARMLAND in IGASI-AKOKO Division.*  
 (b) *N600.00 general damages for trespass committed by the defendants and their agents on the said piece of land.*  
 G (c) *An injunction restraining the defendants and/or their agents from committing further acts of trespass on the said piece of land.*"

Pleadings were ordered in the suit and were duly settled, filed and exchanged.

H At the subsequent trial, both parties testified on their own behalf and called witnesses. The learned trial Judge, Ogundare, J. as he then was, at the conclusion of the addresses of learned counsel for the parties inspected the land in dispute in the presence of the parties and their counsel.

The contest over the land in dispute is between the two communities of Igasi in Akoko Division and Ahan in Omuo-Ekiti Division, both of Ondo State. Both parties, for their root of title, relied on traditional evi

dence and claimed to be the original owners of the land in dispute from time immemorial. Each side claimed that his ancestor was the first person to settle on the land and that they had since been exercising various acts of ownership and possession thereon without let or hindrance from any quarters. Both parties also claimed to have granted parts of the land in dispute to the other party on payment of rent. These claims were denied severally by each of the parties. Of significance, however, is the letter, Exhibit A, which admittedly was written by the plaintiff to the defendant. Its contents, inter alia, are acknowledgement by the plaintiff that members of his community were farming on the land in dispute which belonged to the defendant. This letter, dated the 10th September, 1972, was written in Yoruba language and was tendered with its English translation, without objection, as Exhibit A, A1. It was tendered during the cross-examination of the plaintiff for the purpose of discrediting his entire testimony. B C

At the conclusion of hearing, the learned trial Judge after an exhaustive review of the evidence on the 7th day of July, 1978 found for the defendant and dismissed the plaintiff's claims in their entirety. D

Dissatisfied with this decision of the trial court, the plaintiff lodged an appeal against the same to the Court of Appeal, Benin Division. The said Court of Appeal, in a unanimous judgment on the 4th day of July, 1988 dismissed the appeal and affirmed the decision of the trial court. E

Aggrieved by this decision of the Court of Appeal, the plaintiff has further appealed to this court. I shall hereinafter refer to the plaintiff and the defendant in this judgment as the appellant and the respondent respectively.

The parties, pursuant to the rules of this court, filed and exchanged F their written briefs of argument. The seven issues identified on behalf of the appellant which this court is called upon to determine are as follows-

*"2.1. Whether the appellant taking into consideration the onus of proof in civil cases has not proved his case?"*

*2.2. Whether Exhibit A was an admissible evidence in law?* G

*2.3. Whether the admissibility of Exhibit A under cross-examination was proper for the lower court to have heavily relied on the contents of same in determining the traditional evidence?"*

*2.4. Whether the learned Justices of the Court of Appeal were correct in law in holding that the contents of Exhibit A amounted to an admission by the appellant of the ownership of the land in dispute by the respondent in view of the appellant's averments in his statement of claim?"* H

*2.5. Whether the learned Justices of the Court of Appeal were not in error in holding that even though he (the learned trial Judge) did not*

*proceed correctly in his locus in quo inspection, the observations of the learned trial Judge did not constitute a substitution of evidence in court with his personal observations, but were correct and do not appear to be capable of occasioning a miscarriage of justice?*

B *2.6. Whether the learned Justices of the Court of Appeal were not wrong in law in holding that the averment that some part of the land in dispute was granted to the respondent was not supported by evidence showing which part of the land was in fact so granted?*

C *2.7. Whether the learned Justices of the Court of Appeal misdirected themselves in law and on the facts in holding that there is no substance in the other grounds of appeal which were not considered at all by them?"*

The respondent, on the other hand, submitted five issues in his brief of argument as arising in this appeal for determination. These are -

D *"2.1. Whether this is a case in which judgment ought to have been in favour of the appellants in view of their disbelieved and unsupported claims.*

*2.2. Whether the trial Court was right to have admitted and made use of EXHIBIT "A and A1".*

*2.3. Whether the Court of Appeal did consider all the grounds of appeal.*

E *2.4. Whether the visit to locus in quo led to a miscarriage of justice.*

*2.5. Whether the issue of identity of land not raised in any of the two lower Courts could be raised in this Honourable Court."*

F I have closely examined the issues set out in the respective briefs of the parties and it is clear to me that the five issues identified in the respondent's brief are adequately covered by the issues raised in the appellant's brief which I find sufficiently comprehensive for the determination of this appeal. I shall, therefore, adopt in this judgment, the set of issues formulated in the appellant's brief for my consideration of this appeal.

G At the oral hearing of the appeal, learned counsel for the appellant, H. A. Lardner Esq, S.A.N. was absent but had written to the court apologising for his absence and indicating that he was fully adopting his written brief on behalf of the appellant. Chief J.O.A. Adebo, for his own part, similarly indicated that he was relying on his written brief on behalf of the respondent. I will examine issues 2, 3 and 4 together as they all revolve around the admissibility in evidence, effect and the weight of Exhibit A, A1 in the proceedings.

The contention of the appellant on these issues is that the docu-

ment, Exhibit A, A1 not having been pleaded by the respondent in his statement of defence was inadmissible in evidence. It was argued, relying on the decision in *N.I.P. Co. Ltd. v. Thompson Organisation Ltd & others* (1969) NMLR 99 at 103-104 and *Idahosa v. Oronsaye* (1959) SCNLR 407 4 F.S.C. 166 at 179 that it did not matter that the appellant did not object to the admissibility of the document at the time it was being tendered. The submission was that the document having been wrongly received in evidence ought not to have been acted upon by the courts below as it could not be regarded as legal evidence. The decisions in *Ajayi v. Fisher* 1 F.S.C. 90 and *Owonyin v. Omotosho* (1961) 1 All NLR 304 at 308 were cited in support of this submission in the appellant's brief. Learned appellant's counsel then stressed the evidence in respect of matters not pleaded goes to no issue at the trial and that the court should not allow such evidence to be admitted in the proceedings. In this regard, he called in aid the decision of this court in *Ogboda v. Adulugba* (1971) 1 All NLR 68. He concluded by submitting that the appellant's admission that he wrote the letter, Exhibit A, A1 in 1972 could not be said to amount to an admission of the respondent's ownership of the land in dispute.

Learned counsel for the respondent in his brief argued that the trial court was right to have admitted Exhibit A, A1 in evidence. He submitted that the Court of Appeal was equally right to have upheld the admissibility of the Exhibit. He argued that the fact in issue in the case was the ownership of the land in dispute. On this, he claimed that the respondent copiously pleaded, not only ownership of the land in dispute in his community but that the respondent had granted permissions to the appellant's people to cultivate the land as tenants on payment of *Ishakole* or land rent. He contended that the respondent was only obliged to plead material facts, such as he had done in the present case but not the evidence in proof of such facts. In particular, he argued that the respondent did not have to plead each and every fact with which to discredit or disprove the appellant's case.

Learned counsel next pointed out that the appellant, when Exhibit A was tendered in evidence, did not object to its admissibility. On the contrary both learned counsel for the parties jointly engaged themselves in the interpretation of Exhibit A from Yoruba into the English language. The English translation was further tendered and admitted in evidence with the consent of both counsel as Exhibit A1. It was argued, relying on the authority of *Chukwura Akunne v. Matthias Ekwuno & Ors.* (1952) 14 WACA 59 that the Court of Appeal would not entertain argument on evidence being inadmissible when no objection had been made to it at the trial. It was finally submitted on behalf of the respondent that where documentary evi-

dence is admissible under certain conditions and it is admitted with procedural defect but with the consent of the parties or without objection, a trial court may justifiably make use of it in arriving at a decision in a case.

Now, Exhibit A is a letter dated the 18th September, 1972 written under the hand and letter head of the appellant to the respondent - the Alahan. It is written in the Yoruba language but its English translation is Exhibit A1. I think it is convenient at this stage to set out the contents of Exhibit A1 fully that is to say -

*"Greetings from me. It was quite a long time we saw last. I was very happy when I saw the people you sent to me in respect of my people working on your land.*

*I had rebuked my people very much and have questioned them as to their failure to inform me before going on to the land to work; that I could have sent them to approach you with respect for land to cultivate from your land.*

*Therefore, father, long live the Oba. May the Almighty God grant our Children long lives. May your towns continue to progress. I appeal to you strongly to forgive us this wrongful act committed by us this year. Next year, I will warn them to go to another farmland to cultivate."*

From the evidence before the trial court, Exhibit A, A1 was written by the appellant to the respondent in respect of the land in dispute. There can be no doubt that it contains a measure of admission on the part of the appellant over the ownership of the land in dispute by the respondent. It clearly admits that the appellant's people were working on the respondent's land.

This land, on the evidence before the court, is the land in dispute. It is also admitted that the appellant rebuked his people who cultivated the said land without obtaining the prior permission of the respondent. The appellant appealed to the respondent to forgive the appellant's people for this wrongful act of trespass on the respondent's land that material year, namely 1972. I think I should add that Exhibit A, A1 was written ante litem motam by the appellant to the late Chief Omonusi, the Alahan of Ahan, respondent's late predecessor in office as Alahan who was originally sued as the defendant in this action.

It ought to be noted that Exhibit A, A1 was originally tendered during the cross-examination of the appellant to discredit his evidence that he did not write any letter to the Alahan in 1972. The relevant evidence of the appellant under cross-examination in this regard thus -

*"Cross-examination by Chief Adebo: ..... I did not write any letter in 1972 to the late Chief Omonusi (the Alahan of Ahan, respondent's late predecessor in the office of Alahan who was originally*

*sued). I see this letter: the signature on it is mine. I admit I wrote the letter Chief Adebo seeks to tender dated 18/9/72 and written in Yoruba.*

*Chief Ogunleye does not object. Letter admitted in evidence and marked Exhibit A. I wrote the letter to the Alahan.”* (Words in brackets supplied)

This was subsequently followed by a lengthy cross-examination on the document, the purpose of which, inter alia, was to raise the document to the status of an admission against interest which the respondent was entitled to rely upon to defeat the appellant's claim. The real issue, however is whether or not the document is admissible in law. The main contention of the appellant is that the document, not having been specifically pleaded, was improperly admitted in evidence and consequently could not constitute legal evidence. He argued that it made no difference that no objection was raised against its admissibility by the appellant at the time it was tendered during the trial.

It is a cardinal rule of pleadings that material facts, to be admissible in evidence, must be pleaded. As a result, neither party will be allowed to raise at the trial of a suit, an issue of fact which he has not pleaded. See *Domingo Paul v. George* (1959) 4 F.S.C. SCNLR 510 (1959), *Ajoke v. Amusa Oba & Another* (1962); (1962) 1 SCNLR 137 1 All NLR 73 etc. Where therefore, such facts are not pleaded, (they are in law inadmissible in evidence and, where wrongly admitted, go to no issue and should be discountenanced as irrelevant to the issues properly raised by the pleadings. See *J.O. Idahosa and Another v. D.N. Oronsaye* (1959); (1959) SCNLR 407 4 F.S.C. 166, *N.I.P.C. Ltd. v. Thompson Organisation Ltd & others* (1969) 1 All NLR 138, *George v. U.B.A. Ltd.* (1972) 8-9 SC 264 at 274, *Kalu Njoku and others v. Ukwu Eme and others* (1973) 5 Sc. 293, *Oke-Bola and others v. A.J. Molake* (1975) 12 SC 61 at 62 etc. Documentary evidence, however, needs not be specifically pleaded to be admissible in evidence so long as facts and not the evidence by which such a document is covered are expressly pleaded. See *Alhaji Babatunde Thanni & Another v. Sabalemotu Saibu & Others* (1977) 2 SC 89 at 114, *U.A.C. Ltd. v. Saka Owoade* 13 WACA 207. Consequently, where the contents of a document are material, it shall be sufficient in any pleading to aver the effect thereof as briefly as possible without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material, such as in cases of libel. In the present case, it is the case of the defendant/respondent, and this is copiously pleaded all through his Statement of Defence, that the land in dispute did not belong to the appellant but to the defendant/respondent in whom the same is vested under native law and custom. The respondent pleaded that his people are the traditional owners of the land. More specifically,

paragraphs 13 and 14 of the Statement of Defence aver as follows-

B *"13. The plaintiff and the Igasi people have come to beg for land in the area in dispute to make farms from the defendant and his people and some Igasi people had paid Ishakole (rent) to the defendant on the land in dispute.*

*14. The plaintiff and his people also approached the Olomu to appeal to the defendant to give them land for cultivation in the area in dispute which is the subject matter of this case."*

C It seems to me indisputable that the above paragraphs of the respondent's Statement of Defence pleaded the facts that the appellant's people farmed on the land in dispute as tenants after appealing to the respondent's people for parts thereof. These same material facts constitute, in the main, the contents of Exhibit A, A1. The above notwithstanding, the Court of Appeal held as follows -

D *"It is factually true that the document was not pleaded and that it was elicited in the course of cross-examination."*

E With profound respect, I am unable to accept the view that the document, Exhibit A, A1, can be said not to have been pleaded as was held by the Court of Appeal. This is because the material facts covered by the exhibit were expressly and fully pleaded by the respondent. I think that the Court of Appeal was in error when it held that the contents of Exhibit A, A1 were not pleaded in the respondent's Statement of Defence and that the document would be inadmissible in evidence for the purpose of disproving the appellant's case. In my view, the facts covered by Exhibit A, A1 having been pleaded, the document was rightly admitted in evidence by the trial court both for the purpose of establishing the respondent's case and disproving the appellant's case on the one hand, and discrediting the testimony of the appellant under cross-examination, on the other hand.

G The Court of Appeal, however, upheld the admissibility of Exhibit A, A1 quite rightly, in so far as it was for the purpose of discrediting the evidence of the appellant that he did not write a letter to the Alahan in 1972. That court went further to hold that the conduct of the appellant before the trial court by not only failing to raise an objection to the admissibility of the document for any other purpose than discrediting the testimony of the appellant but helping in the translation of Exhibit A into the English language, would make it almost unconscionable to uphold his objection to the admissibility of the document. In this regard, I must say that I find myself in complete agreement with the Court of Appeal in this view.

H In the first place, it ought to be emphasized that Exhibit A, A1 was tendered in evidence by the respondent without any objection by the

appellant. In general, where a party in a civil proceeding has consented to a procedure at the trial which is neither unconstitutional nor a nullity but merely wrong or irregular and infact suffers no injustice and no miscarriage of justice is thereby occasioned, it would be too late to complain on appeal that the wrong procedure was adopted simply because he lost the case in the trial court. See *Akhiwu v. The Principal Lotteries Officer, Mid-Western State of Nigeria and Another* (1972) All NLR (Pt. 1) 229 at 238, *Ayanwale zand others v. Atanda & Another*(1988); (1988) 1 NWLR (Pt. 68) 22. 1 NSCC 1 at 9-10, (1988) 1 NWLR (Pt. 68) 22; *Okwechime v. Philip Igbinadolor* (1964) NMLR 132. In the present case, Exhibit A, A 1 when it was tendered was not objected to by the appellant, it was fully cross-examined upon and its admissibility was not put in issue at any stage of the trial. The document itself does not belong to the category which by law, is inadmissible in any court of law and in all circumstances although I will later in this judgment deal more fully with this aspect of the matter. It suffices at this stage to say that the court below was right in overruling the appellant's submission on the inadmissibility of the document. See *Chukwura Akunne v. Matthias Ekwunno* (1952) 14 WACA 59 at 60. B C D

I should, however, not be understood as propounding that once a document is received in evidence without objection by a party, then such a party is forever automatically estopped, even in the appellate court, from raising the issue of its inadmissibility. I make no such proposition. If a document is unlawfully received in evidence in the trial court, an appellate court has inherent jurisdiction to exclude and discountenance the document even though learned counsel at the trial court did not object to its going into evidence. See *Mallam Yaya v. Mogoga* (1947) 12 WACA 132 at 133. Accordingly, although a document was unlawfully received in evidence without objection by or on behalf of the appellant, it would still be open to the appellant in the appellate court, particularly where such an appellant has infact suffered injustice as a result, or a miscarriage of justice is thereby occasioned, to object to it since it is the duty of the appellate court to exclude inadmissible evidence which was erroneously received in evidence during the trial. See *Ajayi v. Fisher* (1956) SCNLR 279; 1 FS.C. 97, *Esso West Africa Incorporated v. Alli* (1968) NMLR 414 at 423 etc. E F G

In this connection, it has to be stressed that a court of law is expected in all proceedings to admit and act only on evidence which is admissible in law. Consequently if a court inadvertently admits inadmissible evidence, it has a duty, generally, not to act upon it. Where, however, inadmissible evidence is tendered, it is the duty of the other party or counsel on his behalf, to object immediately to the admissibility of such evidence. H



But where such other party fails or neglects to raise any objection as afore-said, the trial court in civil cases may (and in criminal cases must) reject such evidence ex proprio motu. On appeal, however, and provided the evidence complained of is one which by law, is admissible, under certain conditions, and the other party did not object to its admissibility., at the trial court, or, by implication, consented to its admissibility or, the evidence was legitimately used, say for the purpose of cross-examination (although the conditions precedent to its admissibility were not complied with), he cannot be allowed to raise any objection as to its admissibility in the Court of Appeal. In other words, in the cases where the evidence complained of is not, by law and in all circumstances inadmissible, a party may by his own conduct at the trial be precluded from raising objection to such evidence on appeal. In this category of civil cases, if the evidence was admitted in the trial court without objection or by the consent of the parties or was used by the opposite party (e.g. for the purpose of cross-examination) then it would be within the competence of the trial court to act on it and the Court of Appeal will not entertain any complaint on the admissibility of such evidence. In this class of cases, Cotton, L.J. In *Gilbert v. Endean* (1878) 9 Ch. D. 259 at 269 succinctly explained the situation as follows:-

*"But I must add this: where in the court below, the evidence not being strictly admissible, not being that upon which court can properly act, if the person against whom it is read does not object, but treats it as admissible, then before the Court of Appeal, in my judgment, he is not at liberty to complain of the order on the ground that the evidence was not admissible."*

I am in respectful agreement with the above observations of Cotton, L.J. and fully endorse them as the correct position of the law. See too *Chuhvum Akunne v. Matthias Ekwuno and others* (1952) 14 WACA 59, *Salau Olukade v. Abolade Alade* (1976) All NLR 57 at 61-62 and *Chief Bruno Etim and others v. Chief Okon Udo Ekpe & Another* (1983) 1 SCNLR 120.

Where, however, the evidence complained of is by law inadmissible in any court and in all circumstances, it ought never to be acted upon by any court of law and it is immaterial that its admission in evidence was by the consent of the other party or his default in raising objection at the proper time to its admissibility. In this latter category of cases, the evidence cannot be acted upon even if the parties admitted it by consent and the Court of Appeal will entertain a complaint on the admissibility of such evidence by the trial court although the evidence was admitted in the trial

court without objection. See too Salau Olukade v. Abolade Alade (1976) All NLR 57 at 68-629, Owonyin v. Omotosho (1961) 2 SCNLR 57 (1961) 1 All NLR 304 at 308, Yassin v. Barclays Bank D.C.O (1968) 1 All NLR 171, Alashe v. Olori Ilu (1964) 1 All NLR 390 at 397 etc.

Turning now to the facts of the present case, Exhibit A, A1, even B if the appellant's contention that it was not pleaded and that it is therefore inadmissible is sustained, and I have already pronounced this submission as misconceived, the document is not by law and in all circumstances inadmissible. All that the appellant contended is that the document would have been ordinarily admissible if it was pleaded. In other words, the C appellant's argument is not that Exhibit A, A1 is by law and in all circumstances inadmissible. It is that the document is admissible if the condition that it is pleaded was complied with. But as I have already observed, no objection as to the admissibility of Exhibit A, A1 was raised by the appellant or counsel on his behalf at the time it was tendered before the trial court. As a matter of fact, the document was received in evidence with the D consent of the appellant's counsel. It was fully cross-examined upon and the appellant's learned counsel went further to help in the translation of Exhibit A into the English language (Exhibit A1).

It is the cardinal rule of evidence and practice in civil as well as in criminal cases that an objection to the admissibility of a document sought E to be tendered in evidence is immediately taken when it is offered in evidence. Barring some exceptions where by law certain documents are rendered inadmissible (consent or no consent of the parties notwithstanding) for failure to comply with the provisions of such law (such as the provisions of Section 15 of the Land Instruments Registration Act) the rule remains F inviolate that where objection has not been raised by the opposing party to the reception in evidence of a document or other evidence, the document or evidence would be admitted and the opposing party cannot afterwards be heard to complain about its admission. See Chief Bruno Etim and others v. Chief Okon Ekpe and Another, supra at page 36-37. In all the G circumstances of Exhibit A, A1, I am in complete agreement with the Court of Appeal that the document was admissible in law and was properly received in evidence by the trial court.

Still on the admissibility of Exhibit A, A1, attention may further be drawn to sections 199, 209 and 210 of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990 which provide as follows - H

*"199. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing and relevant to matters, in question in the suit or proceeding in which he is cross-examined without*

*such writing being shown to him, or being proved but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."*

B *"209. A witness may be cross-examined as to previous statements made by him in writing relative to the subject matter of the trial, without such writing being shown to him, but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him:*

C *Provided always that it shall be competent for the court at any-time during the trial, to require the production of the writing for its inspection and, the court may thereupon make use of it for the purpose of the trial, as it shall think fit."*

D *"210. The credit of witness may be impeached in the following ways by any party other than the party calling him or with the consent of the court by the party who calls him -*

(a) .....

(b) .....

(c) *by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted."*

E (All underlinings supplied for emphasis)

F A close study of the above sections of the Evidence Act clearly discloses that the admission in evidence, under cross-examination, of Exhibit A, A1 by the trial court was completely permissible and unimpeachable as a statement previously made in writing by the plaintiff to contradict or discredit his evidence on oath before the court. In my view, it is beyond question that in so far as the document was to discredit the evidence of the appellant that he did not write a letter to the Alahan in 1972 and to impeach his claim of ownership of the land in dispute, it was clearly admissible in evidence and was properly so admitted.

G There is finally the provisions of Order 14 Rule 15 of the High Court (Civil Procedure) Rules, 1977 of Ondo State which inter alia stipulate as follows -

H *"The defence of a defendant shall not debar him at the hearing from disproving any allegation of the plaintiff not admitted by the defence, or from giving evidence in support of a defence not expressly set up by the defence, except where ....."*

In this regard the Court of Appeal commented thus -

*"This rule appears to provide a very wide umbrella for the admission*

*of documents not previously pleaded, and the submission that Exhibits A and A1 are admissible under it would appear to be well taken since those exhibits seek to disprove the allegation that the appellant owns the land in dispute, which averment is denied by the respondent. The circumstances under which their admissions, can be excluded under the exception clause in the Rule, do not here apply”* B

There can be no doubt that the above Rule is as wide as it is all embracing and I agree entirely with the court below that it provides a wide cover under which Exhibit A, A1 became admissible in the proceeding since it sought to disprove the ownership of the land in dispute by the appellant, a claim set up by the said appellant in his pleadings and expressly denied by the respondent. C

In the result, it seems to me that from whatsoever angle issues 2, 3 and 4 are examined, the answers thereto must be in the affirmative and I so hold.

The 5th issue is whether the court below was not in error when it held that any irregularity in the visit to the locus in quo by the court did not occasion a miscarriage of justice in the case. In this regard, the Court of Appeal had observed - D

*“Even though he did not proceed correctly in his locus in quo inspection, the observation of the learned trial Judge did not constitute a substitution of evidence in court with his personal observations, but were correct and do not appear to be capable of occasioning a miscarriage of justice.”* E

The point cannot be over-emphasized that the purpose of an inspection of a locus in quo by a court of law is not to substitute “the eye for the ear” but rather to clear any doubts or ambiguities that may arise in the evidence or to resolve any conflict in the evidence as to physical features. See Olubode v. Salami (1985) 2 NWLR (Pt. 7) 282 at 295, Joseph Olusanmi v. Dayo Oshasona (1992) 6 NWLR (Pt 245) 22. Where there is conflicting evidence from the plaintiff and the defendant as to the existence or non-existence of a physical feature on a land in dispute, it seems to me clear that the trial Judge, where there exists some doubt in his mind as to where the truth lies ought to visit the land in dispute with a view to resolving the issue one way or the other. See Chief Nwizuk v. Chief Waribo Eneyok (1953) 4 WACA 354 at 355, Abigail Briggs v. Nda Briggs (1986) 5 NWLR (Pt. 41) 362, Seismograph Service Ltd v. Akporovo (1974) 6 SC 119 etc. G

As was pointed out, quite rightly, by the court below, it is preferable that a visit by the court to the locus in quo should be on the applica H

tion of one or both of the parties and agreed to by all concerned. This procedure, however, should not prevent the trial court from deciding suo motu to visit the locus in quo without the prior consent of the parties if, in its view, such a visit is necessary for arriving at a correct and judicious decision on the case before it. Indeed in Nwizuk case, where there was conflicting evidence on the issue whether a house was damaged as a result of siesmic operations or not, this court had cause to observe as follows

“This in our view, is a case where the learned trial Judge ought to have visited the locus in quo in view of the conflict in the evidence of the parties. We are satisfied that on the conflict of the evidence before him, it was necessary that the conflicting issues should have been resolved by a visit to the scene. The failure of the learned Judge to do so in this case has caused to be undecided the issue as to whether these buildings were ever damaged at all.”

There can be no room for any doubt, therefore, that a trial court will be perfectly in order where, in the face of conflicts in the evidence of the parties, it decides suo motu to visit the locus in quo with a view to clearing any doubts or ambiguities that may arise in the evidence or to resolve any conflict in the evidence as to physical features as aforesaid. The appellant’s complaint to the effect that the decision and subsequent visit to the locus in quo in the present case was made suo motu by the learned trial Judge and not at the instance of the parties or their counsel cannot, therefore, be any matter of great moment, particularly as the trial Judge gave adequate and cogent reason for the visit. This, he observed, was for the purpose of resolving *“the conflict in the evidence of the plaintiff on the one hand, and the defence on the other, as to the existence of cocoa and coffee plantations on the land in dispute*” “I think the learned trial Judge was quite right in his decision suo motu to visit the scene without an application for such a visit coming from the parties or counsel on their behalf.

The one point that needs be stressed, however, is that in all cases of such visits, it is desirable that the purpose should be noted in the court’s record book before the inspection is undertaken and all parties, with their counsel should be invited to attend as it must not be lost sight of that the visit is a continuation of the court hearing of the case. This procedure was fully complied with by the learned trial Judge in the present case.

It seems to me also advisable that the visit be undertaken before the final addresses of counsel so that the evidence obtained therefrom may be the subject matter of comment by counsel if they so desire. In the instant case, the visit was undertaken after counsel’s addresses. But it is on record that after the inspection, counsel for both parties indicated that they

did not intend to call any further evidence nor did they intend to address the court any further. This note was not challenged by either of the parties. The ideal practice, also, is for the court to record notes of the inspection in its record book. This, the learned trial Judge failed to do although he clearly set out this observation at the locus in quo in his judgment. I think it should be restated that absence of detailed record of the inspection of a locus in quo is not ipso facto fatal to the validity of an otherwise faultless judgment. See Chief Aaro Nwizuk v. Chief Waribo Eneyok, Musa Maji v. Shafa and Briggs v. Briggs, *supra*. The court however, is bound to record the fact of the inspection. See too Dza v. Komla (1956) 1 WALR 145 at 146; Kofi Badoo v. Ampong 12 WACA 439, Agbafun Ejidike v. Obiora 13 WACA 270 etc. And where the trial Judge merely stated in his judgment his observations at the locus in quo but did not record the note of inspection, the observations of the learned trial Judge in the judgment must be taken as the correct account of what transpired at the inspection. See Abigail Everett Briggs v. Nda Briggs (1986) 5 NWLR (Pt. 41) 362. Seismograph Service Ltd. v. Akporovo 6 (1974) SC 119. B  
C  
D

In the present case, the learned trial Judge carefully set out his observations at the locus in quo in his judgment. None of these observations was questioned or attached as incorrect by either of the parties in the court below or before this court and I entertain no doubt that they must be taken as the accurate account of what transpired at the scene. E

The real point, in my view, is that in all civil cases, where a visit to the locus in quo is made, the trial Judge should be careful to avoid placing himself in the position of a witness and arriving at conclusions based upon his personal observations of which there is no evidence in support upon the record. In other words, it is not open to him to substitute the result of his own observation for the sworn testimony nor to reach conclusions from his observations at the scene in the absence of any sworn testimony to the existence or non-existence of the facts he had observed. To do so would tantamount to converting himself as a witness at the trial, a position which he cannot, by law, assume and if his decision is materially affected by such conclusions, this may result in the reversal of his judgment or the order of a new trial. F  
G

The trial Judge must therefore arrive at his decision not on the impressions from the visit to the locus in quo of which there is no sworn evidence in support but upon his impression from the sworn evidence in court thus avoiding substituting H

*"the eye for the ear"* as earlier on observed. See Dza v. Komla (1956) 1 WALR 145 at 146, Chief Aaron Nwizuk v. Chief Waribo Eneyok, Kofi Badoo v. Ampong, Agbafuna Ejidike and others

v. Christopher Obiora, supra etc etc.

This proposition of law was succinctly put in the case of London General Omnibus Co. v. Lavell (1901) 1 Ch. 135 at 139 where Lord Alverstone, C.J. explained as follows -

B *"I have never heard it said and, speaking for myself, I should be very sorry to endorse the idea that a Judge is entitled to put a view in place of the evidence. A view, as I have always understood, is for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence and to apply the evidence."*

C I agree entirely with the above proposition of law and fully endorse the same. I will now examine the findings of the learned trial Judge at the locus in quo complained of. These findings, limited to three, are as follows -

D (1) That there were cocoa, coffee and kolanut plantations growing on the land in dispute as claimed by the defendant/respondent but denied by the plaintiff/appellant.

(2) That there were infact no existing camps of the appellant's alleged tenants on the land in dispute as claimed in their plan, Exhibit B but denied by the respondent.

E (3) That Agbemopon rock said by the appellant to be within the land in dispute was infact outside it.

F In this regard, it ought to be noted that conflicting oral evidence had been given in court about the existence and/or location of the three physical features concerned whereupon the learned trial Judge found it necessary, in the interest of a just determination of the issues, to visit the locus in quo and use his own observations to resolve the conflicts. See Agbafuna Ejidike and others v. Christopher Obiora, Chief Aaron Nwizuk v. Chief Waribo Enyok etc. supra. In the former case, the West African Court of Appeal had held thus -

G *"When there is conflicting evidence as to physical facts. I have no doubt that he (meaning the trial Judge) may use his own observations to resolve the conflict....."*

(Words in brackets supplied)

H The learned trial Judge was, in my view, in order by his visit to the locus in quo and I can find no error on his part which is capable of occasioning any miscarriage of justice in the case. Issue number five must accordingly be resolved against the appellant.

I will now consider issues 1 and 6 together. These deal practically with whether or not the appellant was able to prove his case against the respondent.

It is not in dispute that the appellant's case was based on tradi

tional evidence that they were the original settlers on the land and on acts of possession and ownership of the land in dispute. It is equally clear that on the facts found by the learned trial Judge as affirmed by the Court of Appeal, the appellant abysmally failed to establish his claim under both heads. Quite apart from the admission in Exhibit A made ante litem motam by the appellant conceding ownership of the land to the respondent, the evidence of the appellant and his witnesses was so thoroughly discredited and unreliable that it was disbelieved by the trial court. The learned trial Judge painstakingly considered the evidence of the appellant and his witnesses one after the other and summarised as follows:-

*"In conclusion, I find the evidence of the plaintiff so unreliable and so unsatisfactory that I cannot rely on it in finding in favour of the plaintiff..... I do not believe the traditional evidence adduced nor do I believe that Igasi community have ever exercised acts of ownership on the land in dispute prior to this action. Although the defendant's traditional evidence is equally unimpressional, I am however satisfied that, on the evidence especially in the face of Exhibit A, the Ahan people have been farming on the land in dispute for fairly long time, I do not believe the evidence of the plaintiff and his first witness that Ahan community ever paid Ishakole to Igasi town ..... In the net result, I find that the plaintiff has failed to prove his title to the land in dispute either by traditional evidence or by evidence of acts of ownership, numerous and positive enough as to warrant the inference that he is the owner of the land. The claim for declaration of title must, therefore, fail"*

Earlier on in his judgment, the learned trial Judge had considered and rejected the plaintiff's claim that his community granted a part of the land in dispute to the defendant for farming purposes. Said the court -

*"It is plaintiff's case that his community granted a part of the land in dispute to the defendants to farm when they moved from Oke Ahan to join Igasi community at the present site of Igasi. After having carefully considered the evidence of the plaintiff, I must, with regret, remark that the plaintiff has not been candid with the court."*

The plaintiff's claims for damages for trespass and perpetual injunction were also dismissed.

In the face of the above findings which, in my view, are clearly damaging and fully supported by evidence on record, the Court of Appeal had no option but to dismiss the appellant's appeal. I have myself given very close consideration to the matters raised on issues 1 and 6 and must resolve the same against the appellant.



Turning finally to issue 7, the contention of the appellant is that the court below misdirected itself in law by holding that there was no substance in the remaining grounds of appeal filed and thereby failed to consider them. In the first place, the Court of Appeal is obliged to consider issues raised in an appeal and not the grounds of appeal filed. This is because it is firmly settled that it is the issues raised from the grounds of appeal that are argued and not the grounds of appeal. See *Chinweze v. Masi* (1989) 1 NWLR (Pt. 97) 254, *Western Steel Works Ltd v. Iron and Steel Workers Union of Nigeria* (1987) 1 NWLR (Pt. 49) 284 at 304, *Adelaja v. Fanoiki* (1990) 2 NWLR (Pt. 131) 137 at 148, *Anie v. Uzorka* (1993) 8 NWLR (Pt. 309) 1 at 17 etc. The court below was therefore not in error if it confined itself only to the issues raised in the appeal. Secondly, it cannot be disputed that the four issues raised by the appellant for the determination of the Court of Appeal were fully and exhaustively considered by the court below and I can find no reason for the present complaint of the appellant. Thirdly it is not every slip in a judgment, and I can find no substantial one in the judgment appealed against, that will result in the appeal being allowed. It is only when such a slip or error is substantial in that it has occasioned a miscarriage of justice that the appellate court is bound to interfere. See: *Onajobi v. Olanipekun* (1985) 4 SC (Pt.2) 156 at 163. *Oje v. Babalola* (1991) 4 NWLR (Pt. 185) 267 at 282, *Azuetonma Ike v. Ugboaja* (1993) 6 NWLR (Pt. 301) 539; *Abiodu Amurati v. Madam Agbeke* (1991) 5 NWLR (Pt. 89) 1 (1991) 6 SCNJ 54 at 64 etc. The appellant, has not been able to establish any miscarriage of justice or that the court below would have found otherwise had there been no error as alleged by him. In the circumstance issue 7 must also be resolved against the appellant.

All the issues having been resolved against the appellant, this appeal accordingly fails and the same is hereby dismissed with costs to the respondent against the appellant which I fix at N1000.00

G

### **WALI JSC**

I have had a preview of the lead judgment of my learned brother Iguh, J.S.C. and I agree with the reasons he proffered therein for dismissing the appeal. I hereby endorse them as mine and also dismiss the appeal. I abide by the consequential orders contained in the lead judgment.

H

**KUTIGI JSC (Dissenting)**

The plaintiff/appellant's claim against the defendant/respondent was for a declaration of title to a farmland, damages for trespass and injunction. At the trial the parties testified and called witnesses in support of their case after which counsel addressed the court. Thereafter the learned trial Judge visited and inspected the land in dispute. In a reserved judgment the learned trial Judge dismissed plaintiff's claim with costs. B

Dissatisfied with the judgment, the plaintiff appealed to the Court of Appeal, Benin City. In a unanimous judgment delivered on the 4th July, 1989, the Court of Appeal dismissed plaintiff's appeal. Aggrieved by the judgment of the Court of Appeal, the plaintiff has further appealed to this Court. Five grounds of appeal were filed. C

Mr. Lardner SAN., learned counsel for the plaintiff submitted in his brief seven issues for determination in the appeal. Because of the importance I attach to ground 4 of the Grounds of Appeal below, and the order which I intend to make, I shall proceed to deal with the said ground 4 which is covered by issue (2.5) in the plaintiff/appellant's brief. Ground 4 D reads:

*"4. The Court of Appeal erred in law and on the facts when it held that "even though he (the learned trial Judge) did not proceed correctly in his locus in quo inspection, the observations of the learned trial Judge did not constitute a substitution of evidence in court with his personal observations, but were correct and do not appear to be capable of occasioning a miscarriage of justice."* E

**PARTICULARS**

(i) The Court of Appeal agrees that the learned trial Judge did not follow the principles laid down in *Seismograph Services Ltd v. Onokpasa* (1972) 1 All NLR (Pt. 1) 343 at 352 in his visit to locus in quo but misapplied the said principles to the facts of this case. F

(ii) That a miscarriage of justice has been occasioned against the plaintiff/appellant by the failure of the learned trial Judge to follow the established principles of law in his visit to locus in quo." G

The issue is formulated thus:-

*"2.5. Whether the learned Justices of the Court of Appeal were not in error in holding that even though he (the learned trial Judge) did not proceed correctly in the locus in quo inspection, the observations of the learned trial Judge did not constitute a substitution of evidence in court with his personal observations, but were correct and do not appear to be capable of occasioning a miscarriage of justice?"* H

It is common ground that the decision to visit the locus in quo was made suo motu by the learned trial Judge and not at the instance of coun

sel. The decision and the subsequent visit to the place also took place after the final addresses by counsel and judgment was reserved. The record on page 62 reads thus-

“Court:

- B *In view of the conflict in the evidence for the plaintiff on the one hand and the defence on the other as to existence of cocoa and coffee plantations on the land in dispute, the court will visit the land on 17/6/78 at 9 a.m. Parties and their counsel are ordered to assemble at the Oba’s palace at Igasi at 9. a.m. Judgment in this case is adjourned to 7/7/78.*  
 (SGD),  
 C M.E. OGUNDARE  
 (JUDGE)”

- It is glaring too from the record that the learned trial Judge did not make any inspection notes at the locus in quo and took no further evidence on the inspection so conducted. In fact, he never resumed trial in open court. His judgment shows that his observations were not limited to the purpose for which he suo motu decided to visit the locus in quo to wit: whether or not cocoa and coffee plantations existed on the land in dispute as stated above, he also did not see a certain rock on the land in dispute. Again, he did not see Yesufu and Abu’s Villages, He did not see any camp on the land and that Yesufu and Abu’s compounds had gone into ruins. He simply proceeded to write the judgment after undertaking the visit and thereby making or disclosing his personal observations in the judgment thereof. This state of affairs was confirmed by the Court of Appeal on page 150 of the record where Omo, J.C.A., delivering the lead judgment said thus -

- F *“In the present case on appeal there is no doubt that the trial Judge has not observed strictly the requirements of a visit to the locus in quo. Although the parties and counsel were invited to the locus (and on the strength of the statement of the learned trial Judge in his judgment it must be accepted that they were present thereat), there is no evidence that he made any notes at the locus and/or that the court resumed hearing before judgment was delivered. In fact the record states he did not. He did not record any inspection notes.*  
 G *It is, in his judgment that he stated that “after the inspection counsel for both parties indicated that they did not intend to call any further evidence nor did they intend to address the court any further.”*  
 H *These should properly have been recorded at an adjourned hearing of the court, and before judgment.”*

The judgment then continued on page 151 as follows -

*"It is therefore correct to say that if his observations at the locus in quo complained of stood alone to support the judgment he delivered, such a judgment would be set aside per Onakpasa's case, but if there is other evidence to support that judgment and/or to be considered along with his findings at the locus in quo, such that the judgment can be held not to have occasioned a miscarriage of justice, then it cannot be set aside or a retrial ordered merely on the ground of the procedural defects (however strong) in the conduct of the locus in quo,"*

So far so good. The question now is - was the failure to observe inspection procedure such an irregularity capable of resulting in a miscarriage of justice? The learned trial Judge relying on his personal observations of inspection of the locus in quo said on page 75 as follows -

*"The plaintiff also claimed in his evidence that there were no cocoa, coffee and kolanut trees growing on the land in dispute. The result of my inspection to the land in dispute belies this evidence .*

*.....*  
*My inspection to the land in dispute again shows that there are in fact no camps existing in the area shown on the plan. The camps that once belonged to Abu and Yesufu had gone into ruins and the site is now bush*

*.....*  
*The first witness for the plaintiff Isaiah Ibitoye did not impress me as a witness of truth .....*

*The witness further added in his evidence that Agbemepon rock is on the land in dispute. During my inspection the Agbemepon rock which I visited, is outside the land in dispute .....*

*Finally this witness also said that there are no cocoa, coffee and kolanut trees growing on the land in dispute but, stated earlier, I found cocoa, coffee and kolanut trees growing on part of the land in dispute not far away from the area shown on the plan as Yesufu and Abu's Village.*

*In conclusion, I find the evidence for the plaintiff so unreliable and so unsatisfactory that I cannot rely on it in finding in favour of the plaintiff."*

I have no doubt in my mind at all that a careful reading of the judgment of the trial court shows that the learned trial Judge was substituting his personal observations of the locus for the evidence which should have been given in court. The inspection observations of the learned trial Judge were clearly in my view not legal evidence. I think the Court of Appeal was wrong when it said, relying on the authority of Ejidike & Ors v. Obiora (1951) 13WACA 270 that -

*"Unlike the situation in ONAKPASA'S case, these are not new discoveries made by the trial Judge. Conflicting evidence was given in*

*court about the existence and or location of these physical features which were thereafter confirmed. It is in order for the Judge at a locus in quo visit to make such observations vide Ejidike & Ors v. Obiora (supra) where it was held that:*

B “When there is conflicting evidence as to physical facts, I have no doubt that he may use his own observations to resolve the conflict.....

*Even though he did not proceed correctly in his locus in quo inspection, the observations of the learned trial Judge did not constitute a substitution of evidence in court with his personal observation, but were correct and do not appear capable of occasioning a miscarriage of justice.”*

C For the avoidance of doubt, this is what the Court said in Ejidike & Ors. v. Obiora (supra) on page 274 -

*“In all cases in which a visit by the court is paid to the locus in quo in a civil action (and likewise in a criminal case) the Judge should be careful to avoid placing himself in the position of a witness and arriving at conclusions based upon his personal observations of which there is no evidence upon the record. When there is conflicting evidence as to physical facts, I have no doubt that he may use his own observations to resolve the conflict, but I do not think it is open to him to substitute the result of his own observation for the sworn testimony nor to reach conclusions upon something he has observed in the absence of any testimony on oath as to the existence of the facts he has observed. Should he do so he would in my view, be usurping the position of the witnesses.....”*

F It is quite obvious to me that the Court of Appeal wrongly applied the decision in EJIDIKE’s case to the present case. What the learned trial Judge in the instant case did was to usurp the position of witnesses by substituting his own observations and conclusions for sworn testimony which EJIDIKE said he could clearly not do.

G While I am not saying that an inspection could not be made after judgment had been reserved in a case (see R. v. Martins 12 COX C.C. 204, Ejidike & Ors v. Obiora (supra), but where an inspection raises matters which are damaging to the case of a party, I feel the party or his counsel must have the right or opportunity to comment on the observations made by the Judge. This serious irregularity in the observation of inspection procedure has in my view occasioned a miscarriage of justice in this case.

H The Court of Appeal said above that the conflicting evidence about the existence or non-existence of the physical features were confirmed. But if I may ask - who confirmed the existence or non-existence of physical

features in this case? The learned trial Judge alone did. And he kept the observations to himself only to be revealed in his judgment later. The parties or counsel had no opportunity to deny or confirm the “confirmation”.

I find myself in agreement with the learned counsel for the appellant that the Court of Appeal wrongly relied amongst others, on the case of Olubode & Ors v. Salami (1985) 2 NWLR (Pt. 7) 282 because the facts in that case are not on all fours with the facts in the instant Case. There, unlike here, the learned trial Judge made inspection notes which were read out and adopted in open court. There was no way here that the appellant’s counsel could have led evidence on the learned Judge’s personal observations which were not known but disclosed only in the judgment. There is no doubt at all that the learned trial Judge’s final conclusions on the fate of the plaintiff’s case came after his consideration of his observation at the locus in quo and which observations he used not just to resolve conflicting evidence as to physical facts as claimed, but to destroy the credibility of the plaintiff and his witnesses as well. I also agree with learned counsel that the Court of Appeal clearly misdirected itself for failing to hold that a miscarriage of justice has been occasioned by the failure of the learned trial Judge to follow the principles laid down in Seismograph Services Ltd. v. Onakpasa (1972) 1 All NLR 343 at 352 on his visit to the locus in quo and which failure also violated the provisions of section 76 of the Evidence Act which reads -

“76. Oral evidence must, in all cases whatsoever, be direct  
(a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw that fact;

(b) .....

(c) .....

(d) .....

PROVIDED that -

(i) if oral evidence refers to the existence or condition of any material thing other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection, or may inspect or may order or permit a jury to inspect any movable or immovable property, the inspection of which may be material to the proper determination of the question in dispute. In the case of such inspection being ordered or permitted, the court shall either be adjourned to the place where the subject matter of the said inspection may be and the proceedings shall continue at that place until the court further adjourns back to the original place of sitting or to some other place of sitting, or

*the court shall attend and make an inspection of the subject matter only ,evidence, if any, of what transpired there being given in court afterwards. In either case the accused, if any, shall be present. ”*

Since the learned trial Judge was of the view that an inspection of  
 B the property was material to the proper determination of the case before  
 him, he ought to have followed the procedures laid down in proviso (ii) of  
 section 76 of the Evidence Act above. There are two procedures laid down  
 therein. The learned trial Judge opted for the second procedure. After the  
 view, the court ought to have reassembled at the court room again; and  
 C places pointed out and everything said by witnesses at the locus must be  
 confirmed by evidence on oath in the court, otherwise the learned trial  
 Judge cannot act on such statement which are not part of the evidence in  
 the case vide Seismograph Services Ltd v. Onokpasa (supra); Yeku F.I.G.P.  
 (1959) L.L.R 138, R v. Doghe (1947) 12 WACA 184 at 185.

D The learned trial Judge having failed to observe or comply with these basic  
 elements or principles of an inspection cannot in my view, be said to have  
 acted correctly. I think the omissions were fatal in this case. They are ca-  
 pable of resulting and indeed resulted, in a miscarriage of justice and I so  
 hold.

E I think the Court of Appeal having properly found that the learned  
 trial Judge had failed to observe the requirements of a visit to the locus in  
 quo particularly when there was no evidence that the learned trial Judge  
 made any notes at the locus and/or that the court resumed hearing before  
 judgment was delivered, had no alternative but to set aside the judgment of  
 F the learned trial Judge. Again, I have no hesitation in coming to the conclu-  
 sion that the procedure adopted and followed by the learned trial Judge on  
 his inspection visit has occasioned a miscarriage of justice. The appeal  
 therefore succeeds and it is hereby allowed.

The judgments of the lower courts dismissing plaintiff/appellant's  
 G claims are hereby set aside. A retrial of the plaintiff/appellant's case by  
 another Judge of the High Court is hereby ordered. I award costs of  
 N1,000.00 in favour of the plaintiff.

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### ONU JSC

H I agree entirely with the reasoning and conclusions contained in  
 the judgment of my learned brother Iguh, JSC. a preview of which I have  
 before now. My learned brother has so ably and dispassionately considered

and resolved all the issues arising therein that I do not feel called upon to add anything thereto. I adopt the same as mine.

I abide by the consequential orders made therein including those for costs.

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***ADIO JSC***

I have had the advantage of reading, in draft, the judgment just read by my learned brother, Iguh, J.S.C., and I agree that the appeal fails. Accordingly, it is hereby dismissed by me with N1,000.00 costs.

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