

SUPREME COURT OF NIGERIA
11TH JUNE, 1996. SC. 100/1990
CORAM:- S. M. A. BELGORE, I. L. KUTIGI,
E. O. OGWUEGBU, U. MOHAMMED, A. I. IGUH, JJSC

CHIEF EYO OGBONI AND 2 ORS. PLAINTIFFS/RESPONDENTS
(For themselves and as representing
Biakpan, Biase Development Council
Area, Akamkpa Division)

AND

CHIEF OJA OJAH AND 5 ORS DEFENDANTS/APPELLANTS
(For themselves and as representing
Etono II Biakpan, Biase Development
Council Area, Akamkpa Division)

APPEALS - Concurrent findings of fact - Where supported by overwhelming evidence - Supreme Court will not interfere therewith - In the absence of substantial error.

APPEALS - Findings of fact - Of trial court - Affirmed by the Court of Appeal - Whether erroneous.

COURTS - Relief not claimed - Court must not grant to a party - A relief not sought or one more than that sought.

LAND LAW - Communal land - Title thereto - When onus will shift to defendant - To establish exclusive ownership.

LAND LAW - Communal ownership - Trial Court has jurisdiction to grant - The declaratory order of communal ownership - Under Land Use Act - As vesting of title on governor - Does not totally obliterate family ownership.

LAND LAW - Possession - Where not exclusive to the appellants - Whether user of communal land - Can ripen into personal ownership.

LAND LAW - Title - Land Use Act - Whether customary right over land - Is taken away from a person or community by the Land Use Act.

LAND LAW - Title - Since the enactment of s. 40 Land Use Act - What order can the court make - With respect to parties' right to title.

LAND LAW - Title - Technical language of s. 40 Land Use Act - Where employed by a party - Whether the judgment is vitiated.

FACTS

The respondents (as plaintiffs) instituted an action against the appellants (as defendants) in the High Court of Cross River State, Calabar, claiming - A declaration that the land in dispute is a communal land and perpetual injunction restraining the appellants from doing any act inconsistent with the declaration sought. The case went to trial, pleadings having been filed. At the trial both parties led evidence of traditional history of their root of ownership of the disputed land. At the conclusion of hearing, the trial judge who found for the respondents, decreed in terms of their claim.

The appellants, dissatisfied with the decision of the trial court appealed to the Court of Appeal, Enugu Division. The court dismissed the appeal and affirmed the judgment of the trial court. The appellants, aggrieved by the decision of the Court of Appeal have further appealed to the Supreme Court raising 2 issues. However, the apex court adopted the 2 issues formulated by the respondents in determining the appeal.

ISSUES FOR DETERMINATION

“(i) Has the Court of Appeal any jurisdiction to affirm the judgment of the trial court entered in favour of the plaintiffs/Respondents having regard to the provisions of Section 40 of the Land Use Decree?”

“(ii) Was the Court of Appeal right in affirming or upholding the judgment of the trial court having regard to the conclusions which it arrived at on the facts and evidence adduced at the trial?”

HELD (Unanimously dismissing the appeal per Lead judgment of **IGUH JSC**)

Land Use Act - The order court can make with respect to title

1. There can be no doubt that since the coming into force of the Land Use Act, 1978, matters in respect of any claims concerning title to or interest in land may be disposed of by the court although any order or decision of such a court shall only be as regards the entitlement of either of the parties to the proceedings to a statutory or customary right of occupancy in respect of such land. Judgment in the present suit was delivered by the trial court and the court below on the 7th March, 1986 and 21st April, 1989 respectively, well after the coming into force of the Land Use Act, 1978. It is therefore plain that this suit is caught by section 40 of the Land Use Act. This section of the law stipulates *inter alia* that any order or decision of the court in the

circumstances therein stipulated shall only be as regards “the entitlement of either of the parties to the proceedings to a right of occupancyin respect of such land”. (p. 1110 B)

Relief not claimed

2. With the greatest respect to learned appellants’ counsel, I cannot accept that this court, is, or that the two courts below were entitled in the present grant an order or declaration in favour of the appellants as to their entitlement to a customary right of occupancy over the land in dispute as urged upon us. This is relief or claim the appellants never made before the trial court and it is trite law that a court must not grant to a party a relief or declaration which he has not sought or which is more than he has sought. Indeed, even where a plaintiff’s claim for a declaration of title to land is dismissed, it will be wrong to grant declaration in favour of a defendant never claimed or applied for such remedy by way of counter-claim or a cross-action. I therefore agree with Mr. J.C. Okonkwo, S.A.N. that this court is incompetent, indeed lacks jurisdiction to make the declaration urged on us by the appellants to the effect that the Etono II community are the persons entitled to a customary right of occupancy in respect of the land in dispute. (p. 1110 H)

Possession - Where not exclusive to the appellants

3. It was therefore established that before the coming into force of the Land Act, the land in dispute was truly in the possession and control of the Biakpan people as a community and not in the exclusive possession of the Appellants. All members of the Biakpan community alike had the right of use or possession of the land in dispute under the supervision and control of their paramount chief. In this regard the law appears well settled that user of communal or family property can never ripen into personal ownership of such property. Possession and user of the land in dispute being on the respondents and not on the appellants exclusively at the time of coming into force of the Land Use Act, both the trial court and the court below made no declarations that are inconsistent with the said Act. Accordingly, section 36(2) of the Land Use Act does not avail the appellants who did not have exclusive right of user or possession over the land in dispute. (p. 1112 F)

Technical language of s. 40 Land Use Act

4. I am, therefore, unable to accept, even in a declaration of title to land claim, that the omission to employ the technical language of the law pre

scribed under section 40 of the Land Use Act ipso facto vitiates the judgment of court in favour of a claimant in the suit. In such a case, trial Judge, so long as the claimant has established his claim to the satisfaction of the court, is entitled to grant and may award a declaration of title to right of occupancy in respect of the piece or parcel of land in dispute pursuant section 40 of the Land Use Act. So too, the Court of Appeal and indeed this court, pursuant to their powers under section 16 of the Court of Appeal Act, 1976 and section 22 of the Supreme Court Act, 1990 respectively may where the circumstances of an appeal warrant it, vary the grant of declaration of title to a right of occupancy, whether statutory or customary in respect of such land as provided in the Land Use Act. (p. 1114 A)

Court has jurisdiction to grant order of communal ownership

5. The trial court, in effect, declared that the plaintiffs and the defendant had equal rights to the Biakpan land in dispute which, on the evident found to be part of their communal land. In my view, that court had jurisdiction to grant the declaration in issue. The court below equally possessed jurisdiction to affirm this decision of the trial court. I therefore find it difficult to accept that the court's declaratory order of communal ownership under customary tenure or its grant of perpetual injunction as claimed, is in any way inconsistent with the provisions of section 40 of the Land Use Act, 1978. In this connection, it may have to be re-emphasized that the vesting of radical title in the Governor under the Land Use Act does not appear to have totally obliterated the character of land ownership or holding in a family or community. (p. 1114 E)

Customary right over land

6. The Land Use Act does not appear to have extinguished or taken away the customary right over land by a person's family or community. This is because, a person or community that had title to a piece or parcel of land before the coming into force of the Land Use Act, 1978 is by that Act deemed to be the holder of its right of occupancy, statutory or customary, depending on the status of the land, that is to say, whether it is situate in an urban area or otherwise. I therefore entertain no doubt that the answer to issue 1 above must be in the affirmative and I so hold. (p. 1115 C)

Communal land - Title thereto

7. It is not in dispute that the respondents in their Statement of Claim copiously pleaded the communal status of the land in dispute to the entire Biakpan community, inclusive of the appellants of Etono II. The appellants

on the other hand pleaded in no uncertain terms that the said land is their exclusive personal property. Both parties similarly led traditional and various other evidence in support of their respective claims. The law is settled that where a plaintiff leads evidence that the land in dispute is communally owned, the onus would shift to the defendant to establish that the belongs B to him exclusively. (p. 1116 B)

Concurrent finding of fact

8. It seems to me plain that both the trial court and the court below came to the irresistible conclusion that the land in dispute is communally owned, a finding which is based on overwhelming evidence before the court. On C the strength of the evidence adduced before the trial court, it is clear that both the learned trial Judge and the Court of Appeal arrived at the conclusion that the land in dispute is communally owned by Biakpans. This court will not interfere with the concurrent findings of fact made by both the trial court and the court below where there is sufficient evidence in support of D such tidings and where there is no substantial error apparent on the record of proceedings, such as some miscarriage of justice or a violation of some principle of law or procedure. No reason whatever has been shown by the appellants to warrant my interference with the above findings of fact which accept as firmly established. (p. 1119 C) E

Decision rightly affirmed

9. It is thus clear that whatever communal rights the learned trial Judge declared in favour of the plaintiffs/respondents, he also declared in favour of the defendants/appellants who, on the accepted evidence, are both F Biakpans. In the circumstance, the trial court having found that the land described as Etono II village is part of Biakpan communal land, was perfectly right in making the declaration that it is Biakpan communal land under the headship of their paramount ruler. It is also clear on the findings of both courts below that the Court of Appeal rightly affirmed the said G decision of the trial High Court. On the issue of perpetual injunction, it is equally clear that this was properly ordered by the trial court and affirmed by the court below. In the circumstance and for all the reasons that I have given above, the answer to issue 2 must be in the affirmative. (p. 1119 H)

NOTABLE POINTS OF INTEREST

IGUH JSC

1. Issue for determination - Competency thereof

A close study of the issues set out in the respective briefs of the parties

shows that they practically deal with the same questions. But, as pointed out by J.C. Okonkwo Esq. learned Senior Advocate for the respondent there is no doubt that the issues raised on behalf of the appellants, as framed, would seem, to some extent to embody complaints against the judgment of the trial court as against the decision of the court below. To the extent that those issues may rightly be said to constitute complaints against the decisions of either of the two courts below, they must be regarded as equivocal although, not altogether irregular or incompetent. Perhaps I should restate that issues for determination before this court, to be competent, must relate to the decision of the court from which the appeal lies, in the instant case, the Court of Appeal and issues raised on matters outside those relating to the decision of the court below are incompetent. (p. 1108 A)

D 2. Who is entitled to a declaration by court

It is only a proper party who has sought a competent relief from the court whether by way of a claim, counter-claim or cross-action that may be entitled to an appropriate declaration as stipulated under section 40 of the Land Use Act. A declaration or relief can neither be made or granted in favour of a party who has not specifically claimed it nor to one who is merely content with defending an action against him without more. The appellants, in the present case, neither filed a cross-action nor a counter claim against the respondents. They were merely content with resisting the respondents' claim to communal ownership of the land in dispute without more. (p. 1110 E)

3. Power of court to make declaratory Judgment

I think the first point that ought to be made is that the power of the court to make declaratory judgments is now virtually accepted as unlimited. It also seems to me well settled that notwithstanding the coming into force of the Land Use Act, a successful claimant may be entitled to, and the trial courts are not precluded in appropriate cases from awarding declaration of title, forfeiture and/or injunction in a land case. As Oputa, J.S.C. put it, and I am in total agreement with him, the only innovation introduced in land cases by the Land Use Act was to divest a claimant of radical title to the land claimed and limit his entitlement to a right of statutory or customary occupancy in respect of such land. Accordingly a claimant may still be entitled to a declaration of title to the right of occupancy of a piece or parcel of land in dispute. (p. 1113 C)

4. Court to do substantial justice

It ought to be stressed that our courts, again in appropriate cases, would quite rightly, to have shifted away from the narrow technical approach to justice which characterised some earlier decisions. Instead, they now pursue the course of substantial justice, a situation which clearly deserves great commendation. (p. 1113 G)

REPRESENTATION

Mrs. A. Williams for the Appellants

J.C. Okonkwo SAN with Mba Ukwuni for the Respondents

CASES REFERRED TO

Atonyebi v. The Governor of Oyo State (1994) 5 S.C.N.J. 62 at 78

Abioye v. Yakubu (1991) 5 N.W.L.R. (Part 190) 130

Ekpenyong v. Nyong (1975) 2 S.C. 71 at 80

Emegwara v. Nwaino 14 W.A.C.A. 347 at 348

Emaphil Ltd. v. Odili (1987) 4 N.W.L.R. (Part 67) 915

Kanada v. Governor of Kaduna State (1986) 4 N.W.L.R. (Part 35) 361

Union Beverages v. Owolabi (1988) 2 N.W.L.R. (Part 68) 128 at 133

Makanluola v. Balogun (1989) 3 N.W.L.R. (Part 68) 128 at 206 r

Ntiaro v. Akpan (1918) 3 N.L.R. 10

Kodilinye v. Odu 2 W.A.C.A. 336

Madumere v. Okafor (1990) 3 N.W.L.R. (Part 138) 327

Salami v. Oke (1987) 4 N.W.L.R. (Part 63) 1 at 16

Ozokpo v. Paul (1990) 2 N.W.L.R. (Part 133) 494 at 511

Alao v. Ajani (1989) 4 N.W.L.R. (part 113) 1 at 17

Alli v. Ikusebiala (1985) 1 N.W.L.R. (Part 4) 630

Kasali v. Lawal (1986) 3 N.W.L.R. (Part 28) 305 at 321

Okonjo v. Dr. Odje (1985) 10 S.C. 267

Ikuomola v. Oniwaya (1990) 4 N.W.L.R. (part 146) 617 at 623 and 630

Onwuka v. Ediale (1989) 1 N.W.L.R. (Part 96) 182 at 199 F & G

Atuanya v. Mbajekwe (1975) 3 S.C. 161 at 167

Adigun v. Governor of Osun State (1995) 3 N.W.L.R. (Part 385) 513 at 534-538

Eze v. Igiliegbe (1952) 14 W.A.C.A. 61

Okonkwo v. Okagbue (1994) 9 N.W.L.R (Part 361) 124 H

Okedare v. Adebare (1994) 6 N.W.L.R. (Part 349) 157 at 187

Ekpenyong v. Nyong (1975) 2 S.C. 71 at 80

Ezeokeke v. Uga (1962) 2 S.C.N.R. 199

STATUTES REFERRED TO

1. Constitution of the Federal Republic of Nigeria 1979; s. 236
2. Court of Appeal Act, 1976, s. 16
3. Land Use Act, 1979, s. 36 and s. 40
- B 4. Supreme Court Act, 1990, s. 22

LEAD JUDGMENT BY IGUH JSC

C This is an appeal against the decision of the Court of Appeal, Enugu Division, delivered on the 21st day of April, 1989, dismissing the appellants appeal in a dispute concerning land in Etono II village, Biase Local Government Area, Akamkpa Division of the Cross River State of Nigeria. The said land is more particularly delineated and shown verged pink in survey plan No. EAAC/446/LD dated the 21st July, 1973 tendered as Exhibit 1 by the plaintiffs in the suit.

D The respondents, as plaintiffs, for themselves and on behalf of the people of Biase Development Council Area, Akamkpa Division, had in the Calabar Judicial Division of the High Court of Justice, Cross River State, instituted an action against the defendants, who are now the appellants, for themselves and as representing the people of Etono II village, Biakpan, E Biase Development Council Area, claiming as follows:-

"1. A declaration that land occupied by Etono II Village more particularly described on Plan No. EAAC/446/LD is part of Biakpan Communal land under the headship of the paramount ruler of Biakpan (annual value of land approximately N100.00).

F *2. Perpetual injunction to restrain the defendants by themselves, servants, agents or assigns from leasing alienating or doing anything in Etono II Village inconsistent with the Communal ownership by Biakpan in all that piece of land now occupied by Etono II Village, Biakpan."*

G Pleadings were ordered in the suit and were duly settled, filed and exchanged with the same amended by various orders of court.

At the subsequent trial, both parties testified on their own behalf and called witnesses. They also adduced evidence of traditional history in proof of their claims.

H The case of the plaintiffs is that the defendants people of Etono II had been and were part and parcel of Biakpan. The common ancestor of both the plaintiffs and the defendants was one Akpan Ubaghara who settled with the four groups of his people on their present land. The groups comprised of the Onoronwanza Biakpan, Imienyo Biakpan, Emudakotong Biakpan and Emibit Biakpan. Each group settled in a given area and sprang

up to form a village of Biakpan. A fifth village, Etono II, was subsequently formed in the following manner. In the olden days, it was an abomination in Biakpan for a woman to give birth to twin children. When this happened, both the mother and her twin children were usually killed. However, following the birth of a set of twin children by the daughter of a highly respected Biakpan chief, the said chief appealed to his people to spare their lives. The Biakpans accepted his plea but would not allow them to live together or interact with “uncontaminated” or full-fledged Biakpan citizens. Accordingly they were settled in and allowed to occupy a nearby chosen site which was part of the piece or parcel of land first acquired and settled upon by the said Akpan Ubaghara. In the course of time, other women who gave birth to twins with their children were similarly sent to the same location which subsequently grew into a community or village of its own called Etono II, to distinguish it from Etono I which is situate north of the Cross River.

The plaintiffs claimed that the people of Etono II had always accepted that they were of the same kindred as the Biakpans and that the land which Etono II occupied was communally owned by the entire people of the Biakpan community, of which the people of Etono II are a part. They averred that the defendants speak the Biakpan language as their mother tongue although, in the course of time, they also acquired another language as a result of the movement of people from Etono I to Etono II with the permission of the Biakpans. The plaintiffs explained that as a consequence of the spread of civilization and the influence of christianity, the people of Etono II were no longer discriminated against as outcasts but were gradually assimilated into the main Biakpan clan as full-fledged citizens with no disabilities. Only Biakpan chiefs could alienate or make allocation of land for farming in any of the five Biakpan villages including Etono II. Over the years, the entire Biakpan community including Etono II, had as a unit instituted and defended suits in respect of lands in Biakpan and Etono II and the defendants people had benefited from the result of such litigations jointly pursued.

About 1972, at the end of the Nigerian civil war, the plaintiffs stated that the defendants started to make claims to exclusive ownership over land in Etono II. The defendants further asserted that they were separate and distinct community from the main Biakpan clan with exclusive and independent rights over land in Etono II hence this action.

The defendants, on the other hand, claimed that Etono II had never been a village in Biakpan. It has from time immemorial been a distinct entity from Biakpan village and autonomous in all matters concerning own-

ership of land, chieftaincy, language and tradition and distinguishable from the plaintiffs Biakpan village. They asserted that inheritance to land in Biakpan is matrilineal whereas it is patrilineal in Etono II. This explained why the defendants' people owned land in Biakpan arising from inheritance on inter marriages between the peoples of Etono II and Biakpan. They claimed that Etono II, Biakpan, Etono I and Ikun are four separate ancestral lineages of Ubaghara clan and that each of these villages is distinct and autonomous over matters concerning land, ancestral shrines and chieftaincy. The people of Etono I and II migrated to Biase from a place called Mbe Oton and later settled in their present respective locations. They claimed that the Biakpans came later and settled upon a piece of land which was part of the land earlier acquired by settlement by the Etono II people. The Biakpans were allowed to occupy their abode by the paramount Chief of Etono II on given conditions. They stressed that land in Biakpan is never owned communally. The unit of land ownership in Biakpan, as in the other Ubaghara clan communities, is the family or extended family. They stated that the authority and control of the paramount head of Biakpan and the Biakpan land chief did not extend to Etono II.

At the conclusion of hearing, the learned trial Judge, Effanga, J., after an exhaustive review of the evidence on 7th day of March, 1986 found for the plaintiffs and decreed as follows-

"(1) That the land occupied by Etono II Village is part of Biakpan communal land under the Headship of the Paramount Ruler of Biakpan.

(2) That a perpetual injunction issues restraining the Defendants by themselves, servants, agents or assigns; from leasing, alienating or doing anything in Etono II Village inconsistent with communal ownership by Biakpan in all that piece of land now occupied by Etono II Village, Biakpan."

Dissatisfied with this decision of the trial court, the defendants lodged an appeal against the same to the court of Appeal, Enugu Division. The said Court of Appeal in an unanimous decision on the 21st day of April, 1989 dismissed the appeal and affirmed the judgment of the trial court.

Aggrieved by the said decision of the Court of Appeal, the defendants have further appealed to this court. I shall hereinafter refer to the plaintiffs and the defendants in this judgment as the respondents and the appellants respectively.

Five grounds of appeal were filed by the appellants. These grounds of appeal complain as follows:-

(i) The court below erred in law in failing to observe that in the face of the conflict in the traditional history put forward by both parties in this case, it was wrong for the trial court to have relied on the demeanour

of the witnesses for coming to a decision as to which of the rival versions of the traditional history is true.

(ii) The court below erred in law and on the facts in failing to observe that the case made by the plaintiffs at the trial is not the same as the case pleaded in their Statement of Claim. B

(iii) In the absence of a plan clearly defining the land known as Etono II, the court below erred in law in giving judgment in this case in favour of the plaintiffs.

(iv) The court failed to make a critical review and appraisal of the documentary evidence before the High Court and thereby came to the erroneous conclusion that they supported the case of the plaintiffs. C

(v) The court below erred in law in failing to observe that in accordance with the provisions of Section 40 of the Land Use Act, any order which the High Court and the Court of Appeal have jurisdiction to make *"shall only be as respects the entitlement of either of the parties to the proceedings to a right of occupancy, whether statutory or customary," in respect of the land in dispute. In the premise, if any pronouncement or declaration ought to be made, it ought to have been declared that the defendants are the persons entitled to the customary right of occupancy over the land in dispute.* D

The parties, pursuant to the rules of this court, filed and exchanged E their written briefs of argument. The two issues set out on behalf of the appellants for the determination of this Court and distilled from ground (v) of their grounds of appeal are as follows:-

"(i) Has the Court any jurisdiction to enter judgment in favour of the Plaintiffs on their claims having regard to the provisions of Section 40 of the Land Use Decree. F

(ii) What pronouncement or declaration should the Court have made having regard to the conclusion which it arrived at on the facts of this case."

The respondents, on the other hand, argued that the above issues G raised on behalf of the appellants appeared to be complaints against the decision of the trial court. They contended that as this court lacks jurisdiction to entertain complaints direct from the trial court, the more appropriate issues that fall for resolution in this appeal are:-

"(i) Has the Court of Appeal any jurisdiction to affirm the judgment of the trial court entered in favour of the Plaintiffs/Respondents having regard to the provisions of Section 40 of the Land Use Decree?" H

(ii) Was the Court of Appeal right in affirming or upholding the judgment of the trial court having regard to the conclusions which it ar-

rived at on the facts and evidence adduced at the trial?"

A close study of the issues set out in the respective briefs of the parties shows that they practically deal with the same questions. But, as pointed out by J.C. Okonkwo Esq., learned Senior Advocate for the respondents, there is no doubt that the issues raised on behalf of the appellants, as framed, would seem, to some extent, to embody complaints against the judgment of the trial court as against the decision of the court below. To the extent that those issues may rightly be said to constitute complaints against the decisions of either of the two courts below, they must be regarded as equivocal although, not altogether irregular or incompetent. Perhaps I should restate that issues for determination before this court, to be competent, must relate to the decision of the court from which the appeal lies, in the instant case, the Court of Appeal and issues raised on matters outside those relating to the decision of the court below are incompetent. See *Alhaji Lawani Atoyebi & Another v. The Governor of Oyo State and others* 5 NWLR (Pt. 344) 290; (1994) 5 SCNJ 62 at 78.

The issues formulated by the respondents, as I have pointed out, would appear to relate ostensibly to the same questions raised by the appellants for resolution of this court. They seem to me better couched and legally more acceptable than the issues identified on behalf of the appellants. I shall in this judgment, therefore, adopt the set of issues formulated in the respondents' brief for my consideration of this appeal.

At the oral hearing of the appeal before us, both learned counsel for the parties' adopted their respective briefs' of arguments and proffered additional arguments in further elucidation of the written submissions therein contained. Learned counsel for the appellants, Mrs. A. Williams, in particular, indicated that she was relying only on ground 5 of the appellants' grounds of appeal which, admittedly, is a ground of law. She explained that the issues as framed in the appellants brief, flowed directly from that ground of appeal and she urged the court to resolve these issues in favour of the appellants, allow the appeal, set aside the judgment and orders appealed from and to substitute an order declaring the appellants as the only persons entitled to a customary right of occupancy over the land in dispute.

The appellants' main argument in respect of the first issue is that the courts below had no jurisdiction to enter judgment in favour of the plaintiffs/respondents in terms of their claims, having regard to the provisions of section 40 of the Land Use Act, 1978. In effect, their contention is that since the promulgation of the Land Use Act, 1978, the only order the court has jurisdiction to make is in respect of "the entitlement of either of the parties to the proceedings to a right of occupancy" as against an order in

declaration of title made in favour of the respondents in the present case, Their further contention is that being in occupation of the land in dispute, they shall continue to be entitled to possession of the land as if a customary right of occupancy had been granted to them by the appropriate Local Government pursuant to the provisions of Section 36(2) of the said Land Use Act. In this regard, they relied on the decision of this court in *Abioye v. Yakubu* (1991) 5 NWLR. (Pt.190), 130 and submitted that the courts below only had jurisdiction to declare that the Etono II community are the people entitled to a customary right of occupancy over the land in dispute. On the order for perpetual injunction granted by the courts below, Mrs. Williams contended that the same is inconsistent with the provisions of the Land Use Act and is therefore not an order which the courts below had jurisdiction to make. She argued that the “communal ownership by Biakpan in the disputed land” was not preserved by the Act in which the only restrictions on the appellants’ possessory rights are as contained in sections 36(5) and 36(6) thereof.

Learned respondents’ counsel, J. C. Okonkwo, Esq. S.A.N., for his own part, submitted that both parties descended from the same ancestor, used the land in dispute communally and that the appellants are by no means in exclusive possession thereof. Relying on the decisions of this court in *Ekpenyong and others v. Nyong and others* (1975) 2 S.C. 71 at 80 and *Emaphil Ltd. v. Odili* (1987) 4 NWLR. (Pt. 67) 915, he contended that the appellants, not having counter-claimed in the suit or filed a cross-action, there is no jurisdiction in this court to grant them any declaration, whether under sections 36 or 40 of the Land Use Act as urged by Mrs. Williams. He argued, at all events, that section 36 of the Act did not avail the appellants as they did not have any exclusive right of user or possession in respect of the land in dispute. He called in aid the decision of this court in *Kanada v. Governor of Kaduna State* (1986) 4 NWLR. (Pt. 35) 361 and submitted that the Constitution of the Federal Republic of Nigeria, 1979, particularly section 236 thereof, is superior to the Land Use Act, that any provisions of the Land Use Act inconsistent with the said Constitution must be declared null and void and that both courts below had ample jurisdiction to enter judgment in favour of the respondents in terms of their claims. He pointed out that the declaration of communal ownership made by the two courts below in favour of the Biakpan people fully covered the rights of the appellants over the land in dispute. He urged the court to resolve the issue in question in favour of the respondents.

Now, section 40 of the Land Use Act, 1978 provides as follows:-

“Where on the commencement of this Act proceedings had been

commenced or were pending in any court or tribunal (whether at first instance or on appeal) in respect of any question concerning or pertaining to title to any land or interest therein, such proceedings may be continued and be finally disposed of by the court concerned but any order or decision of the court shall only be as respects the entitlement of either of the parties to the proceedings to a right of occupancy, whether statutory or customary, in respect of such land as provided in this Act.”

There can be no doubt that since the coming into force of the Land Use Act, 1978, matters in respect of any claims concerning title to or interest in land may be disposed of by the court although any order or decision of such a court shall only be as regards the entitlement of either of the parties to the proceedings to a statutory or customary right of occupancy in respect of such land.

Judgment in the present suit was delivered by the trial court and the court below on the 7th March, 1986 and 21st April, 1989 respectively, well after the coming into force of the Land Use Act, 1978. It is therefore plain that this suit is caught by section 40 of the Land Use Act. This section of the law stipulates inter alia that any order or decision of the court in the circumstances therein stipulated shall only be as regards “the entitlement of either of the parties to the proceedings to a right of occupancy in respect of such land.” In my view, it is only a proper party who has sought a competent relief from the court, whether by way of a claim, counter-claim or cross-action, that may be entitled to an appropriate declaration as stipulated under section 40 of the Land Use Act. A declaration or relief can neither be made or granted in favour of a party who has not specifically claimed it nor to one who is merely content with defending an action against him without more. See *Emegwara v. Nwaimo* (1953) 14 WACA 347 at 348. The appellants, in the present case, neither filed a cross-action nor a counter-claim against the respondents. They were merely content with resisting the respondents claim to communal ownership of the land in dispute without more. Nonetheless, the appellants in their brief urged as follows:-

“In the premise, the defendants respectfully submit that this appeal ought to be allowed, the judgment and orders appealed from set aside and an order substituted declaring that the Etono II community are the persons entitled to continue in possession of the disputed land as if a customary right of occupancy had been granted to them by the appropriate Local Government.....” (underlining supplied for emphasis).

With the greatest respect to learned appellants’ counsel, I cannot accept that this court is, or that the two courts below were entitled in the present case to grant an order or declaration in favour of the appellants as to

their entitlement to a customary right of occupancy over the land in dispute as urged upon us. This is a relief or claim the appellants never made before the trial court and it is trite law that a court must not grant to a party a relief or declaration which he has not sought or which is more than he has sought. See *Ekpenyong v. Nyong* (1975) 2 S.C. 71 at 81 - 82, *Kalio v. Daniel Kalio* (1975) 2 S.C. 15 at 17 -19 *Emaphil Ltd. v. Odili* (1987) 4 NWLR. (Pt. 67) 915, *Union Beverages Ltd. v. Owolabi* (1988) 1 NWLR. (Pt. 68) 128 at 133, *Makanjuola v. Balogun* (1989) 3 NWLR. (Pt. 108) 192 at 206 etc.

Indeed, even where a plaintiff's claim for a declaration of title to land is dismissed, it will be wrong to grant declaration in favour of a defendant who never claimed or applied for such remedy by way of counter-claim or a cross-action. See *Ntiaro v. Akpan* (1918) 3 N.L.R. 10, *Ikoku v. Ekeukwu* (1995) 7 NWLR. (Pt. 410) 637, *Abisi v. Ekwealor* (1993) 6 NWLR. (Pt. 302) 643, *Kodilinye v. Mbanefo Odu* (1935) 2 WACA 336 etc. I therefore agree with Mr. J. C. Okonkwo, S.A.N., that this court is incompetent, indeed lacks jurisdiction to make the declaration urged upon us by the appellants to the effect that the Etono II community are the persons entitled to a customary right of occupancy in respect of the land in dispute.

The appellants did further claim that under section 36 of the Land Use Act, they are still entitled to be declared the holders of the Customary right of Occupancy in respect of the land in dispute subject only to the provisions of subsections (5) and (6) thereof. This claim of the appellants is founded on section 36(2) of the Land Use Act which provides thus -

"(2) Any occupier or holder of such land, whether under customary rights or otherwise howsoever, shall if that land was on the commencement of this Act being used for agricultural purposes, continue to be entitled to possession of the land for use for agricultural purposes as if a customary right of occupancy had been granted to the occupier or holder thereof by the appropriate Local Government and the reference in this subsection to land being used for agricultural purposes includes land which is, in accordance with the customary law of the locality concerned, allowed to lie fallow for purposes of recuperation of the soil"

With respect, I am unable to hold that section 36(2) of the Land Use Act avails the appellants in their contention. This is because, the land in dispute, as found by the learned trial Judge and affirmed by the court below was not in the exclusive possession of the appellants. Said the learned trial Judge -

"From the evidence in this case (both oral and documentary), I make the following findings of fact:

.....

(4) *That the defendants were later fully integrated into the Plaintiffs community and mixed freely with no disabilities and that Etono II is Biakpan.*

(5) *That both parties have all along been exercising acts of ownership over the land in dispute (evidenced by Exh. 1) jointly or communally."*

Earlier on in his judgment, the trial Judge had stated thus -

B *"The evidence is that the Head Chief (or Paramount ruler) decides where to farm in a particular year. Then follows an announcement. The chiefs then show the individuals where to farm within the farmland.*

C *The age grades watch and protect the farmlands when there is an announcement. Each family is in possession of the farmland for farming purposes only. Previously, the Etono people were allocated separate lands to farm by the Biakpan chiefs. Now they join the Biakpan people and farm together in their respective farmlands. The town can always give out land and the proceeds paid into a fund for the development and welfare of the town.*

D *That is the evidence of the PW. 1 Nothing was done to dismantle that evidence. That is a strong evidence of communal ownership."*

The Court of Appeal after a close analysis of the defence evidence had this to say-

E *"The evidence of D. W. 1 reproduced above has the effect of virtually destroying the resistance of the defendants to the case of the plaintiffs. The evidence clearly shows that the plaintiffs had fought for against outsiders the land which the defendants now claimed to belong to them exclusively. It is also manifest that in the consolidated 1961 case the villages comprising the Biakpan kindred jointly put up a fight against outsiders to stop encroachment upon land in Etono II which the defendants now claimed.*

F *The costs awarded in the cases were shared and the people of Etono 2 benefited. It is also obvious from the evidence of D. W. 1 at page 250 that the claim of the defendants to distinct and separate identity was only recently brought up."*

G It was therefore established that before the coming into force of the Land Use Act, the land in dispute was truly in the possession and control of the Biakpan people as a community and not in the exclusive possession of the appellants. All members of the Biakpan community alike had the right of user or possession of the land in dispute under the supervision and control of their paramount chief. In this regard the law appears well settled that user of communal or family property can never ripen into personal ownership of such property. See *Alao v. Ajani* (1989) 4 NWLR. (Pt. 113) 1 at 17 and *Alli v. Ikusebiala* (1985) 1 NWLR (Pt. 4) 630. Possession and user of the land in dispute being on the respondents and not on the appellants exclusively at the time of coming into force of the Land Use Act,

both the trial court and the court below made no declarations that are inconsistent with the said Act.

Accordingly section 36(2) of the Land Use Act does not avail the appellants who did not have exclusive right of user or possession over the land in dispute. B

The appellants further argued that having regard to the provisions of section 40 of the Land Use Act, the courts below had no jurisdiction to enter judgment in favour of the respondents on their claims. The point being made is that the form or mode of the declaratory judgment made in favour of the respondents is contrary to the provisions of section 40 of the Land Use Act. C

I think the first point that ought to be made is that the power of the court to make declaratory judgments is now virtually accepted as unlimited. See *Madumere v. Okafor* (1990) 3 NWLR. (Pt. 138) 327. It also seems to me well settled that notwithstanding the coming into force of the Land Use Act, a successful claimant may be entitled to, and the trial courts are not precluded in appropriate cases from awarding declaration of title, forfeiture and/or injunction in a land case. As *Oputa, J.S.C.*, put it, and I am in total agreement with him, the only innovation introduced in land cases by the Land Use Act was to divest a claimant of radical title to the land claimed and limit his entitlement to a right of statutory or customary occupancy in respect of such land. See *Salami v. Oke* (1987) 4 NWLR. (Pt. 63) 1 at 16. Accordingly a claimant may still be entitled to a declaration of title to the right of occupancy of a piece or parcel of land in dispute. See too *Ozokpo v. Paul* (1990) 2 NWLR. (Pt. 133) 494 at 511; *Yesufu Kasali and others v. Alhaji Liadi Lawal* (1986) 3 NWLR. (Pt. 28) 305 at 321. F Indeed, where the circumstances of a case warrant it, a declaration of title simpliciter may be varied by the courts to read title a statutory right of occupancy as the courts have not, in appropriate cases, departed from the path of doing substantial justice in matters before them simply because a successful party has in drafting his claims failed to employ the ipsissima verba of section 40 of the Land Use Act. See *Fasoro v. Beyioku* (1988) 2 NWLR. (Pt. 76) 263. G

It ought to be stressed that our courts, again in appropriate cases, would appear, quite rightly, to have shifted away from the narrow technical approach to justice which characterised some earlier decisions. Instead, they now pursue the course of substantial justice, a situation which clearly deserves great commendation. See *Consortium M. C. v. N.E.P.A.* (1992) 6 NWLR. (Pt. 246) 132 at 142, *Falobi v. Falobi* (1976) 1 N.M.L.R. 169, *Bello v. A. G. Oyo State* (1986) 5 NWLR. (Pt. 45) 828, *Okonjo v. Dr. Odje* (1985) 10 S.C. 267, *Anie v. Uzorka* (1993) 8 NWLR. (Pt. 309) 1 etc. H

I am, therefore, unable to accept, even in a declaration of title to land claim, that the omission to employ the technical language of the law prescribed under section 40 of the Land Use Act ipso facto vitiates the judgment of court in favour of a claimant in the suit. In such a case, the trial Judge, so long as the claimant has established his claim to the satisfaction of the court, is entitled to grant and may award a declaration of title to a right of occupancy in respect of the piece or parcel of land in dispute pursuant to section 40 of the Land Use Act. So too, the Court of Appeal and, indeed, this court, pursuant to their powers under section 16 of the Court of Appeal Act, 1976 and section 22 of the Supreme Court Act, 1990 respectively may, where the circumstances of an appeal warrant it, vary the grant of declaration of title to a right of occupancy, whether statutory or customary, in respect of such land as provided in the Land Use Act. See *In Re Adewunmi and others* (1988) 3 NWLR. (Pt. 83) 483 and *Ikuomola v. Oniwaya* (1990) 4 NWLR. (Pt. 146) 617 at 623 and 630.

In the present case, however, the trial court after a thorough evaluation of the evidence found for the plaintiffs as claimed and decreed:-

- (i) That the land occupied by Etono II village is part of Biakpani communal land under the Headship of the paramount ruler of Biakpan.
- (ii) Perpetual injunction restraining the defendants, their servants and agents from leasing, alienating or doing anything in Etono II village inconsistent with communal ownership by Biakpan in the disputed land.

The trial Court, in effect, declared that the plaintiffs and the defendants had equal rights to the Biakpan land in dispute which, on the evidence, he found to be part of their communal land. In my view, that court had clear jurisdiction to grant the declaration in issue. The court below equally possessed jurisdiction to affirm this decision of the trial court. I therefore find it difficult to accept that the court's declaratory order of communal ownership under customary tenure or its grant of perpetual injunction as claimed, is in anyway inconsistent with the provisions of section 40 of the Land Use Act, 1978.

In this connection, it may have to be re-emphasized that the vesting of radical title in the Governor under the Land Use Act does not appear to have totally obliterated the character of land ownership or holding in a family or community. Thus this court in *Ogunola v. Eiyekole* (1990) 4 NWLR. (Pt. 146) 632 at 653 per Karibi-Whyte, J.S.C., succinctly put the matter as follows:-

“Land is still held under customary tenure even though dominium is in the Governor. The most pervasive effect of the Land Use Act is the diminution of the plenitude of the powers of the holders of land. The char

acter in which they hold remains substantially the same. Thus an owner of customary land remains owner of all the same even though he no longer is the ultimate owner. The owner of land, now requires the consent of the Governor to alienate interests which hitherto he could do without such consent."

Nor does the Land Use Act preclude the courts from making orders of injunction and forfeiture in appropriate cases. See Salami v. Oke, supra, per Kawu, J.S.C. I therefore accept the submission of the learned Senior Advocate that notwithstanding the emergence of the Land Use Act, a court may legitimately make orders for injunction or forfeiture and may give effect to communal land holdings under customary tenure. All that the learned trial Judge did in the present case was to give effect to the communal holding of land under customary tenure by the Biakpan community who are the parties in the case and I think he was entitled under the law to do so.

I should perhaps add that the Land Use Act does not appear to have extinguished or taken away the customary right over land by a person, family or community. This is because, a person or community that had title to a piece or parcel of land before the coming into force of the Land Use Act, 1978 is by that Act deemed to be the holder of its right of occupancy, statutory or customary, depending on the status of the land, that is to say, whether, it is situate in an urban area or otherwise. See Onwuka v. Ediala (1989) 1 NWLR. (Pt. 96) 182 at 199 F & G. I therefore entertain no doubt that the answer to issue 1 above must be in the affirmative and I so hold.

Issue 2 questions whether the Court of Appeal was right in affirming the judgment of the trial court having regard to the conclusions which it arrived at on the facts of the case. It is pertinent in considering this question to bear in mind the central issue in controversy between the parties. This, in a nut shell, is whether the land in dispute is the communal property of the plaintiffs/respondents or whether otherwise it is the exclusive or personal property of the defendants/appellants. The learned trial Judge was in no doubt as to what this issue was for quite early in his judgment, he rightly observed as follows:-

"Now the issue is whether the land occupied by Etono II village is part of Biakpan communal land as claimed by the plaintiffs or have Biakpan and Etono II always been separate distinct communities as claimed by the Defendants. In other words, the Plaintiffs' case is that the land in dispute is the property of both the Plaintiffs and the Defendants while the Defendants have contended that a portion of the land in dispute (Etono 2) belongs to them exclusively. "

The Court of Appeal, for its own part, fully recognised this issue when it summarised the same thus -

B *“The simple issue which the lower court had to determine on the state of the pleadings upon which the suit was tried was whether or not the plaintiffs and the defendants had been part of the same Biakpan unit with the result that the land now occupied by Etono II people was and has always been occupied by them as part of and on behalf of that whole Biakpan unit.”*

C It is not in dispute that the respondents in their Statement of Claim copiously pleaded the communal status of the land in dispute to the entire Biakpan community, inclusive of the appellants of Etono II. The appellants on the other hand pleaded in no uncertain terms that the said land is their exclusive and personal property. Both parties similarly led traditional and various other evidence in support of their respective claims.

D The law is settled that where a plaintiff leads evidence that the land in dispute is communally owned, the onus would shift to the defendant to establish that the land belongs to him exclusively. See Udeakpu Eze v. Samuel Igiliegebe and others (1952) 14 WACA 61 where the West African Court of Appeal cited with approval, the decision of the Privy Council in Amodu Tijani v. Secretary, Southern Nigeria (1921) 2 A.C. 399, wherein it E was held that it was right to presume as a matter of customary law that the land belonged to the community as a whole, and that the onus was on the defendant to establish that his section had title to the exclusion of the community as a whole. See too Atuanya v. Onyejekwe (1975) 3 S.C.161 at 167 and Udeze v. Chidebe (1990) 1 NWLR. (Pt. 125) 141 at 163-164.

F Against the background of the above legal principle in particular and the general law of evidence in general, the learned trial Judge proceeded painstakingly to evaluate all the evidence led before the court. On the issue of traditional evidence, the trial Judge observed as follows:-

G *“.....I am satisfied that the plaintiffs’ version of the traditional history is more probable and I accept it.”*

Earlier on, the trial court had rejected the defendants’ traditional evidence as *“lacking in details and full of conjectures.”* Of D.W.1, Ukereke Ugo Egwu, the 6th defendant whose testimony related inter alia to the defendants’ traditional history, the learned trial Judge stated thus -

H *“.....He impressed me as one who was definitely not quite sure of his facts and their accuracy but came to court just to try and to depend mostly on the promptings of his counsel.”*

On the evidence of communal ownership adduced by the plaintiffs, the trial Judge reproduced the testimony of P.W. 1 as follows:-

"The head chief of Biakpan (a paramount ruler) decides where to farm in a particular year. Then follows an announcement. The Chiefs then show the individuals where to farm within the farmland. People do things on their mother's side. The age grades watch and protect the farmlands when there is an announcement. Each family is in possession of the farmland for farming purposes only. Previously, the Etono people were allocated separate lands to farm by the Biakpan Chiefs. Now they join the Biakpan people and farm together in their respective farmlands. The town can always give out land and proceeds paid into a fund for the development and welfare of the town."

And went on-

"That is the evidence of the P.W. 1. Nothing was done to dismantle that evidence. That is a strong evidence of communal ownership."

He continued -

"From the evidence in this case (both oral and documentary) I make the following findings of fact:

(1) That Ubaghara is the common ancestor of both the Plaintiffs and the Defendants.

(2) That both parties lived in Obutong in Calabar and migrated to the present settlement in four groups and that the Defendants' village later emerged as the fifth group when they were ostracised or "pushed aside".

(3) That the Defendants come from Biakpan from their mother's side and have families in Biakpan (Plaintiffs' side).

(4) That the Defendants were later fully integrated into the Plaintiffs' community and mixed freely with no disabilities and that Etono II is Biakpan.

(5) That both parties have all along been exercising acts of ownership over the land in dispute (evidenced by Exh. 1) jointly or communally.

(6) That the present dispute arose quite recently and after the Nigerian civil war, to be precise, when every piece of land had become a gold mine.

(7) That in spite of that there had been determined efforts by majority of the people to remain together and benefit therefrom. (See in particular Exh. 10 the Arbitration agreement dated 5th December, 1972).

I cannot conclude this Judgment without restating at the risk of boredom, having regard to the entire evidence, that the Plaintiffs and the Defendants have lived together doing almost every conceivable thing together as one community before the civil war. The trouble started after the civil war with the enhanced value of land when people like the D.W. 1, Ukereke Ugo Egwu and the D.W. 2, Okpo Ekpenyong Ojah who style themselves as

the youths emerged to oppose aged people like the 1st and 2nd Plaintiffs on record (now deceased) and the P.W. 1 (now, aged over 100 years). Hitherto, land was communally owned and given out to individuals or communities to build, e.g., Markets, the Presbyterian Church and School, the Police Station etc or large farm projects like that given to the then Eastern Nigerian Development Corporation (now A.D. C.)

Most of the exhibits and oral pieces of evidence (tendered by the Plaintiffs) show that both parties never had quarrels over any piece of land until recently. Rather, both had to stand together to prosecute cases and put the proceeds in a community treasury and utilised same for the entire community. The defendants on the other hand have not tendered a single documentary exhibit to establish their dealing in the communal land as a separate entity. There is evidence that the quarrel arose because three-quarter (3/4) of the Rubber plantation are situate within their portion of land and they now feel like having the greater share of the proceeds from the rents. The evidence is that they went to court over it and lost. The whole case is actuated by selfishness and greed and irrepressible desire to secede from the Biakpan community. This sordid situation impedes progress and generates hatred and enmity among a people who had hitherto lived together as one community. The Plaintiffs are not claiming exclusive ownership of Biakpan land. That is reasonable and magnanimous enough. All that they are saying by this action is that the Defendants should stop acting contrary to the communal ownership of the land."

Concluding, the learned trial Judge stated -

"I have to emphasise that the defendants case is so inherently and vulnerably weak and to the extent of that weakness it clearly supports the Plaintiffs case. The Plaintiffs evidence on traditional history and acts of ownership and possession is more reliable, more convincing and contained sufficient material to entitle them to the exercise of my discretion in their favour.

On the injunction, justice will not be complete if the Defendants are allowed to persist in the acts which the Plaintiffs are complaining of. Consequently, I am satisfied that the Plaintiffs are entitled to the declaration sought. I accordingly grant it."

In affirming the above findings of the learned trial Judge, the Court of Appeal per the lead judgment of Oguntade, J.C.A., with which Macaulay and Uwaifo J.J.C.A., concurred observed as follows:-

"I do not, therefore, think we should interfere with the findings of fact made by the trial Judge, the evidence against the defendants was simply overwhelming".

The court below went on -

"If one now says that Etono II is a distinct community, one would be right to say that the distinct community of Etono II owns land at Etono II in common with the distinct community of Biakpan. If on the other hand one regards Etono II as Biakpan one would be right to say that the land at Etono II is Biakpan land." B

It concluded -

"On the whole, it is my view that the decision in this case turned solely on issues of facts and on whose version of evidence the court accepted. This is not a case where the lower court had not evidence before it which could sustain its conclusion and final orders." C

It seems to me plain that both the trial court and the court below came to the irresistible conclusion that the land in dispute is communally owned, a finding which is based on overwhelming evidence before the court. On this evidence, the entire Biakpans, including members of Etono II village: the defendants/appellants, practiced shifting cultivation from one farmland to the other throughout Biakpan. Only the paramount ruler of Biakpan could allocate a portion, any bit of Biakpan land after the performance of the necessary rites. This is clear evidence that ownership of land in Biakpan was communal. There was therefore no land in Biakpan over which any single Biakpan village (including the defendants/appellants) could lay claim to as its exclusive property as against the rest of the Biakpan community. D E

On the strength of the evidence adduced before the trial court, it is clear that both the learned trial Judge and the Court of Appeal arrived at the conclusion that the land in dispute is communally owned by Biakpans. This court will not interfere with the concurrent findings of fact made by both the trial court and the court below where there is sufficient evidence in support of such findings and where there is no substantial error apparent on the record of proceedings, such as some miscarriage of justice or a violation of some principle of law or procedure. See *Adigun v. Governor of Osun State & Ors.* (1995) 3 NWLR. (Pt. 385) 513 at 534-538, *Okonkwo v. Okagbue* (1994) 9 NWLR. (pt. 368) 301, *Nzeribe v. Dave Engineering Co. Ltd.* (1994) 8 NWLR. (Pt. 361) 124. *Okedare v. Adebara* (1994) 6 NWLR. (pt. 349) 157 at 187 etc. No reason whatever has been shown by the appellants to warrant my interference with the above findings of fact which I must accept as firmly established: F G H

It is thus clear that whatever communal rights the learned trial Judge declared in favour of the plaintiffs/respondents, he also declared in favour of the defendants/appellants who, on the accepted evidence, are both Biakpans. In the circumstances, the trial court having found that the land

described as Etono II village is part of Biakpan communal land, was perfectly right in making the declaration that it is Biakpan,communal land under the headship of their paramount ruler. It is also clear on the findings of both courts below that the Court of Appeal rightly affirmed the said decision of the trial High Court.

On the issue of perpetual injunction, it is equally clear that this was properly ordered by the trial court and affirmed by the court below. In the circumstance and for all the reasons that I have given above, the answer to issue 2 must be in the affirmative.

On the whole, this appeal is without substance and same is hereby dismissed with costs to the respondents against the appellants which I fix at N1,000.00.

BELGORE JSC

Once the trial Court has made far-reaching findings on the evidence and the pleadings before it, the Court of Appeal will not interfere with such findings based on facts. If the Court of Appeal upholds the findings, this Court will not have the right to disturb them. It is clear the two concurrent findings of the two lower Courts cannot be assailed as the appellants offered no reasons to interfere with them.

For the reasons clearly adumbrated in the judgment of my learned brother, Iguh, J.S.C., which I adopt as mine, I also dismiss this appeal as totally lacking in merit. I award the same costs as in the said judgment of Iguh, J.S.C.

KUTIGI JSC

I read in advance the judgment just delivered by my learned brother Iguh, J.S.C. I agree with the conclusion that the appeal lacks merit and ought to be dismissed. I hereby dismiss same with costs as assessed.

OGWUEGBU JSC

I have read the judgment of my learned brother Iguh, J.S.C., in this appeal. I agree entirely with his reasoning and conclusion that the appeal lacks merit and ought to be dismissed.

The learned trial judge gave very clear reasons why it gave judgment to

the plaintiffs in the case. The plaintiffs led convincing and credible oral evidence. The plaintiffs also tendered a total of twenty-nine documentary exhibits to establish acts of possession and communal ownership of the area in dispute in Exhibit 1. The defendants tendered five. All the documentary exhibits were evaluated by the learned trial judge. They showed clearly how the defendants over the years had strived to establish that they were members of one Biakpan community which also owned and used land in common. B

Exhibit 1 which is the survey plan of the land in dispute showed all the villages of Biakpan including the defendants village of Etono-Biakpan. In 1936, when one Chief Okpo Okpo Ekpenyong the village head of Etono II Biakpan was sued in Ubaghara Native Court along with others by a neighbouring village in respect of Biakpan land, he testified in the said proceedings (Exh. 2) that he was a native of Etono Biakpan. He admitted that although he was a chief in Etono Biakpan, he did not own any separate land and that all land was Biakpan land controlled by the Chief of Biakpan. C D

In Exhibit 3 - a land case between Asaga Ohafia people and Biakpan village, the appellants participated in defending the action therein against the people of Asaga as members of Biakpan village. The Asaga people lost the case up to the Privy Council. Exhibits 8 and 9 are agreements which the people of Biakpan and the appellants jointly signed for the leasing of their rubber or palm plantation to the then Eastern Nigeria Development Corporation. E

The most significant of the documents tendered was Exhibit 12 written by D.W. 2 in the present proceedings. D.W. 2 sent it to the Chiefs and people of Biakpan. In this exhibit, D.W. 2 narrated the close affinity of Etono people with Biakpan village and how they had been doing things together without distinction in the past. All the exhibits tendered confirmed that the appellants had at one time or the other, demonstrated that they were a part of the Biakpan village. F G

Based on the oral and documentary evidence, I am satisfied that the learned trial judge was right in giving judgment for the plaintiffs and the court below was equally right in affirming the judgment. The claim of the appellants that they are entitled to a declaration of a customary right of occupancy of the land in dispute under Section 36(2) of the Land Use Act is untenable because before the Land Use Act came into force the land in dispute was in possession of the people of Biakpan as a community of which the appellants are part. H

Section 40 of the Land Use Act did not also avail the defendants. The present proceedings were caught by the Land Use Act, 1978. The said

section 40 provides:

"Where on the commencement of this Act proceedings had been commenced or were pending in any court or tribunal (whether at first instance or on appeal) in respect of any question concerning or pertaining to title to any land or interest therein, such proceedings may be continued and be finally disposed of by the court concerned but any order or decision of the court shall only be as respects the entitlement of either of the parties to the proceedings to a right of occupancy, whether statutory or customary, in respect of such land as provided in this Act." (underlining for emphasis only).

The plaintiffs tendered Exhibit 1. They claimed a declaration that the land comprised in Exhibit 1 is the communal land of Biakpan people. The defendants filed Exhibit 30 showing their own separate land. They did not claim any declaration or reliefs in respect of the land in either Exhibit 1 or Exhibit 30. They merely defended the action and cannot therefore be granted a relief which they never claimed. See *Ekpenyong & Ors. v. Nyong & Ors.* (1975) 2 S.C. 71 at 80, *Emaphil Ltd. v. Odili* (1987) 4 NWLR. (Pt 67) 915 and *Ezeokeke v. Uga* (1962) 2 SCNLR 199. It is not therefore right to contend that the courts below only had jurisdiction to declare that the defendants/appellants were entitled to customary right of occupancy over the land in dispute. Assuming that the plaintiffs lost their claim to a declaration of title to the land which was not the case, the defendants who did not counter-claim would still not be entitled to a declaration in their favour.

There is this complaint of the appellant that the courts below had no jurisdiction to enter judgment for the plaintiffs in terms of their writ. In other words, they contend that orders made by the learned trial judge and affirmed by the court below were inconsistent with the language of the Land Use Act. In my view, the failure to use the technical language of the Act by the courts below did not advance the case of the appellants. The precise language of section 40 of the Act notwithstanding, the important question is whether the plaintiffs established their claim to the declaration sought. If so, this court has jurisdiction under section 22 of the Supreme Court Act, 1960 to vary the grant of declaration of title to that of entitlement to a right of occupancy statutory or customary in respect of the land in dispute. See *Ikuomola v. Oniwaya* (1990) 4 NWLR. (Pt.146) 617.

On the whole, the conclusion reached by the courts below that the entire people of Biakpan including the defendants of Etono II own the land in dispute shown in Exhibit 1 communally was supported by abundant evidence before them. This court has not found any legal basis to interfere with the concurrent findings.

The appeal is therefore dismissed. The judgments of the courts

below are affirmed. The respondents are entitled to costs of N1,000.00 against the appellants.

B

MOHAMMED JSC

I have had a preview of the judgment of my learned brother. Iguh J.S.C., in respect of this appeal and I agree with him that the appellants have not established any ground which would warrant the interference with the concurrent findings of the two lower court.

C

For the reasons given in the lead judgment I too would dismiss this appeal. It is accordingly dismissed. I also award N1,000 costs in favour of the respondents.

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