

SUPREME COURT OF NIGERIA
27TH SEPTEMBER, 1996. SC. 32/1989
CORAM:- M. L. UWAIJS CJN, S. M. A. BELGORE, E. O.
OGWUEGBU, U. MOHAMMED, JJSC.

ALEXANDER AMOBI APPELLANT
AND
PIUS AMOBI & 2 OTHERS RESPONDENTS

EVIDENCE - Documentary evidence - Tendering documents without being sworn ss. 192 & 193 E. A. - Whether the documents in issue can be tendered without oath.

LAND LAW - Title - Root of title not pleaded and proved - The claim must fail.

LAND LAW - Title - Where put in issue by virtue of plaintiff's claim - Plaintiff must prove a better title - In order to succeed.

PLEADINGS - Evidence - Whether the tendered documents - Relate to the arbitration pleaded.

PLEADINGS - Failure to plead a fact in evidence - That evidence goes to no issue.

PRACTICE & PROCEDURE - Reexamination - Trial judge's failure to allow an improper question - Is not a refusal to allow reexamination.

FACTS

Before the High Court, Onitsha, plaintiff/appellant filed an action against the defendants/respondents claiming N400.00 damages for trespass and perpetual injunction in respect of the land in dispute. Plaintiff claimed that his late father, then king of Ogidi, gave the land to plaintiff's mother and plaintiff being the only surviving son of his mother inherited the land upon his mother's death. Plaintiff's evidence of family arbitration was at variance with what he pleaded. Plaintiff failed to prove a better title over the land.

The trial court found in favour of the defendants and dismissed the plaintiff's case. His appeal to the court of Appeal was also dismissed. Plaintiff has further appealed to the Supreme Court raising six questions which the

apex court narrowed down to three issues.

ISSUES FOR DETERMINATION

1. *Were the learned Justices of the Court below right in their application of sections 191 and 192 (now 192 and 193 respectively) of the Evidence Act? If not, did their error occasion a miscarriage of justice?*

2. *Did the procedure adopted by the learned trial Judge in refusing Plaintiff's counsel to reexamine P. W.4, and found by the Court of Appeal to be wrongful, occasion a miscarriage of justice?*

3. *Did the Plaintiff prove a better title to, or better right to be in possession of the land in dispute as against the Defendants who also claimed to be in possession of the land?*

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

Tendering documents without being sworn

1. The question that arises is: could PW4 have tendered Exhibits 'B' and 'F' without being sworn? I rather think not. These are documents made by him in his own handwriting and signed by him. They are the purported accounts of two family meetings, the holding of which and the persons in attendance are of vital importance to the resolution of the dispute between the Plaintiff and the Defendants. These documents could only be admitted in the manner provided in section 91(1) of the Evidence Act and unless PW4 testified as a witness, the two conditions necessary for their admissibility would not have been fulfilled. The Exhibits do not belong to the class of documents that could be tendered by mere production as envisaged in sections 192 and 193 of the Act. In the light of the above provisions of the Act, the learned trial Judge was right in ruling that PW4 must testify on oath if Plaintiff required him to tender the document and the Court below was right to uphold that decision.
(p. 1727 G)

Reexamination - Whether refused

2. It is not correct to say that the trial Judge refused to allow plaintiff's counsel to re-examine PW4. what the learned Judge did was to disallow a question put under re-examination which tended to be a cross-examination of one's witness. A party may examine and re-examine (where there has been cross examination) his witness but cannot cross-examine him unless he is first declared a hostile witness. Section 189(3) of the Evidence Act provides that re-examination shall be directed to the explanation of matters referred to in cross-examination. There is nothing on record to indicate that, apart from disallowing the objectionable question, the trial Judge refused to allow re-examination by

Plaintiffs counsel of PW4. (p. 1730 F)

Pleadings - Evidence

3. The above evidence showed clearly that Exhibits E and F did not relate to the arbitration pleaded in paragraph 10 of the statement of claim. According to PW4 a meeting of the Amobi family is not the same thing as a meeting of the Amobi/Jideofor family. If there was an arbitration of the dispute between the parties by the Amobi family the arbitration would be by the land committee of the Amobi family of which PW4 was not secretary and could therefore not have recorded the minutes of its deliberations. Thus, far from assisting the Plaintiff, the evidence of PW4 and Exhibits E and F supported the case of the Defendants that there was no such arbitration. (p. 1731 H)

Failure to plead a fact

4. I find no merit at all in all the arguments of the Plaintiff. He Claimed in his pleadings that his father Walter Amobi owned the land and gave it to his mother from whom he inherited it. How his father came to own the land was not pleaded. He testified that his father bought lyieniu land and his witness, PW2 testified that Walter Amobi bought the land from the people of Oze - Nkwerre. But these facts were not pleaded. And it is trite law that evidence on a fact not pleaded goes to no issue. (p. 1734 F)

Root of title not pleaded and proved

5. The position then is that Plaintiff failed to plead, and to prove, how his father Walter Amobi came to own lyieniu land part of which the latter allegedly gave to Plaintiff's mother. He thus failed to trace his root of title to the radical owner of the land. On this ground alone, his claim must fail. (p. 1734 H)

Title - Where put in issue

6. True enough, Plaintiff claimed in trespass and injunction. By his claims he has put his title in issue for his claims postulate that he is the owner of the land in dispute or has had, prior to the trespass he complained of exclusive possession of the land. The onus was on him, therefore, to prove a better title to the land. The learned trial Judge found that the Defendant, through their mother - DW3, was in prior possession of the land. This finding was affirmed by the Court below. There was overwhelming evidence to support it. In the circumstance, for the Plaintiff to succeed he must show that he had better title to the land than the Defendants this the Plaintiff failed to do. In the light of the findings of the

learned trial Judge which findings were adequately supported by the credible evidence on record, it is difficult to see how Plaintiff could succeed.
(p. 1735 B)

NOTABLE POINT OF INTEREST

B OGUNDARE.JSC

1. Respondents failure to appeal against lower court's finding - Effect

I must observe that the Defendants have not appealed against the finding of the Court below that it was wrongful of the trial court to refuse to allow PW4 to be re-examined. That notwithstanding I think this Court has the power to review that decision having regard to the general powers of the Court under Order 8 rule 12 of the Supreme Court Rules particularly sub-rule (5) thereof.
(p. 1730 A)

REPRESENTATION

D C. O. Anah for the Appellant

B. C. Ogbuli (J. E. O. Ogbuli with him) for the Respondents

CASES REFERRED TO

- Idahosa v. Oronsaye (1959) 4 FSC 166
- E Nigerian Fishing v. WNHC (1969) NMLR 164
- Ogboda v. Adulugha (1971) IALL NLR 68
- George v. U.B.A. (1972) 8-9 SC. 264
- Orizu v. Anyaegbunam (1978) 5 SC. 21
- Ogunleye v. Oni (1990) 2 NWLR 745
- F Kalio v. Woluchem (1985) 1 NWLR 610
- Piaro v. Tenalo (1976) 12 SC. 31
- Bamgboye v. Olusoga (1996) 4 KLR (Pt.) 40 655
- Kponugbo v. Kodaja 2 WACA 24
- Ogunde v. Ojoniu (1972) 4 SC. 105
- G Aroinire v. Awoyemi (1972) 2 SC. 1
- Mogaji v. Cadbury Fry Nig. (1985) 2 NWLR 393

STATUTE & RULES REFERRED TO

- Evidence Act ss. 91(1), 100, 180, 192, 193
- H Supreme Court Rules o. 8 r. 12(5)

BOOK REFERRED TO

Phibson on Evidence 12th Ed. Para 1591 page 656

LEAD JUDGMENT BY OGUNDARE JSC

By a writ of summons issued in the High Court of the old Anambra State in March 1973, the plaintiff (who is now appellant before us) sued the defendants (now respondents) claiming -

“1. N400.00 damages for trespass in that the defendants on or about March 1970 acting in concert unlawfully broke and entered the Plaintiff’s piece and parcel of land situate at Mile 6 Onitsha - Enugu Road.

2. Perpetual Injunction to restrain the defendants, their servants agents or privies from further acts of trespass on the said land.”

Pleadings were ordered, filed and exchanged and the action proceeded to trial. In his statement of claim (as amended at the trial) the plaintiff had averred, *inter alia*, as follows:-

“3. The defendants are sons of one Madam Nwado Amobi who was married to the plaintiff’s late father- Chief Waller Amobi - Igwe of Ogidi. Nwado begot Onyekeze Amobi - the second defendant for the plaintiff’s father. On the plaintiff’s father’s death Nwado was married to plaintiff’s uncle - late Akunwanne Amobi for whom she begot Pius Amobi and Dominic Amobi (1st and 3rd defendants respectively).

5. The plaintiff got the land in dispute from his father late Chief Walter Amobi who gave the land to the plaintiff’s mother and on the death of the mother, the land devolved on the plaintiff, the only surviving son of the mother according to Ogidi custom.

6. The plaintiff’s mother had been exercising acts of ownership over the land since it was granted to her until her death in 1958. Since the death of the plaintiff’s mother, the plaintiff continued to exercise, numerous acts of ownership such as farming on the land, planting some economic trees and reaping the economic trees already on the land without let or hindrance from anybody. The land has been owned and enjoyed by the plaintiff and his mother for over seventy five years.

7. The plaintiff built a house on the land in dispute with cement blocks and corrugated iron sheets in 1957 but this house was destroyed during the Nigerian Civil War. The ruins of the demolished house of the plaintiff still lie on the land in dispute.

8. The plaintiff’s mother during her life time in or about the year 1936 let a portion of this land to one Okeke Odumuo who was then a tenant of the plaintiff’s mother. The said tenant died around the year 1948 without any male issue and since then, the land let to him reverted to the plaintiff’s mother and on the plaintiff’s mother’s death devolved on the plaintiff.

9. On or about the month of March, 1970 the defendants acting in concert unlawfully broke and entered the plaintiff’s piece and parcel of the

plaintiff's land which is land in dispute and started to plant cassava, yams and other crops thereon, and reaped some palm fruits therefrom.

10. When the defendants did this, the plaintiff reported them to the members of Amobi family. The members of Amobi family asked about five elders and two other men to look into the matter. These people after visiting the land in dispute reported back to the whole of Amobi family that the defendants actually broke into plaintiff's land (the land in dispute). The members of Amobi family then told the defendants to stop further trespass into the land. The defendants were also asked to return to the plaintiff the palm fruits they reaped from the land. The arbitration and findings were recorded in the Amobi family minutes book and the plaintiff shall found and rely on it."

The defendants, in reply, pleaded -

"2. The defendants admit paragraphs (1), (2) and (3) of the Statement of Claim.

4. The defendants deny every allegation of fact contained in paragraph (5) of the Statement of claim and will put the plaintiff to strict proof thereof. In further answer to paragraph (5) of the statement of claim the defendants say as follows:-

(i) Amobi begot five sons in order of seniority viz:-

1. Walter (father of plaintiff and 2nd defendant)
2. Akunwanne (father of 1st and 3rd defendants)
3. Ibaku (late), 4. Akude (late) and 5. Isaac.

(ii) All the descendants of Amobi own Iyienu land in common.

(iii) It is the custom of the descendants of Amobi to allocate portions of Iyienu land to their members, each allotted exercising exclusively maximum acts of possession over an area allotted to him without let or hindrance from anybody.

(iv) Consistent with this custom a portion of Iyienu land (the land now in dispute) was many years ago allotted to the defendants mother for her exclusive use and that of her children by Akunwanne in particular. Life trees were planted to demarcate the area which is verged blue in plan NO. MEC/565/73.

(v) Apart from the compound upon which the plaintiff's mother lived over which the plaintiff had exclusive use, a similar grant was made to the plaintiff's mother for her and her children. This portion is verged green on survey plan No. MEC/565/73.

(vi) At all times the defendants mother and the defendants have made unrestricted use of the land in dispute by inter alia: building a mud house later converted into zinc roof, building market stalls letting to one

Odumuo for building a house, cultivating annual crops and economic crops and reaping their fruits, all to the knowledge of plaintiff, his mother, Iwelu. and plaintiff's senior brother Augustine Ikechukwu without any disturbance or interruption from them or anyone whatsoever.

5. *The defendants deny each and every allegation of fact contained in paragraph (6) of the statement of claim and will put the plaintiff to strict proof. In further answer thereto, the defendants say that since about the year 1928 their mother and they have been in uninterrupted possession of the land in dispute.*

6. *The defendants deny every allegation of fact contained in paragraph (7) of the statement of claim and further say that in 1961, the plaintiff approached the defendants mother for permission to build thatched shed for selling motor oil on the land in dispute. When permission was given, the plaintiff began to build a concrete shed instead of thatched shed. This the defendants mother resisted. The plaintiff then beat up the defendants mother half dead. A report was made to the Police who prosecute the plaintiff to conviction in the Magistrate Court of Onitsha. The plaintiff was given a prison term for 6 months. Thereafter the defendants mother withheld any consent to the plaintiff to continue the building of the shed.*

7. *The defendants deny paragraphs (8), (9) and (10) of the statement of claim and will put the plaintiff to strict proof.*

In further answer to paragraph (8) of the statement of claim the defendants say that after the death of plaintiffs father, members of Amobi family about 1930 showed one Odumuo a portion of the land in dispute to build and live on and to keep defendants mother company.

Odumuo was not a member of Amobi family. Later the defendants as act of possession converted Odumuo's thatch roof into zinc. Since the death of Odumuo's wife the defendants have made exclusive use of the land without question from the plaintiff or anybody.

In further answer to paragraph (10) of the statement of claim the defendants say that sometime before the year 1961, the plaintiff, in the house of Akude invited the members of Amobi family and applied to be given a portion of the land in dispute. His application was turned down on the ground that the land in dispute had long since been granted to the defendants and their mother. Again in 1970 plaintiff invited members of Amobi family in the house of Hezekiah Amobi where he wanted the support of members of Amobi family to excommunicate defendants mother, who, plaintiff said would not let him have his way with the land in dispute. About ten members of the family walked out on the meeting in protest. If there was any arbitration by the Amobi family relating to the issue of trespass, the defen-

dants neither participated nor consented to it nor did the principal members of Amobi family take part.”

Oral evidence was led at the trial by both parties and some documentary evidence were also tendered.

At the conclusion of trial and after addresses by learned counsel for the parties, the learned trial judge, in a reserved judgment, found for the defendants and dismissed plaintiffs claims. In reaching this conclusion, the learned Judge found-

1. *That the 2nd defendant, Onyekeze Amobi was born in the lifetime of Walter Amobi, the father of both the plaintiff and the 2nd defendant;*

2. *That Iyenu land of which the land in dispute forms a part, belonged to Walter Amobi and his brothers in common and not to Walter Amobi alone;*

3. *That the plaintiff failed to prove his title to the land in dispute;*

4. *That the defendants “would appear to have been in possession of the land in dispute for a much longer period than the plaintiff.”*

Being dissatisfied with the trial court’s judgment the plaintiff appealed to the Court of Appeal (Enugu Division). His appeal was however dismissed. He has now, with leave of the Court of Appeal, appealed further to this Court. Pursuant to the rules of this Court, the parties filed and exchanged their respective written briefs of argument. And at the oral hearing before us their learned counsel proffered oral submissions. A notice of preliminary objection filed by the defendants was at the hearing withdrawn by their learned counsel and was struck out.

In his brief of argument, the plaintiff posed 6 questions as culling for determination in this appeal. The questions are:

“1. *Whether on the finding made by the Court of Appeal the appellant showed a prima facie title or a better title than the respondents.*

2. *Whether the arbitration found in favour of the appellant by the Court of Appeal was binding on the respondents and if so whether by that evidence the appellant had not established a possessory title over the land.*

3. *The Court of Appeal having found that the trial Court was wrong for not allowing the appellant’s counsel to re-examine the P.W.4 whether that refusal occasioned a miscarriage of justice.*

4. *Whether the learned Justices of the lower court were right in their application of sections 191 and 192 of the Evidence Act and if they were not whether that error occasioned a miscarriage of justice.*

5. *What was the effect on the whole case of the destruction of the respondents root of title?*

6. *Whether the decision of the Court of Appeal in the face of the findings of fact it made in favour of the appellant, perverse.*"

These can conveniently be reduced to 3, having regard to the judgment appealed against and the grounds of appeal. Questions 1, 2, 5 and 6 can be grouped together while questions 3 and 4 stand alone.

The defendants for their part posed three questions in their brief of B argument, to wit:

1. *"Whether the plaintiff who claimed to be in possession of the land in dispute proved a better title or better right to be in possession as against the defendants who also claimed to be in possession of the land.*

2. *"Having evaluated Exhibit "E" which the trial Court did not C evaluate, and having made specific findings on Exhibit 'E' which the trial court did not make, could those findings of the Court of Appeal, made on Exhibit "E" have established the case for title to the land in dispute which the plaintiff had set out to make on the pleadings and the evidence before the trial Court?"*

3. *"Are Exhibits "E" and "F", which are minutes of Amobi Family D Meeting, a class of documents which, by law, require no proof at the hearing, so that a witness could produce them in Court without being sworn nor without being cross-examined upon their production. "*

The 3 questions that arise for determination in this appeal, in my E respectful view are:

1. Were the learned Justices of the Court below right in their application of sections 191 and 192 (now 192 and 193 respectively) of the Evidence Act? If not, did their error occasion a miscarriage of Justice?

2. Did the procedure adopted by the learned trial Judge in refusing F plaintiff's counsel to re-examine P.W.4, and found by the Court of Appeal to be wrongful, occasion a miscarriage of justice?

3. Did the plaintiff prove a better title to, or better right to be in possession of the land in dispute as against the defendants who also claimed to be in possession of the land?

The facts briefly are these: Plaintiff and the 2nd defendant are half G brothers of the same father, Walter Amobi, Igwe 1 of Ogidi. The 1st and 3rd defendants are full brothers; 2nd defendant is their half brother of the same mother. The land in dispute is part of the land known as Iyieniu which plaintiff H claimed belonged to Walter Amobi alone. The defendants claimed that the land belonged to Walter and his brothers. It is plaintiff's case that the land in dispute was given to his mother by Walter several years ago and she went into possession and remained there until her death in 1958. Plaintiff built a house on the land in 1957 but the house was destroyed during the Nigerian

civil war of 1967 to 1970. Walter Amobi also gave land to his other wives who bore him sons.

The defendants claimed that their mother was wife to Walter Amobi for whom she bore a son, the 2nd defendant. On the death of Walter she was inherited by Walter's brother for whom she had the 1st and 3rd defendants.

- B The Amobi family gave the land in dispute to her about 1928 and she had remained there ever since. At the request of the plaintiff she allowed him to erect a temporary structure on the land but when plaintiff started putting up a permanent building she stopped him and was beaten up by the plaintiff. She sustained injuries and was hospitalized. Plaintiff was prosecuted, convicted and jailed for the assault. On her discharge from hospital she drove plaintiff away from the land. Hence the action by the plaintiff. She gave evidence at the trial as D.W.3.

Question 1

- D Plaintiff called on Leonard Amobi to tender the minutes book of the Amobi family meetings. He was not sworn when he commenced testifying. When he sought to tender a part of the minutes book (already in evidence) written and signed by him, counsel for the defence objected and submitted that the witness could only tender the part of the book after he had been sworn, to enable him to be cross-examined. The trial court upheld his objection and the witness was sworn as P.W.4. He was led in evidence by counsel for the plaintiff after which he was cross-examined by defence counsel. Following the cross-examination of the witness, learned counsel for the plaintiff sought to re-examine him. The following extract from the record of appeal shows what followed:

- F *"Re-xd: In answer to your cross-examination, you said that none of the defendants was present at the meeting held on 2nd May, 1971 but you mentioned in Exhibit E under the heading "Attendance" "members present have been mentioned above, including the following few names." Who are the members present "mentioned above" in Exhibit E?" Ogbuli objects.*

- G *Court: This question does not arise from the cross-examination. The answer of the witness is clear. He says that defendants were not present at the meeting. While Exhibit E shows a list of 29 persons who paid levies and it is not clear what the "above mentioned include, there is no ambiguity as to his answer. Objection upheld. Mr. Anah now applies under Section*
H *188(3) and 209 of the Evidence Law for leave of the Court to clear the confusion in Exhibit E as to who attended the meeting. Ogbuli objects.*

Court: The answer of the witness relating to whether or not the defendants were present at the meeting of 2nd May, 1971 is clear and unambiguous. I can see no circumstances which require me to invoke the

provisions of Section 188(3) and 209 of the Evidence Law. Application refused.”

Thereafter, counsel closed the case for the plaintiff.

The procedure adopted by the learned trial Judge was a major ground of complaint by the plaintiff in his appeal to the Court below. That Court, per Oguntade J.C.A., after quoting sections 191 and 192 (now sections 192 and 193) of the Evidence Act, went on to observe:

“There can be no doubt that under section 191 and 192 of the Evidence Act, a person can be called to produce a document without being sworn. These provisions are usually used to tender official documents requiring no proof and the origin of which is not in dispute. Or documents which the parties themselves have agreed should go in because they are considered useful for the purpose of resolving issues in controversy. But in the instant case, having regard to the pleadings of parties, it is clear that the minutes which Leonard Amobi was called to produce had been disputed by the respondents.”

The learned Justice then referred to section 90(1) (now section 91(1) of the Evidence Act and continued:

“It seems to me that since Leonard was called to tender the minutes which he had recorded as part of a continuous record, he had to be called “as a witness in the proceedings” to produce a document.”

He next turned attention to section 99(now section 100) of the Act and concluded:

“In view of the provision of section 99 above, it was also necessary that the minutes be shown to have been written or made by Leonard. The learned authors of Phipson on Evidence 12th Edition paragraph 1591 Slating the position of the common law on the point write at .- page 656.

(1) A witness called merely to produce a document under a subpoena duces tecum need not be sworn if the document either requires no proof, or is to be proved by other means; and if not sworn, or unnecessarily sworn, he cannot be cross-examined.

(2) A witness sworn by mistake either of counselor the officer of the court, and whose examination has not substantially begun, is not liable to cross-examination. But the mistake must arise from his inability to speak to the transaction, and not from the imprudence of having him called so where the witness can speak to the transaction, but the counsel changes his mind and, after the witness is sworn, asks no questions, the right to cross-examine remains. (3) A witness whose examination has been stopped by the judge before any material question has been put is not liable to cross-examination.’

It would appear from the state of the law that a witness may only be summoned to produce a document without being sworn on oath "if the document either requires no proof or is to be proved by other means."

Leonard later tendered the minutes of Amobi Family meetings as exhibits "E" and "F". The minutes certainly required to be proved. It had to be shown that Leonard Amobi was secretary of Amobi Family; that he recorded and signed the minutes in that capacity and that the minutes as recorded by him were correct. This is so because these are the very matters appellant had to prove in view of respondents' denials of them.

I am satisfied therefore that the trial Judge was right when he ruled that Leonard had to be sworn as a witness before he could tender the minutes of Amobi Family meeting. If the appellant's counsel did not want Leonard Amobi to be sworn as a witness, all he had to do was to inform the court that he no longer wished to call him. But what happened is that Leonard was sworn as P.W.4 without objection by Mr. Anah. Mr. Anah also led the witness to give his evidence-in-chief and to tender exhibits "E" and "F". Having so done, there could be no doubt that respondents counsel had the right to cross-examine P.W.4 as extensively as he did. I am therefore unable to see that there was anything improper or irregular in the action of the trial judge."

The above conclusion is the subject of a further complaint by the plaintiff. It is his contention that the trial Judge was in error to force PW4 on him as a witness when all he required of PW4 was to tender a document and not to give evidence. And as PW4's evidence was heavily relied on to find in favour of the defendants, the error of the trial Judge occasioned a miscarriage of justice and the court below was wrong not to have so found. Needless to say that the defendants contention is in support of the decision of the Court below on this issue. It is their further contention that Exhibits "E" and "F" (tendered by PW4) "are a class of documents which, from the circumstances of this case require to be proved by a witness who could only give evidence after being sworn and whose evidence is subject to cross-examination."

The sections of the Evidence Act relevant to a resolution of the issue on hand are 91(1), 100, 180, 192 and 193. They read:

"91(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied-

(a) If the maker of the statement either –

(i) *had personal knowledge of the matters dealt with by the statement, or*

(ii) *where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and*

(b) *if the maker of the statement is called as witness in the proceedings:*

Provided that the condition that the maker of the Statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success."

"100. *If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's hand-writing must be proved to be in his handwriting."*

"180. *Save as otherwise provided in sections 182 and 183 of this Act, all oral evidence given in any proceedings must be given upon oath or affirmation administered in accordance with the provisions of the Oath Act."*

"192. *Any person, whether a party or not, in a cause may be summoned to produce a document without being summoned to give evidence, and if he cause such document to be produced in court the court may dispense with his personal attendance."*

"193. *A person summoned to produce a document does not become a witness by the mere fact that he produces it and cannot be cross-examined unless and until he is called as a witness."*

The circumstances leading to the evidence of P.W.4 being given on oath has been recounted above. **The question that arises is: could PW4 have tendered Exhibits "E" and "F" without being sworn? I rather think not. These are documents made by him in his own handwriting and signed by him. They are the purported accounts of two family meetings, the holding of which and the persons in attendance are of vital importance to the resolution of the dispute between the plaintiff and the defendants. These documents could only be admitted in the manner provided in section 91(1) of the Evidence Act and unless PW4 testified as a witness, the two conditions necessary for their admissibility would not have been fulfilled. The Exhibits do not be-**

long to the class of documents that could be tendered by mere production as envisaged in sections 192 and 193 of the Act. In the light of the above provisions of the Act, the learned trial Judge was right in ruling that PW4 must testify on oath if plaintiff required him to tender the documents and the Court below was right to uphold that decision.

I consequently answer the first limb of Question (1) in the affirmative and, in view of that answer, it is unnecessary to consider the second limb.

Question 2

I have produced earlier in this judgment the part of the record dealing with the re-examination of PW4. The refusal of the learned trial Judge (1) to allow the question asked of the witness by learned counsel for the plaintiff and (2) to ask the question himself, was made another ground of complaint in the Court below by the plaintiff. That Court, per Oguntade JCA, in resolving the complaint observed:

“With profound respect to the learned trial Judge, I think he was clearly wrong in refusing to allow appellant’s counsel re-examine P.W.4. When the contents of Exhibit “E” the minutes which P:W.4 recorded and tendered are related to the oral evidence of P.W.4 before the court, there are glaring ambiguities requiring explanation.”

After cataloguing the “ambiguities requiring explanation”, the learned Justice said:

“My view is that, arising from the refusal of the trial judge to allow a re-examination of P.W.4 on his evidence in cross-examination, the court had been led to give to the oral evidence of P.W.4 the credence it might not otherwise have deserved while at the same time denying to the appellant the full impact to his case on the minutes of 2/5/71 which were tendered as Exhibit “E”.

The plaintiff, no doubt was happy with this view of the learned Justice. But the Court below did not stop there. Oguntade JCA went on to say:

“But having said that, I do not think that the error of the trial judge in not considering exhibit ‘E’ could have led to a miscarriage of Justice. I shall in this connection consider the last ground of appeal which is a complaint that the judgment is against the weight of evidence.”

After a consideration of the facts, the Plaintiffs appeal, as well as his case, was dismissed. This decision led to a further complaint to this Court. It is argued in the appellant’s brief as follows:

“The learned Justices of the Court of Appeal conceded that the learned trial Judge was wrong not to allow the appellant to re-examine the

P.W.4 but held that the refusal did not amount to a miscarriage of justice.

If indeed there was a miscarriage of justice by the learned trial Judge not allowing the appellant to re-examine the P.W.4 it is respectfully submitted that the Justices of the Court of Appeal ought to have set aside the judgment and more so when the learned Justice who delivered the lead judgment showed what damage the refusal of the learned trial judge to allow the re-examination did to the appellant's case by observing as follows:

"My view is that arising from the refusal of the trial Judge to allow re-examination of P.W.4 on his evidence in cross-examination, the Court had been led give to the oral evidence of P.W.4 the credence it might not otherwise have deserved while at the same time denying to the appellant the full impact to his case of the minutes of 2/5/71 which were tendered as Exhibit "E".

(Page 180/2nd paragraph).

Later he said and I am sorry to repeat this:

"I grant it to the appellant that if the trial Judge had properly considered the contents of Exhibits "E", (sic) he might have concluded that the Amobi family did not grant any land to respondents mother as respondents alleged."

(Page 182 lines 20 to 24).

The learned trial Judge did not consider the contents of exhibit "E" because he did not allow a re-examination on it That certainly occasioned a serious miscarriage of justice.

Earlier, the learned Justices of the Court of Appeal had criticised the learned trial Judge for using the evidence of P.W.4 because from exhibit "E" the trial Court according to them ought to have adjudged his evidence as manifestly unreliable and worthless.

(See Page 179 3rd paragraph and page 180 lines 1 to 4).

The learned trial Judge used the evidence of this witness whom the Court of Appeal said was unreliable in disbelieving the Appellant and giving judgment against him, and yet the Court of Appeal said the refusal by the Judge to allow the appellant to reexamine him and thus expose him as an "unreliable" and "worthless" witness even though he was held to be called by the appellant did not occasion a miscarriage of justice. It certainly did because it led to a wrong evaluation of his evidence by the trial Judge. If he had been re-examined the trial Judge would have discovered that he was not worthy of credit and since he used his evidence to discredit the appellant and give judgment for the respondents there was indeed a miscarriage of justice which cries up to this Court to set aside the judgment."

I must observe that the defendants have not appealed against the finding of the Court below that it was wrongful of the trial court to refuse to allow PW4 to be re-examined. That notwithstanding I think this Court has the power to review that decision having regard to the general powers of the Court under Order 8 rule 12 of the Supreme Court Rules particularly sub-rule B (5) thereof which reads:

“(5) The powers of the Court under the foregoing provisions of this rule may be exercised notwithstanding that no notice of appeal has been given in respect of any particular party to the proceedings in that Court, or that any ground for allowing the appeal or for affirming or varying the C decision of that Court is not specified in such a notice; and the Court may make any Order, on such terms as the Court thinks just, to ensure the determination on the merits of the real question in controversy between the parties.”

and section 22 of the Supreme Court Act, Cap. 424 which reads:

D *“22. The Supreme Court may, from time to time, make any Order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its findings on any question which the Supreme Court thinks fit to determine before final judgment in the ap- E peal and may make an interim order or grant any injunction which the court below is authorised to make or grant and may direct any necessary inquiries or accounts to be made or taken and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the Supreme Court as a court of first instance and may rehear F the case in whole or in pan or may remit it to the court below for the purpose of such rehearing or may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of that court.”*

It is not correct to say that the trial Judge refused to allow G plaintiff’s counsel to re-examine PW4. What the learned Judge did was to disallow a question put under re-examination which tended to be a cross-examination of one’s witness. A party may examine and re-examine (where there has been cross examination) his witness but cannot cross-examine him unless he is first declared a H hostile witness. Section 189(3) of the Evidence Act provides that re-examination shall be directed to the explanation of matters referred to in cross-examination. There is nothing on record to indicate that, apart from disallowing the objectionable question, the trial Judge refused to allow re-examination by plaintiffs counsel of PW4. On the contrary, it was

counsel who indicated he was closing his case. That being so, it is wrong, in my respectful view, to criticise the learned trial Judge for the procedure adopted by him. I think the Judge followed the correct procedure.

Again, much weight was placed on the relevance of Exhibit “E” by the Court below. With profound respect to their Lordships of that Court, they did not advert their minds to the pleadings of the plaintiff and the evidence of P.W.4. If they had done so they would not have observed that:

“The trial judge however failed to give any consideration to the important matters pleaded by appellant, and given in evidence by him and supported by a rigid documentary in evidence in Exhibit “E”. The trial Judge must have been swayed to ignore Exhibit “E” by the testimony of P.W.4 that the respondents were not at the meeting of 2/5/71.”

but would have arrived at the conclusion that Exhibits E and F had no relevance to the case before them. Paragraph 10 (as amended) of the statement of claim reads:

“10. When the defendants did this, the plaintiff reported them to the members of Amobi family. The members of Amobi asked about five elders and two other men to look into the matter. These people after visiting the land in dispute reported back to the whole of Amobi family that the defendants actually broke into plaintiff’s land (the land in dispute). The members of Amobi family then told the defendants to stop further trespass into the land. The defendants were also asked to return to the plaintiff the palm fruits they reaped from the land. The arbitration and findings were recorded in the Amobi family minutes book and the plaintiff shall found and rely on it.”

Thus the arbitration pleaded was that of the Amobi family and the minutes book to be founded and relied upon was that of the Amobi family. But what did PW4 tender?

Cross-examined by the defence counsel, PW 4 testified thus:

“Exhibits E and F relate to monthly meetings of Amobi/Jideofor family. It was not an exclusive meeting of Amobi family alone. The defendants were not present at the meetings which I recorded in Exhibits E and F The Amobi family has a land committee which settles land disputes between members of the family. The Jideofor sector are not members of the land committee. I am not the Secretary of the land Committee. It Is different from the Amobi/Jideofor family meeting. It is the land committee, and not the general meeting that deals with land disputes among members of the family.”

(Underlinings are mine)

The above evidence showed clearly that Exhibits E and F did not relate to the arbitration pleaded in paragraph 10 of the statement of claim. According to

PW4 a meeting of the Amobi family is not the same thing as a meeting of the Amobi/Jideofor family. If there was an arbitration of the dispute between the parties by the Amobi family the arbitration would be by the land committee of the Amobi family of which PW4 was not secretary and could therefore not have recorded the minutes of its deliberations. Thus, far from assisting the plaintiff, the evidence of PW4 and Exhibits E and F supported the case of the defendants that there was no such arbitration. It follows that even if PW4 had been allowed to answer the only question put to him in re-examination and had testified that the defendants were present at the meetings of the Jideofor sector of Amobi family in respect of which Exhibits E and F related, this would still not have helped the plaintiff as such evidence would have been at variance with his pleadings and therefore inadmissible. It is for this reason that I agree with their Lordships of the Court below that even if the trial Judge's disallowing of the question asked in re-examination was wrongful, there was no miscarriage of justice resulting thereby. I have already found that the learned trial Judge, by disallowing the question did not do anything wrong. I must therefore answer Question 2 in the negative, that is, the trial Judge did nothing that could be said to amount to a miscarriage of Justice.

Question (3)

In dismissing the plaintiff's appeal the Court below, per Oguntade JCA observed:

".....there was, evidence that the respondents came on the land. They planted crops and harvested fruits therefrom. There was evidence from the respondents mother that she had been on the land for several years. She claimed that she came on the land as a result of a grant from the Amobi family. The learned trial judge found that the respondents had been on the land through their mother for many years.

The position then is that since both parties claimed to be in possession of the parcel of land in dispute, the law would only ascribe possession to either of them who could prove a better title. See *Aromire v. Awoyemi* (1972) 2 SC. 1.

In that setting, the respective titles of parties to the land was clearly placed in issue. In *Amakor v. Obiefuna* (supra), the Supreme Court explaining the decision in *Kponuglo v. Kodaja* (1933) 2 W.A.C.A. 24 put the matter in these words:

"Generally speaking, as a claim for trespass to land is rooted in exclusive possession all a plaintiff need to prove is that he has exclusive possession, or he has the right to such possession, of the land in dispute. But

once a defendant claims to be the owner of the land in dispute, title to it is put in issue and in order to succeed, the plaintiff must show a better title than that of the defendant."

That decision when translated to the facts of this case means that the appellant had the onus of showing that he had a title superior to respondents over the land in dispute.

In doing so, the appellant must rely on the strength of his own case and not on the weakness of the defence case. See *Kodilinye v. Odu* (1935) 2 WAC.A. 336. I grant it to the appellant that if the trial judge had properly considered the contents of exhibits "E", he might have concluded that the Amobi family did not grant any land to respondents mother as respondent alleged. That obviously was a weakness in the defence case. But it would not without more lead to a pronouncement by the trial court in favour of the appellant's case since appellant as plaintiff would still have to prove his case. Appellant would rust have to show a prima facie case before the court could start considering the defence ease and its weakness.

In *Godwin Egwuh v. Duro Ogunkehin* SC. 529/66 decided on 28/2/69, the Supreme Court said concerning this situation thus:

"We are in no doubt that on the pleadings the case of the plaintiff postulates that she had a better title to the land than the defendant who admittedly was at the time of the institution of the proceedings, rightly or wrongly in possession of the land The learned trial judge rejected the defendants case and passed severe strictures on the defendant's witness and their conduct, but with respect, a consideration of the defendants case and the weakness of it did not arise until the plaintiff had led evidence showing prima facie that she had a title to the land. She had failed to do this and it is inconceivable that she would be allowed to succeed on her claims when, as indeed it is, the defendant is in possession and maintains that he is entitled so to remain. If it be alleged that someone in possession of land is a trespasser the person so alleging has the onus of showing that he has a better right to the possession which was disturbed and unless that onus is discharged, the person so alleging cannot defeat the rival party. Such is the case here and we are of the view that the plaintiffs case had failed and it should have been dismissed." See also *Mogoji v. Cadbury Fry* (Nig.) (1985) 2 NWLR (Pt. 7) 393.

Now the question is, quite apart from the weakness of respondents case, did appellant show a prima facie title to the land in dispute? I think not. The case of the plaintiff is that his father, Chief Walter Amobi acquired the land in dispute by purchase. However, no conveyance or purchase receipt granted to Chief Walter Amobi was tendered in evidence. There was no

scintilla of evidence before the court from those persons or family who sold the land to Walter Amobi

It is patent that the appellant never proved the only title he relied upon. He did not show his late father became the owner of the land which the father later gave to appellant's mother and which appellant claimed to have inherited. The evidence of P.W.2 as to what he saw on Walter's records which were not before the court was plain hearsay.

The position then is that the appellant at the trial succeeded in showing vide Exhibit "E" that the Amobi family could not have granted the land to the respondents. But the appellant failed to prove the title which he relied upon.

In such situation the only conclusion to be arrived at is that appellant failed to prove his case. It was therefore rightly dismissed."

The plaintiff attacked the reasons given in the passage above. He described them in his brief as untenable. He referred to the evidence of PW2 D wherein the latter testified:

"Walter bought it (that is, Iyenu land) from the people of Oze-Nkwerre"(Brackets are mine)

and argued that conveyance and purchase receipts *"were hardly known in customary land deals in those days"*. Plaintiff, in his brief, also referred to the E evidence of DW3 to the effect that

"Iyenu land was bought by Igwe 1"

(that is, appellant's father) and submitted that his traditional evidence that his father Walter Amobi, Igwe 1 of Ogidi was the sole owner of the land and that he (Amobi) granted it to his (appellant's) mother from whom the F appellant inherited the land was sufficient. Plaintiff submitted that on the totality of the evidence it was wrong of the Court below to hold that he had not proved "a prima facie title" to the land in dispute.

I find no merit at all in all the arguments of the plaintiff. He claimed in his pleadings that his father Walter Amobi owned the land and G gave it to his mother from whom he inherited it. How his father came to own the land was not pleaded. He testified that his father bought Iyenu land and his witness, PW2 testified that Walter Amobi bought the land from the people of Oze-Nkwerre. But these facts were not pleaded. And it is trite law that evidence on a fact not H pleaded goes to no issue - see: Idahosa v. Oronsaye (1957) SCNLR 407; (1959) 4 FSC 166; Nigerian Fishing Co. v. WNFC (1969), NMLR 164; Ogboda v. Adulugba (1971) 1 All NLR68; George v. U.B.A. (1972) 8-9 SC.264; Orizu v. Anyaegbunam (1978) 5 SC. 21. The position then is that plaintiff failed to plead, and to prove, how his father Walter Amobi came to own Iyenu land

part of which the latter allegedly gave to plaintiffs mother. He thus failed to trace his root of title to the radical owner of the land. On this ground alone, his claim must fail- see: Ogunleye v. Oni (1990) 2 NWLR (Pt.135) 745; Kalio v. Woluchem (1985) 1 NWLR (Pt. 4) 610; Piaro v. Tenalo (1976) 12 SC. 31; Bamgboye v. Olusoga (1996) 4 NWLR (Pt. 444) 520.

True enough, plaintiff claimed in trespass and injunction. By his claims he has put his title in issue for this claims postulate that he is the owner of the land in dispute or has had, prior to the trespass he complained of exclusive possession of it- see Kponuglo v. Kodaja 2 WACA 24; Ogunleye v. Oni (supra). The onus was on him, therefore, to prove a better title to the land. The learned trial Judge found that the defendants, through their mother - DW3, was in prior possession of the land. This finding was affirmed by the Court below. There was overwhelming evidence to support it. In the circumstance, for the plaintiff to succeed he must show that he had better title to the land than the defendants. Ogunde v. Ojomu (1972) 4 SC.105; Aromire v. Awoyemi (1972) 2 SC.1; Mogaji v. Cadbury (Nig.) (1985) 2 NWLR (Pt.7) 393. This the plaintiff failed to do. In the light of the findings of the learned trial Judge which findings were adequately supported by the credible evidence on record, it is difficult to see how plaintiff could succeed. His case is unmeritorious and is rightly, in my respectful view, dismissed. I answer question (3) in the negative.

All the issues canvassed in this appeal having been resolved against the plaintiff, it follows that his appeal fails and it is hereby dismissed. His claims in the trial court stand dismissed. I award N1,000.00 costs of this appeal to the defendants.

UWAIS CJN

I have had the privilege of reading in draft the judgment read by my learned brother Ogundare, J.S.C. I agree with him that this appeal lacks merit.

Accordingly I too hereby dismiss the appeal with N1,000.00 cost to the respondents.

BELGORE JSC

Learned trial judge in a very well considered judgment based on the pleadings and evidence before him came to the conclusion that the plaintiff's case had no merit and dismissed it. This decision the Court of Appeal affirmed.

I can find no reason whatsoever to interfere with the concurrent findings of facts of the two lower Courts and I agree with Ogundare, J.S.C. that this appeal has no merit. For the reasons advanced in the judgment of my learned brother I also dismiss this appeal and uphold verdict of dismissal of plaintiff's case by the lower Courts. I award N1,000.00 as costs of this appeal to respondents B against the appellant.

OGWUEGBUJSC

I have had the opportunity of reading in draft the judgment read by C my learned brother Ogundare, J.S.C. I agree that the appeal of the plaintiff should be dismissed.

The plaintiff claimed damages for trespass and for injunction in the court of trial. It follows that he has put his title in issue. This means that he is either the owner of the land or he is in exclusive possession. He D has the onus of showing that he has a better title to the land. He failed to do this.

The findings made by the learned trial judge were amply supported by the evidence. The court below was, therefore, right in upholding the decision of the learned trial judge.

E Consequently, I will dismiss the appeal with N1,000.00 costs to the defendants/respondents.

MOHAMMEDJSC

F I entirely agree with the opinion of my learned brother, Ogundare, JSC, in his judgment, just read, that this appeal lacks merit and ought to be dismissed.

The appeal is accordingly dismissed. I abide by all the consequential orders made in the lead judgment.

G Appeal dismissed.

H