

**SUPREME COURT OF NIGERIA**  
24TH JANUARY, 1997. SC. 134/1989  
**CORAM:- S. M. A. BELGORE, A. B. WALI, E. O. OGWUEGBU,**  
**S. U. ONU, Y. O. ADIO, JJSC.**

NWOKAFOR EJINDU & 2 ORS. .... PLAINTIFFS/  
(For themselves and on behalf of the families APPELLANTS  
of Uyenu, Udechukwu and Obi families of  
Ikewelugo of Umuebam in Uruowulu Village,  
Obosi)

AND

OFOJAMA OBI & 2ORS. .... DEFENDANTS/  
(For themselves and on behalf of the families RESPONDENTS  
of Uyenu, Udechukwu and Obi families of  
Ikewelugo of Umuebam in Uruowulu  
Village, Obosi)

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***APPEALS** - Issues - Not formulated in the parties' pleadings - And not forming any ground of appeal - Cannot be dealt with by the Court of Appeal.*

***APPEALS** - Retrial - Where appellants' case was wrongfully upset by Court of Appeal - Retrial will not be upheld.*

***PLEADINGS** - Fact that was pleaded - Whether Court can suo motu - Raise implication of that fact - Not raised by the parties.*

***PLEADINGS** - Purpose of- Where parties have joined issues on a matter -They cannot go outside that matter.*

**FACTS**

Before the Anambra State High Court Onitsha, the plaintiffs/appellants sued the defendants/respondents seeking a declaration that the land in dispute is a communal land of both parties. Appellants contested their case on the ground that they have a common male ancestor with the respondents. The respondents on their part sought to establish that the appellants were strangers who settled with the respondents because their mother, who was married elsewhere was of a common ancestor with the respondents.

The trial court found that the appellants were of same family with the respondents and gave judgment in favour of the appellants.

Respondents' appeal to the Court of Appeal was allowed pursuant to a suo motu issue raised by that Court. The court below ordered a retrial of the case. Appellants being dissatisfied have now appealed to the Supreme Court raising 3 issues.

**ISSUES FOR DETERMINATION**

*“(1) Whether the implication of payment of tribute by the 3rd plaintiff/appellant on the land communally owned by Ebunam family and Okelue family was an issue raised in the pleadings or grounds of appeal between the parties. Etc, see p. 118*

**HELD** (Unanimously allowing the appeal per lead judgment of **ONU JSC**)  
***Fact that was pleaded - Court's suo motu raising of its implication***

1. From the foregoing, it is clearly demonstrated that the parties to the case herein on appeal well and truly pleaded the payment of tribute perse but not definitely the “implication of payment of tribute.” I therefore agree with the appellants' submission that the court below raised the matter of implications of tribute payment suo motu and that that standing alone constitutes a breach of fair hearing. It is in the light of the foregoing also that I hold that as no issue was raised and joined on the implication of payment of tribute in the trial court, the court below was wrong to have suo motu raised and treated it. Nor can the payment of the tribute by the 3rd appellant on the land communally owned by Ebunam and Okelue families ipso facto negate the claim by the appellants that they are members of the Ebunam family, more so that the parties by their pleadings did not make that same an issue. (pp. 121 E& 122 H)

***Purpose of pleadings***

2. It is now clearly settled that the purpose of pleadings in civil cases is to give notice to the other side of the case he is coming to meet in court so as to enable him prepare adequately for same and avoid being taken by surprise. Once, as happened in the instant case the parties had joined issues on a particular matter or matters. They must confine themselves to the matter or matters agitated before the court and nothing more. To go outside it or them is a course that will be out rightly discountenanced. (p. 122 B)

***Issues not formulated in the parties' pleadings***

3. This court has held in a host of cases that issues to be pronounced upon must be clearly formulated by the parties themselves in their pleadings. Thus, I agree with learned counsel for the appellants' contention that issues not so formulated by the parties in their pleadings cannot be

dealt with by the opening of a new vista as the court below has done into the case in hand since to do so, tantamount to a denial of justice. Hence, as the implications of the payment of tribute by the 3rd appellant was neither a ground of appeal nor an issue before the court below, a careful perusal of ground one of the grounds of appeal upon which it was purportedly predicated or hinged, does not provide it with such a pedestal. It is therefore, in my opinion, misconceived. (p. 123 H)

***Appeals - Retrial***

4. from all I have hereinbefore discussed, I see no reason whatsoever to order a retrial in the case in hand since the appellants had proved their case in the trial court on the balance of probabilities and the court below was palpably wrong to have upset it. (p. 127 A)

**REPRESENTATION**

Rob Iweka, with A. N. Iweka (Mrs.) for the Appellants  
Chief Edwin Ume-Ezeoke for the Respondents

**CASES REFERRED TO**

George v. Dominion Flour Mills Limited (1963) 1 All N. L.R. 71 at 77  
Oduka v. Kasunmu (1967) 1 All NLR 293 at 297  
Olusanya v. Olusanya (1983) 3 S.C. 41 at pp. 56-57  
African Continental Seaways Ltd. v. Nigerian Dredging Roads and General  
Words Ltd. (1977) 6 S.C. 235 at 248  
Kadiri v. Kadiri (1990) 5 N.W.L.R. (Part 153) 675 at 673  
Okeowo v. Migliore (1979) N.S.C. 138  
Olumolu v. Islamic Trust of Nigeria (1996) 2 KLR (Pt 38) 200; (1996) 2  
NWL R (Part 430) 253 at 263-264  
Ajibade v. Pedro (1992) 5 N.W.L.R. (Pt. 241) 257  
Olatunji v. Adisa (1995) 2 KLR 321  
Balogun v. Adejobi (1995) 1 KLR 252  
Kuti v. Jibowu (1972) 6 S.C. 147 at 172-173  
United Bank for Africa v. Achoru (1990) 6 N.W.L.R. (pt. 156) 254

**LEAD JUDGMENT BY ONU JSC**

The appellants as the successful plaintiffs in the High Court of Anambra State, presided over by Awogu, J. (as he then was) holden in Onitsha, lodged the appeal herein from the decision of the Court of Ap-

peal, Enugu Division (coram: Katsina-Alu, Macaulay and Oguntade, JJ.C.A.) which upheld the defendants/respondents appeal thereto. It was sequel to plaintiffs/appellants action filed for themselves and on behalf of the Ejindu family of Umu-Muoneme, Umuebunam, in Uruowolu Village, Obosi against the defendants/respondents who defended the action for B and on behalf of Uyenu, Udechukwu and Obi families of Umu-Ikewlugo, Umuebunam in Uruowulu Village, Obosi, as per their writ dated 11/10/76 for the following reliefs:-

*“1. Declaration that Ana Umuebunam situate at Obosi, comprising Ana Odo Izuzu, Ogwugwu Enebo and Abo, is the communal property not of the defendants alone but of both the plaintiffs and the defendants Annual value N20.00.*

*2. Declaration that the defendants according to native law and custom have been wrongfully in possession of the same land to the exclusion of the plaintiffs since 1973.*

D *3. Order for recovery of possession.*

*4. N2,000(two thousand naira) damages.*

*5. Perpetual injunction to restrain the defendants by themselves, their servants agents and otherwise from excluding the plaintiffs as joint owners and from dealing with the land in dispute in a manner inconsistent with the interests of the plaintiffs.*

6. **ALTERNATIVELY**

*An order for partition of the said Ana Umuebunam between Umu-Muoneme and Umuikewelugo.”*

Pleadings were ordered, duly filed and delivered with the plaintiffs/appellants amending their statement of claim in item (3) above, claiming for the recovery of possession of the family “Ikenga.” The case, in which issues were fully joined on traditional history and which consequently went to trial wherein the plaintiffs/appellants and the defendants/respondents (hereinafter in the rest of this judgment referred to simply as G appellants and respondents respectively), was founded upon the following contentions, facts and admissions.

The appellants contention was that there was an ancestor of theirs called Nnagbe (son of Okpala Ogigala- their foremost ancestor) who had four sons, namely Osiga, Ajagala, Ebunam and Okelue by names. H That Ebunam and Okelue come from one mother and that Ebunam had three sons, namely Ikewelugo, Muoneme and Adigwe, who together are referred to as Umu-Ebunam. That by native law and custom the three sons of Ebunam coming from different mothers, are entitled to inherit the property of their father including the land in dispute. The appellants descend through

Muoneme and the respondents descend through Ikewelugo.

The respondents, for their part admitted that the lands in dispute belong to Ebunam but denied that they are the communal property of both the appellants and the respondents. They further contended -

(a) That Ebunam who was the owner or original settler of the lands in dispute had only one son called Ikewelugo who inherited the said lands and through whom the respondents inherited the property of Ebunam in dispute.

(b) That there was also only one daughter of Ebunam called Nwanyinma who was given in marriage to an Onitsha family called Eze-Ocha in the Iyiauwu village of Onitsha.

(c) The respondents further maintained that the appellants were the grand children of Ebunam (Nwadianis) who were assimilated into the family group of Ebunam Nnagbe. That Nwayinma having been married into Iyiauwu Village of Onitsha gave birth to Etuka and Agusia - the appellants ancestors.

The case went to trial at the end of which learned counsel for either side addressed the trial court. Upon reviewing the totality of the evidence, the learned trial Judge in a well considered judgment delivered on 1st June, 1984 found in appellants favour after resolving the conflicts in the traditional histories pleaded that -

(a) That Ebunam had three sons (as contended by the appellants) namely Ikewelugo, Muoneme and Adigwe and rejected outright the defence that Ikewelugo was the only son (as argued by the respondents).

(b) That the respondents failed to prove that the appellants were their Nwadianis (Strangers from Onitsha begotten as claimed through Nwayinma the only daughter of Ebunam).

In the result, the learned trial Judge awarded reliefs 1, 3 and 5 while refusing reliefs 2,4 and the alternative relief with costs assessed at N800 in favour of the appellants. The respondents being dissatisfied with this judgment appealed to the Court of Appeal (hereinafter referred to as the court below) which in its judgment dated the 8th day of December, 1987 allowed the appeal, set aside the decision of the trial court and ordered a retrial by a Judge of the Anambra State High Court as the Chief Judge may direct. This appeal, as hereinbefore stated, is against that judgment of the court below premised on four grounds contained in a Notice of Appeal dated 3rd March, 1988. Briefs were filed and exchanged in accordance with the Rules of this Court.

In the appellant amended Brief of Argument dated 18th May, 1994 they submitted three issues as arising for determination. They are:-

“1) Whether the implication of payment of tribute by the 3rd plaintiff/appellant on the land communally owned by Ebunam family and Okelue family was an issue raised in the pleadings or grounds of appeal between the parties.

2) Whether payment of tribute by 3rd plaintiff/appellant on the land communally owned by Ebunam family and Okelue family negates the claim by the plaintiffs/appellants that they are members of Ebunam family and consequently, necessitating a retrial.

3) Whether in view of the findings of facts especially on the main issues before the High Court, Onitsha, most if not all of which were confirmed and not reversed by the Court of Appeal the later (sic) court was right to have set aside the decision of the very same High Court and orders (sic) a retrial.”

The respondents for their part proffered the following six issues as arising for determination in this appeal, viz:

“1(a) Whether the admission made by the plaintiffs/appellants that the 3rd plaintiff/appellant lives on the land inherited from the ancestors of the defendants/respondents and paid tribute was, in view of the state of the pleadings filed in this suit, a fact in issue or relevant facts?

If the answer to (a) is in the affirmative

(b) Whether the Court below was in error to have ordered a retrial for the failure of the learned trial Judge to advert to and consider this admission aforesaid in his evaluation of evidence?

2. Whether the Court of Appeal misapplied the rule in *Mogaji v. Odofin* (1978) 4 SC 91?

3(a) Whether the Court of Appeal misdirected itself as to the status of the Ebunam and Okelue families? If the answer to this is in the affirmative; (which is denied)

(b) Whether that misdirection has occasioned a miscarriage of justice?

ISSUE 4 Whether the averment to paragraph 3 of the plaintiffs’ reply to the Statement of Defence is an admission under section 19 of the Evidence Act, 1990. If the answer is yes, whether the facts admitted required further proof in evidence, notwithstanding Order 24, Rule 19(1) of Anambra State High court Rules, 1988.

ISSUE 5 Whether in the light of the pleadings and the evidence before the trial court, there are irregularities in the assessment and evaluation of evidence by the trial court to warrant intervention and reevaluation by the Court of Appeal.

ISSUE 6 Whether the order for Retrial made by the Court of

*Appeal was appropriate in the circumstances of this case.”*

In my consideration of this appeal I intend to stick to the three issues formulated for our determination by the appellants since they are, in my opinion, more comprehensive and apt.

At the hearing of the appeal on 27th October, 1996 learned counsel for both sides relied on their briefs of argument. They each expatiated on them. For the appellants, learned counsel Rob Iweka, Esq. after orally submitting that he relied on the amended appellants brief dated 18th May, 1995 pointed out that of the three issues submitted as arising for consideration, he would argue Issues 1 and 2 together and later issue 3 separately. He contended that the crux of this appeal is that the 3rd appellant C lives and pays tribute on land jointly owned by two separate families namely Ebunam and Okelue families. That the findings of the court below in which in its judgment it held that -

*“In the judgment of the court below, not a word was spared on the vital admission made by the plaintiffs/respondents. In other words, D an important aspect of the defence case was never considered. This omission has in my view led to a substantial miscarriage of justice.*

*I cannot say that the appellants case has had the fair consideration it deserved in the hands of the trial Judge. The findings of fact made by the trial Judge which were the products of inadequate and incomplete consideration of the admission on record ought not to be allowed to stand. The first ground of appeal succeeds and because I am unable to say what conclusions the learned trial Judge would have come to if he had adequately and fully considered the case before him, it is proper to make an order for retrial in the High Court of Anambra State” F* has led to a miscarriage of justice. Similarly, learned counsel contended that the court below was equally wrong when in similar vein it held inter alia that:

*“That as to the admission by 1st and 2nd plaintiffs that they live on Umuosiga land and pay tribute, i do not see how this can be taken to G derogate from the case made by the plaintiffs/respondents that they are descendants of Ebunam, Umuosiga land. If a man who has a family land goes to live on land belonging to another family, he cannot because his family owns land be excused from paying tributes to his landlord. It is illogical also to infer that any person who lives on another family’s land H does so because the family of such person has no land. The attempt by appellants, to show that 1st and 2nd plaintiffs/respondents live on Umuosiga family land and pay tributes only because they are not members of Umuebunam family is in my humble view a-non-issue. It must fail. “*

The foregoing findings of fact, learned counsel maintained, simultaneously resolved the issue of admission said to have been made by the 3rd appellant. The mistake the court below fell into, it is further submitted, arose when it failed to treat the two families as one family. In effect, the question the court below posed was, how can you pay tribute on your own land? However, B that the same court treated the two families as one can be seen from an extract in its judgment wherein it said inter alia that -

*“The implication of this is that the 3rd plaintiff who belongs to the same family with the 1st and 2nd plaintiffs is not a descendant of Ebunam. If he were, he would not have to pay tribute for living on his family land.”*

C The learned counsel in his quest to make his submission abundantly clear quoted further from the judgment of the court below in extenso thus:

*“The plaintiffs/respondents have admitted in the Reply to the Statement of defence that the 3rd plaintiff lived on the land of Ebunam D and Okelue and paid tribute. This admission in my view has serious implications for the case of plaintiffs/respondents. It is by itself capable of showing that the plaintiffs/respondents are not descendants of Ebunam/Okelue through Muoneme as they have claimed.*

*At the hearing of the case, the 2nd plaintiff/respondent in his E evidence under cross-examination at page 46 of the records tried to diminish the damage to plaintiffs/respondents case when he said thus:-*

*“1st and 3rd plaintiffs family live on Umuosiga land and pay tribute. Where 3rd plaintiff and his family live in land jointly owned by Okelue/Ebunam. Anyamene is not a joint owner. The 3rd plaintiff did not F pay tribute to Obi Ajie who was Okpala because 3rd plaintiff is a member of Ebunam family” (Italics mine).*

*The above piece of evidence which I have Italicized is a clear departure from the case made by the plaintiffs/respondents on the reply to the Statement of Defence that the 3rd plaintiff paid tribute to Okelue/ G Ebunam family.*

*Throughout the case the relevant pleading of the plaintiffs/respondents remained unamended.”*

In respect of the above quotation learned counsel submitted that it ought to be made abundantly clear that 3rd appellant’s family land is Ebunam H land and not Okelue land; that the two families held the land in common but lived as separate and distinct families and that payment of tribute to the diokpa per se cannot be evidence that the payer is a foreigner (Nwadiani). Our attention was then drawn to the pleadings of the parties, particularly paragraph 9 of the Statement of claim at page 7 of the trial court’s Record vis-a-vis paragraph

15, page 18 of the trial court's Record to the effect that -

Paragraph 9 of the Statement of Claim:

*"IRU" is a tribute paid to the diokpa of the family who holds land in trust for other members of the family. The one who pays the tribute is the one who would succeed as the next diokpa of the family. The diokpa of a polygamous family is not necessarily the eldest member of the family. "Iru" paid to the diokpa is not a constant. It is comprised of the following and paid as follows in respect of his family:-*

1. At "Obiora" festival: 8 yams  
(celebrated about the 1 kolanut  
9th month of the year). 1 gallon of palm wine
2. At "Onu" festival 1 of the fore  
(about end of July) arms of a goat, or one wing of a fowl  
whichever was killed at the festival by one would be the successor
3. At "Olu Iru" (about 8 days after One day free labour" "Onu")

Paragraph 15 of the Statement of Defence:

*"The defendants admit paragraph 9 of the statement of claim as being in keeping with Obosi Native Law and Custom."*

**From the foregoing, it is clearly demonstrated that the parties to the case herein on appeal well and truly pleaded the payment of tribute per se but not definitely the "implication of payment of tribute." I therefore agree with the appellants submission that the court below raised the matter of implications of tribute payment suo motu and that that standing alone constitutes a breach of fair hearing. See Otapo v. Sunmonu (1987) 2 NWLR (Pt. 58) 587 wherein this court held inter alia that**

*"When a represented party is not heard or given the opportunity of being heard in a case the principles of natural justice are abandoned"*

See also Kotoye v. CB.N. (1989) 1 NWLR (Pt. 98) 419 at 448 wherein Nnaemeka Agu, J.S.C. held as follows:-

*"For the rule of fair hearing is not a technical doctrine. It is one of substance. The question is not whether injustice has been done because of lack of hearing. It is whether a party entitled to be heard before deciding had in fact been given an opportunity of hearing. Once an appellate court comes to the conclusion that the party was entitled to be heard before a decision was reached but was not given the opportunity of a hearing the order/judgment thus entered is bound to be set aside."*

In the instant case, the point raised about the implications of customary tribute suo motu by the the court below before which the overriding

issue for resolution by the parties was whether the appellants were Nwadianis or strangers - an issue which along with the return of the 'Ikenga' to the appellants had been thrashed out and was no longer of any moment; indeed since the respondents were not cross-appealing on the point, the court had no business re-opening a new case that no longer B concerned it as an appellate court arising either from the pleadings or in the evidence led by the parties before the trial court. **It is now clearly settled that the purpose of pleadings in civil cases is to give notice to the other side of the case he is coming to meet in court so as to enable him prepare adequately for same and avoid being taken by surprise.** See *George v. Dominion Flour Mills Limited* (1963) 1 SCNLR 117; (1963) 1 All NLR 71 at 77. Once, as happened in the instant case the parties had joined issues on a particular matter or matters (See *Ehimare v. Okaka Emhonyon* (1985) 1 NWLR (Pt. 2) 177 they must confine themselves to the matter or matters agitated before the court and nothing more. To go outside it or D them is a course that will be out rightly discountenanced. See *Oduka v. Kasumu* (1967) 1 All NLR. 293 at 297; *Emegokwue v. Okadigbo* (1973) 4 SC 113 at 177; *Ajao v. Alao* (1986) 5 NWLR (Pt. 45) 802; *James v. Mid-Motors Limited* (1978) 11/12 SC 31 at 60, and *Ukaegbu v. Ugoji* (1991) 6 NWLR (Pt. 196) 127 at 155-156. This is because specific pleading E is part of the rule of fair hearing that we are here concerned with, moreso that no one can be required to prepare for the Unknown. As *Irikefe J.S.C.* (as he then was) put it in *Akpakpuna v. Obi Nzeka II* (1983) 2 SCNLR 1.

*"A defendant in a civil case is not obliged to wade blindfolded through a booby-trapped and uncharted mines field in order to discover F at the end thereof what case he had to meet."*

This is why, in my judgment, the conclusion arrived at by the court below in the instant case goes to no issue, moreso that it is not open to it to introduce a new issue or issues which did not arise from the pleadings. Consequently any decision based thereon ought not to be allowed to stand. See *Idika v. Erisi* (1988) 2 NWLR (Pt. 78) 563 at 576. Provided, however, that for a point or points raised suo motu as herein, the parties must be given an opportunity to address the appeal court before a decision on it or them is made by the appeal court. See *Olusanya v. Olusanya* (1983) 1 SCNLR 134; (1983) 3 SC 41 at pp. 56-57 and *Chief Frank Ebba H v. Chief Warri Ogodu* (1984) 1 SCNLR 372; (1984) 4 SC 84 at 112.

**It is in the light of the foregoing also that I hold that as no issue was raised and joined on the implication of payment of tribute in the trial court, the court below was wrong to have suo motu raised and treated it. Nor can the payment of the tribute by the 3rd**

**appellant on the land communally owned by Ebunam and Okelue families ipso facto negate the claim by the appellants that they are members of the Ebunam family, moreso that the parties by their pleadings did not make the same an issue.** As there was therefore no such affirmation and denial of the implication of such payment of tribute the necessity and urgency of pleading such fact of custom would be a deviation from the evidence on record, to wit: that a successor to the incumbent “Diokpa” (Family Head) pays tribute to the “Diokpa” inspite of the fact that he shares common descent with the “Diokpa” as reflected in paragraphs 8, 9, 10, 11, 12 and 14 of the appellants Statement of Claim vis-a-vis paragraph 15 of the respondents Statement of Defence. Without pleading this particular custom, one can as well speculate that the payment of the tribute implies that the 3rd appellant is not of the same common descent as the respondent much against the grain of the factual situation. However, since the payment of tribute by the 3rd appellant was admitted by both parties, the customary implication of such payment must perforce be pleaded and established by evidence and ought not to be raised by conjecture or become subject of speculation as the court below engaged in the instant case. Indeed, the issue which emerged in the pleadings and evidence between the parties and which the court below upheld was, whose traditional history of descent, appellant or respondents, was correct? To this question the court; below had rightly replied as follows:-

*“I do not see that the question whether or not there were more than one Obi-eche would in any case have affected the central issue which was the number of children that Ebunam had.”* (Italics is mine) Having thus crystalized the central issue, the court below was obliged to make use only of evidence which touched on the traditional history of descent and not, with due respect, a speculation on “implications” of unrelated piece of evidence which stood in a class of its own. In this regard too it must be borne in mind that the court below in confirming the decision of the trial court did say as follow:-

*“I accept the evidence of the plaintiffs and find as a fact that Ebunam begat Ikewelugo, Muoneme and Adigwe. I reject the defence that Ikewelugo was the only son.”*

When therefore, the court below went ahead to raise the issue of the “implications” suo motu for the first time, it was doing so oblivious of the fact that earlier on it had ironically held in unequivocal terms that:

*“Parties will not be allowed to make a case at the trial which they had not made on the pleadings.”*

**This court has held in a host of cases that issues to be pronounced upon must be clearly formulated by the parties themselves**

**in their pleadings.** See *African Continental Seaways Ltd. v. Nigerian Dredging Roads and General Works Ltd.* (1977) 5 SC 235 at 248; *Kuti & anor v. Jibowu & anor* (1972) 6 SC 147 at 171-174 and *Umar v. Bayero University* (1988) 4 NWLR (Pt. 86) 85 at 93. **Thus, I agree with learned counsel for the appellants contention that issues not so formulated by the parties in their pleadings cannot be dealt with by the opening of a new vista as the court below has done into the case in hand since to so do, tantamount to a denial of justice. Hence, as the implications of the payment of tribute by the 3rd appellant was neither a ground of appeal nor an issue before the court below, a careful perusal of ground one of the ground of appeal upon which it was purportedly predicated or hinged, does not provide it with such a pedestal** (See *Kadiri v. Kadiri* (1990) 5 NWLR (Pt. 153) 665 at 673 paragraphs B-C). **It is therefore, in my opinion, misconceived.**

This is notwithstanding the definition of the word tribute according to Wharton's Law Lexicon (not too apt) as "*a payment made in acknowledgement, subjection.*" Black's Law Dictionary, on the other hand, defines it as follows:

*"A contribution which is raised by a prince or sovereign from his subjects to sustain the expenses of the state. A sum of money paid by an inferior sovereign or state to a superior potentate to secure the friendship or protection of the latter.*

*Acknowledgment of gratitude of respect."*

Unfortunately for the respondents in the instant case, the issue of tribute never arose in the pleadings at the trial court. My answer to issues 1 and 2 is accordingly in the negative.

The third issue for determination which arises from ground 3 of the grounds of appeal is whether there was a substantial miscarriage of justice necessitating a retrial after the learned Justices of the court below had upheld all the crucial findings of fact by the trial Judge.

I must point out straight away that a miscarriage of justice in the instant case must of necessity relate to incomplete and inadequate consideration of the traditional history of descent. That the learned Justices of the Court below were cognisant of this fact can be seen in their judgment wherein they clearly pointed out that at the close of pleadings, it would appear that the principal issue to be determined fell under the simple question - whose traditional history of descent was correct or probable the appellants or respondents. In the first place, the findings of fact touching on the traditional history of descent by the learned trial Judge were all upheld by them (the learned Justices of the court below) who, in effect,

dismissed all the eight grounds of appeal filed by the respondents for their consideration except that wrongly formulated by them and considered extensively by me in issues 1 and 2 above. But for the ground and/or issue wrongly formulated by learned Justices of the court below considered under issues I and 2 above, therefore, the decisions of the two courts below would consist of concurrent findings of facts. B

When therefore the trial court held inter alia that -

*"I find as a fact that the defendants failed to prove that the plaintiffs were their 'Nwadiani' and accept the plaintiffs' evidence through P.W.4 that it was the descendants of Nebuwa who are 'Nwadiani' in Obosi."*

That finding was a rejection of the traditional history of descent as put forward by the respondents and the acceptance of the traditional history of descent by the appellants. The learned Justices of the court below however, upheld the finding of fact and reasoning of the learned trial Judge when they said:

*"The trial Judge in my view gave ample consideration to the matter on pages 123 and 124 of the record, he considered the evidence of all the witnesses who testified after which he concluded;*

*"I find as a fact that the defendants failed to prove that the plaintiffs were their 'Nwadiani' and I accept the plaintiffs evidence through PW4 that it was descendants of Nebuwa who are Nwadiani in Obosi."* E

*"There is no basis for me to disturb the findings of fact made by the trial Judge on the point. I decline to do so. The second ground fails.* That, in effect amounts to an acceptance of the version of the appellants case that they are direct male descendants of Ebunam and not strangers, there being no other version of their traditional history of descent by the F respondents.

Secondly, the learned trial Judge found as a fact that the 'Ikenga' of Umubunam should go to the 1st appellant as follows:-

*"Accordingly, I find from the evidence before me that it is the turn of the plaintiffs to produce the Okpala of Umuebunam, and that the 1st plaintiff is the person entitled to hold the Ikenga of Umuebunam being the Okpala. After his reign, it will be the turn of 2nd defendant. "* G  
The court below in upholding the above finding of fact above stated as follows:

*"Having regard to the evidence of 2nd plaintiff/respondent on the point and the admission made by defendants/appellants on the pleading, I cannot find anything wrong with the conclusion of the trial Judge that the "Ikenga" should be handed over to the plaintiffs/respondents. The fourth ground therefore fails"* H

It is worthy of note that the “Ikenga” is a symbol of unity and oneness in the family and which can only be held by one who belongs to a direct line. In the instant case this fact was pleaded in paragraphs 18 and 19 of the appellants’ Statement of Claim and admitted by the respondents in paragraph 25 of their Statement of Defence. In upholding the finding of the trial court that the B “Ikenga” should go to the 1st appellant as the Okpala (Head) of the Ebumam family, that put paid to any other speculation as to whether the appellants are descended from Ebumam. Consequently, the implication of payment of tributes pales into insignificance. To the argument proffered by the respondents that the appellants have their “Obi-Eche” (ancestral home) in land not belonging to the Ebumam family, the court below also upheld the finding of the trial court dismissing the respondents contention that appellants were descendants of the woman (Nwanyima) married to an Onitsha man, thus confirming the appellants case that they descended from Ebumam.

In the face of all that I have set out above, the learned Justices of D the Court below were clearly wrong to turn round to raise the issue of an omission that led to a miscarriage of justice when they held as follows:-

*“In the judgment of the Court below, not a word was spared on the vital admission made by the plaintiffs/respondents. In other words, an important aspect of the defence case was never considered. This omission has E in my view led to a substantial miscarriage of justice. I cannot say that the appellants case had had the fair consideration it deserved in the hands of the trial Judge. The finding of fact made by the trial Judge which were the product of inadequate and incomplete consideration of the admission on record ought not be allowed to stand. First ground of appeal succeeds “*

F Had they not raised the point of the implications on the payment of tribute which are indeed a non-issue, they would not have arrived at the conclusion they did. There is therefore no justification whatsoever in this case for me to order a retrial as submitted by the respondents. This is because, as was held in Okeowo v. Migliore (1979) 11 SC 138; (1979) NSCC. 138 and re-echoed in G Sanusi v. Ameyogun (1992) 4 NWLR (Pt. 237) 527 at 556:

*“If a Court of Appeal on a proper consideration of the case before it comes to the conclusion that it can do complete justice between the parties, a retrial should not be ordered.”*

See also Adeyemo v. Arokopo (1988) 2 NWLR (Pt.79) 703 at 711 where H this court further elucidated on the law as follows:-

*“An order of retrial is not necessary if an Appeal Court can in exercise of its appellate jurisdiction to do justice in the case, bring the litigation to an end.”*

There must indeed be end to litigation.

**From all I have hereinbefore discussed, I see no reason whatsoever to order a retrial in the case in hand since the appellants had proved their case in the trial court on the balance of probabilities and the court below was palpably wrong to have upset it.** See further *Fatoyinbo v. Williams* (1956) SCNLR 274; (1956) 1 FSC. 87; *Okoye v. Kpajie* (1973) NMLR 84; *Imonikhe v. A.G. Bendel State* (1992) 6 NWLR (Pt.248) 396 and Section 22 of the Supreme Court Act, Cap. 424. The case of *Olumolu v. Islamic Trust of Nigeria* (1996) 2 NWLR (Pt. 430) 253 at 263-264 cited to us by learned counsel for the respondents, Chief Ume Ezeoke, regarding retrial in this respect, is of no avail. Issue 3 is accordingly answered in the negative.

The net result is that this appeal is meritorious and it accordingly succeeds. I allow the appeal, set aside the decision of the court below and restore the decision of the trial court with costs assessed at N1 ,000.00 in this Court and N500.00 in the Court below in favour of the appellants.

D

### BELGORE JSC

Court of Appeal inadvertently alluded to the payment of tribute by the appellants herein before us and this singular act weighed heavily in deciding the matter in favour of the respondents. Curious enough, the issue of tribute never arose in the pleadings at the trial Court and was not an issue before the Court of Appeal. Matters should be decided on the pleadings and whatever is unpleaded will go to no issue. Similarly grounds of appeal decided what issues are formulated for the Court of Appeal to decide, but where neither grounds of appeal nor issues for determination allude to a point, Court of Appeal must be wary of advertng to such issues much less F decide the appeal heavily relying on them. *Ajibade v. Pedro* (1992) 5 NWLR (Pt. 241) 257; *Orji v. Zaria Industry Ltd.* (1992) 1 NWLR (Pt. 216) 124; *Akinbinu v. Oseni* (1992) 1 NWLR (Pt. 215) 97. In the exercise of its discretion to do substantial justice or to see the end of justice met, the Court of Appeal could raise matters suo motu but in that case it must allow the parties the opportunity to address that matter even at the expense of filing further briefs or amending the briefs of argument already filed. However the appellate Court must be wary in doing this but will certain do so if there appears to be a fundamental issue of the Constitution or issue as to jurisdiction *Orji v. Zaria Ind. Ltd.* (supra). In the instant appeal, the Court of Appeal raised H the matter of payment of tribute suo motu where it was not an issue before it nor before the trial Court. The parties were not afforded the opportunity to address the Court on the issue; had they been even afforded that opportunity, my considered opinion is that it would be wrong

in the circumstance of this case because it would introduce a novel issue into the case. I therefore agree with the judgment of Onu, J.S.C. and hereby make the same consequential orders.

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**B WALI JSC**

I have the privilege of reading in advance a copy of the lead judgment of my learned brother, Onu, J.S.C. and I agree with him that there is merit in this appeal and it should succeed.

The learned trial Judge meticulously considered the evidence adduced by the plaintiffs and the respondents in proof of the facts pleaded in their respective pleadings and came to the conclusion that the plaintiffs had adduced sufficient and more credible evidence as against the scanty evidence presented by the defendants and accordingly granted some of the reliefs claimed by them, to wit-

D 1. That Ana Umuebunam, made up of Ana Odo Izuzu, Ogwugwu Enebo and Aboh pieces of land, is communal property of the plaintiffs and the defendants.

2. That the “Ikenga” held by the 2nd defendant shall be surrendered to the 1st plaintiff on as before the 10th day of June, 1984 and on the death of 1st plaintiff, it will return to the 2nd defendant to hold since that appears to be the decision of the Ikewelugo line.

3. That the defendants, by themselves, their servants and agents are hereby restrained from excluding the plaintiffs as joint - owners from the enjoyment and use of Odo Izuzu, Ogwugwu Enebo and Aboh lands shown in plan No. ECAS 5/79 of 10/1/79 marked Exhibit A in these proceedings.

Reliefs (2) and (4) as well as the alternative claim in relief (6) were refused by the learned trial Judge.

Dissatisfied the decision above the defendants appealed against it to the Court of Appeal.

The Court of Appeal, after considering the appeal approved the following findings on facts and law made by the trial court:-

*“As to the admission by 1st and 2nd plaintiffs that they live on Umuosiga land and pay tribute, I do not see how this can be taken to derogate from the case made by the plaintiffs/respondents that they are descendants of Eburnam. Umuosiga land is not the same as Umuebunam land. If a man who has a family land goes to live on land belonging to another family, he cannot because his family owns land be excused from paying tributes to his landlord. It is illogical also to infer that any person who lives on another*

*family's land does so because the family of such person has no land. The attempt by appellants, to show that 1st and 2nd plaintiffs/respondents live on Umuosiga family land and pay tributes only because they are not members of Umuebunam family is in my humble view a non-issue. It must fail."*

*"The trial Judge in my view gave ample consideration to the matter on pages 123 and 124 of the record. He considered the evidence of all the witnesses who testified after which he concluded: "I find as a fact that the defendants failed to prove that the plaintiffs were their "Nwadiani", and accept the plaintiffs' evidence through PW4 that it was the descendants of Nebuwa who are Nwadiani in Obosi." There is no basis for me to disturb the finding of fact made by the trial Judge on the point. I decline to do so.*

*"Where a defendant as the appellant in this case traces his holding or title to a particular source, which source is disputed by his adversary, he would have to succeed or fail by the case he has put forward. He cannot alter his case later to rely on long possession. See M.S. Atunrase & Ors. v. Majid Sunmola & Anor. (1985) 1 NWLR (Pt. 1) 105; (1985) 1 SC. 349 at 354, Da Costa v. Ikomi - reported Sc. 1736/1966 delivered on 20/12/68, (1968) 1 All NLR 394; Ado v. Wusu (1938) 4 WACA 96; and Adu v. Kuma (1937) 3 WACA 240. I do not see any merit in the 3rd ground of appeal."*

*"Having regard to the evidence of 2nd plaintiffs/respondent on the point and the admission made by wrong with the conclusion of the trial Judge that the "Ikenga" should be handed over to the plaintiff/respondents. The 4th ground therefore fails."*

It was after these findings which conclusively affirmed the judgment of the trial court in all respects that the learned Justice of Appeal Court introduced and discussed suo motu the issue relating to payment of paying tribute where he observed as follows:-

*"The learned trial Judge should then have taken as proved or admitted the fact that the plaintiffs/respondents have been shown to have paid tribute before to Okelue/Ebunam family of which they claimed to be descendants. It is always to be born in mind that a party to a case is entitled to rely on admissions by its adversary in proof of the case which it has put forward at the hearing."*

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*"I have no doubt in my mind therefore that the admission made by plaintiffs/respondents is very important and clearly merits equally important treatment in the evaluation of the totality of evidence before the court. It might well be that if the trial Judge created the admission as important and gave consideration to it, he would still have come to the same conclusion he did on the evidence when he held at page 122 of the*

record of his judgment thus:

*“on this issue of the sons of Ebunam, the evidence tilts in favour of the plaintiffs. PW2 and PW3 are of the Okelue Une, Okelu being a brother of Ebunam. I accept their evidence that Ebunam begat Ikewelugo, Muneme and Adigwe.”*

B *That was the finding of fact made by the trial Judge.”*

He finally concluded thus:

*“In the judgment of the court below, not a word was spared on the vital admission made by the plaintiffs/respondents. In other words, an important aspect of the defence case was never considered. This omission has in my view led to a substantial miscarriage of justice. I cannot say that the appellants case has had the fair consideration it deserved in the hands of the trial Judge. The findings of fact made by the trial Judge which were the product of inadequate and incomplete consideration of the admission on record ought not be allowed to stand. The first ground of appeal succeeds and because I am unable to say what conclusions the learned trial Judge would have come to if he had adequately and fully considered the case before him, it is proper to make an order for retrial in the High Court of Anambra State.”*

This was not one of the issues raised by the defendants in their appeal in the Court of Appeal. If the Court of Appeal wanted to rely on this issue raised suo motu the parties must be given opportunity to address it on the same. Failure to do so, would be fatal to its decision. See *Otapo v. Sunmonu* (1987) 2 NWLR (Pt. 58) 587, *Kotoye v. CB.N.* (1989) 1 NWLR (Pt. 98) 419, *Olatunji v. Adisa* (1995) 2 NWLR (Pt. 376) 167 at F 188 *Amadi v. Okoli* (1977) 7 Sc. 57.

The order of trial of the case by the Court of Appeal would not have been made if not because of misdirecting itself on the issue raised suo motu. The findings of fact made by the learned trial Judge were amply supported by the evidence he painstakingly considered and accepted. G They are neither perverse nor unreasonable and therefore I see no reason why I should interfere with them. See *Folorunso v. Adeyemi* (1975) NMLR 128; and *Balogun v. Adejobi* (1995) 2 NWLR (Pt. 376) 131.

It is for these and the more detailed reasons given by my learned brother Onu, J.S.C. that I too hereby allow the appeal, set aside the order of retrial made by it and restore the judgment and orders of the trial court, I award N1,000.00 costs for the appeal in this court and N500.00 in the Court of Appeal against the defendants in favour of the plaintiffs.

### OGWUEGBU JSC

I had the advantage of a preview of the judgment which has just been delivered by my learned brother, Onu J.S.C I agree with his reasoning and conclusion.

Issues were joined and evidence led on two vital issues which B were resolved in favour of the plaintiffs and affirmed by the Court of Appeal. The first is whether Ebunam had three sons namely, Ikewelugo, Muoneme and Adigwe as contended by the plaintiffs/appellants or that C Ikewelugo was the only son of Ebunam which the defendants/respondents asserted. The second is whether the plaintiffs were the Nwadianis of the defendants. The defendants contended that the plaintiffs are the descendants of Nwanyinma (the only daughter of Ebunam married to an Onitsha man). She begat Etuka and Etuka begat Ejindu and Asidanya (the plaintiffs).

On the above issues, the learned trial Judge found as follows: D

*“On the issue of the sons of Ebunam, the evidence tilts in favour of the plaintiffs. PW2 and PW3 are of the Okelue line, Okelue being a brother of Ebunam. I accept their evidence that Ebunam beg at Ikewelugo, Muoneme and Adigwe ..... Accordingly, I accept the evidence of the plaintiffs and find as a fact that Ebunam begat E Ikewelugo, Muoneme and Adigwe. I reject that Ikewelugo was the only son I find as a fact that the defendants failed to prove that the plaintiffs were their ‘nwadiani”, and accept the plaintiff’s evidence through PW4 that it was the descendants of Nebuwa who are Nwadiani.”*

The court below affirmed the above findings of the learned trial F Judge. On whether Ebunam had one son Ikewelugo or three sons Ikewelugo, Muoneme and Adigwe, it said: *“That was a finding of fact made by the trial Judge. He had seen the witnesses testify and was therefore placed to determine their credibility. He said he did in his judgment. Generally, therefore, this court has no business to substitute its own views for that of the trial G Court. See Folorunso v. Adeyemi (1975) NMLR 128, AN. Akinloye v. Bello Eyiola & Ors. (1968) NMLR 92 at 95 and Chief Victor Woluchem & Ors. v. Chief Simon Gudi & Ors. (1981) 5 SC. 291 at 326.”*

On whether the plaintiffs were “Nwadiani”, the court below said:

*“From the case made by the appellants, the plaintiffs/respondents would only be “Nwadiani” if the court had found that Ebunam had only two children - a son Ikewelugo and a daughter Nwanyinma. The 2nd plaintiff testified that Ebunam had three sons - Ikewelugo, Muoneme and Adigwe. The plaintiffs are from Muoneme stock ....What is more, a*

witness called by the appellants third D.W. under cross examination by Mr. Iredu for plaintiffs said on page 76 of the record:

“I grew up to know 1st plaintiff and 2nd plaintiff. I have never heard that plaintiff are Nwadiani in Obosi.” There is no basis for me to disturb the finding of fact made by the trial Judge on the point. I decline B to do so. The 2nd ground fails.”

The Court below recognised that one of the core issues in the case is the traditional history of descent of the plaintiffs. Having affirmed the findings of the learned trial Judge on the core issues, the court below went on to speculate and raise suo motu, the implication of payment of C “tribute” by the 3rd plaintiff of the Okelue/Ebunam family. The implication of payment of tribute was not an issue in controversy between the parties. It was not a ground of appeal in the court below. In my view, it was not open to the Court below in the circumstances of this case to raise that question which the parties did not raise for themselves either at D the trial or during the hearing of the appeal. See *Kuti & Or. v. Jibowu & Or.* (1972) 6 Sc. 147 at 172- 173 and *African Continental Seaways Ltd. v. Nigerian Dredging Roads & General Works Ltd.* (1977) 5 Sc. 235 at 248.

By raising the issue of the implication of the payment of tribute, E the court below arrived at a wrong conclusion. Both learned counsel were not even given the opportunity to address the court on the issue before it made the order. There is no basis for the order of retrial made by it having regard to its affirmation of the findings of the learned trial Judge on the vital issues canvassed by the parties.

F For the above reasons and the fuller reasons contained in the lead judgment of my learned brother Onu, J.S.C. I agree that the appeal has merit and I hereby allow it. The judgment of the court below is set aside and that of the trial court is hereby restored. I would also make the same order as to costs as contained in the lead judgment of my learned G brother Onu, J.S.C.

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### ADIO JSC

I have had the opportunity of a preview of the judgment just H read by my learned brother, Onu, J.S.C. and I agree that there is merit in the appeal. The payment of tribute and what was said to be its implication which were questions suo motu raised and determined by the court below were very fundamental. The determination of the questions substantially affected the decision eventually arrived at. They were questions

which should not have been raised by the court below at all. The judgment of a court should be confined to issues raised by the parties to the case. See *United Bank for Africa v. Achoru*. (1990) 6 NWLR (Pt. 156) 254. Bearing in mind the principles governing the granting of an Order of retrial, the circumstances in this case do not warrant the making of the order. See *Management Enterprises Ltd., v. Otusanya*, (1987) 2 NWLR (Pt. 55) 179.

B

It is for the reasons given above and for the detailed reasons given in the lead judgment of my learned brother, Onu, J.S.C., that I agree that there is merit in the appeal. I too allow the appeal and agree with the consequential orders, including the order for costs.

Appeal allowed

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