

SUPREME COURT OF NIGERIA

19TH DECEMBER, 1997. SC. 125/1991

**CORAM:- M. L. UWAIS CJN, I. L. KUTIGI, M. E. OGUNDARE, E. O.
OGWUEGBU, A. I. IGUH, JJSC**

ALHAJI ABDUL WAHAB ODEKILEKUN PLAINTIFF/APPELLANT

AND

MRS. COMFORT OLUBUKOLA HASSAN & ANOR DEFENDANTS/
(For themselves and as representatives of RESPONDENTS
S. F. Onamade - deceased)

CONVEYANCING - *Attestation to instrument executed by illiterates -By virtue of s. 8 of the Land Instrument Registration Law - Exh D3 was properly executed - In view of the nature of attestation therein.*

CONVEYANCING - *Validity - Deed of conveyance Exh. D2 - That was made at a time Vendors' title was extinguished by operation of Limitation Law - Is void as it conveyed nothing.*

LAND LAW - *Family land - Conveyance by some individual members of a family - When does it become void or voidable.*

LAND LAW - *Family land - Execution of some documents - Issue of whether done by family head or all sections of the family - Cannot be raised as it was not pleaded.*

LAND LAW - *Family land - Partition of family land vide Exh. p4 - Without the consent of the head and principal family members - Is void together with any document emanating therefrom.*

LAND LAW - *Limitation Law ss. 6(2) & 16 - Apply only to title under statutory law and not customary law - And that law applies to extinguish respondents' title.*

LAND LAW - *Trespass - Exclusive long adverse possessor of land - Can maintain trespass action against original owner - Whose title has been extinguished by operation of the Limitation Law.*

LAND LAW - *Trespass - Exclusive possessor of land - Can sue any one*

trespass even if he is neither owner nor privy to the owner - Save a person who can establish better title.

LAND LAW - *Trespass & injunction - Documents of both parties - Where found to be defective - The appellant that has been in exclusive possession - Is entitled to judgment in trespass and injunction.*

FACTS

The plaintiff/appellant filed an action against one S.F. Onamade (now deceased) before the Lagos High Court claiming N250.00 general damages for trespass and perpetual injunction in respect of the land in dispute. Deceased defendant was substituted by the present defendants. The land in dispute was purchased by one Salu Kayaoja by a Deed of Conveyance Exh D4 dated 16th November, 1914. Both parties to this action claim to have purchased the land in dispute from descendants of the said Kayaoja. The appellant relied on long possession of the land since 1949. He also relied on a Deed of Partition Exh p4, and a Deed of Conveyance by which a descendant of Kayaoja conveyed his own share of the partitioned land to him (the appellant). The respondent on the other hand claimed title by virtue of a Deed of Conveyance Exh D2 which was executed by the donees of a power of attorney Exh. D3. It was respondent's case that he took possession and built a house on the land in 1967.

The trial court found the documents of title relied upon by both parties defective and entered judgment for the appellant on ground of exclusive possession. The respondent appealed to the Court of Appeal and the appellant cross appealed on the issue of validity of his title documents. The court below dismissed the cross appeal and found in favour of the respondent. Being aggrieved, appellant has further appealed to the Supreme Court raising 8 issues. But the ultimate court found the 3 issues raised by the respondent sufficient.

ISSUES FOR DETERMINATION

"(i) Was the Power of Attorney upon which the defendants' title was based void?

(ii) Was the Deed of Partition upon which the Plaintiff's case was based void and ineffective?

(iii) Whether in the circumstances of this case the plaintiff can rely on the provisions of the Limitation Law to sustain his claim to title."

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

Conveyance by some individual members of a family

1. So, too, where some individual members of a family convey family property in their own names as the absolute owners, such a disposition would be absolutely null and void, again, under the principle of nemo dat quod non habet aforementioned. On the other hand, where some, only, of the members of a family convey family property and expressing themselves to be acting for and on behalf of the family, then such a sale is prima facie valid but voidable at the instance of members of the family whose consent was necessary but was never obtained. (p. 2038 E)

Conferment of power to dispose family property

2. It is patent that the donors in Exhibit D3 conferred the relevant powers in respect of their family land on the donees, not as absolute owners thereof in their personal capacity but as representing the entire members of their family. It therefore seems to me that Exhibit D3 is entirely valid until set aside by members of the family, if any, aggrieved by its execution. The court below was absolutely right when it observed that it is quite unnecessary for each and every member of a group of people with common interest to take part individually in executing a deed which may be validly executed in a representative capacity by one or more of them.

Exhibit D3 has not been set aside or even challenged by any member of the family. (p. 2039 B)

Family land - Execution of some documents

3. My short answer to this submission is that the question of whether Exhibits D2 and D3 were executed by the head of the Salu Kayaoja family or all sections of the family was never raised by the appellant whether in his pleadings or throughout the trial of the suit. It cannot be over-stressed that save for a question, such as jurisdiction, courts of law must limit themselves to the issues raised by the parties in their pleadings. The appellant having failed to plead material facts relating to his present complaints cannot now be allowed to raise them belatedly. (p. 2040 B)

Attestation to instrument executed by illiterates

4. In this regard the court below commented as follows -

"My understanding of sub-section 1 of section 172 is that where two or more persons witness and attest a Deed of Power of appointment, the execution of the Deed is valid regardless of any provision regulating the execution or attestation of another deed made by virtue of the power. The section does not say that the only way the execution of a power of appoint-

ment can be valid is when it is witnessed or attested by two or more witnesses. Secondly, the section relates to power of appointment generally and not necessarily wider concept than power of attorney It is crystal clear that section 8 is a special provision relating to all instruments wherein one or more of the grantors are illiterate. Since one or more of the donors or grantors of the power of attorney, Exhibit "D3" were illiterates, for it to be valid it had to be executed in the presence of a Magistrate or Justice of the peace. Exhibit "D3" was therefore duly executed, according to law. Section 172 of the Property and Conveyancing Law is inapplicable in this instance."

I think the court below is completely right in its observations above. Exhibit D3, without doubt, is a Power of Attorney and not a Power of Appointment. It is my firm view that subject to my finding on issue 3, Exhibit D3 upon which the respondents' title, Exhibit D2 is based is unimpeachable. (p. 2041 C)

Partition of family land vide exh p 4

5. It is clear from the findings of both courts below, not only that all the six branches of the Salu Kayaoja family did not join in the alleged partition of their family land, the alleged partition made no provision for the shares of all the branches of the family. In the finding of the two courts below, Salu Kayaoja was survived by at least six children whereas Exhibit P4 showed that the family land was partitioned between only four members of the family. There was also nothing to indicate that all the branches of the family concurred in the partition. Besides the appellant neither pleaded nor led any evidence to establish that Sabalemotu Kayaoja and the two others who executed Exhibit P4 did so as Head and representatives of the family. On the contrary, Exhibit P4 was executed by them in their personal capacities as the absolute beneficial owners of the land in issue. It is only when the partition of family land is with the consent of all the principal members of the family that it confers upon each member an absolute right to his share of the land. A partition of family land which is made without the consent of the head and the principal members of the family is clearly defective. I am in complete agreement with the court below that Exhibit P4 is clearly worthless and void. In the same vein, the Deed of Conveyance, Exhibit P1 executed pursuant to the said Exhibit P4 which is void becomes necessarily void and ineffective as well. Issue 2 must therefore be resolved in the affirmative. (p. 2042 G & 2043 F)

Validity of deed of conveyance

6. In my view, the Kayaoja family not only lost their right of action against the appellant but had their right or title to the land in dispute extinguished by the

operation of law after the expiration of the prescribed twelve year period in 1961. The Deed of Conveyance, Exhibit D2 by which the Kayaoja family purported to convey the land in dispute to the respondents' predecessor in title in 1964 is, without doubt, void as it conveyed nothing to the respondents, the maxim being nemo dat quod non habet. As at 1964, the Kayaoja family had B pursuant to the said provisions of the Limitation Law had their rights and/or title to the land in dispute extinguished. They therefore had nothing to convey to the respondents' predecessor in title in so far as the land in dispute is concerned. The court below, with respect, was therefore in error when it pronounced Exhibit D2 as valid and having effectually conveyed the land in C dispute to the respondents. (p. 2045 E)

Limitation law ss. 6 (2) & 16

7. Accordingly, it is indisputable that the provisions of the Limitation Law, Cap. 64, Laws of Western Nigeria, 1959, particularly Sections 6 (2) and 16 D thereof, which prescribe title by prescription, clearly do not affect actions in respect of title to or any interest in land held under customary tenure. They, however, govern actions in respect of title to land held under statutory law. In the present case, the land in dispute forms part of a large parcel of land vested in Salu Kayaoja by virtue of a Deed of Conveyance dated the 16th November, E 1916, Exhibit D4. It is therefore not land held under customary tenure. Consequently the Limitation Law, Cap. 64. Laws of Western Nigeria, 1959 does therefore apply to the land in dispute which was at all material times held under a registered Conveyance. The appellant, on the concurrent findings of both courts below, was in exclusive adverse possession of the land in dispute from F 1949 to 1977, a period of 28 years before the present action was commenced. In my view, the appellant can rely on the Limitation Law to defeat the alleged title of the respondents as evidenced by Exhibit D2 which, at all events, is void. The net effect of Sections 6 and 16 of the Limitation Law is that any title of the Kayaoja family in respect of the land in dispute extinguished and was G lost in 1961. (p. 2046 E)

Trespass - Exclusive long adverse possessor

8. Can the exclusive and long adverse possessor of land maintain an action trespass against a former owner thereof whose title has been effectively extin- H guished by the operation of law, such as the Limitation Law of Western Nigeria, 1959 or, against any person who purports to have acquired interest in the land through the original owner but after the title of such an original owner had been lost? My answer to the above questions must be in the affirmative. The reasons seem to me clear. A plaintiff in exclusive possession of land may

quite rightly institute an action in trespass to protect his right to retain and to undisturbed enjoyment of the land against all wrong-doers except a person who can establish a better title thereto. It will not matter, in my view, that such a plaintiff retained his exclusive possession of the land pursuant to the provisions of the Limitation Law and he cannot be estopped from asserting his possessory title to such land by virtue of the Limitation Law. I think the court below, with profound respect, was in error when it held in the circumstances of this case that long possession could not be employed as a sword but as a shield. This may well be right in respect of land held under customary tenure but not land held under and by virtue of a Statute, such as the Limitation Law. Issue 3 is accordingly resolved in favour of the appellant. (p. 2047 D) C

Trespass - Exclusive possessor can sue

9. It is a basic principle of law that only a person in possession of land can maintain an action in trespass. In the same vein, where a plaintiff's title is defective and the defendant's title is also defective and the plaintiff is in possession of the land in dispute, the plaintiff can successfully maintain an action in trespass against the defendant. See Alhaji Adeshoye v. J. O. Shiwoniku (1952) 14 W.A.C.A. 86 etc. A person in exclusive possession of land can sue for trespass even if he is neither the owner nor a privy of the owner as such possession confers on the possessor in an appropriate case the right to retain it and to undisturbed enjoyment thereof against all wrong-doers except a person who can establish a better title. (p. 2048 C) D E

Trespass & injunction - Who is entitled to judgment

10. In the present case, the documents of title of both the appellant and the respondents are defective. The appellant nonetheless was at all material times in exclusive possession of the land in dispute. The respondents were unable to establish any title to the land in dispute, let alone better title thereto. I think the appellant in the circumstance is entitled to judgment in trespass and injunction as found by the trial court. The court below was, in my view, in error to have dismissed the appellant's claims. In the final result, this appeal succeeds and it is hereby allowed. (p. 2048 F) F G

NOTABLE POINT OF INTEREST

IGUJSC

1. Conveyance of family property - Role of the family head

Without doubt, the law is firmly established that the head of a family must join in a disposition or conveyance of family land and the principal members must concur therein and that such a transaction purporting to transfer family land

without these essentials will be void. However, where the head of a family alone executes a conveyance of family land as a grantor, the sale is prima facie voidable and the family can set aside such a sale if the other members act timeously. This principle, however, only applies where the head of the family executes the conveyance for and on behalf of the family and not where he purports to convey the property in his personal capacity as the beneficial owner thereof. In the latter event, the applicable principle is nemo dat quod non habet as such head of family, not being the absolute owner of the land, cannot alienate that which does not belong to him. Consequently, such a transaction would be void ab initio. (p. 2038 B)

C

REPRESENTATION

P. O. Jimoh-Lasisi for the Appellant

O. E. L. Ideh for the Respondents

D CASES REFERRED TO

Ekpendu v. Erika (1959) 4 F.S.C. 79

Esan v. Fara 12 W.A.C.A. 135

Atunrase v. Sunmola (1985) 1 N.W.L.R. (Part 1) 105 at 120 - 121

Metalimpex v. A.G Leventis Co. Ltd (1976) 2 S.C. 91

E Kalio v. Kalio (1977) 2 S.C. 15

Oniah v. Onyia (1989) 1 N.W.L.R. (Part 99) 514

Shell B. P. Ltd. v. Abedi (1974) 1 ALL N.L.R. (Part 1) 13

Johnson v. Onisiwo (1943) 9 W.A.C.A. 189

Odubeko v. Fowler (1993) 7 N.W.L.R (part 308) 637 at page 661 and 678

F Olayioye v. Oladeinde (1969) 1 All N.L.R. 281 at 285

Mogaji v. Cadbury (1985) 2 N.W.L.R. (Part 77) 383

STATUTES REFERRED TO

Property and Conveyance Law Cap. 100 Laws of Western Nigeria 1959 s. 172

G (1)

Land Instrument Registration Law of Western Nigeria 1959 s. 8

Limitation Law Cap. 64 Laws of Western Nigeria 1959 ss. 6(2), 16, 1(2)

LEAD JUDGMENT BY IGUH JSC

H

This is an appeal against the judgment of the Court of Appeal, Lagos Division, which had on the 11th day of January, 1989 allowed the appeal of the defendants from the decision of Olourunnimbe, J., sitting at Ikeja Judicial Division of the High Court of Lagos State. The cross-appeal of the plaintiff was, by the same judgment, dismissed by the said Court of Appeal.

The Plaintiff had instituted an action against one S. F. Onamade, now deceased, the predecessor in title of the present defendants/respondents, claiming as endorsed in his amended Statement of Claim as follows -

"1. N250.00 being general damages for trespass committed by the defendant, his servants and/or agents on the plaintiff's land shown and edged in red by erecting thereon a building shown and edged in blue on Plan CD/ B 432/77;

2. A perpetual injunction restraining the defendant, his servants and/or agents from further trespass."

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

At the subsequent trial, the parties testified on their own behalf and called witnesses.

The land in dispute which is the subject matter of this appeal was part of a large tract of land which had been purchased by one Salu Kayaoja by a Deed of Conveyance, Exhibit D4 dated the 16th November, 1914. Both parties to this action claimed to have purchased the land in dispute from the descendants of the said Salu Kayaoja. D

The plaintiff, for his title, relied on long possession of the land in dispute. It was his case that he was put into possession of the land since 1949. He also relied on the Deed of Partition dated the 17th December, 1949, Exhibit P4, by which some of the surviving children of Salu Kayaoja purported to partition their father's land and to transfer a portion thereof to one Salu Kayaoja together with the Deed of Conveyance dated the 23rd October, 1951, Exhibit P1 by which the said Salu Kayaoja who incidentally testified for the defendant as D.W3 conveyed to the plaintiff in fee simple absolute in possession, a portion of the said land transferred to him. It is this piece or parcel of land conveyed by Exhibit P1 that is in dispute in this appeal. F

The defendant, for his own part, claimed title to the land in dispute by virtue of the Deed of Conveyance, Exhibit D2 dated the 19th September, 1965. This conveyance was executed by the donees of a Power of Attorney, Exhibit D3, dated the 2nd January, 1962 given by 17 descendants of Salu Kayaoja, acting on behalf of themselves and the entire members of their families. It was the case of the defendant that he took possession of this land and built a house thereon in 1967. G

At the conclusion of hearing, the learned trial Judge Olorunnimbe, J. H after a review of the evidence on the 13th day of December, 1985 was of the view that the deed of partition, Exhibit P.4 executed in favour of D.W3 was invalid by reason of the fact that those who executed it were not the only persons entitled to the land in dispute. On Exhibit P.1, he held that at the time

it was executed in favour of the plaintiff by D.W3, the land in dispute did not belong to the said D.W.3 but was Kayaoja family property. He concluded that the plaintiff's title in so far as Exhibits P.1 and P.4 were concerned, was defective.

Turning to the Power of Attorney, Exhibit D.3, the learned trial Judge described it as invalid. His reasons were that many descendants of Salu Kayaoja who had interest in the property had not been joined in its execution and that the Power of Attorney was not executed in the presence of and attested to by two or more witnesses in accordance with the provisions of section 172 (1) of the Property and Conveyance Law, Cap. 100, Laws of Western Nigeria, 1959. He therefore concluded that the conveyance, Exhibit 2, executed in favour of the defendant by the donees of the said Exhibit D3 was equally invalid and null and void. He was however satisfied that the plaintiff having been in actual and exclusive possession of the land since 1949 until his possession was disturbed by the defendant in 1967 and later in 1977 was entitled to maintain an action in trespass against him. Accordingly, he entered judgment for the plaintiff against the defendant in the sum of N200.00 being general damages for trespass. He also granted perpetual injunction restraining the defendant, his servants and/or agents from further acts of trespass on the land.

Dissatisfied with this judgment of the trial court, the defendant lodged an appeal against the whole decision to the Court of Appeal, Lagos Division but died before the appeal was heard. His two children were however substituted in his stead by the order of court as defendants/appellants in that court. The plaintiff also filed a cross-appeal against the decision of the trial court to the effect that his documents of title in respect of the land in dispute were defective.

The Court of Appeal in a unanimous judgment delivered on the 11th January, 1989 affirmed the trial court's findings that Exhibits P.1 and P.4 were invalid and consequently dismissed the plaintiff's cross-appeal. It however allowed the main appeal and set aside the trial court's decision that the Power of attorney, Exhibit D.3 was also invalid. It held that the conveyance in favour of the defendants, Exhibit D2 was valid. Although it confirmed the finding of the trial court that the plaintiff had been in exclusive possession of the land in dispute until he was disturbed by the defendants, it held that this adverse possession by the plaintiff and acquiescence on the part of the Kayaoja family could not defeat the case of the defendants who had a better title than the plaintiff. It further held that the plaintiff was precluded from invoking the plea of long possession as a sword instead of as a shield.

Aggrieved by this decision of the Court of Appeal, the plaintiff has

now appealed to this court. I shall hereinafter refer to the plaintiff and the defendants in this judgment as the appellant and the respondents respectively.

Nine grounds of appeal were filed by the appellant against this decision of the Court of Appeal. The parties pursuant to the Rules of this court filed and exchanged their written briefs of argument. B

A total of eight issues were distilled from the appellant's grounds of appeal for the determination of this court. These are as follow:-

"1. Whether the burden of proving the validity of Exhibit D2 (Defendant's deed of conveyance) and Exhibit D3 (Defendant's Power of Attorney) was discharged at the trial by the defendants?" C

2. Whether the six surviving children or their representatives ought to join in donating Exhibit D3 or the Six branches or Sections of the Late Salu Kayaoja Family ought to join in donating Exhibit D3?

3. If there was no proof that the six branches or section of Salu Kayaoja family joined in donating the Exhibit D3 was the Exhibit D3 not void in Law. D

4. Whether the Court of Appeal was not wrong when they relied on the doctrine of waiver to justify the validity of Exhibit D3 when the issue of waiver was neither pleaded nor canvassed by the defendants.

5. Whether Exhibit D3 (Defendant's Power of Attorney) was not a power of appointment by deed within the purview of Section 172 (1) Property and Conveyancing Law Cap 100 L.W.N. E

6. If so, whether Exhibit D3 was not executed in breach of Section 172 (1) P.C.L. Cap 10 L.W.N. which requires that for a power of appointment by deed to be valid it must be executed and attested to by two or more witnesses. F

7. Whether the Court of Appeal was right when it held that Exhibits P1 and P4 were void in Law.

8. Whether the title of Kayaoja family was not extinguished in 1964 when Exhibit D2 was executed?" G

The respondents, for their, part have contended in their brief of argument that the eight issues formulated by the appellant may easily be categorized into only three main issues. According to their learned counsel, issues 1,2,3,4,5, and 6 are concerned basically with the question of the validity of the Power of Attorney, Exhibit D3 and the Deed of conveyance, Exhibit D2 through which the respondents claimed their title to the land in dispute. They may thus be grouped together as a single issue. Issue 7 deals entirely with the validity of the appellant's documents of title, Exhibits P1 and P4 and may constitute the second issue. Issue 8 which raises the question of whether the H

appellant could successfully invoke and rely on the Statute of Limitation against the respondents' predecessors in title may stand on its own as the third issue. They therefore submitted that the only three issues which arise for determination in this appeal are as follows:-

"(i) *Was the Power of Attorney upon which the defendants' title was based void?*

(ii) *Was the Deed of Partition upon which the Plaintiff's case was based void and ineffective?*

(iii) *Whether in the circumstances of this case the plaintiff can rely on the provisions of the Limitation Law to sustain his claim to title."*

C I have closely examined the two sets of issues identified in the respective briefs of the parties and I agree entirely with the submission of learned counsel for the respondents that the three issues identified in their brief of argument fully cover the various issues raised by the appellant. I therefore propose in this judgment to adopt the set of issues raised in the respondent's D brief of argument for my determination of this appeal.

At the oral hearing of the appeal, learned counsel for the appellant, P.O. Jimoh-Lasisi, Esq, proffered oral arguments in further elucidation of the submissions contained in his written brief. The main argument of learned counsel on issue 1 was that the respondents failed to plead or prove that E Exhibits D2 and D3 were executed with the consent of either the head of Kayaoja family or the principal members of the six branches or sections of the said family. Relying on the decisions in Ekpendu v. Erika (1959) 4 F.S.C. 79, Esan v. Fara 12 W.A.C.A. 135 and Atunrase v. Sunmola (1985) 1 N.W.L.R. (Part 1) 105 at 120 - 121 and Ajamogun v. Oshunrinde (1990) 4 N.W.L.R. (Part 144) F 407 at 419, he submitted that Exhibits D2 & D3 were executed without the consent of either the head of the Kayaoja family or the six branches thereof and are therefore invalid. He further argued that Exhibit D3 was caught by the provisions of Section 172 (1) of the Property and Conveyancing Law, Cap 100 Laws of Western Nigeria 1959. This is because being an appointment by G deed, it ought to have been executed in the presence of and attested to by two or more witnesses. Exhibit D3, not having been so executed and attested to, he argued, must be void. He contended that Exhibit D2 is equally void because the interest of the respondents was extinguished by virtue of Sections 6 (2) and 16 of the Limitation Law, Cap 64, Laws of Western Nigeria, 1959 as at H the time the purported grant was made.

On issue 2, learned counsel submitted that Exhibit P1 and P4 are merely voidable and therefore remain valid until set aside. He argued that this left the appellant with a better title than the respondents.

Dealing finally with issue three, learned counsel submitted that eve if

Exhibits D2 and D3 were validly executed, which he did not concede, the title of Kayaoja family, in the land in dispute was extinguished in 1964 when Exhibit D2 was purported to have been executed. He urged, the court to allow this appeal and to restore the judgment of the trial court.

Learned counsel for the respondents, O. E. L. Ideh, Esq., in his reply, adopted the respondents' brief of argument and similarly proffered additional submissions in amplification thereof. He pointed out that the donors of the Power of Attorney, Exhibit D3 did so, not as absolute owners, but in a representative capacity. He therefore argued that Exhibit D3 remained valid until set aside by members of the Kayaoja family who did not consent thereto. He stressed that the execution of the Conveyance, Exhibit D2 by the donees of Exhibit D3 is clear evidence that all Sections of the Kayaoja family subscribed to and approved the representative action of the donors of Exhibit D3 in granting the Power of Attorney to the donees thereof. He submitted that Exhibit D2 was thereof effective to pass a valid title of the land in dispute to the respondents. He stressed that Exhibit D3 is simply a Power of Attorney authorizing the donees inter alia to dispose of the Kayaoja family land and was not a Power of Appointment as contended by the appellant's learned counsel and that the provisions of Section 172 (1) of the Property and Conveyancing Law, Cap 100, Laws of Western Nigeria 1959 have no application thereto.

On the Deed of Partition, Exhibit P4, learned counsel described this as absolutely void as all the six branches of the Kayaoja family were not involved in the exercise. Title to the land in issue therefore remained in the Kayaoja family and the Deed of Conveyance Exhibit P1, by which the land was purported to have been transferred to the appellant was ineffective to pass a valid title to him.

Dealing with the third issue, learned counsel referred to the decision in *Atunrase v. Sunmola* (1985) 1 N.W.L.R. 105 and submitted that adverse possession of land can be used as a shield but not as a sword. He submitted that the appellant cannot rely on the Limitation Law and his adverse possession against the Kayaoja family to defeat the superior title of the respondents. He urged the court to dismiss this appeal.

The 1st issue concerns the question whether or not the Power of Attorney, Exhibit D3 upon which the respondents' Deed of Conveyance, Exhibit D2 was based was void and therefore ineffective.

The first attack Launched by the appellant against Exhibit D3 is that it was not executed by all the members of the Salu Kayaoja family, especially when it conferred powers on the donees to alienate the family property concerned. He argued that on this point alone, the Power of Attorney must be

pronounced defective and void.

On this issue, the court below per the leading judgment of Akpata, J.C.A., as he then was, observed thus:-

"It is not necessary for a crowd of people who have common interest to take part individually in executing a deed. Such a deed can be validly executed by representatives of others who have the same interest in the property."

Without doubt, the law is firmly established that the head of a family must join in a disposition or conveyance of family land and the principal members must concur therein and that such a transaction purporting to transfer family land without these essentials will be void. See Agblo II and others v. Sappor and Another (1947) 12 W.A.C.A. 187, Bello Adedubu and Another v. Makanjuola (1944) 10 W.A.C.A 33, Atunrase v. Sunmola (1985) 1 N.W.L.R. (Part 1) 105 at 120-121. However, where the head of a family alone executes a conveyance of family land as a grantor, the sale is prima facie voidable and the family can set aside such a sale if the other members act timeously. This principle, however, only applies where the head of the family executes the conveyance for and on behalf of the family and not where he purports to convey the property in his personal capacity as the beneficial owner thereof. In the latter event, the applicable principle is nomo dat quod non habet as such head of family, not being the absolute owner of the land, cannot alienate that which does not belong to him. Consequently, such a transaction would be void ab initio. So, too, **where some individual members of a family convey family property in their own names as the absolute owners, such a disposition would be absolutely null and void, again, under the principle of nemo dat quod non habet aforementioned.** On the other hand, where some, only, of the members of a family convey family property and expressing themselves to be acting for and on behalf of the family, then such a sale is prima facie valid but voidable at the instance of members of the family whose consent was necessary but was never obtained. See generally Ekpendu v. Erika (1959) 4 F.S.C. 79 at 81, City Property Development Ltd. v. A. G. Lagos State and others (1976) 1 S.C. 71 at 100, Akerele v. Atunrase (1960) 1 ALL N.L.R. 201 at 208, Solomon v. Mogaji (1982) 11 S.C. 1 at 7-10 etc. It is against the above principles of law that I must now examine Exhibit D3 which, though not a conveyance, has granted power of alienation of family land to named individuals.

The capacity in which the donors of Exhibit D3 purported to act is expressed in the instrument as thus -

"For ourselves and on behalf of the entire members of our families."

The donees in Exhibit D3, on the other hand, were expressly appointed to exercise all their powers therein stipulated as -

"Head, Representatives and lawful Attorney to the entire members of our families and in our names and on our behalf to execute all or any of the following acts."

It cannot, in my view, be doubted that the relevant clauses in Exhibit D3 brought it into focus the facts that the donors, acting for themselves and on behalf of the entire members of the Salu Kayaoja family conferred powers on the donees who comprised of and were therein expressly identified individually and collectively as the head of their family, the representatives and lawful Attorneys of the entire members of their said family. **It is patent that the donors in Exhibit D3 conferred the relevant powers in respect of their family land on the donees, not as absolute owners thereof in their personal capacity but as representing the entire members of their family.** It therefore seems to me that Exhibit D3 is entirely valid until set aside by members of the family, if any, aggrieved by its execution. See Ekpendu v. Erika, City Property Development Ltd. v. A.G. Lagos State, Akerele v. Atunrase, Solomon v. Mogaji, supra. The court below was absolutely right when it observed that it is quite unnecessary for each and every member of a group of people with common interest to take part individually in executing a deed which may be validly executed in a representative capacity by one or more of them.

Exhibit D3 has not been set aside or even challenged by any member of the family. Indeed, as pointed out by the learned counsel for the respondents it is clear that members of the Salu Kayaoja family who did not join as donors in Exhibit D3 were the donees therein named who had not only accepted the appointment but had proceeded to act thereunder by conveying the land in dispute to the respondents per Exhibit D2.

Learned counsel for the appellant further submitted that the court below was in error when it relied on the doctrine of waiver to justify the validity of Exhibit D3 when the issue of waiver was neither pleaded nor canvassed by the respondents. The passage of the judgment of the Court of Appeal complained against runs thus -

"It is instructive to note that five of the persons whom the learned trial Judge held ought to have been amongst the donors of the power of Attorney were the donees of the power of attorney. While it may not be improper for donees of power of attorney to also be the donors, it seems to me more desirable that donees do not take part in granting themselves power of attorney. Granted that they ought to have been donors, by agreeing to be donees only, they waived their rights to be donors. That would not by itself, to my mind, render the power of attorney invalid."

With profound respect, I find it difficult to accept that the court below was by the above passage considering the legal concept of the equi-

table doctrine of waiver as such. I agree with Mr. Ideh that the Court of Appeal merely employed the word "waiver" in its purely colloquial sense to drive home its view of the matter by the donees' failure to insist on executing the deed as donors and yet accepted their appointment thereunder.

It was contended by the appellant that failure on the part of the respondents to plead and prove that Exhibits D2 and D3 were executed with the consent of either the head of the family or all the sections thereof is fatal to their defence. **My short answer to this submission is that the question of whether Exhibits D2 and D3 were executed by the head of the Salu Kayaoja family or all sections of the family was never raised by the appellant whether in his pleadings or throughout the trial of the suit.** After the respondents, in paragraphs 10 and 14 of their amended Statement of Defence, pleaded and relied on Exhibits D2 and D3 as their root of title, the appellant filed a Reply but did not herein raise the issues now complained of. Indeed no iota of evidence was led by the appellant to the effect that the necessary consent of the head of the Salu Kayaoja and/or the entire sections of the family had not been obtained before Exhibits D2 and D3 were executed. The respondents, in my view, did all they were expected under the law to do by pleading that the Salu Kayaoja family which owned the land sold the same to them and proving the averment by producing their title deeds, Exhibits D2 and D3. If it was the case of the appellant that the sale was invalid or ineffectual for whatever cause, the onus was on him to plead and adduce evidence of facts which would establish the alleged invalidity. Such is not the position in the present case.

It cannot be over-stressed that save for a question, such as jurisdiction, courts of law must limit themselves to the issues raised by the parties in their pleadings. See Metalimpex v. A. G. Leventis and Co. Ltd. (1976) 2 S.C. 91, Kalio v. Kalio (1977) 2 S.C. 15, Oniah v. Onyia (1989) 1 N.W.L.R. (Part 99) 514, Shell B.P. Ltd. v. Abedi (1974) 1 ALL N.L.R. (Part 1) 13, Alhaji Ogunlowo v. Prince Ogundare (1993) 7 N.W.L.R. (Part 307) 610 at 624. etc. **The appellant having failed to plead material facts relating to his present complaints cannot now be allowed to raise them belatedly.**

It was further submitted on behalf of the appellant that because Exhibit D3 was executed before only one witness, a Magistrate, instead of 2 witnesses as required by Section 172(1) of the Property and Conveyancing Law, Cap. 100 Laws of Western Nigeria, 1959, this constituted a fatal defect in its execution which rendered it invalid. Section 172(1) of the Property and Conveyancing Law, Cap. 100, Laws of Western Nigeria, 1959 stipulates as follows -

"A deed executed in the presence of and attested by two or more witnesses (in the manner in which deeds are ordinarily executed and at-

tested) is so far as respects the execution and attestation thereof, a valid execution of a power of appointment by deed or by any instrument in writing not testamentary notwithstanding that it is expressly required that a deed or instrument in writing, made in exercise of the power is to be executed or attested with some additional or other form of execution or attestation or solemnity".

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There is also the provision of Section 8 of the Land Instrument Registration Law of Western Nigeria, 1959 which states thus -

"No instrument executed in Nigeria after the commencement of this law, the grantor, or one or more of the grantors, whereof is illiterate, shall be registered unless it has been executed by such illiterate grantor or grantors in the presence of a magistrate or justice of the peace and is subscribed by such magistrate or justice of the peace as a witness thereto."

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In this regard the court below commented as follows -

"My understanding of sub-section 1 of section 172 is that where two or more persons witness and attest a Deed of Power of appointment, the execution of the Deed is valid regardless of any provision regulating the execution or attestation of another deed made by virtue of the power. The section does not say that the only way the execution of a power of appointment can be valid is when it is witnessed or attested by two or more witnesses. Secondly, the section relates to power of appointment generally and not necessarily wider concept than power of attorney It is crystal clear that section 8 is a special provision relating to all instruments wherein one or more of the grantors are illiterate. Since one or more of the donors or grantors of the power of attorney, Exhibit "D3" were illiterates, for it to be valid it had to be executed in the presence of a Magistrate or Justice of the peace. Exhibit "D3" was therefore duly executed, according to law. Section 172 of the Property and Conveyancing Law is inapplicable in this instance." I think the court below is completely right in its observations above. Exhibit D3, without doubt, is a Power of Attorney and not a Power of Appointment. It is my firm view that subject to my finding on issue 3, Exhibit D3 upon which the respondents' title, Exhibit D2 is based is unimpeachable. I will deal with the validity of Exhibit D2 along with issue 3 in this appeal. It suffices to state that having regard to my findings above, issue I must be resolved in favour of the respondents.

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The second issue poses the question whether the Deed of partition, Exhibit P4, upon which the appellant's case was based is void and ineffective. Both the trial court and the Court of Appeal had held that Exhibit P4 could not pass any title in the land in dispute to the appellant on the ground that those who executed it were not the only persons who were entitled to the land in

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dispute. Said the learned trial Judge -

"The Deed of Partition Exhibit P4 too cannot save then the situation. For the reason that the Executants SABALEMOTU ABIKE KAYAOJA, SABITIYU ADUKE KAYAOJA AND ALIMOTU AJIUN ABDULAI AGUNBIADI were not the only persons who are entitled to the land in dispute. It is my view that they cannot to the exclusion of the other co-owners validly transfer the interest in the land in dispute to SADU KAYAOJA, DW 3. The net result is that the Plaintiff's title as far as Exhibits P1 and P4 are concerned are defective."

The Court of Appeal for its own part dealing with Exhibit P4 commented thus-

"In the same light a partition and sharing of family land by the head and some members of the family amongst themselves as beneficial owners and not partitioned and shared for and on behalf of the family is void ab initio. The respondent did not plead and adduce evidence to establish that Sabalemotu Kayaoja and two others who executed Exhibit "P4" did so as head and representatives of the family It is only when the partition of family land is with the consent of all members of the family that such partition confers upon each member an absolute right to his partitioned portion. There is evidence that Salu Kayaoja was survived by at least six children. In effect, there were at least six branches. It is clear from Exhibit "P4" that only four members were given portions or shares following the partition and there is nothing to indicate in the Exhibit that all the branches concurred to the partition. Therefore, the combined effect of the partition not having been executed for and on behalf of the family and every branch not getting a share renders Exhibit "P4" void. D.W.3 was therefore not competent to convey the land in dispute to the respondent. It is of interest to note that the deed of partition Exhibit "P4" was declared null and void by Duffus J., in the judgment Exhibit "6", Suit No. ID/273/85 - Onasanya v. Siwoniku dated 6th October, 1980."

I am in complete agreement with the above concurrent findings of both the trial court and the court below on the question of the invalidity of Exhibit P4. **It is clear from the findings of both courts below, not only that all the six branches of the Salu Kayaoja family did not join in the alleged partition of their family land, the alleged partition made no provision for the shares of all the branches of the family. In the finding of the two courts below, Salu Kayaoja was survived by at least six children whereas Exhibit P4 showed that the family land was partitioned between only four members of the family. There was also nothing to indicate that all the branches of the family concurred in the partition. Besides the appellant neither pleaded nor led any**

evidence to establish that Sabalemotu Kayaoja and the two others who executed Exhibit P4 did so as Head and representatives of the family. On the contrary, Exhibit P4 was executed by them in their personal capacities as the absolute beneficial owners of the land in issue. It is only when the partition of family land is with the consent of all the principal members of the family that it confers upon each member an absolute right to his share of the land. B See Kadiri Balogun v. Tijani Balogun (1943) 9 W.A.C.A. 78 at 82. **A partition of family land which is made without the consent of the head and the principal members of the family is clearly defective.** See Latunde Johnson v. Amusa Onisiwo (1943) 9 W.A.C.A. 189.

I entertain no doubt that both courts below were right when they C held that the Deed of Partition, Exhibit P4 upon which the appellant's case was based is void and ineffective to pass the Kayaoja family interest in the land in dispute to the appellant's vendor. The maxim nemo dat quod non habet meaning that you do not give that which you do not possess is a well established principle of law which, without doubt, is in accordance with common sense. D So, too is the often quoted dictum of Lord Denning in the Privy Council case of Macfoy v. U.A.C. Ltd. (1962) A.C. 152 where the learned Law Lord observed as follows -

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of Court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also incurably bad. You cannot put something on nothing and expect it to stay. It will collapse." E

I am in complete agreement with the court below that Exhibit P4 is clearly F worthless and void. In the same vein, the Deed of Conveyance, Exhibit P1 executed pursuant to the said Exhibit P4 which is void becomes necessarily void and ineffective as well. Issue 2 must therefore be resolved in the affirmative.

Issue 3 poses the question whether in the circumstances of this G case, the appellant can rely on the provisions of the Limitation Law to sustain his claim to title. In this regard, although both courts below had held, quite rightly, that Exhibits P4 and P1 through which the appellant based his title were ineffective, they accepted his evidence that he had been in exclusive possession of the land from 1949 until he was disturbed by the respondents in H 1967. Said the learned trial Judge -

"I am satisfied on the evidence before me that the Plaintiff was put in possession in 1949 and was in actual and exclusive possession until that possession was disturbed by the Defendant in 1967. The evidence of the

Plaintiff and his witnesses PW1 and PW4 are lucid and straightforward. I accept them. In exhibit P2 at page 3 - my learned brother DUFFUS J. said "I am satisfied and accept the Plaintiffs' case that he was in actual possession of this land"

The court below, for its own part, commented thus -

B *"It may be said that the respondent had what appears as a de facto adverse and long possession against the Kayaoja family. The question however is whether the respondent is entitled to judgment for this reason."*

A little later in its judgment, the Court of Appeal continued -

C *"In his judgment, the learned trial Judge held as a fact that the respondent was put in possession of the land in dispute in 1949 and was in actual and exclusive possession until that possession was disturbed by the defendant in 1967 I have no cause to dispute these findings of fact made by the learned trial Judge."*

D In this connection, reference must be made to Sections 6(2) and 16 of the Limitation Law, Cap. 64 Laws of Western Nigeria., 1959 which provide as follow:-

E *"6(2) No action shall be brought by any other person to recover any land after the expiration of 12 years from the date on which the right of action accrued to him or, if it first accrued to some person other than the Crown which ever period first expires."*

"16. Subject to the provisions of Section 9 of this law, at the expiration of the period prescribed by this Law for any person to bring an action to recover land (including redemption action) the title of that person to the land shall be extinguished." (Underlining supplied for emphasis)

F The contention of the appellant is that the title of Kayaoja family over the land in dispute was extinguished after the expiration of 12 years from the year 1949 in which year the appellant went into possession of the land in dispute. He submitted that the said family thus lost their title to the land from 1962 by virtue of the provisions of Sections 6(2) and 16 of the said Limitation
G Law. The contention was that the appellant having been in exclusive possession of the land for 17 years from 1949 to 1967 in which latter year his possessory right on the land was disturbed, the title of the Kayaoja family over the land had extinguished in 1962. The respondents' reply is that the appellant cannot rely on the Limitation Law and his adverse possession against the
H Kayaoja family to defeat the alleged superior title of the respondents.

Dealing with this issue, the court below was of the opinion that the Conveyance, Exhibit D2 executed in the year 1964 was valid. The court said:-

"As the donees of the power of attorney actually acted under the power of attorney Exhibit "D3" by executing the Deed of Conveyance, Ex-

hibit "D2" in favour of the defendant/appellant the conveyance is valid to that extent. The question now is whether Exhibit "D3" was duly executed according to law".

With the greatest respect, I find it difficult to accept that the respondents derived good title from the conveyance, Exhibit D2. It seems to me plain that although Section 6(2) of the Limitation Law, Cap. 64, Laws of Western Nigeria, 1959 merely bars the right of action and thus destroys the remedy which would have been available to a person in respect of the recovery of his land after the expiration of twelve years from the date on which the right of action accrued to him, Section 16 of the same Law, subject to the provisions of Section 9 of that Law, which is inapplicable in the present case, goes on to extinguish the alleged right of that person itself at the expiration of the twelve year period prescribed for the filing of an action for the recovery of such land. Accordingly both Sections of the Law not only deny the right of action to a claimant, they completely extinguish an existing right at the expiration of 12 years from the accrual of the right of action. See Jimoh Odubeko v. Victor Fowler and Another (1993) 7 N.W.L.R. (Part 308) 637 at Page 661 and 678.

In the present case it is not in dispute that the appellant was put into exclusive possession of the land in dispute in 1949. The possession he enjoyed was clearly adverse to the right of the Kayaoja family, the original owners of the land. The twelve year period prescribed by Section 6(2) of the Limitation Law, Cap. 64, Laws of Western Nigeria, 1959 expired in 1961. **In my view, the Kayaoja family not only lost their right of action against the appellant but had their right or title to the land in dispute extinguished by the operation of law after the expiration of the prescribed twelve year period in 1961. The Deed of Conveyance, Exhibit D2 by which the Kayaoja family purported to convey the land in dispute to the respondents' predecessor in title in 1964 is, without doubt, void as it conveyed nothing to the respondents, the maxim being nemo dat quod non habet. As at 1964, the Kayaoja family had pursuant to the said provisions of the Limitation Law had their rights and/or title to the land in dispute extinguished. They therefore had nothing to convey to the respondents' predecessor in title in so far as the land in dispute is concerned. The court below, with respect, was therefore in error when it pronounced Exhibit D2 as valid and having effectually conveyed the land in dispute to the respondents.**

The respondents however argued that the appellant's adverse possession of the land in dispute and acquiescence on the part of the Kayaoja family could not be used to defeat the respondents' case. He contended that those may only be used as a shield but not as a sword and that the appellant was not entitled to invoke the Limitation Law to sustain a claim in trespass

against the respondents who have a better title. The decisions in Olayioye v. Oladeinde (1969) 1 ALL N.L.R. 281 at 285 and Atunrase v. Sunmola (1985) 1 N.W.L.R. (Part 1) 105 were relied on for this submission.

I think it ought to be pointed out on this issue of adverse long possession that it is trite that title by prescription is completely unknown to B land held under customary tenure. See Mogaji v. Cadbury (1985) 2 N.W.L.R. (Part 77) 383. In this connection a distinction must be drawn between land held under customary tenure and land held under statutory law. Whereas there is nothing like prescriptive title over land held under customary tenure, that mode of title is certainly cognizable in respect of land held under statu- C tory law. Indeed the application of the provisions of the Limitation Law, Cap. 64, Law of Western Nigeria, 1959 is specifically excluded in all actions in respect of title to land held by customary tenure. This is made clear by the provisions of Section 1 (2) of the Limitation Law, Cap 64, Laws of Western Nigeria, 1959 which stipulate as follows:-

D *"1 (2) Nothing in this law shall affect actions in respect of the title to land or any interest held by customary tenure or in respect of any matter which is subject to the jurisdiction of a customary court relating to marriage, family status, guardianship of children, inheritance or disposition of property on death".*

E Accordingly, it is indisputable that the provisions of the Limitation Law, Cap. 64, Laws of Western Nigeria, 1959, particularly Sections 6 (2) and 16 thereof, which prescribe title by prescription, clearly do not affect actions in respect of title to or any interest in land held under customary tenure. They, however, govern actions in respect of title to land held under statutory law.

F In the present case, the land in dispute forms part of a large parcel of land vested in Salu Kayaoja by virtue of a Deed of Conveyance dated the 16th November, 1916, Exhibit D4. It is therefore not land held under custom- ary tenure. Consequently the Limitation Law, Cap. 64. Laws of Western Nigeria, 1959 does therefore apply to the land in dispute which was at all G material times held under a registered Conveyance.

The appellant, on the concurrent findings of both courts below, was in exclusive adverse possession of the land in dispute from 1949 to 1977, a period of 28 years before the present action was commenced. In my view, the appellant can rely on the Limitation Law to defeat the alleged title of the H respondents as evidenced by Exhibit D2 which, at all events, is void. The net effect of Sections 6 and 16 of the Limitation Law is that any title of the Kayaoja family in respect of the land in dispute extinguished and was lost in 1961. See too The Belize Estate and Produce Company Ltd. v. Quilter (1897) A.C. 367 at 372. Accordingly, the Kayaoja family had nothing to convey to

any body when they purported to convey the land in dispute in 1964 to the respondents' predecessor in title per Exhibit D2. See Odubeko v. Fowler, *supra* at 670 and 678.

I need mention that the decisions in Olayioye v. Oladeinde and Atunrase v. Sunmola, (*supra*) are distinguishable from the facts of the present case. Both cases concerned land subject to customary tenure to which the provisions of the Limitation Law did not apply. The present land in dispute, on the other hand, was held under Statutory Law and was therefore subject to the Limitation Law. There lies the distinguishing feature between the two decisions relied upon by the respondents' learned counsel as against the facts of the present case. C

The real question however is whether the appellant is entitled to rely on the provisions of the Limitation Law to sustain his action in damages for trespass and injunction as claimed. In other words, can the Limitation Law in the circumstances of this case be used as a sword? **Can the exclusive and long adverse possessor of land maintain an action trespass against a former owner thereof whose title has been effectively extinguished by the operation of law, such as the Limitation Law of Western Nigeria, 1959 or, against any person who purports to have acquired interest in the land through the original owner but after the title of such an original owner had been lost? My answer to the above questions must be in the affirmative.** See Odubeko v. Fowler, and Belize Estate and Produce Company Ltd. v. Quilter, *supra*. D E

The reasons seem to me clear. A plaintiff in exclusive possession of land may quite rightly institute an action in trespass to protect his right to retain and to undisturbed enjoyment of the land against all wrong-doers except a person who can establish a better title thereto. It will not matter, in my view, that such a plaintiff retained his exclusive possession of the land pursuant to the provisions of the Limitation Law and he cannot be estopped from asserting his possessory title to such land by virtue of the Limitation Law. I think the court below, with profound respect, was in error when it held in the circumstances of this case that long possession could not be employed as a sword but as a shield. This may well be right in respect of land held under customary tenure but not land held under and by virtue of a Statute, such as the Limitation Law. Issue 3 is accordingly resolved in favour of the appellant. F G

The appellant has urged the court to allow this appeal, set aside the H judgment of the Court of Appeal and to restore the judgment of the trial court. And I ask myself whether the appellant succeeded in establishing his action in trespass and injunction as claimed. In the view of the court below, the appellant's action in trespass must fail as against the respondents "who had a

better title" than the appellant.

With the greatest respect to the court below, I find it difficult to accept that the respondents established a better title to the land in dispute than the appellant. In the first place, the respondents derived no title whatever from the Kayaoja family by virtue of Exhibit D2 executed in 1964. This is because the title and all the interest of the family in respect of the land in dispute were totally extinguished" in 1961 by operation of the Limitation Law aforementioned. This is on the principle of nemo dat quod non habet. As against this position is that of the appellant who, although his title per Exhibits P1 and P4 were defective, was found by both courts below to be in exclusive possession of the land for 15 years before the respondents came on the land.

It is a basic principle of law that only a person in possession of land can maintain an action in trespass. See Olugbenro v. Ajagunbade (1990) 3 N.W.L.R. (Part 136) 37, Adebajo v. Brown (1990) 3 N.W.L.R. (Part 141) 661 etc. In the same vein, where a plaintiff's title is defective and the defendant's title is also defective and the plaintiff is in possession of the land in dispute, the plaintiff can successfully maintain an action in trespass against the defendant. See Alhaji Adeshoye v. J. O. Shiwoniku (1952) 14 W.A.C.A. 86 etc. A person in exclusive possession of land can sue for trespass even if he is neither the owner nor a privy of the owner as such possession confers on the possessor in an appropriate case the right to retain it and to undisturbed enjoyment thereof against all wrong-doers except a person who can establish a better title. See Pius Amakor v. Benedict Obiefuna (1974) 4 S.C. 67 at 75 - 76.

In the presence case, the documents of title of both the appellant and the respondents are defective. The appellant nonetheless was at all material times in exclusive possession of the land in dispute. The respondents were unable to establish any title to the land in dispute, let alone better title thereto. I think the appellant in the circumstance is entitled to judgment in trespass and injunction as found by the trial court. The court below was, in my view, in error to have dismissed the appellant's claims.

In the final result, this appeal succeeds and it is hereby allowed. The decision of the court below is hereby set aside together with the order for costs therein made. The judgment of the trial court is hereby restored. There will be costs to the appellant against the respondents which I assess and fix at N600.00 in the court below and N10.00.00 in this court.

UWAIS CJN

I have had the privilege of reading in draft the judgment read by my learned brother Iguh, J.S.C. I entirely agree with the judgment.

I accordingly hereby allow the appeal and adopt the order in the said judgment.

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KUTIGI JSC

I read before now a copy of the judgment just delivered by my learned brother, Iguh, J.S.C I will also allow the appeal, set aside the judgment of the Court of Appeal and restore the judgment of the trial High Court with costs as assessed.

OGUNDARE JSC

I have had the advantage of a preview of the judgment of my learned brother Iguh JSC just delivered. For the reasons given by him in the said judgment I have no hesitation whatsoever in allowing this appeal. I need only comment briefly on the 3rd issue for determination, that is to say, the effect of the provisions of the Limitation Law on the title purportedly acquired by the Respondents.

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Both parties traced their root of title to Salu Kayaoja who acquired a large tract of land (of which the land in dispute forms a part) by purchase in 1914 and a deed of conveyance dated the 16th November 1914 was executed in his favour. Salu Kayaoja thus held the land not under a customary tenure but in fee simple absolute. Plaintiff was unable to prove his title to the land but on the concurrent findings of the two courts below he had been in possession of the land in dispute since 1949. He was at best a squatter on the land all that time as he failed to prove that he claimed title through the true owners of the land, that is, the Kayaoja family. The rule of law is that a squatter who is necessarily a trespasser can maintain an action in trespass against anyone else but the true owner. Thus for the Respondents to defeat the claim of the Plaintiff for damages for trespass and injunction, they must establish that they are the true owners of the land in dispute.

To discharge the onus on them the Respondents rely on a deed of conveyance executed in 1964 in their favour by the Kayaoja family. It is the contention of the Plaintiff that that deed does not transfer any title to the Respondents because at the time the Kayaoja family executed the deed their title to the land had, by operation of law, been extinguished. He relies on Section 16 of the Limitation Law Cap 64 Laws of the Western Region of Nigeria

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1959 applicable at the time of the transaction. Section 16 provided:

"16. Subject to the provisions of section 9 of this Law, at the expiration of the period prescribed by this Law for any person to bring an action to recover land (including a redemption action) the title of that person to the land shall be extinguished."

B By section 6(2) of the Law the period prescribed for the bringing of any action to recover land was 12 years from the date on which the right of action accrued. The Kayaoja Family's right of action against the Plaintiff's wrongful entry on the land accrued in 1949. By 1961, that is, 12 years thereafter that family lost its right of action against the Plaintiff who had remained on the land
C all those years and by virtue of section 16 the family also had their title to the land extinguished. Thus, in 1964 when the family executed the deed of conveyance in favour of the Respondents, the family had no title to pass on to the latter. The net result is that they too have no title to the land in dispute. They, therefore, cannot be described as true owners of the land.

D In Olayoye v. Oso (1969) 1 ALL NLR 281; (1969) ANLR 271 and Atunrase & Anor. v. Sunmola & Anor. (1985) 1 NWLR 105 this Court held that prescription is unknown to customary law and that consequently, under that law, long and adverse possession of land cannot found a claim in title against the true owner. It was also held in the said cases that the plea of long possession can only be employed as a sword and not as a shield. The Respondents in this appeal rely on these cases in their plea that the Plaintiff cannot resort to Section 16 of the Limitation Law to defeat their title purportedly acquired by virtue of the deed of conveyance in their favour. I think they are wrong. I say so because the land in each of those cases, unlike the land in the present
F appeal, was held under customary tenure and to which, by virtue of Section 1(2), the Limitation Law would not apply. Secondly, the Plaintiff in this case is not claiming title by prescription but damages for trespass and injunction. Had the title of the Kayaoja family in the land in dispute not been extinguished by section 16 of the Limitation Law, the Plaintiff, on the authority of those
G cases could not have successfully set up a plea of long possession to defeat the Respondents' title. I can find no conflict in the decision of this Court in those cases on the one hand and its later decision in Odubeko v. Fowler (1993) 7 NWLR 637.

The Respondents not being the true owners of the land in dispute
H the Plaintiff, though a squatter on it, can maintain an action in trespass against them. The Court below was, therefore, in error to have found to the contrary. I agree with the learned trial Judge who held that the Plaintiff's claims succeeded.

I agree entirely with my learned brother Iguh, JSC that issues 1 & 2

must be resolved in the Respondents' favour but as issue 3 is resolved against them this appeal succeeds. It is hereby allowed by me. I subscribe to the Consequential orders including the order as to costs made by my learned brother Iguh JSC.

B

OGWUEGBU JSC

I have had the privilege of a preview in draft of the judgment of my learned brother Iguh, J.S.C. and I entirely agree that the appeal must succeed and it is hereby allowed.

The right and title of Kayaoja family to the land in dispute which was subject to adverse possession by the plaintiff from 1949 to 1967, a period of about eighteen years was absolutely extinguished in 1961 by virtue of sections 6(2) and 16 of the Limitation Law, Cap. 64, Laws of Western Nigeria, 1959. This Law which was applicable at the time of the transaction provided as follows in Sections 6(2) and 16 thereof:

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"6(2) No action shall be brought by any other person to recover any land after the expiration of 12 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person: Provided

"16. Subject to the provisions of section 9 of this law, at the expiration of the period prescribed by this law for any person to bring an action to recover land (including redemption action) the title of that person to the land shall be extinguished."

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The proviso to section 6(2) is not applicable to the instant case. While section 6(2) of the Law merely barred the remedy, section 16 extinguished the title. The said Law in its section 1(2) excluded actions in respect of title to land or any interest in land held under customary tenure from its operation. The parcel of land the subject matter of the present litigation was held under the received English Law and it was therefore subject to the Limitation Law. The cases of Olayioye v. Oso (1969) ALL N.L.R. and Atunrase & Ors. v. Sunmola & Anor. (1985) ALL N.L.R. 145 relied on by the court below in dismissing the plaintiff's claim are distinguishable in the following respects:-

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(1) Those two cases concerned parcels of land subject to customary tenure to which the Limitation Law of 1959 did not apply and,

(2) The plaintiff in the present proceedings was not claiming a declaration of title by prescription. His claim was for trespass and it was actionable at the suit of the person in possession of the land. That person could even if he was neither the owner, nor a privy of the owner. See Amakor Obiefuna (1974) ALL N.L.R. 109, Emegwara & Ors. v. Nwaimo & Ors. 14 W.A.C.A. 347 at

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348 and Wuta-Ofei v. Danquah (1961) 3 ALL E.R. 596 at 600.

Accordingly, the descendants of Salu Kayaoja, the original purchaser of the land in dispute had nothing to convey to the defendant in 1965. The basic rule as to transfer of title to personal or real property is that no one can give a better title than his own. He can give possession but definitely not a B title which is not vested in him. Nemo dat quod non habet.

For the above reasons and the fuller reasons contained in the judgment of my learned brother Iguh, J.S.C., I, too, allow the appeal. I abide by the consequential orders including the order of costs made in the said judgment of my learned brother Iguh, J.S.C.

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