

**SUPREME COURT OF NIGERIA**  
11TH APRIL, 1997. SC. 164/1990  
**CORAM:- S. M. A. BELGORE, E. O. OGWUEGBU, U. MOHAMMED,**  
**S. U. ONU, Y. O. ADIO, JJSC.**

ANTHONY O. IYAMU EDEBIRI ..... PLAINTIFF/APPELLANT  
AND  
1. DOLEYI OSAWE EDEBIRI ..... 3RD DEFENDANT/RESPONDENT  
  
2. PERMANENT SECRETARY MINISTRY ..... RESPONDENT  
OF WORKS AND TRANSPORT, (Joined by Order of  
BENDEL STATE Court dated 6th July, 1978)  
  
3. THE REGISTRAR, HIGH COURT, BENIN ..... DEFENDANT

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**ACTIONS** - *Relief - Granted to the respondent - Is inconsistent with his case.*

**JUDICIAL PRECEDENT** - *Principle of apportionment of compensation - In the case of Agheoghen v. Chief Waghoreghor - Ought to be distinguished from the instant case.*

**LAND LAW** - *Compensation - Paid by Government in respect of acquired land - Was wrongfully apportioned - To a party with mere possessory right.*

**LAND LAW** - *Compensation - Judicial precedent - Apportionment of compensation - Cannot be granted to a party in possession - But who has no proprietary interest.*

**PLEADINGS** - *Relief that was not pleaded - Should not be granted to a party - Since the court is not a charitable institution.*

**FACTS**

The plaintiff/appellant in a previous suit No. B/68/72 that was finally determined by the Supreme Court, secured declaration of title against the defendants/respondents in respect of a piece of land known as No. 1 Omo Street, Benin - City. Part of this land was acquired by Government of Bendel State who paid N11,700.00 compensation into court. In the said previous suit No. B/68/72 both the trial court and Supreme Court held that the 3rd defendant/respondent (referred to simply as respondent hereinafter) was in possession of part of the building.

Appellant filed this action in his capacity as the declared owner to recover the N11,700.00 compensation. Respondent against whom appellant made no claims got himself joined as a party. The trial Court found in favour of the appellant. Respondent's appeal to the Court of Appeal led to half of the compensation being granted to the respondent, a relief that was never claimed by him. Being aggrieved appellant has now appealed to the Supreme Court raising 3 issues.

#### **ISSUES FOR DETERMINATION**

*"1. Whether the Respondent not having filed or made any claim/ counter claim in this case, is entitled to portion of the sum of N11,700.00 duly claimed by the Appellant.*

*2. Whether the Court of Appeal was right in adjudging portion of the sum of N11,700 to the Respondent on the basis of his possession of part of the damaged portion of the premises.*

*3. Whether on the facts of this Case, it was right for the Court of Appeal to have relied on the principle of apportionment adopted by the Supreme Court in Chief Waghoreghor & 2 ors. v. Aghenghen."*

#### **HELD** (Unanimously allowing the appeal per lead judgment of ONU JSC) **Compensation was wrongful apportioned**

1. The court below in my respectful view was wrong to have based its decision to apportion the compensation money amounting to N11,700.00 on what the court regarded as the 'possessory right' of the Respondent in respect of No. 1 Omo Street, Benin City, being the absolute and unencumbered property of the appellant. (p. 679 F)

#### **Actions - Relief granted is inconsistent with respondent's case**

2. It is thus clear from the above that the Respondent's case is inconsistent with the relief granted to him by the court below which was based on his possession of part of the property in question and which he claimed to be his property. Clearly, that was not the basis of his case at the trial. It is trite that a party is not permitted to change his case on appeal, since appeal is simply the continuation of the case put forward in the court of first instance. (p.681F)

#### **Judicial precedent - Apportionment of compensation**

3. The court below as can be seen, was therefore in error to have relied on the principle of apportionment adopted by this court in Aghenghen v. Chief Waghoreghor (supra) which ought to be distinguished from the instant case in the following respects. Whereas the contest for apportionment of compensation money in Aghenghen's case was between the landlords and the cus-

tomary tenants, both of whom have differing and well-known legal estates or interests in the land, the dispute in the case in hand is between the absolute owner of the house on the one hand, and the son of the absolute owner's late uncle who was accommodated in the house by the father of the absolute owner on the other hand. In other words, while the customary tenants in Aghenghen's Case have proprietary interest in the land in dispute, subsisting in perpetuity unless forfeited, the Respondent's possession of or better still, presence in No. 1 Omo Street, Benin City, did not confer on him any proprietary interest whatsoever in respect of the property in this case. (p. 683 C)

### **Relief that was not pleaded**

4. Nowhere in his Statement of Defence did he even plead or ask for entitlement to the sum of N11,700.00 or any part thereof. Indeed, his only contention in his Statement of Defence was that the Appellant's claim to the sum of N11,700.00 should be dismissed. In that wise, no court should, unsolicited, grant any relief to the Respondent in this case on the well known legal principle that a court of law should never award what is neither claimed nor pleaded by a party, since a court is not a charitable institution. In the circumstances, the court below was in error in awarding to the Respondent a portion of the sum of N11,700.00 claimed by the Appellant against 1st and 2nd defendants. (p. 684 B)

### **NOTABLE POINT OF INTEREST**

#### **OGWUEGBUJSC**

*Respondent's father had no inheritable interest*

1. The respondent's father being at best, a licensee or a tenant at will as found by the learned trial judge, respondent's possession of the premises cannot be higher than that of his late father. Infact, the possession of part of No. 1, Omo Street, Benin City ought to have terminated on the death of Chief Osawe Edebiri (respondent's father) since he had no interest in the property which could be inherited by the respondent. (p. 687 E)

### **REPRESENTATION**

Dr. Mudiaga Odje SAN. with P. B. Atayi Esq. for the Appellant  
Alhaji J. Omo Ehizogie, for the Respondent

### **CASES REFERRED TO**

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

Shell B. P. Petroleum Dev. Company v. Abedi (1974) 1 S.C. 23 at p. 49

Oredoyin v. Arowolo (1989) 4 NWLR (Part 114) 172 at 211

Cardoso v. Exors of Doherty (1938) 4 W.A.C.A. 78 at p. 80  
 George v. Dominion flour Mills Ltd. (1963) 1 All N.L.R (part 1) 71 at 77  
 Evbuomwan v. Elema (1994) 11 KLR 323  
 Union Beverages Ltd. v. Owolabi (1988) 1 NWLR (Part 68) 118  
 Cardoso v. The Executor of the Estate of Late J. H. Doherty  
 Obioma v. Olomu (1978) 3 S.C. 1  
 Abang v. Effiom (1976) 1 S.C. 17  
 Chief Registrar, High Court of Lagos State v. Navigation Ltd. (1976) 1 S.C. 33

### **LEAD JUDGMENT BY ONUJSC**

The Plaintiff/Appellant and 3rd Defendant/Respondent (hereinafter referred to simply as Appellant and Respondent respectively) were parties to Suit No. B/68/72. In the present suit, Appellant claimed against the Defendants jointly and severally:

*"1. For a declaration that the Plaintiff is entitled to the sum of N11,700.00k paid by the 1st Defendant to court that is to say, to the Registrar, High Court, Benin City, in respect of the damage done to the Plaintiff's house known and called No. 1, Omo Street, Benin City during the construction of Mission Road, Benin City.*

*2. For an order that the said sum of N11,700.00k in the custody of the 2nd Defendant be paid to the Plaintiff, he, Plaintiff having obtained a declaration of title to the said No. 1, Omo Street, Benin City by a decision of the High Court, Benin City dated 31st July, 1974, in suit No. B/68/72 which said judgment was upheld by the Supreme Court of Nigeria on 10th October, 1977 in appeal No. SC. 320/1975."*

For a better appreciation of how the case herein originated, it is pertinent to set out albeit briefly, the facts giving rise thereto as follows:-

The Appellant was plaintiff and the Respondent as 3rd Defendant, were first in the High Court Benin City in Suit No. B/68/72 in which the Appellant was seeking against the Permanent Secretary, Ministry of Works and Transport, Bendel (now Edo) State of Nigeria, the Registrar High Court Benin City and the Respondent (joined in the suit by Order of Court dated 6/7/78) seeking:

(a) a Declaration of Title, (2) Recovery of possession, and (3) perpetual Injunction to a piece or parcel of land.

While that case was proceeding in the High Court, the Government of Bendel (now Edo) State acquired part of the land for the extension of Mission Road, Benin City. The Appellant in order to prevent the Respondent or any other person from claiming the money due to be paid as compensation for the land and part of the building demolished, wrote to the Controller of Works

and Permanent Secretary, Ministry of Works and Transport, Benin City through his solicitors on 2nd February, 1974 requesting that the money be paid into Court in the interest of justice. This request was duly acceded to.

At the end of the proceedings in the High Court the Appellant had judgment in his favour. Whereupon the Respondent appealed to this Court B (there being no Court of Appeal at the time). This court dismissed the respondent's appeal, affirmed the order for Declaration of Title but varied the order for perpetual injunction made by the trial court as too wide in scope, and dismissed the Appellant's cross-appeal against the refusal of the trial court to make an order for recovery of Possession; the trial court having in consequence arrived at the view that the Respondent was in possession of that part C of the building under Bini customary Law.

Soon after the termination of the litigation hereinbefore alluded to, the appellant Applied to be paid. As the money was not paid for obvious reasons, the Appellant filed the suit giving rise to this appeal in the High Court D claiming a declaration that he was entitled to be paid the compensation money as owner of No. 1 Omo Street, Benin City, part of which was damaged and paid for by the Bendel State Government.

The Respondent whose possession of No. 1 Omo Street under Bini Customary law had been confirmed by this Court also applied in the pleadings E ordered to be joined to the two defendants and he was so joined by Order of the Court dated 6th July, 1978 as 3rd Defendant.

The Benin High Court (Ekeruche, J.) gave judgment on 7th December, 1978 for the entire sum of N11,700.00 in favour of the Appellant. Whereupon, the Respondent appealed to the Court of Appeal, Benin Division sitting F at Benin City (hereinafter referred to as the court below).

The Court below allowed the Respondent's appeal on 7th December, 1988 and proceeded to divide the compensation equally between the Appellant and Respondent with costs against the appellant assessed at N400.

Being dissatisfied with the said judgment of the Court of Appeal, the G Appellant has appealed to this Court upon a Notice of Appeal containing five grounds. Parties subsequently exchanged briefs of argument in accordance with the rules of this Court.

Three issues were submitted by the Appellant as arising for determination. They are:

H *"1. Whether the Respondent not having filed or made any claim/counter claim in this case, is entitled to portion of the sum of N11,700.00 duly claimed by the Appellant.*

*2. Whether the Court of Appeal was right in adjudging portion of the sum of N11,700 to the Respondent on the basis of his possession of part of*

*the damaged portion of the premises.*

3. *Whether on the facts of this Case, it was right for the Court of Appeal to have relied on the principle of apportionment adopted by the Supreme Court in Chief Waghoreghor & 2 ors. v. Aghenghen."*

The Respondent for his part rather than formulate fresh and separate issues for the determination of this Court, quite rightly in my view, adopted the three B submitted by the Appellant.

At the hearing of this appeal on 21st January, 1997, learned counsel for the parties adopted and relied on their respective briefs of argument. They made oral expatiation of the briefs. Learned Senior Advocate, Dr. Odje, for the Appellant after indicating that he would argue issues 2 and 3 first, submitted C on those issues as follows:-

The decision which this Court will ultimately resolve in this case, he contended, is based on two concepts, to wit: ownership and possession as well as the advocacy technique of pleadings. Happily, he added, the issue of ownership had been resolved by the two lower courts in favour of the Appel- D lant. For instance, he argued, the court below having held that

*"There can be no doubt, therefore that by the above quoted judgment of the Supreme Court, the respondent in this appeal had been adjudged as the owner of the property described as Nos. 1, 3 and 5 Omo Street, Benin City."* E

a finding on which there was no cross-appeal by the Respondent. Learned Senior Advocate further submitted concerning the concept of possession that, this was not really a contested matter as indeed conceded by the Respondent's counsel (then as appellant's counsel in the court below) and this is the moreso, as a court should not make a case for a party which that F party never made for himself. In other words, that the gravamen of the Appellant's argument is that the respondent, who joined the proceedings as the 3rd Defendant by Order of Court following his application in that regard, never at any time throughout the proceedings placed any claim/counterclaim G to any sum before the Court. Nowhere in his statement of defence, it is contended, did he even plead or ask for entitlement to the sum of N11,700.00 or any part thereof. Indeed, it is maintained, his (Respondent's) only contention in the statement of defence was that the Appellant's claim to the sum of N11,700.00 should be dismissed, adding that on the legal proposition stated above, no court should grant any relief to the Respondent which he neither H claimed nor pleaded, it being no charitable institution. The case of Ekpenyong & 3 ors. v. Nyong & ors. (1975) 2 S.C. 71 was cited in support of the proposition thereof. Learned Senior Advocate after referring to some passages in the Record of Appeal, further submitted that this aspect of the case for the Re-

spondent who was Appellant in the court below, was not based on his claim to possession but rather to the money paid into court on the basis of his ownership of the property involved. After we were also referred to some pleadings in the statement of Defence and certain passages in the Record of appeal, learned Senior Advocate urged us to hold that the Respondent was a tenant at B will or a glorified tenant. He further submitted that it was leave and licence granted by the Appellant's father to Respondent's father as his brother, adding that that tenancy could not ripen into ownership. It is further argued that by the permanent injunction this court granted at pages 114 and 115 of the Record of appeal the Respondent is precluded from dealing with anybody in C relation to the land in dispute.

The other side of the coin, learned Senior Advocate submitted, is the pleadings, upon which he argued, the Respondent had not based his claim to compensation on occupation of the land in dispute as someone put in possession by the rightful owner; by reason of which he (Respondent), had no D proper claim before the court. Indeed, it is contended, the Respondent applied to be joined in the suit; not that he brought a substantive suit himself. It is further contended that where a customary tenant claims a right to compensation but is not the owner, he must of necessity have his claim dismissed. The case of Shell B. P. Petroleum Dev. Company v. Abedi (1974) 1 S.C. 23 at p. E 49; (1974) 1 All N.L.R. (Part 1) 1 at p. 19 was cited in support of the proposition. In the instant case, he submitted, the Respondent pleaded ownership but did not prove it. After we were enjoined to see the effect of Exhibit 2, learned Senior Advocate finally argued that the judgment of the trial court was correct and ought not to have been disturbed, adding that that court fully relied on F and considered Exhibit 2 and in conclusion referred to Oduka v. Kasumu (1967) 1 All N.L.R. 2923; (1968) N.M.L.R. 32, 2nd para.

I see the force in the Appellant's submission.

By the purports of paragraphs 5, 8 and 9 of Statement of claim the Appellant pleaded inter alia as follows:-

G     "5. *The Plaintiff avers that No. 1, Omo Street, Benin City was built by and property of the said Edebiri (deceased). Edebiri lived in the said house and property during his life time. On the death of the said Edebiri the said house was inherited by Igbinoghene under Bini Customary law by which the property where the deceased lived passed to the eldest son. By the H same custom the house was inherited by Iyamu and then by the Plaintiff.*

*8. The 3rd Defendant appealed to the Supreme Court of Nigeria whereat the Supreme Court affirmed the decision of the Benin High Court making a declaration of title to the Plaintiff. The Supreme court also granted a permanent injunction against the 3rd defendant, his agents or privies from*

*alienating, surveying, dealing of treating with anybody in respect of the said piece or parcel of land known and described as No. 1, Omo Street, Benin City, in any manner inconsistent with the Plaintiffs right, title and interests in the said piece of land. The said judgment of the Supreme Court will be relied upon at the trial.*

9. *The Plaintiff avers that during the reconstruction of Mission B Road, Benin city the front part of the said No. 1, Omo Street, Benin City, was demolished and part of the land was annexed to the Road by the reconstruction and extension of the Road."*

In paragraph 2 of the Respondent's (3rd Defendant's) Statement of Defence, the respondent denied among others, paragraphs 5, 9, 14, 16 and 18 of the Appellant's Statement of Claim. He, in addition in paragraph 3 of the Statement of Defence Stated that he was no in a position to deny or admit paragraphs 6, 7, 8, 12, 13 and 17 of the Statement of Claim. He then went ahead in paragraphs 5, 8 and 9 of the Statement of Defence to plead as follows:-

"5. *That the N11,700.00 paid by Government was for the demolition of part of the house of 3rd defendant known as No. 1 Omo Street, Benin City."*

8. *The 3rd defendant's predecessor in title built the house about forty years ago and Government paid the compensation the subject matter of this action as a result of the demolition of part of the house during the reconstruction of Yakubu Gowon road, (Now Mission Road) Benin City.*

9. *At the hearing of this suit the 3rd defendant shall establish that before the demolition of part of the said house he had the following tenants in the house; Namely:- Akinjobi, Mr. O. Odiase, Mr. Nusa, Mr. W. Otabor, Mr. D. Agbontaen, Mrs. S. Abu, F. Anigbere, Onuma and Mr. Mba."*

**The court below in my respectful view was wrong to have based its decision to apportion the compensation money amounting to N11,700.00 on what the court regarded as the 'possessory right' of the Respondent in respect of No. 1 Omo Street, Benin City, being the absolute and unencumbered property of the appellant.** The following are my reasons.

Firstly, the so called 'possessory right' of the respondent in respect of No. 1 Omo street Benin City was not such as he acquired an estate or interest that devolved on him from his deceased father, Chief Osawe Edebiri, on the principle of 'Igiogbe' which is basically patrilineal under Bini customary law of succession. See *Ogiamien v. Ogiamien* (1967) N.M.L.R. 246. This was the express finding of the learned trial Judge who held *inter alia* that:

*"I do not agree with the contention of the learned counsel for the 3rd Defendant (i.e. respondent herein) that the 3rd Defendant is entitled to compensation for loss of possession and use of the rooms which were demol-*



ished even assuming that the part demolished were those which late Chief Osawe was allowed to let out and use rents therefrom for his subsistence. That argument will only hold water if late Osawe's possession and use of the said apartment which on his death might accrue to his successor to the apartment amounted to a transmissible estate or interest. There is no evidence that this is so. [Parenthesis are mine].

Furthermore, on the specific finding of the trial court, the Respondent father (and afortiori the Respondent himself whose possession is neither hither nor better) was a glorified tenant at will in respect of parts of No. 1 Omo Street Benin City. This is because as the trial Court pointed out:

"The 3rd Defendant's father had no right or interest in the house which he could assert against the Plaintiff's late father who accommodated him in parts of the house. He was only a dignified tenant at will in the apartment."

Secondly, the inconsequential nature of the possession of the Respondent's father in respect of No. 1 Omo Street Benin city is better appreciated from Exhibit 1, i.e. Suit No. B/68/72 in which Ogbobine, J's judgment (affirmed on appeal by this Court in SC.320/1975 - Exhibit 2) wherein he authoritatively laid down the position of the Respondent's father as that of someone having no beneficial interest whatsoever in the apartments given to him for use by his elder brother, the Appellant's grandfather, whose title to the house was absolute and unencumbered as follows:-

"The Defendant himself [i.e. the Respondent in this appeal] said in cross-examination as follows:-

"I now inherit No. 1 Omo Street, Benin City. Some of my younger brothers are living with brothers. Those living with me cannot claim part of the house occupied by them."

This is exactly what the Plaintiff's father Iyamu Igbino ghene said, and which the Plaintiff said, and which the Plaintiff is saying that Chief Osawe Edebiri could not do. Having lived with Igbino ghene in the house built by him and which house was inherited by Iyamu Igbino ghene who was the eldest son, Chief Osawe Edebiri could not claim the apartments in which he lived as his own. The evidence shows that this is Bini custom and I accept it as being reasonable and sensible. It did not matter what improvements Osawe made to the house, which is now known as No. 1 Omo Street, it continues to remain the property of the Plaintiff's grandfather which was inherited by the Plaintiff's father and now the Plaintiff. The absolute title to the land under native law and custom is vested in the Plaintiff." (Underlining is mine for emphasis).

It is clear from the foregoing that the court below did not advert its attention

to this vital part of Exhibit 1. Neither did it consider the Appellant's case as set out in Exhibit 1 nor did it evaluate it as part of its judicial duty, this vital documentary evidence duly placed before it and submitted for its consideration.

Thirdly and finally, although the Respondent was allowed to remain in his hollow and inconsequential possession of part of the premises as a result of the judgment is Exhibit 1, Suit no. B/68/72, yet his whole case both on his pleadings and evidence was based on his ownership of No. 1 Omo Street, Benin City. Indeed, what he had done is to openly challenge the Appellant's absolute title to the house, and errantly represented himself to the defunct Bendel State Government as the actual owner of the building and he thereby got top State Government functionaries to deal with him as if he was the real owner of the house concerned. This is borne out of the contents of Exhibits 5 and 6, which are notices addressed by these officials to him as the true owner of the house, albeit erroneously. Thus, I take the firm view that the court below went wrong when it held inter alia that:

*"It is in my view clear that by the judgment of the Supreme Court quoted above, their Lordships clearly gave cognizance to the possessory right of the appellant. The position then must be that at the time of the litigation that led to this appeal, the appellant was in possession of the areas of the disputed property occupied by him. And as it was established in evidence before the learned trial Judge that at the time of the demolition exercise the appellant was in occupation of the area of the property which included the portion that was demolished, it must therefore follow that his possessory interest was to that extent affected by the demolition exercise. It must therefore follow that if there was any compensation paid for the disturbance of his possessory right, he should for that reason also be a beneficiary of part of the compensation money so paid."*

**It is thus clear from the above that the Respondent's case is inconsistent with the relief granted to him by the court below which was based on his possession of part of the property in question and which he claimed to be his property. Clearly, that was not the basis of his case at the trial. It is trite that a party is not permitted to change his case on appeal, since appeal is simply the continuation of the case put forward in the court of first instance. See Lawrence Adebola Oredoyin & 2 ors. v. Chief Akala Arowolo & ors. (1989) 4 NWLR (Part 114) 172 at 211 paras. E-F (per Oputa, J.S.C.). See also Order 1 Rule 2 Court of Appeal Rules where appeal is defined thus:**

*"Appeal includes an application for leave to appeal" while Black's Law Dictionary, Sixth Edition page 96 defines the word "Appeal" thus: "Appeal includes an application for leave to appeal." or "Resort to a supe-*

*rior (i.e. appellate) Court to review the decision of an inferior (i.e. trial) court or administrative agency. A complaint to a higher tribunal of an error or injustice is sought to be corrected or reversed."*

The Appellant's contention as regards the difference between the basis of the Respondent's case and the judgment of the court below is founded on the well-known legal proposition that a party is not permitted to make a case contrary to his pleadings and of course, evidence as well vide Cardoso v. Exors of Doherty (1938) 4 W.A.C.A. 78 at p. 80; George & ors. v. Dominion Flour Mills Ltd. (1963) 1 All N.L.R. (part 1) 71 at 77, Orizu v. Anyeagbunam (1978) 5 S.C. 21 at 36 and Oredoyin v. Arowolo (supra). In Shell B.P. Petroleum Development Company of Nigeria Ltd. v. Abedi & ors. (1974) 1 S.C. 23, a case dealing with claims for oil compensation between land owners and customary tenants, the plaintiff community represented by Mr. Abedi claimed inter alia compensation from Shell B. P. Petroleum Development Company of Nigeria Limited. They based their claim on ownership of the land on which the oil company carried out its operations, even though there was an earlier binding judgment declaring them as customary tenants to an adjacent but rival community. Notwithstanding the basis of ownership on which the plaintiffs predicated their claim for compensation against the oil company, the trial court awarded compensation in favour of the plaintiffs on the basis that they were customary tenants on the land on which the oil was produced by the company.

On appeal to this court from the judgment of the lower court (appeals then still lay from the High Court direct to the supreme Court) the decision was set aside, and the plaintiffs' claim for compensation was dismissed as being inconsistent with the basis of their claim as owners of the land. Delivering the unanimous judgment of this Court, Fatayi-williams, J.S.C., as he then was, observed inter alia at pages 49-50 of the report as follows:-

*"Both in his pleadings and in the evidence adduced in support, it is the contention of the plaintiff/respondent that the Abadiamas (that is, the plaintiffs/respondent people) relied on their ownership of the land for their claim for damages. Having failed to prove such ownership, of the land for their claim for damages. Having failed to prove such ownership, the evidence adduced as to possession becomes irrelevant ..... Therefore, that possession, unless they were customary tenants, cannot be inconsistent with the occupation of the true owner or of some body duly authorized or permitted to occupy the land by the true owner."*

In view of the foregoing, the court below was clearly wrong when in the instant case it went ahead to award part of the compensation money in favour of the Respondent, the basis of whose case is inconsistent with the judgment

of the court which held:

*"For the above reasons, it is my opinion that the appellant ought to have a share in the compensation money. The payment of a portion of the money to the appellant would not in the circumstances derogate from the ownership of the property as it now stands, in the respondent. In any event from the evidence it seems clear that the possessory rights earlier enjoyed by the appellant had been extinguished by the demolition exercise, and the fact that the appellant, upon his own admission had moved out of the remaining portion of No. 1 Omo Street, Benin City, to his own house.*

*Following the principle established in the Aghenghen case (supra) that there can be no hard and fast rule that can be laid down as to the exact proportion of the shares in every case, I would in this case divide the compensation money equally between the appellant and the respondent."*

**The court below as can be seen, was therefore in error to have relied on the principle of apportionment adopted by this court in Aghenghen v. Chief Waghoreghor (supra) which ought to be distinguished from the instant case in the following respects.**

**Whereas the contest for apportionment of compensation money in Aghenghen's case was between the landlords and the customary tenants, both of whom have differing and well-known legal estates or interests in the land, the dispute in the case in hand is between the absolute owner of the house on the one hand, and the son of the absolute owner's late uncle who was accommodated in the house by the father of the absolute owner on the other hand. In other words, while the customary tenants in Aghenghen's Case have proprietary interest in the land in dispute, subsisting in perpetuity unless forfeited, for which see Nya v. Waro & 3 ors. v. Ogegede (1971) 1 F NMLR. 413 at Page 418, the Respondent's possession of or better still, presence in No. 1 Omo Street, Benin City, did not confer on him any proprietary interest whatsoever in respect of the property in this case - none that is known under Bini customary law of acquisition of land. See William Evbuomwan & 3 ors. Jonathan Elema & 2 ors. (1994) 6 NWLR (Part 353) 638.**

Another point of marked difference in the facts and circumstances of both cases is that while the claim for apportionment of the compensation money in Aghenghen's Case was also made by the customary tenants qua customary tenants, who thus founded their claim on their possession of the land, the Respondent in the instant case made no claim to compensation but based his defence on his ownership of the house at No. 1 Omo Street, Benin City. Such claim to absolute ownership of the house is, as earlier pointed out, inconsistent with the judgment of the court below which apportioned the compensation money based on his (Respondent's) possession thereof. Such

judgment, with due respect, cannot be allowed to stand.

My answer to both issues 2 and 3 are accordingly in the negative.

It remains to consider issue No. 1 briefly by stressing that the Appellant, even though raised this point in the court below, that court declined to consider it in the absence of a cross-appeal on it by him. The gravamen of the B appellant's argument is that the Respondent, who later joined in the proceedings as 3rd defendant by order of court following his application to that effect, never at any time throughout the proceedings, placed any claim/counter-claim to any sum before the court. **Nowhere in his Statement of Defence did he even plead or ask for entitlement to the sum of N11,700.00 or any part C thereof. Indeed, his only contention in his Statement of Defence was that the Appellant's claim to the sum of N11,700.00 should be dismissed. In that wise, no court should, unsolicited, grant any relief to the Respondent in this case on the well known legal principle that a court of law should never award what is neither claimed nor pleaded by a party, since a court is not a charitable institution.** See Ekpenyong & ors. v. Nyong & 6 ors. (supra) and Union Beverages Ltd. v. Owolabi (1988) 1 NWLR (Part 68) 118. **In the circumstances, the court below was in error in awarding to the Respondent a portion of the sum of N11,700.00 claimed by the Appellant against 1st and 2nd defendants, whom the Respondent joined as 3rd defendant, ostensibly in defence to the E Appellant's claim. It is noteworthy to observe in conclusion that the Appellant who had a claim and a right to enforce same, made it abundantly clear in paragraph 16 of his Statement of Claim that he had absolutely no claim to pursue against the Respondent. On the other side of the coin is the Respondent's quest to be joined in the suit giving rise to the appeal herein F which was acceded to. Interestingly enough, however, he has ended up defending nothing.**

I have no hesitation therefore in answering issue 1 in the negative.

In the result, this appeal succeeds and it is allowed by me. The judgment of the Court of Appeal Benin Division delivered on 7th December, G 1988 with the costs awarded is hereby accordingly set aside. The judgment of the trial court is hereby restored with costs assessed at N400 in the court below and N1,000 in this Court in appellant's favour.

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#### BELGORE JSC

I agree with the judgment of my learned brother, Onu, J.S.C., and I have nothing to add. I adopt his reasonings in allowing this appeal.

**OGWUEGBU JSC**

I agree with the judgment just delivered by my learned brother Onu, J.S.C., and for the reasons given, that this appeal should be allowed. I however wish to make the following contribution only for sake of emphasis.

The facts of the case and the questions to be determined in this appeal have been fully stated in the lead judgment of my learned brother Onu, B J.S.C. and I need not to repeat them.

Dr. Odje has submitted in the appellant's brief in respect of issue (2) that the court below was wrong to have based its decision to apportion the compensation money amounting to N11,700.00 on what the court regarded as the "possessory right" of the respondent in respect of No. 1, Omo Street, Benin City which is an absolute and unencumbered property of the appellant.

He further submitted that the so-called "possessory right" of the respondent was not such that was obtained by him as an estate or interest that devolved on him from his deceased father, Chief Osawe Edebiri.

It was further submitted that the respondent's possession of No. 1, D Omo Street, Benin City was not higher or better than his father's (Chief Osawe Edebiri). We were referred to the decision of the Benin High Court in Exhibit "1" (Suit No. B/68/72) which came on appeal in this court as Suit No. SC.320/1975 (Exhibit "2").

To determine whether the respondent's "possessory right" is one E which is coupled with interest that can be transmitted to be able to justify the decision of the court below in apportioning the compensation money between the appellant and the respondent, I will consider the pleadings and Exhibits "1" and "2". In paragraphs 1, 4, 5, 6, 7 and 8 of the statement of claim, the plaintiff/appellant averred as follows:

*"1. The Plaintiff is a Bini and a member of the Edebiri family of Benin City. The Plaintiff is the eldest son of Iyamu (deceased). The said Iyamu was the eldest son of Igbinoghene (deceased) himself the eldest son of Edebiri (deceased). The Plaintiff resides at No. 1, Omo Street, Benin City.*

*4. The 3rd Defendant is also a member of the Edebiri family of Benin G City whose father, Chief Osawe (deceased) is the eleventh son of Edebiri aforesaid. The 3rd Defendant was joined in this suit by an order of this Honourable Court dated 6th July 1978.*

*5.<sup>8</sup>*

*6. The ownership of the said No. 1, Omo street, was inter alia H the subject of litigation in Suit No. B/68/72 at the High Court, Benin City between the Plaintiff and the 3rd Defendant. The Plaintiff got judgment in*

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<sup>8</sup> See p. 678 G

*the said Suit and obtained a declaration of title to Nos. 1, 3 and 5 Omo Street, Benin City.*

*7. The proceedings in the said suit and in particular the judgment thereat will be relied upon at the trial.*

B 8.<sup>9</sup> "

The 3rd defendant in paragraph 1 of his statement of defence admitted paragraphs 1, 2, 3, 10 and 15 of the statement of claim. He denied paragraphs 5, 9, 14, 16 and 18 in paragraph 2 of his statement of defence. In paragraph 3 of his statement of defence, the 3rd defendant averred that he was not in a position to admit or deny the averments in paragraphs 6, 7, 8, 12, 13 and 17 of the statement of claim.

In paragraphs 4, 8 and 9 of the statement of defence, the 3rd defendant averred as follows:

*"4. At the hearing of this suit the 3rd defendant shall establish that both in the High Court, Benin City in Suit No. B/68/72 and in the Supreme court in Suit No. SC. 320/1975 the possession of the house for which the Government of Bendel State paid N11,700.00 (Eleven thousand seven hundred naira) was declared to be in the 3rd defendant.*

8. ... 9.<sup>10</sup> "

E On the question whether No. 1, Omo Street, Benin city was part of Igbinoghene's house or whether it was build by the father of the 3rd defendant, the learned trial judge held:

*"Having lived with Igbinoghene in the house built by him and which house was inherited by Iyamu Igbinoghene who was his eldest son, Chief Osawe Edebiri could not claim the apartments in which he lived as his own. The evidence shows that this is Bini Custom and I accept it as being reasonable and sensible. It did not matter what improvements Osawe made to the house, which is now known as No. 1, Omo Street, it continues to remain the property of the plaintiff's grandfather which was inherited by the plaintiff's father and now the plaintiff. .... The plaintiff's father had no right or interest in the house which he could assert against the plaintiff's late father who accommodated him in parts of the house. He was only a dignified tenant at will in the apartments."*

H In Suit No. B/68/72 between the same parties the appellant herein claimed a declaration of title under Bini Customary Law, possession and injunction against the defendant in respect of Nos. 1, 3 and 5, Omo Street, Benin

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<sup>9</sup>See p. 678 H

<sup>10</sup>See p. 679 D

City. The learned trial judge, Ogbobine, J. held as follows:

*"By the same reasoning and relying heavily on the evidence of the plaintiff's first two witnesses, I am convinced that Edebiri did not build on the land before he died and that it was Igbinoghene who first built on the land, after which he brought all his younger brothers and sisters (including late Chief Osawe Edebiri) to live with him in the house as his wards ..... B*  
*The evidence which I have accepted is that the entire parcel of Edebiri's land (of which No. 1, Omo Street forms part) was inherited absolutely under Bini native law and custom by Igbinoghene, then Iyamu and now the plaintiff absolutely."*

The defendant appealed to this court against the judgment of C  
 ogbobine, J. This court in appeal No. SC. 320/1975 (Exhibit "2") stated:

*"This appeal has no merit. The findings of the learned trial judge are amply supported by the evidence which he accepted, quite rightly in our view. The complaint about the scope of the injunction granted against the defendant/appellant is, we think, well founded. For this reason we substitute the following order for the injunction ordered by the learned trial judge D*  
*..... Save as above, we see no substance in the appeal which is accordingly dismissed. The judgment of the court below is affirmed."*

The judgment of the learned trial judge in the appeal before us as well as the judgments of the learned trial judge in Suit No. B/68/1972 and this court in appeal No. SC. 320/1975, confirm the appellant's ownership of No. 1, Omo Street, Benin City which constitutes the IGIOGBE in Bini Customary Law. The respondent's father being at best, a licensee or a tenant at will as found by the learned trial judge, respondent's possession of the premises cannot be higher than that of his late father. Infact, the possession of part of No. 1, Omo Street, F  
 Benin City ought to have terminated on the death of Chief Osawe Edebiri (respondent's father) since he had no interest in the property which could be inherited by the respondent.

Another side of the story is that form the pleadings and the evidence adduced at the trial, the respondent did not base his case on possession but G  
 on ownership of the premises. In his evidence-in-chief in the trial court, he testified as follows:

*"The house belonged to my father Osawe Edebiri. I am the owner of house now. In 1974 when the Mission road was to be widened, the government valuer came to tell me that the Government was going to break part of H*  
*No. 1, Omo Street, which was my house. I showed the valuer the whole of my house and the shops facing the Road."*

It is therefore not difficult to see that the case put up by the respondent is inconsistent with the relief granted to him by the Court of Appeal



which was based on his possession of part of No. 1 Omo Street, Benin City. A party should not be allowed to make a case contrary to his pleadings. See Cardoso v. The Executor of the Estate of Late J.H. Doherty 4 W.A.C.A. 78 and Shell BP Petroleum Dev. Co. Ltd. v. Jacob Abedi (1974) 1 N.M.L.R. 202. The relief granted to the respondent, namely: The apportionment of the compensation money by the court below between the appellant and the respondent is not that sought by the respondent. The justices of that court went beyond their jurisdiction when they purported to make the order. It is trite law that the court is without the power to award to a claimant that which he did not claim. See Obioma & Or. v. Olomu & Ors. (1978) 3 S.C. 1, Ekpenyong & Ors. v. Nyong C & Ors. (1975) 2 S.C. 71, Abang v. Effiom & Ors. (1976) 1 S.C. 17, and Chief Registrar, High Court of Lagos State & Or. v. Vamos Navigation Ltd. (1976) 1 S.C. 33.

I have therefore come to the conclusion that the court below failed in its judicial duty by not evaluating the evidence both oral and documentary, particularly Exhibit "1" placed before it and ought not have awarded part of the compensation money to the respondent.

In the circumstances, I will also allow the appeal and set aside the judgment of the Court of Appeal. The judgment of the learned trial judge is hereby restored. I agree with the order for costs made by Onu, J.S.C.

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#### MOHAMMED JSC

I will also allow this appeal and set aside the judgment and costs awarded by the lower court in favour of the respondent. I have had the privilege of going through the lead judgment, just delivered by my learned brother, Onu, J.S.C., and I adopt his opinion in allowing this appeal. I abide by all the consequential orders made in the lead judgment, including the assessment and award of costs.

G \_\_\_\_\_

#### ADIO JSC

I have had a preview of the judgment just delivered by my learned brother, Onu, J.S.C., and I agree that the appeal succeeds. I too allow it. I abide by the consequential orders, in including the order for costs.

H \_\_\_\_\_