

SUPREME COURT OF NIGERIA

11TH APRIL, 1997. SC. 62/1991

**CORAM; S. M. A. BELGORE, M. E. OGUNDARE, U. MOHAMMED,
S. U. ONU, Y. O. ADIO, JJSC.**

ALHAJI TIJANI SALAMI APPELLANT
AND
CHIEF SURAKATU GBODOOLU RESPONDENT

APPEALS - *Retrial - Land matter - Failure of plaintiffs' claim - retrial that will amount to giving plaintiffs a second chance - Will be refused.*

LAND LAW - *Right - Identity of the Land - Right of occupancy claim - Plaintiff in discharging his burden - Must prove the identity of the land.*

LAND LAW - *Identity of the land in dispute - Whether raised as an issue - By the parties*

LAND LAW - *Identity of the land - Ascribing different names to same land - May not be fatal - But contradictory evidence by plaintiffs' witnesses on the location - Will defeat the claim.*

LAND LAW - *Acts of possession or ownership - Cannot be established by plaintiffs - Who failed to establish - That they settled on any particular piece of land.*

FACTS

Before the High Court Abeokuta, the plaintiffs/respondents filed an action against the defendant/appellant claiming entitlement to certificate of occupancy, damages for trespass and injunction in respect of the land in dispute. Plaintiffs sought to establish their settlement on the land since 1830. But their evidence on the identity and location of the land was contradictory. Plaintiffs' witnesses traced the location of the land to different areas contrary to the plaintiffs' survey plan. The defendant led evidence of various acts of ownership exercised by his family in respect of the land in dispute.

The trial judge dismissed the plaintiffs' claim in its entirety. Their appeal to the Court of Appeal succeeded partially as that court ordered a retrial. Being dissatisfied, the defendant has now appealed to the Supreme Court raising a lone issue

ISSUE FOR DETERMINATION

"Whether from the totality of the evidence adduced at the trial, the respondents discharged the onus of proof necessary to entitle them to the reliefs claimed."

HELD (Unanimously allowing the appeal per lead judgment of **KUTIGI JSC**)
Right of occupancy claim - Plaintiff is to prove identity of the land

1. The burden is on a plaintiff who is claiming a statutory right of occupancy to satisfy the court that he is entitled on the evidence adduced by him to the declaration claimed. He must rely on the strength of his own case and not on the weakness of the defendant's case, for the purpose of discharging the burden. The burden on the plaintiff, in the circumstance, includes the requirement that it is for him to prove the identity of the land claimed by him if the parties are not ad idem on the identity of the land. If a plaintiff fails to fulfil the requirement, that is, to prove or establish the identity of the land in dispute his claim for a declaration of statutory right of occupancy will be dismissed. The onus is on a plaintiff who is claiming a statutory right of occupancy in relation to a parcel of land to prove that he is entitled to the declaration being sought. One of the things that he has to prove in order to succeed is the identity/location of the land in dispute otherwise his claim will be dismissed. See Makanjuola's case, supra. If, on the whole, the burden on the plaintiff is not discharged, the weakness of the defendant's case will not help him and the proper judgment, in the circumstance, is for the defendant. Such a judgment decrees no title to the defendant, he not having sought the declaration.
 (p. 694 G & 698 C)

Whether identity of the land is in issue

2. It does not appear, therefore, to be correct to say or contend that the identity/location of the land in dispute which formed part of the land on which members of the respondents' community allegedly settled was not raised as an issue. It was raised and the parties joined issue on it. The learned trial Judge was not, as stated by the court below, a bit confused. He was clear in his mind as to the real issue. (p. 697 H)

Ascribing different names to same land

3. When the parties, by the evidence adduced, both oral and documentary, are ad idem on the identity of the land in dispute, the fact that different names are ascribed to it or the area where it is located is called different names is not fatal to the plaintiff's claim. The foregoing position or situation is separate and distinct from the situation in which, from the evidence led by a plaintiff, it is

impossible to ascertain, with reasonable degree of certainty, the location of the land in dispute or a situation in which some of the witnesses who testified, on the point, for a plaintiff stated that the land in dispute was located in one place and other witnesses testified that it was at another place or at other places. Where, from the evidence of a plaintiff's witness or witnesses it is not reasonably possible to ascertain the location/identity of the land in dispute the production of a survey plan may be an answer or provide a solution to the problem. In this particular case, the situation was so confused and unusual that the production of a survey plan could not or did not provide an answer. In view of the overwhelming nature of the contradictory evidence, both documentary and oral, led by the respondents on the location/identity of the land on which members of their (Tafin) community settled (which included the land in dispute), the learned trial Judge was in my own considered opinion right and was justified, after pointing out that there was no evidence that the places called Tafin, Oke Adao, Oke Aregba and Aregba were one and the same place, in stating or coming to the conclusion that the contradictions made it difficult to believe the contention of the respondents that the land in dispute originally belonged to Tafin community or that they granted any land to Adao community. (p. 698 F & 699 H)

Acts of possession or ownership

4. There is one vital issue in this connection. It is that there could be no question of giving consideration to any purported acts of possession or of ownership on the part of the respondents as the traditional evidence led by them did not establish that, as they alleged, they settled on any particular parcel of land in Abeokuta. Nemo dat quod non habet which means that no one gives what he does not possess or does not belong to him. Allegations that the respondents granted part of the land in dispute or that they purported to exercise any act of possession or of ownership in relation to it could, therefore, not be sustained. Nobody can give what he has not got. (p. 701 A)

Failure of plaintiffs' claim - When retrial will be refused

5. If a plaintiff who claims for statutory right of occupancy fails to establish or prove his claim by evidence of traditional history or by proof of acts of ownership and/or possession, his claim is liable to be dismissed. An order for retrial was not the proper order to make in the circumstances of this case. The view of the court below could not, on the facts, be sustained as the learned trial Judge properly identified the issues involved and adequately dealt with them. His approach in dealing with the case was, therefore, not wrong. The respondents' claim was dismissed by the learned trial Judge because their

claim failed in toto. Where a plaintiff has failed in toto to prove his case in the court below, an appellate court should not order a retrial or a nonsuit if to do so will amount only to giving the plaintiff another opportunity of proving what he had failed to prove in the first instance. (p. 701 E)

B NOTABLE POINT OF INTEREST

ADIO JSC

1. Location is an important aspect of land description

The word "land", in its ordinary meaning, means any ground, soil or earth or the solid part of the earth's surface as distinguished from sea. See Webster C Dictionary, 2nd ed., 1098. The fact is that, by its very nature, land ordinarily is an immovable object. Its location is such an important part of its description that it is doubtful whether a description of it, for the purpose of identification, can be said to be complete without mentioning its location. (p. 697 C)

D REPRESENTATION

A. Fashanu Esq. for the appellant.

Y. O. Alli Esq. with S. U. Solagberu for the respondents.

CASES REFERRED TO

- E Kodilinye v. Odu (1935) 2 W.A.C.A. 336
- Imah v. Okogbe (1994) 1 KLR 151
- Makanjuola v. Balogun (1989) 3 N.W.L.R. (pt. 108) 192
- Abisi v. Ekwealor (1993) 9 KLR 99
- Abiodun v. fasanya (1974) 11 S.C. 61 at pp. 76 & 77
- F Dibiamaka v. Osakwe (1989) 3 N.W.L.R. (pt. 107) 101
- Amadi v. Nwosu (1992) 5 NWLR (Pt. 24) 273
- Olanrewaju v. Governor of Oyo State (1992) 9 NWLR (Pt. 265) 335
- George v. George (1964) 1 All NLR 136
- Total v. Nwako (1978) 5 SC. 1 at 14
- G Ebba v. Ogodo (1984) 4 SC. 84 at 98
- Mogaji v. Cadbury (Nigeria) Limited (1985) 2 NWLR (Part 7) 393 at 430

LEAD JUDGMENT BY ADIO JSC

In the High Court of Justice, Abeokuta Judicial Division of Ogun State, the reliefs claimed, in paragraph 31 of the Statement of Claim, by the respondents against the appellant were as follows:-

"1. Declaration that the plaintiffs are entitled to certificat of occupancy over the piece or parcel of land in respect of the area verged yellow excluding the area upon which Adewuyi built his house as indicated on

survey plan No. AK. 5997/OG drawn by D.O. Akingbogun Licensed Surveyor of Ibadan.

2. Five hundred naira general damages for trespass committed by the defendant who without consent or permission of the plaintiffs unlawfully entered the land and started the erection of a building foundation on the land.

3. Injunction to restrain the defendant his servants and/or agents from further acts of trespass on the land."

Pleadings were filed and duly exchanged by the parties. The evidence led by the respondents was, *inter alia*, that the whole area verged "red" on the survey plan, Exhibit "A", formed part of a larger parcel of land originally settled upon by the Tafin community members when they migrated from their Tafin homestead at Osiele to Abeokuta allegedly in 1830. According to them, part of the area verged red was granted absolutely to one Onlado, a chief of Tafin, and another portion was granted to one Latifu Adewuyi while the parcel of land adjacent to the land of their community was similarly granted absolutely to Adao (appellant's) community.

The appellant's case was that the whole land verged "red" in the survey plan (Exhibit "B") was owned by one Oluwo Adao, the appellant's ancestor, who was the founder of adao Aboni family. He (the appellant's ancestor) acquired it by settlement when he migrated from Adao homestead to Abeokuta in 1830. The land in dispute, according to the appellant, was within Adao family land. On acts of ownership exercised on the land in dispute by his family, the appellant led evidence that his family had on the land in dispute a portion thereof designated as "Igbo Ifa" demarcated originally by either palm trees planted by his ancestor out of which four were still on the land in dispute. Appellant's family granted permission to one Latifu adewuji (5th P.W.) to be on the land in dispute. When one Alhaji Abudu attempted to cause surveyor to survey the land in 1971, the appellant's family successfully resisted the move. The Ibarapa Community Chiefs intervened and resolved the conflict in the matter in favour of the appellant. The incident and the resolution of it in favour of the appellant's family were known to the 1st p.w. In 1982, the 5th p.w. converted the temporary shed which he erected, with the permission of the appellant's family, on the land in dispute to a permanent structure, the appellant gave the 5th p.w. a notice to quit and made a report of the matter to the police. The 5th p.w. was arrested by the police and he was released when he gave an undertaking to give up possession.

After due consideration of the evidence led by the parties and of the submissions of their learned counsel, the learned trial Judge dismissed the respondents' claim in its entirety. The learned trial Judge pointed out that

there were contradictions between the contents of the survey plan, tendered by the respondents, (Exhibit "A"), and the oral evidence led by the respondents and contradictions in the evidence of the respondents' witnesses on the location of the land in dispute. It was not a case of witnesses referring to the location of the land in dispute by different names in which case it could be B that the parcel of land being referred to by the witnesses by different names was the same. The evidence being given by them purported to show that the land in dispute was at separate and different places. On the whole, the learned trial Judge rejected the evidence led by the respondents and accepted the appellant's evidence. He, therefore, dismissed the respondents' claim.

C Dissatisfied with the judgment of the learned trial Judge, the respondents lodged an appeal against it to the Court of Appeal which allowed the appeal. The court below set aside the judgment of the learned trial Judge and ordered a retrial. The court embarked upon the consideration and evaluation of the evidence before the learned trial Judge. In the view of the court below, D the question of the location of the land in dispute was not raised and the learned trial Judge was wrong to allow its views on the credibility of the respondents' witnesses, on the point, to influence it in the evaluation of the evidence and the making of findings of fact on other aspects of the case. Further, in the view of the court below, the approach of the learned trial Judge E to the case as a whole was wrong and the proper order to make, in the circumstances, was an order for a retrial.

Dissatisfied with the judgment of the court below, the appellant lodged an appeal against it to this court. In accordance with the rules of this court, the parties filed and exchanged briefs. The appellant filed an appellant's brief F and the respondents filed a respondents' brief. The appellant also filed a reply brief. The appellant identified only one issue for determination in his brief while the respondents, in their own brief, identified only one issue for determination. The issue identified for determination in the appellant's brief appeared to me to be more comprehensive and I will use it for the determination of this G appeal. It was as follows:-

"Whether from the totality of the evidence adduced at the trial, the respondents discharged the onus of proof necessary to entitle them to the reliefs claimed."

The burden is on a plaintiff who is claiming a statutory right of H occupancy to satisfy the court that he is entitled on the evidence adduced by him to the declaration claimed. He must rely on the strength of his own case and not on the weakness of the defendant's case, for the purpose of discharging the burden. See Kodilinye v. Odu, (1935) 2 W.A.C.A., 336, and Imah v. Okogbe, (1993) 9 N.W.L.R. (pt. 316) 159. The burden on the plaintiff, in the

circumstance, includes the requirement that it is for him to prove the identity of the land claimed by him if the parties are not ad idem on the identity of the land. See Makanjuola v. Balogun, (1989) 3 N.W.L.R. (Pt. 108) 192. If a plaintiff fails to fulfil the requirement, that is, to prove or establish the identity of the land in dispute his claim for a declaration of statutory right of occupancy will be dismissed. See Makanjuola's case, supra. In view of the fundamental importance of the requirement, it was one of the first issues dealt with by the learned trial Judge. His conclusion was that the respondents did not establish the identity of the land (as part of the land on which members of the respondents' community settled). The court below reversed the finding. The finding of the learned trial Judge, which the court below reversed was as follows:-

"Although there is no dispute as to the identity of the land which is the subject matter of this case; it is surprising that whilst the 1st plaintiff says that the land is at Tafin, the 2nd plaintiff that it is at Oke Adao and the 5th p.w. says it is at Oke Aregba. There is no evidence that Tafin, Oke Adao, Oke Aregba and Aregba are one and the same thing. The contradictions in the evidence of the plaintiff's witnesses highlighted above make it difficult to believe the contention of the plaintiff's that the land in dispute belonged to Tafin Community or that they granted any land to Adao community."

In the view of the court below, the learned trial Judge, having stated in his judgment that the identity of the land which was the subject matter of this action was not in doubt, was wrong in holding that the evidence of the respondents' witnesses on the location of the land in dispute was contradictory, that, for that reason, the witnesses lacked credibility and in allowing his erroneous view about the credibility of the witnesses to influence him in making findings of fact in other respects. The court below stated, inter alia, as follows:-

"The respondent's counsel on the other hand said that the appellants and their witnesses were unable to say with certainty in which area the land in dispute is located. I must pause here and observe straightaway that nowhere in the respondent's pleadings did he raise such issue The respondent filed Exhibit "B" describing the land as being at Oke Adao, whilst the appellants filed Exhibit A and stated that it is Aregba. The issue as canvassed by the respondent not having been raised the trial Judge was wrong to have relied upon it..... He further submitted that the appellants' evidence and those of their witnesses were at variance with their pleadings."

The point here on that submission is that all the different names given in that case will clearly go to no issue. The learned trial Judge ought therefore to have so considered and ignored them..... Even then, if such

issue had been raised, and I am wrong in construing the passage, the onus is on the respondent, and NOT the appellants to prove the averment. It is only then that the learned trial Judge can therefore make a finding on the issue. As no such issue was raised, no such finding was called for.

It is significant to note that from the pleadings the land in dispute B as edged yellow in Exhibit "A" was admitted and no further proof of the identity of the land was required on the appellants' part The learned trial Judge therefore appeared to be a bit confused, in that the real issue before him is as to the ownership of the land in dispute (Exhibit A as admitted) which formed part of the area originally settled upon by the ap- C pellants according to their case and by the respondent's family according to his case. His views on the contradictions of the evidence of appel- lants' witnesses and his disbeliefs by reason of these, led him erroneously to evaluate the evidence on the palm trees. Oddly enough he did this on the basis of the respondent's case after he had discredited the appellants D witnesses It is not uncommon under native law and custom that different names are given by different people and communities to the same area of land, which is subject matter of dispute under native land and cus- tom."

The appellant, in his brief, pointed out that the respondents, pur- E ported to trace their root of title to Tafin Community which was said to have settled on a large piece of land (edged red in Exhibit A) which included the land in dispute edged yellow in Exhibit A. It was also pointed out that it was the case of the respondents that the whole land, edged red in Exhibit "A" which included the land edged yellow in the same Exhibit, was at Aregba and F that members of Tafin (appellants') community were the first set of people who settled on the land. It was submitted that since the respondents based their alleged ownership of the land edged red in Exhibit "A" on settlement, the oral evidence led by them on the alleged settlement should not differ in material particulars from the relevant averments in their pleadings otherwise their claim G must fail. The appellant set out the discrepancies or contradictions in the oral evidence led on the identity/location of the area edged red in Exhibit "A" and pointed out that there was no evidence that the various places mentioned were one and the same place particularly having regard to the evidence of the 6th p.w. that the place upon which one Aregba settled was known as Aregba. H It was contended that what the appellant admitted was that the land in dispute was edged yellow in Exhibit "A". It was contended that that could not be taken as an admission that the appellants' community settled on the large parcel of land edged red in Exhibit "A" which included the land in dispute edged yellow in the same survey plan.

The submission in the respondents' brief in relation to the identity/location of the land in dispute was that there was no cross-appeal against the finding of the learned trial Judge that there was no dispute as to the identity of the land which was the subject matter of this case. It was pointed out that the averment in paragraph 5 of the statement of claim was that the land in dispute was edged yellow on Exhibit "A" and the appellant in paragraph 1 of the statement of defence admitted paragraph 5 of the statement of claim. Further, the surveyors of both parties testified that the land in dispute in Exhibits "A" and "B" were more or less identical. It was, therefore, submitted that, in the circumstance, the respondents did not have to discharge the burden of proving the identity of the land in dispute.

The word "land", in its ordinary meaning, means any ground, soil or earth or the solid part of the earth's surface as distinguished from sea. See Webster Dictionary, 2nd ed., 1098. The fact is that, by its very nature, land ordinarily is an immovable object. Its location is such an important part of its description that it is doubtful whether a description of it, for the purpose of identification, can be said to be complete without mentioning its location. The averment in paragraph 5 of the statement of claim which the appellant admitted, was that the land in dispute was edged yellow on Exhibit "A" and no more. That was not an admission that the area edged yellow on Exhibit "A" was necessarily the land or any part of the land on which the members of the appellants' community settled when they allegedly migrated from their hometown to Abeokuta. The question whether members of the respondents' community migrated from somewhere to a place in Abeokuta and, if so, the land on which they settled, was raised in paragraph 8 of the statement of claim and the appellant in paragraph 4 of the statement of defence denied it. Even in that case, somehow the respondents did not state in paragraph 8 of the statement of claim the name of the place on which they allegedly settled. Paragraph 8 of the statement of claim reads:-

"The plaintiffs state that the whole area verged Red on the survey plan No. AK 5997/0G forms part of a larger parcel of land originally settled upon by Tafin community when they migrated from Tafin homestead at Osiele to Abeokuta as the result of inter tribal war in or around 1830."

If, as held by the court below, the real issue before the learned trial Judge was as to the ownership of the land in dispute (Exhibit A as admitted) which formed part of the area originally settled upon by the respondents according to their case and by the appellant's family according to his case, then the identity/location of the land upon which the members of respondents community settled on their migration from their homestead to Abeokuta, was not only a relevant fact; it was a fundamental issue. **It does not appear, there-**

fore, to be correct to say or contend that the identity/location of the land in dispute which formed part of the land on which members of the respondents' community allegedly settled was not raised as an issue. It was raised and the parties joined issue on it. The learned trial Judge was not, as stated by the court below, a bit confused. He was clear in his mind as to the real issue.

B The court below stated that if the issue of identity/location of the land in dispute had been raised it (court below) would have held that the onus was on the appellant and not the respondents to prove the averment. With respect, it has to be pointed out that the appellant who was the defendant in this case did not counter-claim for declaration of statutory right of occupancy in relation to the land in dispute. **The onus is on a plaintiff who is claiming a statutory right of occupancy in relation to a parcel of land to prove that he is entitled to the declaration being sought. One of the things that he has to prove in order to succeed is the identity/location of the land in dispute otherwise his claim will be dismissed. See Makanjuola's case, *supra*. If, on the whole, the burden on the plaintiff is not discharged, the weakness of the defendant's case will not help him and the proper judgment, in the circumstance, is for the defendant. Such a judgment decrees no title to the defendant, he not having sought the declaration. See Kodilinye's case *supra*; and Abisi v. Ekwealor, (1993) 6 N.W.L.R. (Pt. 302) 643.**

E The court below observed that it was not uncommon under native law and custom that different names could be given by different people and communities to the same area of land which was subject matter of dispute under native law and custom. If the parcel of land concerned is described by a name accepted by both parties as attaching to the land a declaration of entitlement to statutory right of occupancy may be granted. See Abiodun v. Fasanya, (1974) 11 S.C. 61, at pp. 76 & 77. **When the parties, by the evidence adduced, both oral and documentary, are ad idem on the identity of the land in dispute, the fact that different names are ascribed to it or the area where it is located is called different names is not fatal to the plaintiff's claim. See Makanjuola's case, *supra*.**

H **The foregoing position or situation is separate and distinct from the situation in which, from the evidence led by a plaintiff, it is impossible to ascertain, with reasonable degree of certainty, the location of the land in dispute or a situation in which some of the witnesses who testified, on the point, for a plaintiff stated that the land in dispute was located in one place and other witnesses testified that it was at another place or at other places. Where, from the evidence of a plaintiff's witness or witnesses it is not reasonably possible to ascertain the location/identity of the land in dispute the production of a survey plan may be an answer or provide a solution to the problem. A**

situation like that arose in Ojibah v. Ojibah, (1991) 5 N.W.L.R. (pt. 191) 296 and Nnaemeka-Agu, J.S.C., at p. 312, observed, inter alia, as follows:-

"the nature of the problems that have arisen in this issue exposes the danger of deciding cases or issues therein on established legal jingles and catch-phrases without fully asking oneself how well they fit into the particular facts, of the case. Yes, where parties know a land in dispute well, a plan is not necessary. But as in this case, parties may know some pieces or parcels of land pretty well but as not quite agree as to the location and boundaries of the particular piece in dispute. In such a case the principle in Kwadzo v. Adjei (supra) has no place: a plan showing the particular portion which the plaintiff claims is the only answer."

In this particular case, the situation was so confused and unusual that the production of a survey plan could not or did not provide an answer.

The respondents' witnesses gave evidence, which the learned trial Judge, rightly, construed as asserting that the land in dispute, which formed part of the land (edged red in Exhibit A) upon which the Tabin community members allegedly settled in Abeokuta, was located in two or more places in Abeokuta. The survey plan, Exhibit a, tendered by the respondents, who were the plaintiffs, was not only unhelpful; it was misleading and it added to the confusion and uncertainty that arose in relation to the identity/location of the land in dispute. The land edged red in Exhibit "A" was as stated in Exhibit "A" at Aregba, Abeokuta. The 6th p.w.'s evidence was that he knew the land in dispute and that it was at Oke Aregba. The foregoing would appear to be consistent with the statement on the survey plan. However, under cross-examination by the learned counsel for the appellant, the 6th p.w. stated, inter alia, as follows:-

"I agree Aregba settled at Oke Aregba when he migrated from the homestead."

Aregba was not a member of the respondents' community. He belonged to an entirely different and distinct family. That was not all. The evidence of the 1st p.w. who also claimed to know the land in dispute, was under cross examination, that the aforesaid land in dispute was at Oke Adao. It was the family of the appellant that was known as Adao family. The evidence of the witness (2nd p.w.) would appear to confirm the evidence of the appellant that the land in dispute was in the middle of the land on which members of his own family settled when they migrated from their homestead to Abeokuta. That was not all. The 4th p.w. who also claimed to know the land in dispute, stated that the land in dispute was at Oke Adao. The evidence of the 5th p.w. to whom the respondents alleged they granted the land edged red in Exhibit "A", was that the land was at Aregba. **In view of the overwhelming**

nature of the contradictory evidence, both documentary and oral, led by the respondents on the location/identity of the land on which members of their (Tafin) community settled (which included the land in dispute), the learned trial Judge was in my own considered opinion right and was justified, after pointing out that there was no evidence that the places called Tafin, Oke B Adao, Oke Aregba and Aregba were one and the same place, in stating or coming to the conclusion that the contradictions made it difficult to believe the contention of the respondents that the land in dispute originally belonged to Tafin community or that they granted any land to Adao community.

The foregoing was not all. The contradictions in the evidence led by the respondents on the identity/location of the land have their own legal implications. In the first place, I have pointed that where a plaintiff fails to establish the identity/location of the land being claimed by him, his claim will be dismissed. Even if there is no requirement like that in a claim for a declaration of statutory right of occupancy, as the claim of the respondents was based on the members of their community having settled on a large parcel of land, which included the land in dispute, the onus was on them to establish the identity/location of the parcel of land on which they settled. It is a fact which by itself or in connection with other facts makes the existence or non-existence of the fact in issue or the relevant fact probable or improbable. See section 12(a) of the Evidence Act. If, as in the present case, the respondents were unable to establish the precise identity or location of the land upon which their ancestors allegedly settled, it may reasonably be inferred that members of the respondents' community never settled on the land edged red in Exhibit "A" at all or that if they settled anywhere in Abeokuta it was not on the parcel of land edged red in Exhibit "A" which included the land in dispute.

Where evidence of traditional history is not contradicted or in conflict and found by the court to be cogent, it can support a claim for a declaration of statutory right of occupancy. See Olujebu of Ijebu v. Oso, (1972) 5 S.C. 143; and Atanda v. Ajani, (1989) 3 N.W.L.R., (pt. iii) 511. If the evidence of traditional history is not conclusive then the court should consider evidence of recent acts of possession and of ownership. See Motunwase v. Sorungbe, (1988) 4 N.W.L.R. (pt. 92) 90. I have already made reference to the evidence of various acts of ownership alleged by both parties. The learned trial Judge duly considered the evidence. He, justifiably, in my view, accepted the evidence led, on the point, by the appellant and rightly rejected the evidence led by the respondents. The court below was of the view that the learned trial Judge should not have accepted the evidence led by the appellant or rejected the evidence led, on the point, by the respondents. It was, however, clear, on this point, to note that the appellant was the defendant and that he did not

counterclaim for a declaration or claim any thing. Further, the court below itself did not think that the evidence led by the respondents could justifiably warrant entering judgment in their favour; the court ordered a retrial. **There is one vital issue in this connection. It is that there could be no question of giving consideration to any purported acts of possession or of ownership on the part of the respondents as the traditional evidence led by them did not establish that, as they alleged, they settled on any particular parcel of land in Abeokuta. Nemo dat quod non habet which means that no one gives what he does not possess or does not belong to him see Anyaduba v. Nigerian renowned Trading Co. Ltd. (1992) 5 N.W.L.R. (pt. 243) 535. Allegations that the respondents granted part of the land in dispute or that they purported to exercise any act of possession or of ownership in relation to it could, therefore, not be sustained. Nobody can give what he has not got.** The learned trial Judge was right when he came to the following conclusion in relation to the claim for statutory right of occupancy:-

"Upon a careful consideration of the evidence adduced by the parties, I prefer the defendant's evidence to that of the plaintiff's. The evidence of traditional history given by the plaintiffs is unsatisfactory and judgment should, on that ground, be for the defendant:- See Frempong v. Brempong. 14 W.A.C.A. 13. It is the plaintiffs who seek relief but they have failed to prove that they are entitled to what they claim either by evidence of tradition or by acts of ownership as laid down in Ekpo v. Ita, 11 N.L.R. 68. ----- -- The claim for declaration must, for reasons stated above, be dismissed."

If a plaintiff who claims for statutory right of occupancy fails to establish or prove his claim by evidence of traditional history or by proof of acts of ownership and/or possession, his claim is liable to be dismissed. See Dibiamaka v. Osakwe, (1989) 3 N.W.L.R. (pt. 107) 101. An order for retrial was not the proper order to make in the circumstances of this case. The view of the court below could not, on the facts, be sustained as the learned trial Judge properly identified the issues involved and adequately dealt with them. His approach in dealing with the case was, therefore, not wrong. The respondents' claim was dismissed by the learned trial Judge because their claim failed *in toto*. Where a plaintiff has failed *in toto* to prove his case in the court below, an appellate court should not order a retrial or a nonsuit if to do so will amount only to giving the plaintiff another opportunity of proving what he had failed to prove in the first instance. See Elias v. Disu & Anor. (1982) 1 All N.L.R. 214.

The appeal succeeds. The judgment of the Court of Appeal dated 12th July, 1989 is hereby set aside. In its place is restored the judgment of the learned trial Judge dated 18th December, 1985. The Appellant is awarded

N300 as costs in the court below and N1,000.00 as costs in this court.

BELGORE JSC

A plaintiff has the duty to prove his case and where there are material conflicts in his case, he has failed to prove what he prays the court to grant him. In a case like the one in hand where the trial Court was in no doubt as to the identity of the land in dispute and he has ably reviewed the evidence and made his findings in line with that evidence, the appellate Court ought not to interfere with the findings. The Appeal Court ought not interfere with clear findings of fact based on the evidence of the trial Court when there are no justifiable exceptions to this time honoured principle of law - (Amadi v. Nwosu (1992) 5 NWLR (Pt. 24) 273; Odinaka v. Moghalu (1992) 4 NWLR (pt. 223) 1; Romaine v. Romaine (1992) 4 NWLR (Pt. 238) 650; and Olanrewaju v. Governor of Oyo State (1992) 9 NWLR (Pt. 265) 335 and contrast with situations in Olabanji v. Omokewu (1992) 6 NWLR (Pt. 250) 671 and Ekretsu v. Oyobebere (1992) 9 NWLR (pt. 266) 438). The respondents by giving various names to the land in dispute failed to confuse the trial High Court, unfortunately he had some success at the Court of Appeal where retrial was wrongly ordered. All the known principles and guidelines by this Court on retrial are not present in this case. See [Duru v. Nwose (1989) 4 NWLR (Pt. 113) 24; Agbonifo v. Aiwerioba (1988) 1 NWLR (pt. 70) 325; Bakare v. Apena (1986) 4 NWLR (pt 33) 1; Adeyemo v. Arokopo (1988) 2 NWLR (Pt. 79) 703; Total v. Nwako (1978) 5 SC. 1, 14; George v. George (1964) 1 All NLR 136.]

I therefore find great merit in this appeal, and for the above reasons and fuller reasons in the judgment of my learned brother, Adio, J.S.C., which I adopt also as mine, I allow this appeal and restore the judgment of the trial High court. I make the same consequential orders as in the lead judgment.

OGUNDARE JSC

I have had the advantage of a preview of the judgment of my learned brother Adio JSC just delivered. I agree with his reasoning and conclusion that there is merit in this appeal. The learned trial Judge correctly identified the issue involved in the placing, by the witnesses for the plaintiffs, of the land in dispute in different locations in Abeokuta. The learned trial Judge observed:

"Although there is no dispute as to the identity of the land which is the subject matter of this case; it is surprising that whilst the 1st plaintiff says that the land is at Tafin, the 2nd plaintiff says that it is at Oke Adao and the 5th P.W. says it is at Oke Aregba. There is no evidence that Tafin, Oke Adao,

Oke Aregba and Aregba are one and the same thing. The contradictions in the evidence of the plaintiffs' witnesses high-lighted above make it difficult to believe the contention of the plaintiff's that the land in dispute belonged to Tafin Community or that they granted any land to Adao community."

Considering the evidence adduced for the plaintiffs the observation was rightly made. The observation showed that the learned Judge had full grasp and understanding of the case before him. If anyone was confused, it was, with profound respect, their Lordships of the Court of appeal when they equated the placing of the land in dispute in different locations with giving the land different names. Their Lordships, per Omololu-Thomas JCA, said:

"It is not uncommon under native law and custom that different names are given by different people and communities to the same area of land, which is subject matter of dispute under native law and custom."

With the greatest respect to their Lordships, the issue here is not apposite. It is not a case of calling the land in dispute different names by different witnesses. It is a case of contradictions in the location of the land, that is as to whether the land is in Tafin (where it would be if the plaintiff's story of settlement is correct) or Oke Adao (if it is the defendant's story that is the correct version) or in Oke Aregba or aregba. As the witnesses for the plaintiffs could not agree as to the location of the land, rather than its identity, plaintiffs must fail in their claims and those claims were rightly dismissed by the trial court. There is no basis for an order of retrial as the conditions for such an order are not present here - see: Total v. Nwako (1978) 5 SC. 1 at 14; George v. George (1964) 1 All NLR 136.

I too allow this appeal, set aside the judgment of the Court of Appeal and restore that of the trial High Court dismissing Plaintiffs' claims. I abide by the order for costs made by Adio JSC.

MOHAMMED JSC

I have had the privilege of reading the judgment of my learned brother, Adio, J.S.C., in draft and I agree with him that there is merit in this appeal and it ought to be allowed. I agree that the learned trial judge was right to dismiss the claim of the respondents because it is quite plain that they failed to prove their case. The Court of Appeal is therefore in error to reverse the decision of the trial Court and order for a retrial of the action.

Consequently, this appeal is allowed. The judgment of the Court of Appeal ordering a retrial of this action is set aside. The judgment of the learned trial judge is hereby restored. I abide by all the consequential orders made by my learned brother, Adio, JSC., including the award for costs.

ONU JSC

I had the privilege to read in draft the judgment just delivered by my learned brother Adio, JSC and I entirely agree with his reasoning and conclusion that the appeal be allowed.

I wish to comment on the matter briefly as follows:-

B The lone issue submitted by the appellant as arising for determination queries:

"Whether from the totality of the evidence adduced at the trial, the respondents discharged the onus of proof necessary to entitle them to the reliefs claimed."

C The consideration of this issue raises the collateral issue of which a court of trial which saw and heard the witnesses and has come to specific findings of fact on the evidence on issues before it, an appellate court which had no such opportunity should refrain from coming to different findings unless it can show that the conclusions could not follow from the evidence D before it, as rightly decided by this court in Odofin v. Ayoola (1984) 11 SC. 72 at 106; Ebba v. Ogoto (1984) 4 SC. 84 at 98; The State v. Iyaro (1988) 2 SC. (part 1) 167 at 172; Babatunde Ajayi v. Te..aco (1987) 9-11 S.C. 1 at 27 and Onwuka v. Ediala (1989) 111 NWLR (part 96) 182 at 208-209.

E In the instant case, the trial court possessed of the totality of the evidence that could possibly have been forth-coming from both parties, inclusive of that as to the identity/location of the land in dispute, to enable it through evaluation of the traditional evidence, evidence of acts of ownership and possession, etc. arrived inter alia at the conclusion, to wit:

"Upon a careful consideration of the evidence adduced by the parties, I prefer the defendant's evidence to that of the plaintiffs'. The evidence of traditional history given by the plaintiffs is unsatisfactory and judgment should, on that ground, be for the defendant - Frempong v. Brempong 14 W.A.C.A. 13. It is the plaintiffs who seek relief but they have failed to prove that they are entitled to what they claim either by evidence of tradition or by G acts of ownership as laid down in Ekpo v. Ita 11 N.L.R. 68. The Supreme Court in Aseagba v. Ofodile (1972) 6 SC. 251 said that title must be established with a fair degree of probability; this the plaintiffs have not done in this case. The claim for declaration must, for reasons stated above, be dismissed."

H In re-evaluating these findings of fact on appeal, the court below said among other things, thus:

"The respondent's counsel on the other hand said that the appellants and their witnesses were unable to say with certainty in which area in dispute, it is located. I must pause here and observe straight away that

nowhere in the respondent's pleadings did he raise such issue. Counsel submitted that in view of the discrepancies in the location of the land appellants and their witnesses failed to prove that the land in dispute is within Tafin Community, there being no evidence that the various names given to the location are one and the same What ought to have been done (and I agree, if any such issue is raised) is that the learned trial Judge ought B to have resolved the issue, and make a finding as to the correct name of where the land is located."

And later down in its judgment the court below further held as follows:-

"..... The emphasis in the above passage is on the averment that the land in dispute "is better show" on Exhibit B. With great respect, I do not C see how the foregoing passage can be construed as raising a specific issue as to whether the land in dispute is located within Tafin Community land at aregba (part of which is shown in Exhibit A) or located within the land known as Adao Aboni family land in Exhibit B.

Even then, if such an issue had been raised and I am wrong in D construing the passage, the onus is on the respondent, and NOT the appellants to prove the averment. It is only then that the learned trial Judge can therefore make a finding on the issue. As no such issue was raised, no such finding was called for

The learned trial Judge therefore appears to be a bit confused, in E that the real issues before him is (sic) as to the ownership of the land in dispute (Exhibit A as admitted) which formed part of the area originally settled upon by the appellants according to their case; and by the respondent's family according to his case. Both sides are relying on tradi- F tional histories of their respective families, which cannot be determined on the basis of contradiction in the testimonies of witnesses, moreso when such contradictions are merely as to names of the locality of the land in dispute."

In the light of the above, when one falls back on the evidence ad- G duced before the trial court of respondents witnesses firstly, by P.W. 1 who stated that the location of the land in dispute is at Tafin; PW2, that the land in dispute is at Oke-Adao: PW5 that the land in dispute is at Aregba and P.W 6 that the land in dispute is at Oke-Aregba and there is no additional evidence that these various names given to the location of the land are one and the same, then the evidence of these witnesses clearly contradicted one another H materially and further that they (respondents) had not proved that Tafin community settled on the land in dispute or granted Onlado any part thereof. That being so, it is little wonder that in relation to the respondents' claim the learned trial Judge held that it was difficult to believe their contention that the land originally belonged to Tafin or that they granted any land to Adao Commu-

nity. Thus, in embarking on re-evaluation of the evidence adduced before the trial court leading it to hold that that court to have resolved the issue of contradiction on the names given by the parties, the court below was grossly in error, it being no duty of the learned trial Judge, in my view, to make a case for the parties as a party must succeed or fail on the case as presented before B the court. See O...u v. Anyeagbunam (1978) 5 SC. 1 at 36.

Furthermore, where as in the instant case, the respondents pleaded and relied on traditional history as their root of title to the land in dispute, evidence thereof given by them and their witnesses which is conflicting and contradictory, would be treated as unreliable - See Mogaji v. Cadbury (Nigeria) Limited (1985) 2 NWLR (Part 7) 393 at 430 and Odofin v. Ayoola (supra).

The instant case on appeal is not a case where judgment is given on facts not pleaded as observed by the court below. Thus, the authority of Emegokwe v. Okadigbo (1973) 4 S.C. 113 cited in support thereof by that court is irrelevant and inapplicable to the facts of this case. The court below in its D consideration of the state of the pleadings, particularly paragraph 3 of the Statement of Defence, held that no specific issue was raised as to whether the land in dispute is located within Tabin Community land at Aregba or located within Adao Aboni family land. The court further shifted the onus on the respondent and not on the appellants to prove the averment. With utmost E due respect, the court below misconstrued the issues raised in the pleadings. This it did by taking paragraph 3 in isolation without a consideration of other relevant paragraphs namely, paragraphs 5, 6 and 7 of the statement of Defence.

In a claim for Declaration of title to land the Plaintiff must succeed on F the strength of his own case and not on the weakness of the defendants' and as the respondents in the case herein on appeal have failed to discharge the burden placed on them, (see Kodilinye v. Mbanefo Odu (1935) 2 WACA. 336 and Elendu v. Ekwuoba (1995) 3 NWLR (Part 386) 704) the trial court rightly, in my view, dismissed the respondents' case. The court below was also wrong G not only in reversing the tables but in ordering a retrial. As the duty of court should be to do complete justice in each case "if a court of Appeal on a proper consideration of the case before it comes to the conclusion that it can do complete justice between the parties, a retrial should not be ordered." See Sanusi v. Ameyogun (1992) 4 NWLR (Part 237) 527 at 556 and Adeyemo v. H Arokopo (1988) 2 NWLR (pt. 79) 703 at 711. Indeed, as this Court has held in a long line of decided cases such as Fatoyinbo v. Williams (1956) 1 FSC 87; Okoye v. Kpajie (1973) NMLR. 44; Imonikhe v. A.G. Bendel (1992) 6 NWLR (Part 248) 396 and by the application of the provisions of section 22 of the Supreme Court Act, 1960 (now Cap. 424) Laws of the Federation of Nigeria,

1990:

"An order for retrial is not necessary if an appeal court can in exercise of its appellate jurisdiction do justice in the case and bring the litigation to an end."

I so hold and decide in the instant case.

For these reasons and the fuller ones contained in the leading judgment of my learned brother Adio, J.S.C, I will allow this appeal and make similar consequential orders inclusive of those as to costs.

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