

SUPREME COURT OF NIGERIA
11TH APRIL, 1997. SC. 151/1993
CORAM:-S.M.A.BELGORE, E.O.OGWUEGBU, U.MOHAMMED,
S. U. ONU, Y. O. ADIO, JJSC.

OKONKWO UKATTA & ORS. APPELLANTS
AND
JAMES NDINAEZE & ORS RESPONDENTS

ACTIONS - *Joinder of parties* - Where plaintiffs are not persons having same interest in one suit - They are not entitled to bring the action.

ACTIONS - *Causes of action* - Lumping of several causes of action - Makes the defendants counterclaim incompetent.

APPEALS - *Findings of fact* - Of a trial judge - Should not easily be disturbed by appeal court - Save where the findings are perverse.

APPEALS - *Findings of trial judge* - Where found to be perverse - Court of Appeal rightly interfered.

CUSTOMARY LAW - *Repugnancy test* - Land tenure custom of the parties - Was wrongfully declared repugnant - By the trial judge suo motu.

LAND LAW - *Communal claim to land* - Onus lies on each side - To prove their assertion concerning the land in dispute.

FACTS

The plaintiffs/appellants filed an action against the defendants/respondents claiming communal entitlement to customary right of occupancy, N100,000.00 damages for trespass and perpetual injunction in respect of the land in dispute. The defendants filed a cross action and the two suits were consolidated. While the plaintiffs maintain that the land in dispute is a communal land, the defendants claim that the land belongs to them according to native law and custom.

At the conclusion of hearing the trial court found in favour of the plaintiffs. Defendants appeal to the Court of Appeal was upheld. Being dissatisfied, the plaintiffs have now appealed to the Supreme Court raising 5 issues.

ISSUES FOR DETERMINATION

"3 (a) *Whether the Court of Appeal was right in reversing the findings of fact made by the trial court given the state of credible evidence before the court.*

(b) *Whether the appellants did raise any legal objection to issue 1 in the respondents brief before the Court of Appeal, and if so, the proper legal effect thereof.* Etc. see p. 713

HELD (Unanimously dismissing the appeal and striking out the defendants' counter claim per lead judgment of **OGWUEGBU JSC**)

Findings of fact - Not to be easily disturbed

1. It is trite law as submitted in the appellants' brief that a court of appeal should not easily disturb the findings of fact of a trial judge who had the singular opportunity of listening to the witnesses and watching their performances. It is also settled law that such findings of facts or the inferences from them may be questioned in certain circumstances such as where the appellate court is satisfied that the advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion, and for that reason the Court of Appeal finds that the decision is perverse or where the facts found by the trial judge are wrongly applied to the circumstances of the case or where the inferences drawn from those facts are erroneous or indeed where the finding of facts are not reasonably justified or supported by the credible evidence given in the case, a Court of Appeal is in as much a good position to deal with the facts and findings as the court of trial. (p. 717 H)

Communal Claim to land

2. In the present case the plaintiffs assert that the land in dispute is the communal land of the entire Obibi village. As plaintiffs the onus lies on them to prove their assertion. In addition, the defendants maintain that Mgbo Ekpe belongs to them according to native law and custom of Awo Idemili. They also have the burden of establishing that fact as plaintiffs in HOR/20/87. (p. 718 D)

Findings that are perverse

3. A careful reading of the pleadings, the evidence led and the judgment of the learned trial judge will leave one in no doubt that the finding of the learned trial judge are with respect, perverse and the court below was perfectly entitled to interfere in order to prevent a miscarriage of justice which would have resulted. (p. 721 H)

Repugnancy test - Land tenure custom

4. The learned trial judge without any invitation from any of the parties suo motu proceeded to declare this custom of Awo-Idemili on land tenure null and void as being repugnant to natural justice, equity and good conscience and without giving the parties the opportunity to address him on that. The reason given by the trial judge for declaring it null and void is not tenable having regard to section 20 (1) of the High Court Law of Eastern Nigeria. To apply the repugnancy doctrine to this custom is a demonstration of the contempt with which we treat our native laws and customs. There is need for legal emancipation on the part of judicial officers and legal practitioners in order to hasten the development of our native laws and customs. This finding is hereby set aside. (p. 722 E)

Joinder of parties

5. The defendants/respondents and those they represent (Alugburu and Nkurume families) are not persons having the same interest in one suit within the meaning of Order 4 Rule 3 of the said High Court Rules. The plaintiffs are therefore not entitled to bring the representative action. (p. 726 E)

Lumping of several causes of action

6. It is also clear that while the alleged damage to wall fence, blocks and iron is within the portion of land verged blue and belonging to 1st defendant separately, the defendants have lumped in their claim several causes of action together. Order 4 rule 2 provides for joinder of plaintiffs in one action but not for joinder of causes of action. The guiding principle is whether the plaintiffs have the same interest in the action, not whether it was similar acts of the defendants that gave rise to different causes of action. I am satisfied that in its present form and on the pleadings and evidence given at the trial, the suit (Suit No. HOR/20/87) is incompetent and ought to have been struck out by the learned trial judge. (p. 726 G)

NOTABLE POINTS OF INTEREST

OGWUEGBUJSC

1. Evidence of old men in land matters

D.W.4 was thirty years on the throne and seventy five years old in 1989 when he testified. It is common knowledge that generally, Traditional Rulers and old men are by their positions in a position to know the true facts in land disputes and also often find it difficult to twist the truth. (p. 722 D)

ONUJSC

2. Appeal court is to give the reason for allowing a ground of appeal

The court below merely saying in respect of ground 9 (now issue 5 in the respondents' present appeal) that the appeal thereon succeeded without giving reasons therefor, in my respectful view, was wrong. Be it noted that it is trite law that if capacity made out on the writ is not proved at the hearing the action fails. (p. 732 C)

REPRESENTATION

Chief M. I. Ahamba SAN with Chidi Awuke for the appellants
Mrs. A. Williams for the Respondents

CASESREFERREDTO

Onwuka v. Ediala (1989) 1 N.W.L.R. (Pt. 96) 182 at 208 - 209
Balogun v. Labiran (1988) 3 N.W.L.R. (Pt. 80) 66 at 84
Emaphil Ltd v. Odi (1987) 4 N.W.L.R. (Pt. 67) 915 at 935
Duru v. Nwosu (1989) 4 N.W.L.R. (Pt. 113) 24 at 35
Obodo v. Ogba (1987) 3 S.C. 459 at 479-486
Nwawuba v. Enemuoh (1988) N.S.C.C. (pt. 1) 930 at 940
Adesanya v. President of Nigeria (1981) 2 N.C.L.R. 358
Amachree v. Newington 14 W.A.C.A. 97
Nayaku v. Pabi (1937) 3 WACA 220
Duke of Bedford v. Ellis (1901) A.C. 1.
Atane v. Aku (1974) 19 S.C. 237
Adegbite v. Lawal 12 W.A.C.A. 398 at 399
Akinloye v. Eyiola (1968) N.M.L.R. 92

STATUTES&RULESREFERREDTO

High Court Law Cap. 61 Laws of Eastern Nigeria, 1963 s. 20(1)
High Court Rules of Eastern Nigeria 1963 O.4 rr.2,3&7
Evidence Act s.58

LEADJUDGMENTBYOGWUEGBUJSC

The Appellants before this Court are plaintiffs in Suit No HOR/15/87. They brought the action against the five defendants Claiming in paragraph 26 of their statement of Claim as follows;

"(a) A declaration of the Communal entitlement of the Obibi Community to the customary right of occupancy to part of the piece or parcel of land known as and called Mgbo-Ekpe Obibi situate at Obibi, Awo-Idemili, which part is shown in survey plan No. AS. A/IMD 99/87 wherein it is verged

pink.

"(b) N100,000 damages for trespass to the palm plantation of the plaintiffs in the said land part of which was destroyed by the defendants.

"(c) A perpetual injunction restraining the defendants, their agents, assigns, relations and successors from treating or dealing with the land B verged pink in the manner whatsoever inconsistent, with the communal possessory rights of the entire Obibi Awo Idemili Village or community, and in particular, erecting or continuing to erect any physical structure on the land in dispute. The plaintiffs brought this action "for and on behalf (sic) members of Obibi Village Community Awo Idemili".

C The defendant in suit No. HOR/15/87 filed a cross-action against the plaintiffs in suit No. HOR/15/87. The cross action is Suit No. HOR/20/87. paragraph 46 of their statement of claim reads:

"WHEREFORE the plaintiffs claim against the defendants jointly and severally as follows:

D *(a) A declaration that the plaintiffs are entitled to the customary right of occupancy over the piece or parcel of land known as and called "MGBO EKPE" SITUATE AND LYING AT Obibi, Awo-Idemili more particularly shown and delineated in plan No. DS8624/IMII40D/87 wherein it is verged PINK.*

E *(b) N200,000.00 (two hundred thousand naira) damages for trespass by the Defendants made up as follows:*

I. N165,000.00 (one hundred and sixty five thousand Naira) Special Damages as pleaded in paragraph 44 above.

(ii) N35,000.00 (thirty five thousand Naira) General Damages

F *(iii) A perpetual injunction restraining the defendantsfrom trespassing or further trespassing onto the land dispute more particularly verged pink in plan No. DS 8624/IM.II40D/87 dated 12th May, 1987".*

In paragraphs 1 and 2 of the statement of claim in Suit No. HOR/20/87 it was averred as follows:

G *"1. The plaintiffs are principal members of the Alugburu/Nkurume families in Obibi Village of Awo- Idemili in Orlu Local Government Area, Imo State and bring this suit for themselves and as representing the members of Alugburu and Nkurume families.*

H *2. On the 11th of March, 1987, this Honourable Court approved the authorization given to the plaintiffs to bring and prosecute this action in a representative capacity".*

From the averments so far, it becomes clear that both parties are members of Obibi Village in Awo-Idemili Autonomous Community as testified by both parties. Obibi is one of the thirteen Villages that make up Awo-Idemili

Autonomous Community in Orlu Local Government Area of Imo State.

Pleadings were ordered, filed and exchanged in the two suits. With the leave of the court Suit Nos. HOR/15/87 and HOR/20/87 were consolidated for the purpose of hearing by the learned trial judge on 14:9:87 with the consent of both parties. The trial judge further ordered that the plaintiffs in Suit No. HOR/15/87 shall be designated as plaintiffs while the plaintiffs in Suit No. HOR/20/87 shall be designated as defendants in the consolidated suits. Hearing commenced thereafter.

In the end, the learned trial judge granted the reliefs sought by the plaintiffs. A nominal damage of N100.00 was awarded against the 1st defendant. As to the injunction claimed, he restrained the defendants from excluding the plaintiffs from exercising reasonable acts of possession of the land as co-owners.

In respect of the cross-action (Suit No HOR/20/87), the learned trial judge held as follows:

"Coming to the cross action filed by the defendants in suit No. HOR/20/87, I adopt my findings in suit HOR/15/87 as outline above and hold that the defendants have not discharged the burden placed on them to prove on balance of probabilities that the land in dispute situate at Obibi and delineated in survey plans Nos. DS 8848/IM1357D/87 Exhibit "J" and No. DS 8624/IM 1140D/87- Exhibit "K" on portion verged pink, is the exclusive property of Alugburu and Nkurume families in Obibi Village and not the communal land of the entire Obibi people as found in Suit No. HOR/15/87".

The defendants who were dissatisfied with the decision appealed to the Court of Appeal Port Harcourt Division which court allowed their appeal. The judgment of the learned trial judge was set aside. The court further held as follows:

"Appellants claim in suit No HOR/20/87 succeeds except that the general damages shall be N10,000.00 Suit No. HOR/15/87 is dismissed".

The appeal before us is at the instance of the plaintiffs who are aggrieved by the decision of the court below. Briefs of argument were filed and exchanged by the parties. The following five issues are formulated by the plaintiffs/appellants for determination in this appeal:-

"3 (a) Whether the Court of Appeal was right in reversing the findings of fact made by the trial court given the state of credible evidence before the court.

(b) Whether the appellants did raise any legal objection to issue 1 in the respondents brief before the Court of Appeal, and if so, the proper legal effect thereof.

(c) Whether the Court of Appeal could grant the reliefs sought by the

respondents in Suit No. HOR/20/87 without reversing the trial courts decision that the said suit was bad for misjoinder of both parties and causes.

(d) Whether Suit No. HOR/20/87 was not bad for misjoinder of parties and causes contrary to Order 2 Rule 7 High Court Rules of Eastern Nigeria applicable to Imo State.

B *(e) Whether on the preponderance of evidence the appellants did not prove their case before the trial court".*

Learned counsel for the defendants/respondents adopted the five issues for determination formulated by the appellants and proposed that the five issues can conveniently be dealt with under three headings, namely - (1) joinder

C (ii) Appellate jurisdiction and findings of fact (iii) Burden of proof. I agree that the five issues for determination can be considered under the three headings.

The land which is the subject matter of the suit giving rise to this appeal is called MGBO-EKPE situate at Obibi in Awo-Idemili Antonomous Community within the jurisdiction of the Orlu Judicial Division of the High Court of Imo D State.

The plaintiffs described and delineated the land in dispute in survey plans Nos. AS.A/IMD99/87 verged green and A/IMD 158/87 verged red. The defendants on their side filed survey plans Nos. DS8624/IMI140D/87 and DS8848/IMI357D87. The area in dispute is verged pink in both plans. Survey E plan No. AS A/IMD99/87 was tendered by the plaintiffs at the trial and it was admitted in evidence as Exhibit "B". Survey plans Nos. DS 8848/IMI3/57D/87 and DS 8624/IMI140D/87 were tendered by the defendants and admitted in evidence as Exhibits "J " and "K".

The dominant issue between the parties is whether the Mgbo-Ekpe F land in dispute is communal land of the entire people of Obibi Village as averred by the plaintiffs in paragraphs 6 and 10 of their statement of claim in Suit No. HOR/15/87 and paragraph 16 of their statement of defence in Suit No. HOR/20/87 or the property of Alugburu and Nkurume families of the defendants as contained in paragraph 5 of their statement of defence in Suit No. HOR/15/87 G and paragraphs 15 and 16 of their statement of claim in Suit No HOR/20/87.

The said paragraphs of the pleadings are as follows:

(a) Paragraphs 6 and 10 of the statement of claim in suit No. HOR/15/87:

H "6. The original owner of the land was Obibi. Obibi had three sons namely, Eleke, Ezike and Okpara. These were the ancestors of Umueleke, Umuezike and Umuopara kindreds of Obibi.

10. The land Mgbo Ekpe has always been a Communal property of Obibi village and has been so applied from time immemorial

(B) Paragraph 5 of statement of defence in Suit No. HOR/15/87:

"5. The defendants deny paragraphs 6, 7, 8, and 9 of the statement of Claim and will at the trial put the plaintiffs to the strictest proof thereof. In further answer to these paragraphs, the defendants state that:

(a) Obibi, the ancestor of the parties to this dispute was not the original owner of the MGBO EKPE land in dispute.

(b) The land in dispute belongs to the members of the families of the defendants in accordance with the custom of the people of Awo Idemili autonomous community in Orlu Local Governments Area, Imo state.

(c) Members of the Alugburu and Nkurume families DEFORESTED the southern part of the Mgbo Ekpe land now in dispute in 1967. Prior to 1967 the southern part of the land in dispute was thick virgin forest abutting the EDIMIRI juju of Awo-Idemili Community. This juju was worshipped by the villages of Awo-Idemili Community. THE Northern part of the land in dispute was deforsted by the defendants long before 1967.

(d) Mgbo Ekpe land stretches from Ede Ukwu village on the east, through Obibi village on the centre, to Ezeogwu village on the West - all in Awo-Idemili Autonomous Community ,

(e) The custom of the people of Awo-Idemili Autonomous Community in relation to ownership/possession of forest land/shrine is that the owner of the adjoining any forest or shrine (MGBO) is also owner of his own portion of this forest/shrine land right through the forest/shrine land to the boundary of the forest land.

(f) in 1967 when the Awo-Idemili Community took a decision to deforest part of Mgbo Ekpe land including the land now in dispute, the Amalas, represented by the Igwe-in-Council, made up of titled men in the Awo-Idemili Autonomous Community gathered, and in accordance with the aforesaid custom, demarcated the affected part of Mgbo Ekpe land right through to the Ekpe Edemiri lake, between:

(a) Umuduruoma Family in Edeukwu village on the East, and

(b) Alugburu/Nkurume families (Defendants) in Obibi village at the Centre.

(g) The families involved in the demarcation exercise in 1967 were the families whose land adjoined the then forest/shrine Mgbo Ekpe land. The members of the various families aforesaid, (including the Defendants) thereafter DEFORESTED their own portions of Mgbo Ekpe land,

(h)

(i)

(j)

(c) Paragraphs 15 and 16 of the statement of claim in suit No. HOR/

"(15) According to the customs and traditions of the good people of Awo-Idemili Autonomous Community Mgbo Ekpe land, shown and verged GREEN in plaintiffs' plan, belonged to members of ALUGBURU and NKURUME Families in Obibi village, Awo Idemili.

16. Members of the Alugburu and Nkueume Families DEFORESTED B part of the Mgbo Ekpe land in dispute in 1967. Prior to 1967, part of the land dispute was a thick virgin forest abutting the EDIMIRI juju of Awo Idemili community. The juju was worshipped by the villages of Awo Idemili Community. The Northern part of the land in dispute was deforested by the plaintiffs long before 1967."

C (D) Paragraph 16 of the statement of Defence in suit No. HOR/20/87 reads:

"16. The defendants deny paragraphs 15 and 16 of the statement of Claim. Mgbo-Ekpe Obibi land is communal. Hence the communal farm was there in established."

D The parties joined issue on the ownership of the land in dispute. Is it a communal land of the entire Obibi village which includes the defendants or is it the exclusive property of Alugburu and Nkurume families in Obibi in accordance with the custom of Awo Idemili Autonomous community?

I will deal with issue 3 (a) and (e) first, and issue 3 (b), (c) and (d) last. E On the first issue (3) (a), it was submitted in the appellants' brief that the learned trial judge attached no probative value to the evidence of D.W.4 (Eze Odinkemelu - the Traditional Ruler of Awo Idemili) and D.W.7 (1st respondent herein). It was further submitted that the trial judge having had the advantage of listening and seeing the two witnesses in the witness box after which he F decided not to attach any probative value to their testimonies, the evidence proffered by them cannot go into the imaginary scale at the trial level or during re-evaluation in the appellate court. We were referred to the case of Onwuka v. Ediala (1989) 1 N.W.L.R. (Pt. 96) 182 at 208 - 209. It was contended that once the finding is supported by some evidence on record, it is not within the G province of an appellate court to tamper with it. The case of Balogun v. Labiran (1988) 3 N.W.L.R. (Pt. 80) 66 at 84 was cited. We were urged to hold that the finding of the trial judge is consistent with the evidence of the plaintiffs which the court believed.

On the issue of the existence of custom of Awo Idemili that whoever H owns the land abutting a juju forest automatically owns the juju forest, the court was referred to the finding of the learned trial judge where he held that the custom of Awo Idemili where two families in Obibi are entitled to the vast area of land in dispute is as inadequate as it "is ridiculous for such custom to exist." I will come back to this finding later in the judgment.

On the issue of custom, it was argued in the appellants' brief that the trial judge's attitude to Exhibits "E" and "H" was supported by the evidence before him and the conclusion reached by the court below on the two exhibits which confirm the version of the respondents' evidence is untenable, that an appellate court will not interfere with the findings of fact made by a trial judge unless there is no evidence at all to support the finding or that no reasonable jury could have believed the evidence and that it is not within the concern of the Court of Appeal to concern itself with matters touching on credibility. He referred to the case of Emaphil Ltd. v. Odi (1987) 4 N.W.L.R. (pt. 67) 915 at 935

On burden of proof, it was contended in the appellants' brief that both sides claimed ownership and possession of the particular land in dispute and that the respondents asserted exclusive ownership and possession based on custom; that the onus of proof of the custom was on the respondents, that the court below wrongly placed the onus of proof on the appellants and that the conclusion reached by the court below cannot be sustained. We were referred to the case of Duru v. Nwosu (1989) 4 N.W.L.R. (Pt.113) 24 at 35. It was further submitted that any conclusion reached which took the testimony of D.W. 4 into consideration is not sustainable.

It is further argued in the brief that evidence of communal ownership is found in the evidence of all the appellant's witnesses except P.W. 1; that the trial judge accepted the evidence that Obibi was the original owner of the land; that the appellants having traced their communal title to Obibi himself, the onus shifted to the respondents to show how they acquired exclusive title. The court was referred to the case of Udeze v. Chidebe (1990) 1 N.W.L.R. (pt. 125) 141 at 164-164.

On the appellate jurisdiction of the court below, it was submitted in the respondents' briefs follows:

The defendants respectfully submit that the Court of Appeal did not act improperly nor did it exceed its powers and jurisdiction in reviewing the finding of fact made by the court below in this case. The defendants gratefully and respectfully adopt the reasoning and conclusions of the Court of appeal in its review of the facts of this case and its comments on the evidence of the various witnesses. It is submitted that in the light of the reasons given by the court of Appeal in their judgment, it would have resulted in a miscarriage of justice to have allowed the judgment of the High Court to stand undisturbed

It is trite law as submitted in the appellants' brief that a court of appeal should not easily disturb the findings of fact of a trial judge who had the singular opportunity of listening to the witnesses and watching their

performances. It is also settled law that such findings of facts or the inferences from them may be questioned in certain circumstances such as where the appellate court is satisfied that the advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion, and for that reason the Court of Appeal finds that the decision is perverse or where the facts found by the trial judge are wrongly applied to the circumstances of the case or where the inferences drawn from those facts are erroneous or indeed where the finding of facts are not reasonably justified or supported by the credible evidence given in the case, a Court of Appeal is in as much a good position to deal with the facts and findings as the court of trial. See Benmax v. Austine Motor Co. Ltd. (1955) A.C. 270 at 374-376. Thomas v. Thomas (1947) A.C. 484 at 487-488, Fabumiyi & Or. v. Obaie & Or. (1968) N.M.L.R. 242 at 247, Fatoyinbo & Ors. v. Williams (1956) 1 F.S.C.87 and Akinola & Or. v. Oluwao & Ors. (1962) All N.L.R. 225.

D In the present case the plaintiffs assert that the land in dispute is the communal land of the entire Obibi village. As plaintiffs the onus lies on them to prove their assertion. In addition, the defendants maintain that Mgbo Ekpe belongs to them according to native law and custom of Awo Idemili. They also have the burden of establishing that fact as plaintiffs in HOR/20/87.

These are some of the findings of the learned trial judge;

1. The defendants have not denied that they descended from a common ancestor Obibi - the nucleus of the present Obibi village and having not pleaded specifically how the Mgbo Ekpe land in dispute devolved on them, it goes without saying that at the time the land in dispute was cleared by the defendants in 1967, its character of communal land of Obibi had not shed off as pleaded by the plaintiffs."

The fact that both parties are descendants of Obibi was not an issue in the proceedings and the defendants did not have to deny it. It is also not correct as held by the learned trial judge that the defendants did not specifically plead how the Mgbo Ekpe land in dispute devolved on them. They pleaded it in paragraph 5 of their statement of defence in suit No. HOR/15/87 and paragraphs 15 and 16 of their statement of claim in No. HOR/20/87. Because the defendants did not deny that they are descendants of Obibi and did not aver how they came by land in dispute (which are not correct), the learned trial judge was in error to hold that "it goes without saying that at the time the land in dispute was cleared by the defendants in 1967, its character of communal land of Obibi had not shed off as pleaded by the plaintiffs". This conclusion is erroneous. The grounds for the conclusion are not borne out by the

pleadings and the evidence. Those two grounds on which the conclusion is based assuming they are correct (which they are not) are no proof of the communal ownership asserted by the plaintiffs.

2. The learned trial judge while construing Exhibit "G" held:

"I am therefore of the firm view that D.W.4 was not at the meeting to arbitrate one any matter. He was there to secure a portion of Mgbo Ekpe for his village Edeukwu. In fact once Ede and Obibi had decide to partition the whole lot of Mgbo Ekpe between themselves" as Akuma and Ezeogwu had done", it did not lie with that body to tell Obibi and Ede how they could share their own portion So, I hold that the portion of Mgbo Ekpe which went to Obibi must be regarded as a common property of Obibi unless the contrary had been established. If the custom postulated before me is the custom of Awo Idemili, I am yet to decide whether such custom was reasonable and just and whether it is not repugnance (sic) to natural justice, good conscience and equity..... I have rejected the argument of Chief Nwakanma that such act of deforestation could change the character of the land in dispute by virtue of the evidence of the custom of Awo Idemili land, because I regard the existence of such custom as a made up story. Even if it is not a false story or even if it exists I regard it as inequitable and unjust in the circumstances of these consolidated suits. I do not accept the evidence of D.W. 4, the Eze of Awo Idemili." (the underlining is for emphasis).

The learned trial judge misconstrued Exhibit "G". Exhibit "G" reads:

"Minutes of meeting Held By CHIEF, AMALAS AND COUNCILLORS OF EDE AND OBIBI PEOPLE ON SATURDAY THE 18TH OF FEBRUARY 1967 AT 11 A.M."

Agenda of the meeting:

(a) To determine from Ede whether to allow to fallow or to clear a portion of Ekpe Idemili forest sanding near Ede and Obibi kindred.

(b) To determine from Ede and Obibi the persons who have the right of claim to the land on which the said portion of Ekpe Idemili forest stands.

To demarcate the boundary between the kindred of Ede and Obibi.

1. After hearing from the spokesmen namely Ukachwku Onwugufor from Ede and Onyetume Okorie from Obibi the people present unanimously resolved that:

(a) The position of Ekpe Idemili forest standing near Ede and Obibi must be cleared as Akuma and Ezeogweu had done.

(b)

(c) That Mr. Ndinaeze Alugburu of Obibi and Owowo Ehineme of

Ede and Okafor Iroka of Obibi whose farm lands lie adjacent to the Ekpe-Idemili forest have the right of claim of the land on which the Ekpe-Idemili forest stands .”

About twenty two persons including D.W.4 (the Traditional Ruler of the entire Awo Idemili Autonomous Community) signed/ thumb printed Exhibit “G”. Exhibit “G” did not demarcate any boundary between Ede and Obibi in the Ekpe-Idemili forest. Of the three persons families whose names appear as beneficiaries of the exercise in resolution (c) of exhibit “G”, D.W. 4 is not one of them. They are the father of the 1st defendant (Ndianeze Alugburu) from Obibi, Owowo Ehineme from Ede and Okafor Iroka from Obibi.

C D.W.4 in his evidence-in-chief stated:

“The land in dispute was first deforested in 1967 by families of Alugburu and Nkurume. I was then a traditional ruler the status I have now enjoyed for 30 years. Before the deforestation, there was need to clear virgin lands for farming purposes. I took all the elders to the virgin forests at the instance of Umuduruome, Nkurume and Alugburu. We demarcated the boundaries of the forests on the criterion that which ever family had land adjoining or close to the forest were allocated portions of the forest close to them: in this manner the families of Umuruome in Edukwu, Alugburu and Nkurume families in Obibi village had portion of the Mgbo (forest) allocated to them.

E *The custom regarding ownership of virgin forest is that who ever that has land adjoining to the forest is deemed the owner of a portion of the forest close to his land. It is only the families of Alugburu and Nkurume in Obibi village that have land adjoining the land in dispute.”*

This evidence of the Traditional Ruler supports Exhibit “G”. The evidence of D.W.1 (John Ebighi) confirms the evidence of D.W.4 on Awo Idemili custom on ownership of land adjoining virgin forest and in this case, Mgbo-Ekpe forest. P.W.5 (Obi Okorie) from Ezuogu in his examination-in-chief stated that he could not say whether a person who owns land near a juju forest becomes automatically the owner of the forest; but in answer to cross-examination he stated that those who deforested Mgbo Ekpe became the owners thereof from the date of deforestation and that this is the custom in Awo Idemili. His evidence supports the case of the defendants. There is abundant evidence on record showing that defendant deforested the land in 1967 after the demarcation by D.W.4 and his cabinet.

H The court below made the following findings:

“With respect, I find myself unable to agree with the learned trial judge that the appellants having not denied that they descended from a common ancestry Obibi and have not specifically pleaded how Mgbo Ekpe land devolved on them (appellants). It should be presumed that at the time

the land was deforested, its character as Obibi communal land remained unchanged. The law demands proof by admissible evidence and not by presumptions With the respect, the learned trial judge's conclusion is baseless, both in fact and in law. His conception of common ancestry and in relation to common ownership and possession of land could not be well-founded."

B

I entirely agree with the above conclusion of the court below which had also been discussed earlier in this judgement. The learned trial judge went further to attack the integrity of D.W.4 and D.W.7 when there is no evidence on record to justify his conclusions. He described the 1st defendant as a financial bully whose wealth has somehow blinded his vision and that D.W.4 is not a disinterested witness. The court below found as follows:

"In the present appeal the learned trial judge observed that the appellant (1st defendant) employed all powerful personalities and groups in Awo Idemili to ensure that Obibi people ceded to him the whole south of Mgbo land in dispute. This is an unfair institution. The learned trial judge went on to conclude from this premise that exhibits "E" and "H" were produced under circumstances of pressure, in which "..... The body making them has not been shown to have been constituted in a manner as to secure (that is the body) independence and impartiality see section 33 (1) of the Constitution of 1979."

D

These remarks and conclusions which follow are surprising, irrelevant and wholly uncalled for. Totally baseless and unfair to the appellants. At page 177 of the record he found without evidence that D.W.4 Eze Julius Odinkemelu (the Paramount Ruler of Awo-Idemili people was not a "disinterested" witness,....."

E

I entirely agree with the court below. There is no evidence whatsoever to support his finding.

On the respective customs averred by both parties, the court below correctly found as follows:

"Respondents pleaded in HOR/15/87 that by custom of Awo-Idemili the land is communal. There was no proof of that custom. Appellants gave traditional evidence to rebut it and proceeded to establish in HOR/20/87 that by the custom of the area the deforestation of the juju forest followed by first occupation entitles them to ownership of the land The learned trial judge unwittingly, I believe, gave the impression that he had taken side in the brawl. That is unfortunate."

F

A careful reading of the pleadings, the evidence led and the judgement of the learned trial judge will leave one in no doubt that the finding of the learned trial judge are with respect, perverse and the court below was per-

factly entitled to interfere in order to prevent a miscarriage of justice which would have resulted. See Mogaji v. Odofin & Ors. (1978) 4 S.C. 91, Omoriegie v. Idugiemwany (1985) 2 N.W.L.R. (Pt. 5) 41, Egonu & Ors. v. Egonu & Ors. (1978) 11 - 12 S.C. III at 129 and Obodo & Or. v. Ogba & Ors. (1987) 3 S.C. 459 at 479-486.

B The learned trial judge disbelieved the evidence of D.W. 4 and D.W.7. The court below rejected his findings on the two witnesses there is no evidence to support the findings. The D.W.4 is the acknowledged and recognized traditional ruler of Awo Idemili comprising thirteen villages. Obibi village is one of them. He is the custodian of the native laws and customs of Awo-
C Idemili Autonomous Community. He sits, deliberates and takes decisions with his cabinet or Eze-in-Council. His evidence on the custom of the entire Awo Idemili in respect of ownership of virgin forests or for that matter Mgbo Ekpe was not challenged in cross-examination. His evidence ought to have been accorded some respect and not dismissed on an irrelevant and very weak
D reasoning. D.W.4 was thirty years on the throne and seventy five years old in 1989 when he testified. It is common knowledge that generally, Traditional Rulers and old men are by their positions in a position to know the true facts in land disputes and also often find it difficult to twist the truth.¹¹ See Nwauba & Ors. v. Enemuo & Ors. (1988) N.S.C.C. (Pt.1) 930 at 940.

E **The learned trial judge without any invitation from any of the parties suo motu proceeded to declare this custom of Awo-Idemili on land tenure null and void as being repugnant to natural justice, equity and good conscience and without giving the parties the opportunity to address him on that.** The trial court deprived the defendants/respondents the benefit of the custom which by section 20(1) of the high Court Law Cap. 61 Laws of Eastern
F Nigeria, 1963 applicable in Imo State, he is enjoined to enforce. Section 20(1) provides:

*“20 (1) The court shall observe and enforce the observance of every local custom and shall not deprive any person of the benefit thereof
G except when any such custom is repugnant to natural justice, equity and good conscience or incompatible, either directly or by its implication, with any law for the time being in force.”*

**The reason given by the trial judge for declaring it null and void is not tenable having regard to section 20 (1) of the High Court Law of Eastern
H Nigeria. To apply the repugnancy doctrine to this custom is a demonstration of the contempt with which we treat our native laws and customs. There is need for legal emancipation on the part of judicial officers and legal practi**

¹¹ See p. 733 D

tioners in order to hasten the development of our native laws and customs. This finding is hereby set aside.

The appellants entry into the land to establish the oil palm plantation should be seen as an act of trespass as this was done without the consent of the 1st defendant's father who lodged a complaint of the unlawful entry to the D.W.4 and his cabinet in 1975. B

On the issue of misjoinder of parties and causes of action in suit No. HOR/20/87, it was contended in the appellants' brief that the learned trial judge considered the issue and concluded as follows:

"It is quite clear that the joinder of parties and causes of action as done in the present consolidated suits by the defendants offend our rules of C practice and procedure."

It was submitted that the respondents in this court who were appellants in the court below challenged the finding in ground nine of their additional grounds of appeal and made it issue No. (5) in their brief of argument and court below failed to decide on it one way or the other. It was further submitted that the D finding of the trial court on the issue therefore remains in force.

It was also contended that suit No. HOR/20/87 was bad for misjoinder of parties and causes and contrary to Order 4 Rule 7 of the High Court Rules of Eastern Nigeria, 1963 applicable in Imo State and that it was pleaded in paragraph 1 of the statement of claim in Suit No. HOR/20/87 that: E

"1. The plaintiffs are principal members of the Alugburu/Nkurume families in Obibi village of Awo-Idemili in Orlu local Government Area, Imo State and bring this suit for themselves and as representing the numbers of Alugburu and Nkurume families ."

It was further stated that the two families are jointly seeking declaration of F customary right of occupancy to the piece of land verged pink in Exhibit "J" and that the area verged pink in Exhibit "J" is divided into two and differently verged blue and described as the land of Alugburu family and the other verged brown as the land of Nkurume family.

It was further submitted on behalf of the appellants that the respondents having pleaded separate as against communal interest, they cannot therefore bring a joint suit for their alleged separate possessions. We were referred to the cases of Amachree v. Newington 14 W.A.C.A..97 at 99-100 and Itumo v. Anyim (1960) E.R.N.L.R. 48. G

On damages for destruction of a concrete fence belonging to the 1st H respondent, it was submitted that no other respondent has any interest in it the damaged blocks or wall and that this claim cannot stand in the same suit with the other claim of the other defendants. There is also the submission that numbers of Alugburu family had on locus standi to bring a suit for declaration

of customary right of occupancy to Nkurume land and vice versa. The case of Adesanya v. President of Nigeria (1981) 2 N.C.L.R. 358 and Thomas v. Olufosoye (1986) 1 N.W.L.R. (Pt. 18) 669 were cited and relied on.

The defendants who were the appellants in the court below challenged the issue of misjoinder in ground nine of their amended grounds of B appeal and it is covered by issue (5) in their brief of argument. It was issue (1) in the respondents' brief in that court. Quite unfortunately, the court below did not pronounce on it. Since it is a question of law and this court does not need to go outside evidence and the for its determination, it is the duty of this court to pronounce on it and having regard to the fact that it has been raised C in the courts below and in this court.

The materials which I will consider are the pleadings of the defendants/respondents, the evidence led by them, the survey plan of the land in dispute and the relevant rules of the High Court of the former Eastern Nigeria 1963 edition. Paragraphs I and II of the statement of claim filed by the defendants as plaintiffs in Suit No. HOR/20/87 are relevant. Paragraph I has reproduced in this judgment,¹² Paragraph II reads:

"II. Part of Mgbo Ekpe land which belongs to the members of the Alugburu Family for farming purposes is shown verged BLUE in the plaintiffs plan. Part of Mgbo Ekpe land which belongs to members of Nkurume E Family shown verged BROWN in the plaintiffs plan."

The 1st plaintiff who testified as D.W.7 in the consolidated suits stated under cross-examination:

"Not all families in Obibi own land in common. When we own land in common there could be a partitioning of a parcel or parcels of land F among the members of the families for farming purpose. This is generally a permanent arrangement."

Asoye Chukwukelu (3rd plaintiff in Suit No. HOR/20/87) who testified as D.W. 6 said under cross-examination:

"It is true that in Awo Idemili Nkurume family has land separate G from Alugburu. Myself and 2nd defendant have land in common. Nkurume land has not been shared."

Exhibits "J" and "K" are survey plans filed by the respondents herein as plaintiffs in Suit No. HOR/20/87 and as defendants in Suit No. HOR/15/87. Exhibits "J" and "K" are one and the same survey plan in all H respects. In both exhibits the same portions of land are verged "blue" and "brown". The keys or references in Exhibits "J" and "K" read:

"3. Portion of Mgbo Ekpe land Belonging To Alugburu Family Verged

¹² See p. 723 E

Blue”

4. Portion of Mgbo Ekpe land Belonging To Nkurume Family Verged brown”

References or Keys (1) and (2) in both exhibits read:

“(1) Land known as and called Mgbo Ekpe Bona fide Property of Alugburu and Nurume Families (Defendants) as shown in plan Nos. WAV/ B 108/A & B/82 verged Green.

(2) Portion of “MgboEkpe” landed Property Of The Plaintiffs Families NOW in Dispute Verged Pink”.

The reliefs sought in paragraph 46 of the statement of claim in Suit No. HOR/20/87 read:

46 WHEREFORE the plaintiffs claim against the defendants jointly and severally as follows:-

(a) A declaration that the plaintiffs are entitled to the customary right of occupancy over the piece or parcel of land known as and called “MGBO EKPE” situate and lying at Obibi, Awo-Idemili, more particularly D shown and delineated in plan No. DS8624/IMI140D/87 wherein it is verged PINK.

(b) N200,000.00 (Two hundred thousand Naira) damages for trespass by the Defendants

(c) A perpetual injunction with respect to the damages E claimed, the 1st defendant (1st plaintiff in Suit No. HOR/20/87) testifying as D.W.7 stated:

“ Sometime in 1982 I met the families of Umualugburu and Nkurume to give a piece of land to build sometime. They did so and there I erected concrete wall fence- about half a kilometer (square). It cost me N150,000.00 F on it. I also stacked 10,000.00 9-inch block (sic) at the site: I left one iron gate and rails all valued N5,000.00. On 6th January 1987 the plaintiffs entered the said land and started harvesting palm fruits On 6th and 7th February 1987 the plaintiffs destroyed the wall and 10,000 blocks. The iron gate was also destroyed.”

From Exhibits “J” and “K”, Key (I) shows the land of Alugburu and Nkurume families verged green and the area in dispute is divided again into two and verged blue and brown. The area verged blue is in the possession of Alugburu family while the area verged brown is in possession of Nurume family. These possessory rights of the two families are pleaded in paragraph H II (supra).

At this stage the provisions of Order 4, Rules 2, 3 and 7 of the High Court Rules of Eastern Nigeria, 1963 applicable in Imo State come into focus. They are the rules in force when the action was filed and determined in the

High Court. They provide:

“2. Where a person has jointly with other persons a ground for instituting a suit, all those other persons ought ordinarily to be made parties to the suit.

3. Where more persons than one have the same interest in one suit, one or more of such persons may, with the approval of the court, be authorized by the other persons interested to sue or to defend in such suit, for the benefit of or on behalf of all parties interested.

7. In case a writ states two or more distinct causes of suit, but not by and against the same parties, or by and against the same parties but not in the same rights, the writ may, on the application of any defendants, be amended or set aside, as justice may require.”

There are three causes of action in Suit No. HOR/20/87. The first is by Alugburu family in respect of the parcel land verged “blue “ in Exhibits “J” and “K”, the second is by Nkurume family over the parcel of land verged D “brown” in those exhibits. This is so having regard to paragraphs 1 and 11 of their statement of claim, Exhibits “J” and “K” and the evidence of D.W.6 and D. W.7. The third cause of action is the claim of N200,000.00 being damages for wall fence, blocks and iron gate belonging to the 1st defendant and destroyed by the plaintiffs.

E **The defendants/respondents and those they represent (Alugburu and Nkurume families) are not persons having the same interest in one suit within the meaning of Order 4 Rule 3 of the said High Court Rules. The plaintiffs are therefore not entitled to bring the representative action.** See the cases of Amachree & Ors.v. Newington 14 W.A.C.A. 97 and Markt & Co. F Ltd. v. Knight Steam Co. Ltd. (1910) 2 K.B. 1021 Order 4 Rule 2 which is in par imateria with Order 4, rule 2 of the former Supreme Court (Civil Procedure) Rules, 1948, permits joinder of plaintiffs where there is a common ground of action but not joinder of causes of action. See Duke of Bedford v. Eilis & Ors. G (1910) A.C.1. It is clear from the pleadings, the evidence and Exhibits “J” and “K” that the parcels of land verged blue and brown belong respectively to Alugburu and Nkurume families separately. **It is also clear that while the alleged damage to wall fence, blocks and iron is within the portion of land verged blue and belonging to 1st defendant separately, the defendants have lumped in their claim several causes of action together. Order 4 rule 2** H **provides for joinder of plaintiffs in one action but not for joinder of causes of action. It cannot be seriously contended that on the pleading and the evidence of D.W.6 and D.W.7, damage done to the 1st defendant is a common ground of action within the purview of the rule which conferred a limited liberty of joining plaintiffs with separate causes of action. See Kukoyi & Ors. v. Ladunni**

(1976) 11 S.C. 245. **The guiding principle is whether the plaintiffs have the same interest in the action, not whether it was similar acts of the defendants that gave rise to different causes of action. I am satisfied that in its present form and on the pleadings and evidence given at the trial, the suit (Suit No. HOR/20/87) is incompetent and ought to have been struck out by the learned trial judge.**

B

This appeal, therefore, partially succeeds. Issues (a) and (e) are resolved against the appellants. The court below was right in reversing the findings of fact made by the trial court and on the preponderance of evidence. The appellants did not prove their case before the trial court. Issue 3 (d) is resolved in favour of the appellants. Suit No. HOR/20/87 is incompetent on the ground of misjoinder of parties and causes of action. Issues 3 (b) and (c) do not call for determination having regard to the misjoinder.

C

The net results are that the appeal in respect of Suit No. HOR/15/87 fails and the suit is accordingly dismissed and Suit No. HOR/20/87 being wrongly constituted, is hereby struck out. It is further ordered that parties should bear their own costs of this appeal.

D

BELGORE JSC

I agree with my learned brother, Ogwuegbu, J.S.C. that unless parties have the same interest in the same subject matter they cannot have their matter joined in one action for trial. It is true the purpose of joinder of actions is to save time and expenses in litigation but the mere facts that the parties are the same is not a reason to join issues and interests that are divergent and not the same. The suit No. HOR/20/87 is wrongly constituted and it is struck out instead of being dismissed because it was an incompetent matter for trial. The appeal in respect of suit HOR/15/87 having failed for the detailed reasons in the judgment of Ogwuegbu, J.S.C. which I adopt as mine, I also dismiss that appeal, Parties are to bear their respective costs.

F

MOHAMMED JSC

G

I have had the advantage of reading the judgment just delivered by my learned brother, Ogwuegbu J.S.C., in draft, I agree with his reasoning and conclusions.

My learned brother, has made considerable findings on all the issues canvassed in this appeal and I entirely agree with him that the appeal from the decision of the Court of Appeal in respect of suit No. HOR/15/87 has failed and it is accordingly.

H

I also agree that the plaintiffs in Suit No. HOR/20/87 have no common ground of action to sue the defendants jointly. The pleadings and evi-

dence make it abundantly clear that the plaintiffs, in that actions, have no common interests and as has been clearly pointed out in the lead judgment they cannot be joined in one suit. The learned trial judge was in error in failing to strike out the plaintiffs' action after finding that there was misjoinder of parties and causes of action in that suit. The Court of Appeal was also wrong B to reverse the decision of the trial judge and grant reliefs claimed by the plaintiffs in that suit (HOR/20/87) when the parties have no common ground or interest to sue jointly. In Mensah Nayakuand other v. Otoo Pabi (1937) 3 WACA 220 the west African Court of Appeal regarded a case of multiple joinder of parties and of causes of action a hindrance to a fair and proper trial C of the suit. It therefore struck out the writ. See also Kukoyi and Ors. v. Lanunni (1976) 10 N.S.C.C. 582.

Consequently, the appeal from the decision of the court below in respect of Suit No. HOR/15/87 is dismissed. The appeal against the decision in respect of Suit No. HOR/20/87 is allowed. That Suit is hereby struck out. I D also order that parties should bear own costs.

ONU JSC

I had the privilege or of a preview of the judgment of my learned brother Ogwuegbu, J.S.C. just read. I am in entire agreement with his reasoning and conclusion that the appeal in respect of suit No. HOR/15/87 of the two consolidated suits be and is hereby dismissed while appeal in Suit No. HOR/20/87 being wrongly constituted be and is hereby allowed by me. The following are my reasons:-

I fully endorse the adoption of the five issues formulated as arising F for consideration by this Court of the appeal at appellants' instance by my learned brother and with issues the respondents similarly adopted, although conveniently dealt with under the underlisted heads, to wit: (i) Joinder (ii) Appellate jurisdiction and findings of fact, and (iii) Burden of proof.

I am in full agreement with my learned brother's treatment of heads G (ii) and (iii) which I adopt and nothing usefully to add thereto. I wish, however, to make the following comments of mine on head (i) i.e. Joinder, as follow:-

In the first place, it would appear clear that the learned trial judge decided the issue of joinder of parties and causes of action in Suit No. HOR/20/87 which he held to offend our rules of practice and procedure and so H resolved that issue in favour of the appellants. The Court of Appeal, for its part, made no comments albeit tacitly thereon. This is irrespective of the fact that by appellants' Notice of Appeal dated 22nd April, 1993 contained on pages 380 to 382 of the appeal records, the cross-appellants herein, attacked the decision of the Court of Appeal (hereinafter referred to as the court below)

and dated 20th April, 1993 to the following effect:-

“GROUND ONE:

The Court of Appeal erred in Law when it allowed the appeal and entered judgment for the appellants in terms of their cross-action when the said action was bad for both misjoinder of parties and causes contrary to order 2 Rule 7 High Court Rules of Eastern Nigeria then applicable to Imo State.

PARTICULARS OF ERROR:

(a) The Alugburu and Nkurume families who constitute *the defendants/appellants own lands separately, and this was reflected in the plan filed in the court.*

(b) *The cement block alleged destroyed belonged to the 1st defendant/appellant only.*

(c) *The interest sought to be protected were not in the same right.”*

The two issues distilled from the ground of appeal set out above are set out as issues No. (c) and (d) below for purposes of clarity thus:

“(c) Whether the Court of Appeal could grant the reliefs sought by the respondents in Suit No. HOR/20/87 without reversing the trial court’s decision that the said suit was bad for misjoinder of both parties and causes.

(d) Whether Suit No. HOR/20/87 was not bad for misjoinder of parties and causes contrary to Order 2 Rule 7 High Court Rules of Eastern Nigeria as applicable to Imo State.”

For a clear understanding of how the trial court approached these issues I wish to quote in extenso what the trial court said in resolving the matter. Said the learned trial Judge:

“..... But the problem would have been a little less apparent, here, for Chief Ahamba pointed out that in paragraph 11 of the defendants’ statement of claim in the consolidated suits, in HOR/20/87, the defendants’ plan i.e. the said Exhibit ‘K’ identifies two separate parcels of land on the entire Mgbo Ekpe land in dispute verged green South of Ezeogwu/Akuma Road. These separate parcels of land are verged blue and brown. The former is described as Mgbo Ekpe land belonging to Alugburu family, while the latter belongs to Nkurume family.

The said paragraph 11 above referred to reads thus:

“Part of the Mgbo Ekpe land which belongs to the members of the Alugburu family for farming purposes is shown verged blue in the plaintiffs’ plan. Part of Mgbo Ekpe land which belongs to members of the Nkurume family for farming purposes is shown verged brown in the plaintiffs’ plan.”

The defendants on record are members of separate families of Alugburu and Nkurume. And from the above analysis their interests in the land in dispute

are shown separately and not joint. That is why Chief Ahamba did submit that the joinder of parties in the consolidated suits was improper and bad for the Alugburu family has no locus standi to sue for Nkurume family land and vice versa. The position would have been different if the families have a common undivided interest in the entire land of Mgbo Ekpe south of Ezeogwu land B which is in dispute.

The principle governing a representative action has been stated many times by our court. The authorities Chief Ahamba relied upon are Order 4 r.2 of the former High Court Rules: Amachree & ors. v. Newington 14 WACA. 97 at 99-100 and the case of Itumo v. Anyiam (1960) E.R.N.L.R.48. Order 4 r. 2 C provides:

"Where a person has jointly with other person have ground for instituting a suit, all those other persons ought ordinarily to be made parties to the suit."

But I think that Chief Ahamba's reliance on the above quoted rule is not quite D apposite. In the present suits the defendants are suing for themselves and as representing the members of Alugburu and Nkurume families. and this relates to Order 4 r. 3 which states:

"Where more persons than one have the same interest in one suit, one or more of such persons may, with the approval of the Court, be authorized by the other persons interested to sue or defend in such suit, for the benefit of or on behalf of all parties so interested."

The question is whether the defendants have a common interest and a common grievance. If the defendants had sought for a mere declaration of customary right of occupancy in respect of various parcels of land in the land in F dispute depicted in different colour verges as belonging to the separate families of Alugburu and Nkurume, this Court would have had no doubt that such a declaration can be made so long as a parcel or parcels of land in Mgbo Ekpe in dispute belonging to each of the two families can be easily identified - see the case of Duke of Bedford v. Ellis & Ors. (1901) A.C.1. But unfortunately this G is not the claim before me, the defendants in Suit No. HOR/20/87 claim (a) "a declaration that the plaintiffs are entitled to the customary right of occupancy over the piece or parcel of land known as and called "Mgbo Ekpe" situate and lying at Obibi, Awo-Idemili, more particularly shown and delineated in plan No. DS 8624/1M 1140 D/87 wherein it is verged pink."

H

Thus, it is clear from the above that relief is for a declaration of the area verged pink in Exhibit 'K' the area comprising separate "ownership." Furthermore, there is evidence that damages complained of as a result of the alleged trespass relates to (a) cost of concrete block fence damaged, (b) cost of iron gate

damaged, (c) cost of 10,000 9" by 18" cement blocks damages. These items belong to the 1st defendant alone and not to Alugburu and Nkurume families but even if they belong to the two families the joinder of the causes of action as Chief Ahamba has contended was improper and to that extent, the Amachree and Itumo cases apply since the evidence does not support the claim and, moreover, the rule of joinder of parties and causes of action have been infringed. I have read the case of Atanda & anor v. Taiwo Akunyun (1988) 4 NWLR (part 89) 394 cited by Chief Nwakanma and my view is that the issue in that case was essentially the withdrawal of a representative action by opposing members of the community represented. The supreme Court held that other members of the community so represented could resist and attempt by such opposing members to withdraw the action. It is quite clear that the joinder of parties and causes of action as done in the present consolidated suit by the defendants offend our rules in practice and procedure. (Underlining above is mine for emphasis)

The complaint by the appellants as to joinder from the trial court to the court below is contained in ground 9 of their Notice of Appeal. In dealing with that ground of appeal all that the court below said at page 373 of the Record is cursorily as follows:-

"Grounds 2 and 7 in connection with Issue No.4 are predicated on the same facts. They succeed. So also grounds 9 and 10."

The above, the learned Senior Advocate for the appellants has attacked in both appellants' brief and in oral argument. Elucidating on the point in his oral submission, learned Senior Advocate argued by submitting that:

"On the question of joinder, etc. Our contention is that the learned trial judge discussed joinder of parties and causes. Except the cursory remark of a sentence, the court below said nothing to reverse the order made by the trial court as it did."

It has been held in Otugor Ogamioba & ors. v. Chief D.O. Oghene & ors. (1961) 1 All NLR. 59 that a representative suit is in order if the relief sought is in its nature beneficial to all whom the plaintiffs proposed to represent. See also Atane v. Aku (1974) 19 S.C. 237; Shaibu v. Bakare (1984) 12 S.C. 187 at 230 and Abuakwa v. Adanse (1957) 3 All E.R. 539 at 562.

In the first place, in the case in hand, land on which the suit was founded rather than being the joint property of the Alugburu and Nkurume families is said to rest in only the 1st defendant in Suit No. HOR/20/87. Secondly, the trial court from the above excerpts would appear to have dealt with the matter exhaustively before awarding the customary right of occupancy to the present appellants, whose success the court below upset, leading to the appeal herein. Thirdly, it is not disputed that where there is a challenge to the

capacity and/or authority of the plaintiffs to sue in a representative capacity and the parties have joined issue on it in their pleadings as happened in the instant case it is a matter to be resolved by the trial judge vide Jeremiah Nsima v. Ole Nnaji & ors. (1961) All N.L.R. 441 at 443; Adegbite v. Lawal 12 W.A.C.A. 398 at 399; Chief J.S. Ekpere & 3 ors. v. Chief Odaka Aforije & ors. (1972) 1 All NLR (Part 1) 220; Oloriode & ors. v. Oyebi & ors. (1984) 5 S.C.1, 37 and Amachree v. Newington (supra).

In the case in hand, the learned trial judge having resolved the matter of joinder in its judgment of 9th April, 1990, it became the duty of the court below, to which an appeal lay on the point, to make a pronouncement thereon one way or the other. The court below merely saying in respect of ground 9 (now issue 5 in the respondents' present appeal) that the appeal thereon succeeded without giving reasons therefor, in my respectful view, was wrong. Be it noted that it is trite law that if capacity made out on the writ is not proved at the hearing the action fails. See Chapman v. C.F.A.O. 9 W.A.C.A. 18, Duke v. Henshaw (1940) 6 W.A.C.A. 200 and Disu & Faro v. Adele (1959) LLR.131.

Now, it is established that when a judgment is delivered in a lower court, here the High Court, it is presumed on appeal to be correct or subsist until the contrary is shown. See Odiase v. Agho & ors. (1972) 1 All NLR (Part 1) 170 at 176; Melifonwu v. Egbuji (1982) 9 SC. 145 at 165; Johnson v. Williams 2 W.A.C.A.248 at 254 and Management Enterprises Ltd. v. Otusanya (1987) 4 S.C. 368. In the case in hand, the court below by merely saying that ground 9 (even if along with other grounds) succeeded, that did not and would not, in my view, amount to a demonstration in full a dispassionate consideration of the issue arising from that ground properly raised and heard as to reflect the results of such an exercise. See Polycarp Ojogbue & anor. v. Ajie Nnubia (1972) 6 S.C. 227 at 236 and Tsalibawa v. Habiba (1991) 2 NWLR (Part 171) 461. The court below, having in my view, failed to make any definitive pronouncement on the vital issue of joinder, whereas the trial court did, the appeal on it ought, in my view, to be allowed.

It is for these reasons and those set out in the leading judgment of my learned brother Ogwuegbu, J.S.C. that I, too, agree to dismiss Suit HOR/15/87; allow the appeal in Suit HOR/20/87, declare same as incompetent and accordingly strike it out. I also order that each party do bear their own costs.

H ADIO JSC

I have had the opportunity of reading, in advance, the judgment just delivered by learned brother, Ogwuegbu, J.S.C., and I agree that the appeal in respect of suit No. HOR/15/87 fails and, accordingly, I too dismiss the suit. I also agree that suit No. HOR/20/87 was wrongly constituted and I strike it out.

If one carefully reads the averments in the pleadings, the evidence before the learned trial judge, and his judgment, it can reasonably be inferred that some of the findings made by the learned trial judge were, with respect, perverse. Where a trial Court unquestionably evaluates the evidence and appraises the facts, it is not the business of an appellate Court to substitute its own views for the views of the trial Court. See Akinloye v. Eyiola, (1968) B N.M.L.R. 92. An appellate Court will, however, be justified to interfere or disturb a finding of fact it is perverse. See Kimdey V. Military Governor, Gongola State, (1988), 2 N.W.L.R. (pt. 77) 445 at p. 459. "Perverse", in this connection, means persistent in error, different from what is reasonable or required, or against the weight of evidence. See Atolagbe v. Shorun (1985) 1N.W.L.R. C (pt.2) 360 at p. 375.

Apart from there being a justification for the interference of the Court below with some of the findings of fact made by the learned trial judge on the ground that they were perverse, there was also the rejection of the findings of the learned trial judge on the d.w.4 and d.w.7. There was no evidence to support them. The learned trial judge rejected the evidence of d.w.4 apparently for no sufficient or good cause. The witness was a native chief in Awo Idemili. He gave evidence on the custom in respect of Awo Idemili in relation to ownership of virgin forests and his evidence was not contradicted or challenged. His evidence on the custom of the community in question should have ordinarily been given some respect in view of the chieftaincy office which he had held for about thirty years. The attitude of the learned trial judge to the evidence of the witness was, with respect, in obvious ignorance or disregard of the provision of section 58 of the Evidence Act which is as follows:-

"58. In deciding questions of native law and custom the opinions of native chiefs or other persons having special knowledge of native law and custom and any book or manuscript recognized by natives as a legal authority are relevant."

In the case of suit No. HOR/20/87, it is incompetent on the ground of misjoinder of parties and of cause of action. In order to enable a Court to entertain a case, there should be no feature in the case which prevents the Court from exercising its jurisdiction, See Madukolu V. Nkemdilim (1962) 2 S.C.N.L.R. 341.

It is for the foregoing reasons and for the detailed reasons given by my learned brother, Ogwuegbu, J.S.C., in the lead judgment that I agree that the appeal in respect of suit No. HOR/15/87 fails. I too dismiss it. I also agree that suit No. HOR/20/87 was wrongly constituted. I too strike it out.