

SUPREME COURT OF NIGERIA
2ND MAY, 1997. SC. 227/1990
CORAM:- M. L. UWAI S CJN, S. M. A. BELGORE, I. L. KUTIGI,
S. U. ONU, A. I. IGUH, JJSC.

ADEWALE ALABI EBOADE & ANOR DEFENDANTS/APPELLANTS

(For themselves and on behalf of other
members of Eboade family)

AND

RAUFU OLANIYAN ATOMESIN & ANOR PLAINTIFFS/RESPONDENTS

(For themselves and behalf of other
members of Atomesin family)

COURTS - *Disbelieving of a party and his witnesses - Is proper - Where substantiated with reasons.*

LAND LAW - *Title - Once radical title has been proved - Acts of possession and ownership need not be considered.*

LAND LAW - *Parties - Family land - Contention that the plaintiffs were not members of the Atomesin family - Cannot now be raised by the defendants.*

LAND LAW - *Locus in quo - Where the identity of the land in dispute is not in controversy - Visit to locus is not necessary.*

LAND LAW - *Kojo v. Bonsie rule - Where one side failed to put forward a traditional history capable of being tested - The rule will not apply.*

FACTS

Before the Ibadan High Court, the plaintiffs/respondents filed an action against the defendants/appellants claiming declaration to a statutory right of occupancy, N1,000.00 general damages for trespass and injunction. The defendants pleaded settlement, but led evidence showing a grant which was not pleaded. The plaintiffs pleaded and led evidence of traditional history. The trial court believed the plaintiffs and their witnesses and gave judgment in their favour.

The defendants appealed to the Court of Appeal which dismissed their appeal. Being dissatisfied, the defendants have further appealed to the

supreme Court raising 4 issues.

ISSUES FOR DETERMINATION

"1. Whether the Court of Appeal was right in holding that the trial judge did not fall into error in the manner in which he proceeded to resolve the conflict in traditional history before him.

2. Whether the Plaintiffs could bring an action in the name of Atom-esin family for title to land without joining the said Atomesin family as a party when the Plaintiffs are not related to the said Atomesin family.

Etc, see P. 854

HELD (Unanimously dismissing the appeal per lead judgment of **KUTIGI JSC**)

Kojo v. Bonsie Rule

1. So, clearly the rule relating to traditional history stated in KOJO 11 v. BONSIE (above) will only apply where the two parties pleaded traditional histories and led evidence in accordance with their pleadings at the trial. It will not apply, as in this case, where the Defendants pleaded "settlement" and led evidence showing a "grant". The pleaded settlement on which no evidence was led would be regarded as abandoned, while evidence of a "grant" which was not pleaded would be regarded as going to no issue vide AFRICAN CONTINENTAL SEAWAY LTD. v. NIGERIAN DREDGING, ROADS & GENERAL WORKS LTD (1977)5 SC. 235. The defendants never amended their pleadings throughout the trial as they should have done. The rule in KOJO 11 v. BONSIE (supra), I believe, is not intended to be applied where one side has completely failed to put forward a traditional history capable of being tested and compared with the other side, which has pleaded and led evidence of traditional history. (p. 856 H)

Court - Disbelieving a party

2. So that although the Defendants and their witnesses were disbelieved, the learned trial judge gave his reasons for doing so. That was as it should have been. I think he was right. (p. 857 H)

Once radical title has been proved

3. In a suit for a declaration of title the onus of proof lies on the plaintiff to prove his case on a balance of probabilities and he must succeed on the strength of his own case and not on the weakness of the defendants' case. And I must say that I agree with the submission of Chief Akande for the plaintiffs, that once the radical title has been pleaded and proved, acts of ownership or

possession resulting from such title, need no longer be considered for they are then non-issues. Therefore in this case where the two sides each pleaded settlement as its root of title, the learned trial judge having found that the Plaintiffs proved their radical title to the land in dispute, needed not to have gone further to consider acts of ownership or possession by the parties at all. (p. 858 A)

Parties - Family land

4. The learned trial judge was therefore right in my view when he stated that although the Plaintiffs never showed how they came to be known as Atomesin, they nevertheless proved the title of their ancestor as the founder of the compound or land in dispute and therefore entitled to succeed. The Defendants never proved that the Plaintiffs were not members of Atomesin family as their story was entirely rejected by the trial court. Really, if anyone is to complain about the joinder or non-joinder of Atomesin family, that should be Atomesin family itself. If that family is different from the one represented by the Plaintiffs herein, it has never applied to be joined as party. The Defendants also never applied that it be made a party to the suit. Clearly, "Atomesin" or no "Atomesin", the Plaintiffs having proved to the satisfaction of the trial court that their ancestors founded the land in dispute are entitled to judgment in their favour. Issue (2) is accordingly resolved against the Defendants. (p. 858 E)

Locus in quo - Identity of land not in controversy

5. I endorse the views expressed above. There was not a thread of doubt that the parties knew the land over which they were litigating as clearly demonstrated by testimonies of witnesses on both sides. There was therefore absolutely no necessity for the trial court to have visited the locus or site of the disputed land. I find no merit in issue (4) which is hereby resolved against the Defendants. (p. 860 H)

NOTABLE POINTS OF INTEREST

IGUH JSC

1. Admissions of counsel in a civil case

In a civil case, admissions by a party are evidence of the facts asserted against but not in favour of such a party although they are not estoppels or conclusive against the party against whom they are tendered. In the same vein, the admissions of counsel in a civil case, if made at the trial or during the actual progress of litigation, are evidence against his client in the same proceeding. Indeed, if made for the express purpose of dispensing with proof at the trial,

such admissions will generally be conclusive against the client. In view of the said evidence of the parties coupled with the admission of learned counsel for the appellants, it cannot be seriously suggested that the identity of the land in dispute is in issue in this case. (p. 867 E)

B 2. *When visit to locus will not be necessary*

The law is established that the inspection of locus in quo may not generally be necessary where the area in dispute is clear to the Court and parties as the trial Court should reach its judgment, not on the impressions from the locus in quo, but upon its impressions from the evidence before the Court unless, of course, there is a special reason or a specific cause for which an inspection has become necessary or desirable. In the present case, there is no special reason why an inspection of the locus was necessary. (867 H)

REPRESENTATION

Matthew Ade Adepoju with Miss Matilda Ade Adepoju for the Defendants/
D appellants
Chief O. Akande for the plaintiffs/Respondents

CASES REFERRED TO

- kojo v. Bonsie (1957) 1 WLR 1223
E Ozibe v. Aigbe (1977) 7 SC 1
Balogun v. Akanji (1988) NWLR (Pt. 70) 301 at 322
Thomas v. Holder 12 WACA 78
Ayanwale v. Atanda (1988) 1 NWLR 22 at 34
Kodilinye v. Odu 2 WACA 336
F Fasoro v. Beyioku (1988) 2 NWLR (Pt. 76) 263
Amadi v. Nwosu (1992) 5 NWLR (pt. 241) 273
Oloriode v. Oyebi (1984) 5 SC. 1
Uredi v. Dada (1988) 1 NWLR (Part 69) 237
Ogboda v. Adulugba (1971) 1 All NLR 68 at 72-73
Okai v. Ayikai 12 W.A.C.A. 31
G Blackstone v. Wilson (1957) 26 L. J. Ex. 299

LEAD JUDGMENT BY KUTIGI JSC

The Plaintiffs' claims against the Defendants jointly and severally are contained in para. 39 of the Amended Statement of Claim. They read as follows -

- H "(a) Declaration to a Statutory Right of occupancy to that piece or parcel of land situate, lying and being at Atomesin Compound, Nalende,

Ibadan shown on plan No. FA 2821 drawn by Mr A.O. Adebogun licensed Surveyor on 2nd February, 1983.

(b) *The sum of One Thousand Naira (N1,000.00) being general damages for trespass committed by the defendants, their servants and agents on the said parcel of land on 20th day of February, 1983.*

(c) *An order of injunction restraining the defendants, their servants, agents privies or anyone claiming through them from committing any further acts of trespass on the said parcel of land."*

The parties filed and exchanged pleadings. The Defendants' Statement of Defence and Counter-Claim contained a counter-claim in para. 41 thus -

"Wherefore the defendants jointly and severally counter-claim against the plaintiffs for the total sum of N1,860.00 (One Thousand Eight Hundred and Sixty Naira) being total rent admitted by the Plaintiffs to have been collected from the tenants on the disputed land which is the property of the defendants and their family."

During the trial of the suit in the High Court seven witnesses testified for the Plaintiffs while four witnesses testified for the Defendants.

The learned trial judge in a reserved judgment considered the case put forward by each side along with the evidence and came to the conclusion that on the balance of probabilities, the Plaintiffs proved their case and were entitled to succeed. The Defendants' counter claim failed and was dismissed. He concluded his judgment on pages 75 -76 of the record thus -

"Finally, I hold that the plaintiffs are entitled to succeed in this action and the plaintiffs' claims are hereby allowed.

I therefore hereby declare that the plaintiffs are entitled to a Statutory Right of occupancy to all that piece and parcel of land lying and situate at Atomesin Compound, Inalende, Ibadan which is more particularly shown on plan No. FA 2021 and FA 11,550 and tendered as Exhibits C and D in this action.

I also hereby award a sum of N600.00 (Six hundred naira) being general damages for trespass committed by the defendants on the said land on the 20th day of February, 1983.

I also make an Order of injunction restraining the defendants, their servants, privies or anyone claiming through them from committing further acts of trespass on the said land.

The counter-claim filed by the defendants fails and is hereby dismissed."

Aggrieved by the decision of the High Court the Defendants appealed to the Court of Appeal holden at Ibadan. The appeal was unanimously dis-

missed with costs against the Defendants.

Still not satisfied with the judgment of the Court of Appeal the Defendants have now further appealed to this Court.

In compliance with the Rules of Court, the parties filed and exchanged briefs of argument. These were adopted at the hearing. Chief Adepaju, B Learned counsel for the Defendants has in his brief, submitted four issues for determination in this appeal as follows -

"1. Whether the Court of Appeal was right in holding that the trial judge did not fall into error in the manner in which he proceeded to resolve the conflict in traditional history before him.

C 2. Whether the Plaintiffs could bring an action in the name of Atomesin family for title to land without joining the said Atomesin family as a party when the Plaintiffs are not related to the said Atomesin family.

3. Whether the trial judge had correctly appraised the evidence and whether the Court of Appeal was right to have upheld the decision of the trial court when findings of the trial court are not supported by the evidence led D by the plaintiffs to prove their case.

4. Whether it was not necessary for the trial court to have visited the locus when neither the trial court nor the Court of Appeal found in their judgements any defined physical features of the area of the land in dispute."

Issues (1) & (3) will be treated together while issues (2) & (4) will E be taken separately thereafter.

Issues (1) & (3)

Defendants' counsel submitted that watching both parties in the witness box and relying on such observations to decide conflict in traditional evidence is not the correct approach. That the proper approach once the F court recognized that there were conflicts in the traditional histories of the parties was to resolve the conflicts in the light of recent facts established by evidence before it and not by proceeding to prefer the evidence of one party to the other on the basis of demeanour of witnesses as the High Court had done in this case and confirmed by the Court of Appeal. He referred to page 71 of the record lines 5 - 9 and the cases of -

G KOJO & ANOR v. BONSIE (1957) 1 WLR 1223 ADEYEMO v. POPOOLA (1987) 3 NWLR (PT.66) 578 OLORIODE v. OYEBI (1989) 5 SC.1

He said failure by the trial court to properly apply the test as laid down in KOJO & ANOR v. BONSIE (supra) has occasioned a miscarriage of justice.

H It was also submitted that the judgement of the learned trial judge did not demonstrate in full or at all a dispassionate consideration of the issues properly raised and neither did it reflect the result of such an exercise. That

it was not enough for court to say that it believed or disbelieved the witnesses without a proper evaluation of the evidence and that if it had done so it would have been clear that the plaintiffs did not prove their title to the land in dispute more especially when the identity of the land was not proved. That the Plaintiffs and their witnesses contradicted themselves on material facts and that the Court of Appeal ought to have allowed the appeal. He referred to the case of OZIBE & ORS v. CHIEF AIGBE & ORS (1977) 7 SC. 1. B

Chief Akande learned Counsel for the Plaintiffs on the other hand, submit that the trial High Court was right in its approach to the traditional history led by the parties before it. That the learned trial judge appraised the evidence on both sides and found the evidence led by the Plaintiffs more plausible. The judge also clearly did not believe the traditional history of the Defendants and he gave his reasons particularly when the Defendants according to their pleadings pleaded settlement but gave evidence of a grant. C He referred to the judgment on page 71 of the record lines 4 -25. It was also submitted that the learned trial judge having accepted the traditional history of the Plaintiffs ought to have stopped there without any further reference to acts of possession of ownership by the parties even though the Plaintiffs still won. He cited the cases of BALOGUN v. AKANJI (1988) NWLR (PT.70) 302 at 322; ABUDULAI v. MANUE (1945) 10 waca 172; THOMAS v. HOLDER 12 WACA 78. He said the Court of Appeal was therefore right in D confirming the judgement of the trial court having found hat the judgement was fully supported by evidence and that there was nothing done against the rule in KOJO & ANOR v. BONISIE (supra). E

It was further submitted that the learned trial judge properly evaluated the evidence on both sides in this case and also applied the relevant laws as well. He referred to pages 65 -72 of the record. That since it is not the law for the Court of Appeal to substitute its own views for that of the lower court which had properly reviewed and evaluated the evidence before it, the Court of Appeal in this case was right to have affirmed the judgement of the trial High Court. We were referred to AKINLOYE v. EYIOLA (1968) NMLR G 92, AWOYELE v. OGUNNIYI (1986)4 SC.98 and AYANWALE v. ATANDA (1988) 1 NWLR 22 at 34. He also said that the Defendants who pleaded settlement but who gave evidence of a grant only qualified to have their case dismissed as was done in the trial court. F

Now, I think simply put, the proposition of law relating to traditional history as decided in KOJO 11 v. BONISIE (supra), is that where there is a conflict of traditional history, demeanour is of little guide to the truth, and that the best way to test the traditional history is by reference to the facts in recent years as established by evidence and by seeing which of the two competing H

histories is more probable.

The plaintiffs in their Amended Statement of Claim pleaded in para. 6 that -

"The land in dispute verged red on Plan No. FA 11,550 and forms part of a larger area of land settled upon by one Asumo, the ancestor of the B Plaintiffs about 200 years ago."

The Defendants also in their Statement of Defence an Counter-Claim pleaded in para.7(a) thus -

"One Iyiola, an Oro Worshipper who was the defendants' great grand father and a warrior left Ika near Iroko, Oyo Road, Ibadan to settle at Oke C Oloro, Sapati, Ibadan where he begat Adekunbi Akinlotan."

They had pleaded in para. 6(a) that :-

"The piece or parcel of land in dispute is part of a large tract of land owned and continuously and indisputably possessed by Eboade Iyiola family and situate at Eboade Iyiola Compound, Inalende, Ibadan for over 200 years ago."

D It is therefore doubtless that both sides in this case pleaded settlement as their root of title.

In his evaluation of the evidence led by the parties the learned trial judge had this to say on page 68 of the record -

"The Plaintiffs in this matter traced their root of title to one Asunmo E who they described as their ancestor and original owner of the land in dispute. They also narrated how the land got into possession of his descendants....."

And on page 69 he continued thus -

"On this issue, the defendants testified that one Adekunbi who was F their ancestor once lived with one Okebukola who was the original settler on the larger piece of land including the land in dispute. The 2nd defendant narrated how his ancestor settled at Aiyesome now called Inalende. The 1st witness for the defendants, one Joseph Olutayo Okebukola who claimed to be the son of Okebukola testified that his father granted the land in dispute to the family of the defendants. He said further that one Ojo Atomesin, one G Olukanmbi, one Atorl and one Eboade came to settle at Inalende with his father. He said his father granted the land to Eboade. Eboade according to the 2nd defendant was a son of Adekambi. One would see straight away that the evidence of 2nd defendant and that of 1st defendant witness on the point of how the land was acquired by the Eboade family as well as to whom the grant was made is conflicting. The 2nd defendant said Adekunbi settled on H the land he gave birth to Eboade and his other children there; while the 1st defendant's witness said that the land was granted to Eboade"

So, clearly the rule relating to traditional history state in KOJO 11 v. BONSIE (above) will only apply where the two parties pleaded traditional histories and led evidence in accordance with their pleadings at the trial. It will not apply, as in this case, where the Defendants pleaded "settlement" and led evidence showing a "grant". The pleaded settlement on which no evidence was led would be regarded as abandoned, while evidence of a "grant" which was not pleaded would be regarded as going to no issue vide AFRICAN CONTINENTAL SEAWAY LTD. v. NIGERIAN DREDGING, ROADS & GENERAL WORKS LTD (1977) 5 SC. 235. The defendants never amended their pleadings throughout the trial as they should have done. The rule in KOJO 11 v. BONSIE (supra), I believe, is not intended to be applied where one side has completely failed to put forward a traditional history capable of being tested and compared with the other side, which has pleaded and led evidence of traditional history.

It is settled that where a court of trial unquestionably evaluates the evidence and appraises the facts, it is not the business of a Court of Appeal to substitute its own views for the views of the trial court. The learned trial judge accepted the evidence of traditional history led by the Plaintiffs and rejected that of the defendants who as I said based their root of title on settlement, while the case presented at the trial was one of a grant of the land in dispute. On page 71 of the record the trial court observed - and this is what is being attacked now :

"Watching both parties in the witness box, I find easier to believe the evidence of the plaintiffs and their witnesses. The evidence of the 2nd defendant and the defendants' were tainted with lies and exaggerations. The evidence of the 1st defendants' witness is unreliable. Those of the 2nd and 3rd defendants' witnesses are manifestly unreliable. In fact, I had to warn both of them during the proceedings. For example, the 2nd witness for the defendants testify that the land in dispute was never used for anything. Immediately, he changed his testimony and said that members of the defendants' family were trading on the land before a house was built on it. This is contrary to the testimony of the 2nd defendant himself.

The 3rd defendants' witness who like the 2nd claim to be a boundary man of the defendants also testified that the land in dispute was never used as a market.

On the balance of probabilities, I hold that the plaintiffs story about the title of their ancestors is more plausible and I hold that Asunmo their ancestor was the founder of the compound now known as Atomesin Compound."

So that although the Defendants and their witnesses were disbelieved, the learned trial judge gave his reasons for doing so. That was

as it should have been. I think he was right.

I have also, like Court of Appeal, perused the record and I am satisfied that the learned trial judge fully appraised and gave probative value to relevant evidence before making his findings and coming to the conclusion which he reached. **In a suit for a declaration of title the onus of proof lies on the plaintiff to prove his case on a balance of probabilities and he must succeed on the strength of his own case and not on the weakness of the defendants' case** (see KODILINYE v. ODU 2 WACA 336 ADEREMI v. ADEDIRE (1966) NMLR 398). **And I must say that I agree with the submission of Chief Akande for the plaintiffs, that once the radical title has been pleaded and proved, acts of ownership or possession resulting from such title, need no longer be considered for they are then non-issues.** (See FASORO & ANOR v. BEYIOKU & ORS (1988) 2 NWLR (PT. 76) 263. BALOGUN v. AKANJI (1988) 1 NWLR (PT.70) 301). **Therefore in this case where the two sides each pleaded settlement as its root of title, the learned trial judge having found that the Plaintiffs proved their radical title to the land in dispute, needed not to have gone further to consider acts of ownership or possession by the parties at all.** Issues (1) & (3) are therefore resolved against the Defendants.

Issue (2)

The issue here is simply whether the Atomesin family which the Plaintiffs said they represent ought to have been parties to the suit simply because the Defendants claim that the Plaintiffs were not so related. I have stated above that the learned trial judge accepted Plaintiffs' traditional history while he rejected that told by the Defendants. The Defendants and their witnesses were disbelieved. It was common ground that the Plaintiffs live in Atomesin Compound. **The learned trial judge was therefore right in my view when he stated that although the Plaintiffs never showed how they came to be known as Atomesin, they nevertheless proved the title of their ancestor as the founder of the compound or land in dispute and therefore entitled to succeed. The Defendants never proved that the Plaintiffs were not members of Atomesin family as their story was entirely rejected by the trial court.** I cannot see how failure to join Atomesin family as a party to the suit would have helped to advance the Defendants' case who were disbelieved. The Court of Appeal had this to say in the lead judgment on page 184 of the record -

"..... it seems to me that learned trial judge was justified in holding from the evidence before him as he did that the Plaintiffs are members of Atomesin family and particularly when the Defendants were not able to prove that Ojo Gbogiyen has children The members of Atomesin family seem

to have not only common interest in the action but also common grievance"

Really, if anyone is to complain about the joinder or non-joinder of Atomesin family, that should be the Atomesin family itself. If that family is different from the one represented by the Plaintiffs herein, it has never applied to be joined as party. The Defendants also never applied that it be made a party to the suit. Clearly, "Atomesin" or no "Atomesin", the Plaintiffs having proved to the satisfaction of the trial court that their ancestors founded the land in dispute are entitled to judgment in their favour. Issue (2) is accordingly resolved against the Defendants.

Issue (4)

The Defendants complained that owing to the peculiar nature of the case especially when the physical features of the land in dispute was in issue, the best way of resolving that issue was for the learned trial judge to have visited the site, the locus. They claimed that the identity of the land in dispute was not clear even though plans were tendered at the trial. Counsel referred to para. 15 of the Amended Statement of Claim and to the evidence of 1st Plaintiff page 45 line 1 - 5, 2nd Defendant page 57 lines 14 - 20 and 1st witness for the Defendant page 59 lines 24 -27, and page 60 lines 23 - 29. He said the learned trial judge should have substituted his eyes for the ears and examine the physical features of the land in dispute as allowed by law of Evidence. That failure to visit the locus in quo by the learned trial judge has deprived him of the opportunity of knowing the truth and has occasioned a miscarriage of justice.

The Plaintiffs on the other hand, submitted that the identity of the land in dispute was never an issue between the parties. It was submitted that the Plaintiffs and the Defendants and the witnesses on both sides gave evidence to the effect that they knew the land in dispute. Counsel referred to the evidence of Plaintiffs and their witnesses on pages 44 - 53 of the record, and that of the Defendants and their witnesses on pages 5 -61. We were also referred to the address of counsel for the Defendants at the trial on page 62 line 27 - 28 where it was conceded that there was "no dispute as to the identity of the land in dispute." Counsel said what was admitted needed no further proof and it was unnecessary on the facts for the learned trial judge to have visited the locus and that the Court of Appeal rightly confirmed the decision of the High Court.

I have already stated at the beginning of this judgment that the Plaintiffs and the Defendants respectively called seven and four witnesses at the trial in the High Court. Needless to say that all the witnesses called by the Plaintiffs clearly stated in their testimonies before the court that they knew the

land in dispute (see pages 44,48,49,51,52 and 53 of the record respectively). The Defendants and their witnesses testified from pages 55 to 62 of the record.

1. Adeniyi Adekola Eboade (2nd Defendant) testifying on page 55 said -

"I know the land in dispute which is at Inalende market"

B 2. Joseph Oketavo (1st witness for the Defendants) also said on page 59 -

"I know the 6th Plaintiff's witness. I know the defendants. I know the land in dispute."

3. Lamidi Anwo (2nd witness for the defendants) said on page 50 -

C "I know the defendants. I know the land in dispute. It belongs to Eboade."

4. Owoade Ajanga (3rd witness for the defendants) testified on page 61 thus -

"I know the defendants. I know the land in dispute."

The Defendants then closed their case. Thereafter, their counsel one

D Mr Odeleye addressed the court. His opening sentences on page 62 read -

"Refers to the Amended Statement of Claim. No dispute as to the identity of the land in dispute. Parties took the action in a representative capacity."

The learned trial judge in his judgment on page 68 of the record

E observed thus -

"The first point of note is that there is no dispute about the identity of the land in dispute. The defendants' counsel in his final submission conceded this point."

The Court of Appeal in its lead judgment on page 192 also stated as

F follows -

"Both sides seem to be agreed as to the situation of the land in dispute from the evidence of several witnesses on both sides. Evidence had been adduced of land that formed boundary with the land in dispute, and the learned defendants' counsel in the lower court even conceded that there was no dispute as to the identity of the land, apart from the fact that the plans filed by both parties - Exhibits A & B - confirmed that the parties know the land they were talking about. It is therefore abundantly clear from the record that the parties know and were agreed as to what land they were litigating upon, its features and its area. What further uncertainty could there arise as to these matters? My answer is, NONE (vide AJIBADE GARBA v. ABUAKACHA (1966) NMLR 62 at 64 and MABERI v. ALADE (1987) 2 NWLR (PT. 55) 101)."

H **I endorse the views expressed above. There was not a thread of doubt that the parties knew the land over which they were litigating as**

clearly demonstrated by testimonies of witnesses on both sides. There was therefore absolutely no necessity for the trial court to have visited the locus or site of the disputed land. I find no merit in issue (4) which is hereby resolved against the Defendants.

All the four issues having been resolved against the Defendants, the appeal must, of necessity, fail. It is accordingly dismissed with one thousand B Naira (N1,000.00) costs against the Defendants.

UWAIS CJN

I have had the opportunity of reading in draft the judgment read by C my learned brother Kutigi, JSC. I entirely agree that the appeal has no merit and that it should be dismissed. I have nothing more to add.

I adopt the order in the said Judgment as mine.

BELGORE JSC

The unwary judge could easily be swayed by deliberate change of the name of the land and or manipulation of plan to confuse. It is now an unfortunate common practice in litigations on land especially in pleadings. But with care for detail, a trial judge will not allow a litigant to kill a case by giving the land in litigation a wrong, will I say, a bad, name. In the instant case it is clear that on the plan of the plaintiffs the land in question is not in doubt and it would have been superfluous for the trial judge to embark on visit to locus in quo.

The plaintiffs in this case proved their root of title whereas the defendants never attempted to move beyond their generation and it is therefore no surprise the learned trial judge unhesitatingly arrived at the conclusion by believing the plaintiffs. On all facts before the trial Court, one can hardly find fault with the conclusion of the trial judge; the Court of Appeal in such a case had no reason to interfere with those findings of facts. (Overseas Construction vs Creek Enterprises Ltd. (1985) 3 NWLR (Pt. 13) 407; Udo vs Obot (1989) 1 NWLR (Pt 95) 59; Amadi vs Nwosu (1992) 5 NWLR (Pt 241) 273).

Learned trial judge, I must state clearly, never simply held he believed the plaintiffs and disbelieved the defendants. On concrete evidence before him he found the plaintiffs were not only in possession but also controlled the land H all around the land now in dispute. Despite the abortive attempt to confuse the very land in question the trial judge remained steadfast in following the evidence and relating it to the pleadings and the plaintiffs plan. After meticulous review of the evidence, he found clearly that the balance of probabilities

D

favoured the plaintiffs and that the defendants' claim had nothing in evidence and on the ground to sustain their own case. The logical conclusion is that the plaintiffs' case had been proved on the balance of probability and the defendants' case was not supported having regard to all the evidence. This is a far cry from the situation deprecated in Kojo & Anor. vs Bonsie (1957) B 1 WLR 1223; Oloriode vs Oyebi (1984) 5 SC.1 and Adeyemo vs Popoola (1987) 3 NWLR (Pt 66) 578 which defendant/appellants wanted to use as a life raft.

For the foregoing reasons and fuller reasons in the judgment of my learned brother, Kutigi, J.S.C., with which I am in full agreement, and which I C also adopt, I find no merit in this appeal and I hereby dismiss it with N1,000.00 costs to the respondents.

ONU JSC

I had the advantage to read before now the judgment just delivered D by my learned brother Kutigi, J.S.C. and I am in entire agreement with him that this appeal lacks merit and must perforce fail.

I wish to comment briefly on the four issues formulated by the appellants as arising for our determination classified into the following three categories to wit: traditional history corresponding with issues 1 and 3 E together; acts of ownership tallying with identity and visit to locus which is concomitant with issue 4 commencing with issue 4 as follows :-

Issue No. 4 asks whether it was not necessary for the trial court to have visited the locus when neither the trial court nor the Court of Appeal found in their judgments any defined physical features of the area of the land in F dispute. If one adverts ones attention to the records the answer to this question is undoubtedly the most manifest. At page 62 of the Record Mr. Odeleye, learned counsel for the appellants has this to say as part of his address when he conceded thus :

"Refers to the Plaintiffs' claim. Refers to the Amended Statement of Claim.

G No dispute as to the identity of the land in dispute."
In its judgment, the trial court went straight to the point when it held inter alia as follows :-

"The first point of note is that there is no dispute about the identity of the land in dispute. The defendants' counsel in his final submission conceded this point."

H The Court of Appeal in this point made a concurrent finding overlapping the trial court's when it held as follows :-

"The question whether the learned trial judge ought to have visited the locus in quo should have been the subject of a specific ground of appeal especially in view of the counsel's reason for the submission that - "to resolve conflicts in evidence, the learned trial judge would have agreed but he refuse to visit the locus which would have afforded the learned trial judge proper assessment of the case before him to meet the justice of the case." B

"His reason for the refusal is not farfetched. Both sides seem to be agreed as to the situation of the land in dispute from the evidence of several witnesses on both sides. Evidence had been adduced on land that formed boundary with the land in dispute, and the learned defendants' counsel in the lower Court even conceded that there was no dispute as to the identity of C the land, apart from the fact that the plans filed by both parties - Exhibits A and B - confirmed that the parties know the land they were talking about. It is therefore abundantly clear from the record that the parties know and were agreed as to what land they were litigating upon, its features and its area. What further uncertainty could there arise as to these matters. My answer D is: NONE (vide Ajibade Garba v. Abu Akacha (1966) NMLR 62 at 64 and Maberi v. Alade (1987) 2 NWLR (Part 55) 101."

I have no hesitation in resolving this issue against the appellants.

In relation to issues 1 and 3 regarding the resolution of the conflict in traditional history and whether the learned trial judge appraised the evidence E the appellant alleged to be unsupported in the case put forward by the respondents, it is pertinent to point out that both parties to the case herein on appeal, pleaded traditional history as to their roots of title to the land in dispute. The respondents established by evidence at the trial that they descended from one Asunmo, a warrior, and although he was their ancestor who settled on the F land and acquired the appellation Atomesin, it was in fact one Adelowo who was their recognized family head at the apex of their genealogical family tree down the line. At the end of the day, the learned trial judge after evaluating the evidence adduced by both sides, rather than applying the test laid down in Kojo 11 v. Bonsie (1957) 1 W.L.R. 1223 to decide the case, proceeded ex G abundanti cautela to consider acts in recent times to find in the respondents' favour for a declaration of title, damages for trespass and an injunction and dismissing the appellants' counterclaim. The appellants had pleaded settle- H ment on which no evidence was led. This would be regarded as abandoned while evidence of "a grant" led which was on the other hand, not pleaded, H would be regarded as going to no issue. See Uredi v. Dada (1988) 1 NWLR (Part 69) 237 at 246; Chief Abah Ogboda v. Daniel Adulugba (1971) 1 All NLR. 68 at 72-73 and Atanda v. Ajani (1989) 3 NWLR (Part 111) 511. The appellants, it must be remarked, never amended their pleadings throughout the trial to reflect this. The test in Kojo 11 v. Bonsie (supra), to my mind, is

applicable where the traditional evidence led by both sides to the conflict is inconclusive, in which case, the case must then rest on question of facts. See Omoregbe v. Edo (1971) 1 All NLR. 282, Ogundairo v. Gbadamosi (1974) 4 W.S.C.A. 27 at 31 and P.M. Alade v. Lawrence Awo (1975) 4 S.C. 215 at 228. Where the evidence of the witnesses of one party, as happened in the case of the appellants in the instant appeal is contradictory on the traditional history of ownership, their case should fail. See Mogaji v. Cadbury (1985) 2 N.W.L.R. (Part 7) 393 at 430 following Kojo 11 v. Bonsie (supra). See also Anyaduba v. N.R.I.C. Ltd. (1992) 5 NWLR (243) 535. It was on this plank more than anything else that the appellants' defence and counter-claim founded. Thus, it cannot be gainsaid that the appellants' and respondents' evidence had not been properly appraised and evaluated. A fortiori, the conclusion arrived at by the Court of Appeal was well supported by the evidence of witnesses which, in my opinion, has no need to be re-appraised by this court. The duty of appraising evidence given at a trial is pre-eminently that of the court that saw and heard the witnesses, and it is also the right of that court to ascribe values to such evidence. The Court of Appeal may not disturb the judgement of the trial court if it is supported by evidence even in the slightest degree just because it would have come to a different conclusion on the same facts. See Ajumobi Ogundulu & ors. v. Chief E. O. Phillips & ors. (1973) 1 N.M.L.R. 267 at 272; (1973) 2 S.C.1; Mogaji v. Odofin (1978) 4 SC. 91 at E 94-96; Christopher Okolo v. Eunice Uzoka (1978) 5 S.C. 77 at 86; Adeleye v. Ajiboye (1987) 3 NWLR (Part 61) 432 at 451 Nzekwu v. Nzekwu (1989) 2 N.W.L.R. (Part 104) 373 at 393. The above principle is undoubtedly trite enough to need further emphasis or restatement.

That the learned trial judge correctly appraised the evidence adduced before it and that the court below rightly upheld that decision and based same upon findings which were fully supported may be seen in the following passage in the judgment of the court below.

"I am satisfied, having looked at all the evidence, that the learned trial judge fully appraised and gave probative value to the relevant evidence, and as appropriate, before making his findings and coming to the conclusion which he reached.

Nothing has been urged before this Court in my humble opinion which could suggest that the learned trial judge was wrong in his appraisal of the evidence or that his findings are not supported by the evidence; or that he in any way made imperfect use of the opportunity of seeing and hearing the witnesses, or that he had drawn wrong conclusions from the available legal evidence before him.

In the circumstance therefore Court ought not to interest with his

findings and conclusions (vide Federal Commissioner for Works & Housing v. R. Lababedi & 15 ors. (1974) 11 & 12 S.C. page 15 at page 24; Fashanu v. Adekoya (1974) 1 All N.L.R. (Part) 1 page 33 at page 41; Ogbero Egiri v. Edoho Uperi (1974) 1 NMLR page 28 and Chief Ehogbo Fabumiyi & anor. v. Fatumo Obaje & anor. (1968) NMLR page 242 at page 247."

I cannot agree more since the above conclusion not being perverse or causing a miscarriage of justice thereof, amount, in my view, to concurrent findings by the two courts with which I will be loath to interfere.

Finally, with regard to the appellants' grouse questioning the respondents' right to bring an action in the name of Atomesin family for title land without joining the said Atomesin family as a party when the respondents are not related to that family, it will suffice in answer to say :

(a) that this is a non-issue since if it were a point of importance to the appellants they could have raised it in limine to have same determined from the inception of the case.

(b) not having acted as in (a) above it is at best an after-thought for them (appellants) to do so now

(c) there being nowhere a challenge to the respondents bearing the name Atomesin-and on which, in their action they clearly joined issues, or short of saying that they were usurping that family name, they cannot now be heard to complain.

This issue is accordingly resolved against the appellants. For the above reasons and the more elaborate ones contained in the leading judgement of my learned brother Kutigi, JSC, I too, dismiss this appeal.

I abide by the consequential orders set out in that judgment inclusive of costs awarded therein.

IGUH JSC

I have had the privilege of reading in draft the leading judgment just delivered by my learned brother, Kutigi, J.S.C. and I am full in agreement with him that this appeal is without substance and ought to be dismissed. I propose however to make a brief comment by way of emphasis only on issues 1 and 4 raised by the parties in the appeal.

Both parties, for their root of title, relied mainly on traditional history and acts of ownership and possession of the land in dispute.

On the issue of traditional evidence, the respondents traced their root of title to one Asunmo, their ancestor and the original settler and owner of the land. They gave evidence of their successive great grand fathers who, before them, inherited and owned the land and through whom they claimed.

The appellants, for their part, traced their root of title to their ancestor, one Adekunbi who once lived with Okebukola, the original settler on the larger piece of land which included the land in dispute. Both parties also led evidence of alleged recent acts of possession on the land.

The learned trial judge after a thorough examination of the evidence found the respondents' traditional history as "much more plausible" than the appellants. The appellants have attacked this finding, claiming that it was arrived at through a wrong approach which was based on the credibility of the witnesses as against testing the parties' conflicting traditional histories by recent facts established by evidence as laid down in Kojo V. Bonsie (1957) 1 W.L.R. 1223 at 1226 - 1227.

It ought to be pointed out that one material reason why the trial Court rejected the traditional history of the appellants was that they pleaded settlement in their pleadings as their root of title but gave evidence of grant at the trial. The learned trial judge next proceeded, rightly, to test the traditional evidence before him by recent facts established by evidence.

Examining the appellants' alleged recent acts of ownership of the land which he rejected as unreliable, the trial Court commented :-

".....for example, the 2nd witness for the defendants testified that the land in dispute was never used for anything. Immediately, he changed his testimony and said that the members of the defendants' family were trading on the land before a house was built on it. This is contrary to the testimony of the 2nd defendant himself. The 3rd defendants' witness who, like the 2nd, claimed to be boundary man of the defendants also testified that the land in dispute was never used as a market."

He next considered the respondents' own acts of user over the land in dispute as a market and found :-

On the part of the plaintiffs, they claimed that their ancestor established a market on the land in dispute several years ago. The market according to them was established during the time Adelowo was Mogaji of their family. Adelowo and other successive heads of their family collected rent on the land. They also said that the present head of their family (2nd P.W) built shops on the land and collected rents on the shops....."

There is no doubt that there is over-whelming evidence in both sides that the plaintiffs' family collected tolls and later rents from the traders on the land in dispute to the exclusion of the defendants' family. All the traders who gave evidence for the plaintiffs with the exception of their 5th witness, testified that they paid rent to the plaintiffs. Only the 5th P.W. who is a member of the plaintiffs' family testified that he paid no rent."

Having tested the traditional evidence of both parties by the aforesaid

recent facts established by evidence, the learned trial judge held :-

"On the balance of probabilities, I hold that the plaintiffs story about the title of their ancestors in more plausible and I hold that Asunmo their ancestor was the founder of the compound now known as Atomensin compound."

In my view, the learned trial judge cannot be faulted in the approach he adopted in the determination of the traditional evidence he accepted. It is also clear to me that the Court below was right in upholding the above view of the traditional evidence led before the trial Court. On this finding alone, the respondents were entitled to the declaration of title sought. See Balogun and others V Akanji and Another (1988) Vol. 19 1 N.S.C.C. 180. Issue 1 is accordingly resolved against the appellants.

Turning now to issue 4 which queried whether it was not necessary for the trial Court to have visited the locus, it must be emphasized that the identity of the land in dispute was clearly not in issue between parties. There is overwhelming evidence on record that both parties and their witnesses knew the land in dispute. Indeed, the learned counsel for the appellants in his final address before the trial Court conceded that the identity of the land in dispute was not in issue. Said he :-

"No dispute as to the identity of the land in dispute." The learned trial judge, quite rightly, made the same finding. He commented :-

"The first point of note is that there is no dispute about the identity of the land in dispute. The defendants' counsel in his final submission conceded this point."

In a civil case, admissions by a party are evidence of the facts asserted against but not in favour of such a party although they are not estoppels or conclusive against the party against whom they are tendered. See Okai V. Ayikai 12 W.A.C. 31. In the same vein, the admissions of counsel in a civil case, if made at the trial or during the actual progress of litigation, are evidence against his client in the same proceeding. See Blackstone V. Wilson (1857) 26 L.J Ex 299. Indeed, if made for the express purpose of dispensing with proof at the trial, such admissions will generally be conclusive against the client. See Langley V. Earl of Oxford (1836) 5 L.J Ex 166. In view of the said evidence of the parties coupled with the admission of learned counsel for the appellants, it cannot be seriously suggested that the identity of the land in dispute is in issue in this case.

The law is established that the inspection of locus in quo may not generally be necessary where the area in dispute is clear to the Court and parties as the trial Court should reach its judgment, not on the impressions from the locus in quo, but upon its impressions from the evidence before the

Court unless, of course, there is a special reason or a specific cause for which an inspection has become necessary or desirable. See Dza V. Komla (1956) 1 W.A.L.R. 145 at 146, Ejidike V. Obiora (1951) 13 W.A.C.A. 270 at 273 and London General Omnibus. Co V. Lavell (1901) 1 Ch. 135. In the present case, there is no special reason why an inspection of the locus was necessary.

B The appellants' complaint for considering the inspection necessary is their unsubstantiated claim that the identity of the land in dispute was uncertain. But as already pointed out, the identity of the land in dispute is clearly not in doubt and I entirely agree with the Court below that the trial Court was justified in refusing to visit the locus which in all the circumstances of this case was completely unnecessary and utterly irrelevant to the determination of the issues before the Court.

It is for the above and more elaborate reasons contained in the leading judgment of my learned brother that I, too, dismiss this appeal as unmeritorious. I abide by the order for costs therein made.

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