

SUPREME COURT OF NIGERIA

20TH JUNE, 1997. SC. 277/1990

**CORAM:-A. B. WALI, E. O. OGWUEGBU, U. MOHAMMED,
Y. O. ADIO, A. I. IGUH, JJSC.**

DOPEMU TAIWO ADEYERI & 2 ORS. PLAINTIFFS/APPELLANTS
AND
AKINBODE OKOBI & 4 ORS DEFENDANTS/RESPONDENTS

APPEALS - *Grounds of appeal - Omnibus ground that judgment is against weight of evidence - Is a proper and valid ground of appeal.*

APPEALS - *Issues - Raising of a new issue before the Supreme Court - The general rule that it will not be allowed - Is not rigid.*

LAND LAW - *Traditional evidence - Conflict therein - Cannot be resolved by trial judge believing the evidence of one party or the other.*

LAND LAW - *Title - Reliance on two methods in seeking to prove title - Failure to prove any of the methods - Will lead to dismissal of the claim.*

PLEADINGS - *Evidence - On an issue that was not pleaded - Goes to no issue.*

FACTS

Before the Ogun State high court, Ilaro, the plaintiffs/appellants filed an action against the defendants/respondents claiming inter alia, entitlement to customary right of occupancy in respect of the land in dispute. The plaintiffs sought to establish that while the 1st - 3rd defendants have nothing to do with the land, the 4th and 5th defendants are plaintiffs' customary tenants. Both parties gave evidence and relied on conflicting traditional histories.

The trial court which visited the locus in quo did not see trace of any plaintiffs' presence on the land in dispute. It relied on a statement by a defence witness which was not pleaded and found for the plaintiffs. Defendants' appeal to the Court of Appeal was allowed. Being aggrieved, plaintiffs have now appeal to the Supreme Court raising 5 issues.

ISSUES FOR DETERMINATION

"1. Whether or not the Court of Appeal can suo motu dismiss/strike out an incompetent appeal?

2. Whether the learned justices of the Court of Appeal were right in

holding that the appellants are not entitled to the declaration sought, when the trial judge who had the opportunity of seeing and listening to the witnesses accepted and preferred the traditional evidence of the appellants to those of the respondents? Etc, see p. 1192

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

Omnibus ground - Is a proper ground of appeal

1. In a civil appeal the general ground that the judgment is against the weight of evidence is permissible. Similarly, in a criminal appeal a ground which states that the verdict is unreasonable or cannot be supported having regard to the evidence is permitted. In a civil case, after all the evidence is led, it is the duty of the trial judge to consider the evidence of both the plaintiff and the defendant and ascribe relative weight to each of them. After the weighing of evidence of both sides, the plaintiff should succeed if the evidence in his favour tips the balance in the imaginary scale. He should lead more credible and admissible evidence to secure a declaration in his favour. The appellants' contention that the original ground of appeal in the court below (the omnibus ground) is incompetent cannot be correct. It is a proper ground of appeal in a civil case. (p. 1194 E)

Raising of a new issue

2. The learned respondents' counsel also argued that there was no objection in the court below to the omnibus ground of appeal. The general rule adopted in this court is that an appellant will not be allowed to raise on appeal a question which was not raised in the court below. It is not a rigid rule. Where the question involves substantive points of law either substantive or procedural, the court may entertain the appeal and prevent an obvious miscarriage of justice. In so far as the omnibus ground of appeal is competent, there was nothing for the court below to strike out suo motu. (p. 1195 E)

Traditional evidence

3. After reviewing the traditional evidence led by the parties, I entertain no doubt that there is conflict. This conflict cannot be resolved by believing the evidence of one party or the other as the learned trial judge has done. The correct approach as stated by the court below is to test the traditional history by reference to the facts in recent years as established by evidence, and by seeing which of the two competing histories is the more probable. See Kojo v. Bonsie (1957) 1 W.L.R. 1226. (p. 1198 A)

Title - Reliance on two methods

4. In this case, the plaintiffs relied heavily on traditional evidence and acts of ownership/possession in proof of their claim. They failed woefully on both methods of proof of title. It is trite law that a plaintiff must succeed on the strength of his own case, and not on the weakness of the defendant's case. The plaintiffs having failed to prove their claim, their claim ought to have been dismissed as a result of its own weakness. (p. 1200 A)

Evidence - On an issue that was not pleaded

5. Furthermore, facts are pleaded and evidence are led in support of those facts. Whether the father of the 2nd plaintiff was a Bale of Aferiku was not an issue arising from the pleadings. Where evidence is led which is not based on facts pleaded, it goes to no issue. See Emegokwe v. Okadigbo (1973) 4 S.C.113. Where a plaintiff has not sufficiently proved his case, he cannot rely on the weakness of the defendant's case. (p. 1200 C)

NOTABLE POINT OF INTEREST

OGWUEGBUJSC

1. Whether omnibus ground is no ground vide a past dictum

Counsel for the appellants relied on the dictum of Eso, J.S.C. in Awhinawhi & Or. v. Oteri & Ors. (1984) 15 N.S.CC (Vol. 15) 299 where he was reported to have said:

"The only ground of appeal specifies "weight of evidence" which is no ground of appeal. Afortiori, the proceeding before the Court of Appeal were null."

It has been accepted that the above statement of the law credited to Eso, J.S.C. was wrongly reported. I agree with the submission of the learned respondents' counsel that the omnibus ground of appeal is valid having regard to the decisions of this court particularly Atuyeye & Ors. v. Ashamu (supra) and order 3 Rule 2(4) Court of Appeal Rules, 1981. (1195 C)

REPRESENTATION

Parties absent and not represented by counsel

CASES REFERRED TO

Christray Nig Ltd. v. Elson & Neil Ltd (1990) 3 N.W.L.R. (Pt. 140) 630 at 634

Aladesuru v. The Queen (1955) 3 W.L.R. 515

Atuyeye v. Ashamu (1987) 1 S.C. 333

Adio v. The State (1986) 2 N.W.L.R. (Pt. 24) 581

Okezie v. The Queen (1963) All N.L.R. 1 at 4

Akperie v. Barclays Bank of Nig Ltd (1977) 1 S.C. 47
Kojo II v. Bonsie (1957) 1 W.L.R. 1223 at 1226
Balogun v. Agboola (1974) ALL N.L.R. (Pt. 2) 66
Kodilinye v. Odu 2 W.A.C.A. 236
Emegokwe v. Okadigbo (1973) 4 S.C. 113
Awoyale v. Ogunbiyi (1986) 1 NSCC 487

STATUTE & RULES REFERRED TO

Court of Appeal Rules 0. 3 r. 2(5)
Supreme Court Rules 0.6 r. 8 (6)
Court of Appeal Act s. 20

LEAD JUDGMENT BY OGWUEGBU JSC

This is an appeal from the Court of Appeal, Ibadan. The appellants were the plaintiffs before the High Court of Ogun State holden at Ilaro in a suit filed on 13:5:76. When the appeal came up for hearing on 24/3/97, parties were absent and not represented by counsel. Briefs having been filed, the appeal was taken as argued by them. See O. 6 r. 8(6) of the Supreme Court Rules.

On 15:7:76, the 4th and 5th defendants were joined by the Order of the court following an application made to the court by the plaintiffs. The plaintiffs applied to amend their writ of summons and statement of claim. The application was granted and the amended writ of summons and statement of claim were filed as ordered. The statement of defence was also amended with the leave of the court. The plaintiffs' claim against the defendants as finally settled in the amended writ of summons is as follows:

"1. A declaration that the plaintiffs are entitled to apply for a customary right of occupancy to all that piece of land situate, lying and being at Aferiku village near Idi-Iroko, Egbado Division, Ogun State.

2. Injunction to restrain the defendants, their agents or servants from trespassing alienating or otherwise injuriously dealing with the said parcel of land.

3. Forfeiture of whatever interests the 4th and 5th defendants have or might inherited (sic) on the land in dispute on grounds of misconduct."

The plaintiffs' case is that the fathers of the 4th and 5th defendants were put on the land in dispute by one of the ancestors of the plaintiffs by name, Adeyeri to build houses and live in them payment of tribute every three years during the period of Oro festival. The plaintiffs are claiming title through their ancestor Adebo whom they said first settled on the land. They also asserted that the 1st, 2nd and 3rd defendants have nothing to do with the land and that the 4th and the 5th defendants are their customary tenants.

The 4th and 5th defendants denied that they are tenants of the plaintiffs. The defendants gave evidence of their traditional history and acts of ownership. The claimed the land through their ancestor called Babalogun whom they said was the first to settle on the land and that they, the 1st, 2nd and 3rd defendants were the people who allowed the 4th and 5th defendants B to be on the land and that they are their customary tenants.

The 1st - 3rd defendants also asserted that the 4th and 5th defendants are descendants of one Aferiku, a tenant of Babalogun, whom they claimed first settled on Idologun land and established his farm on Aferiku farm. Aferiku farm is the land in dispute. The defendants further averred that C Aferiku begat Sosefun who begat the fathers of the 4th and 5th defendants. But the plaintiffs maintained that this Aferiku was one of the children of Adebo, their own ancestor who first settled on the land in dispute.

The High Court of Ogun State sitting at Ilaro (as per Delano, J. as he then was) granted all the reliefs sought by the plaintiffs. The defendants D appealed to the Court of Appeal which allowed their appeal.

The plaintiffs, not satisfied with the said decision of the Court of Appeal, have appealed to this court. Counsel for the plaintiffs/appellants, in his brief, identified the following five issues for determination in the appeal:-

"1. *Whether or not the Court of Appeal can suo motu dismiss/strike E out an incompetent appeal?*

2. *Whether the learned justices of the Court of Appeal were right in holding that the appellants are not entitled to the declaration sought, when the trial judge who had the opportunity of seeing and listening to the witnesses accepted and preferred the traditional evidence of the appellants to F those of the respondents?*

3. *Whether the learned justices of the Court of Appeal were right to hold that because the land held by 4 P.W., 5 P.W. and 6 P.W. are not located on the land in dispute, (though part of the plaintiffs land), therefore the trial court was in grave error to hold that payment of tributes by these tenants (on G the Aferiku's land) amounted to evidence of acts of ownership exercised by the appellants?*

4. *Whether from the facts and the pleadings, the learned justices of the Court of Appeal were right to hold that the learned trial judge relied and decided the case on issues not raised in the pleadings.*

H 5. *Whether or not the denial of title of their overlords by the 4th and 5th defendants who are Customary tenants of the plaintiffs amount to a misconduct which attracts the penalty of forfeiture?"*

The respondents formulated the following issues in their brief:-

"1. *Whether the defendants/respondents appeal from the High Court*

to the Court of Appeal was incompetent.

2. *Whether the plaintiffs/appellants have not waived their right to say that the defendants/respondents appeal before the Court of Appeal was incompetent and by reason of this waiver, whether the plaintiffs/appellants are not estopped from saying that there was no competent appeal before the Court of Appeal?*

3. *Whether or not upon a calm view, a thorough and proper appraisal, consideration and evaluation of the totality and quality of the evidence offered by both sides, the Court of Appeal was not justified in reversing the judgment of the court of trial?"*

Arguing issue 1, the learned appellants' counsel contended that the general ground or omnibus ground of appeal contained in the notice of appeal filed by the defendants/appellants on 1:7:80 against the judgment of the learned trial judge is incompetent because it is not a ground applicable in civil appeals.

He submitted that there is a clear distinction between the allegation that:

- (i) *"Judgement is against the weight of evidence" and*
- (ii) *"the judgment is unreasonable, unwarranted and cannot be supported having regard to the weight of evidence".*

He further submitted that the former is a valid ground of appeal in a civil matter while the latter is a valid ground of appeal in criminal cases. He cited and relied on Christry (Nig) Ltd. v. Elson & Neil Ltd. (1990) 3 N.W.L.R. (pt. 140) 630 at 634, Aladesuru v. The Queen (1955) 3 W.L.R. 515, Saka Atuyeye v. Ashamu (1987) 1 S.C. 333 and Adio v. State (1986) 2 N.W.L.R. (pt. 24) 581.

He further argued that where a notice of appeal is defective, the appeal is not properly before the court and a judgment based on an incompetent appeal is a nullity. He referred the court to the case of Awhinawhi v. Oteri (1984) 5 S.C.38 at 40 and 41 and urged the court to distinguish the decision in Oteri's case (supra) from that in Ashamu (supra). We were urged to follow the decision in Oteri more particularly because it was a decision of the Full Court.

The learned counsel for the respondents submitted that judgment was delivered in this case on 30th June, 1980 and the defendant who were aggrieved by the decision of the learned trial judge filed their notice of appeal on 1st July, 1980; that the notice of appeal was filed within time and that there was no need to seek enlargement of time within which to do so. He submitted that the omnibus ground contained in the notice of appeal from the High Court to the Court of Appeal is competent and that it is proper and legitimate for the court below to assume jurisdiction and therefore the judgment of the court below delivered on 18th July, 1988 was not a nullity. He relied on the

case of Atuyeye v. Ashamu (supra).

In the notice of appeal filed on 1:7:80 against the decision of Delano, J. (as he then was), the only ground of appeal filed by the defendants who were appellants in the Court of Appeal reads:

"That the judgment is unreasonable, unwarranted and cannot be supported having regard to the weight of evidence."

The judgment of the learned trial judge was delivered on 30:6:80. In other words, the notice of appeal was filed a day after the judgment.

On 9:3:87 the defendants/appellants in the court below filed a motion on notice under Order 3 Rule 2(5) of the Court of Appeal Rules, 1981 for leave to file, serve and argue nine additional grounds of appeal, the court below granted this application on 12:3:87. The plaintiffs/respondents' counsel did not oppose the application. The additional grounds of appeal were numbered 2 - 10.

After briefs of argument were filed and exchanged, the court below heard and determined the appeal. The judgment of the learned trial judge was set aside. There was no objection in the court below that the original ground of appeal was incompetent.

I am surprised that the learned counsel for the respondents raised this preliminary issue in view of a long line of decisions of this and other courts dealing with proper grounds of appeal in civil and criminal cases.

In a civil appeal the general ground that the judgment is against the weight of evidence is permissible. Similarly, in a criminal appeal a ground which states that the verdict is unreasonable or cannot be supported having regard to the evidence is permitted. See section 20 of the Court of Appeal Act, 1996 and Order 3 Rule 2 (4) of the Court of Appeal Rules, 1981. Section 20 of the Act provides:

"20 (i). The Court of Appeal on any appeal under this part against conviction or against an order of acquittal, discharge or dismissal, shall allow the appeal if it thinks that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or"

Order 3 Rule 2(4) reads:

"(4) No ground which is vague or general in terms or which discloses no reasonable ground of appeal shall be permitted, save the general ground that the judgment is against the weight of evidence,"

(the underlining is for emphases.)

Section 20 of the Court of appeal Act relates to criminal appeals whilst Order 3, Rule 2(4) relates to civil appeal. Unless there is evidence to support it, a verdict in a criminal case cannot stand. **In a civil case, after all the**

evidence is led, it is the duty of the trial judge to consider the evidence of both the plaintiff and the defendant and ascribe relative weight to each of them. After the weighing of evidence of both sides, the plaintiff should succeed if the evidence in his favour tips the balance in the imaginary scale. He should lead more credible and admissible evidence to secure a declaration in his favour. The appellants' contention that the original ground of appeal in the court below (the omnibus ground) is incompetent cannot be correct. It is a proper ground of appeal in a civil case. See Atuyeye & Ors. v. Ashamu (1987) 1.N.S.C.C. (Vol. 18)117, Okezie v. The Queen (1963) All N.L.R. 1 at 4, Akibu v. Opaleye & Or. (1974) 11 S.C. 189 and Adesuru v. The Queen (1956)A.C. 49.

Counsel for the appellants relied on the dictum of Eso, J.S.C. in Awhinawhi & Or. v. Oteri & Ors. (1984) 15 N.S.CC (Vol. 15) 299 where he was reported to have said:

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The learned respondents' counsel also argued that there was no objection in the court below to the omnibus ground of appeal. The general rule adopted in this court is that an appellant will not be allowed to raise on appeal a question which was not raised in the court below. It is not a rigid rule. Where the question involves substantive points of law either substantive or procedural, the court may entertain the appeal and prevent an obvious miscarriage of justice.⁴

See Akperie v. Barclays Bank of (Nig) Ltd. (1977) 1 S.C. 47 and Shonekan v. Smith (1964) All N.L.R. 168 at 173. **In so far as the omnibus ground of appeal is competent, there was nothing for the court below to strike out suo motu.**

Having disposed of the preliminary issue, the appeal will now be considered on its merits. Appellants' counsel submitted that both parties

⁴ It is possible the above statement may be relied upon by some counsel unto falling into procedural error. The need to obtain leave of court before raising a new issue on appeal cannot be overemphasized - Yusuf v. Union Bank (1996) 6 KLR (Pt. 42) 1249, Adesokan v. Adetunji (1994) 10 KLR 85. Where a new point of law is sought to be raised without leave, see Okonkwo v. Ogbogu (1996) 4 KLR (Pt. 40) 810 for circumstances under which it may be allowed.

based their case on traditional evidence and that after reviewing the evidence of the parties, the learned trial judge preferred the traditional evidence of the plaintiffs to that of the defendants. He further submitted that the learned trial judge resolved the conflicting traditional evidence by resorting to the principle of law enunciated in Kojo 11 v. Bonsie (1957) 1 W.L.R.1223 at 1226 and B that P.W.4, P.W.5 and P.W.6 are competent and credible witnesses whom the learned trial judge saw, watched as they testified and believed. He contended that the court below was in error to reverse the findings of the learned trial judge. He referred to the cases of Balogun & Ors. v. Agboola (1974) All N.L.R. (pt. 2) 66 and Ugwu & Ors. v. Ogbuzuru & Ors. (1974) 10 S.C. 191.

C It was also contended in the appellants' brief that it was not part of the plaintiffs' case that P.W.4, P.W.5 and P.W.6 are on the land in dispute. Counsel argued that the land in dispute is the portion of Aferiku land upon which the 4th and 5th defendants are customary tenants of the plaintiffs whilst P.W.4, P.W.5 and P.W.6 are also customary tenants of the plaintiffs on D Aferiku land adjacent to the land in dispute. Appellant's counsel further argued that the plaintiffs/appellants proved their ownership of the land in dispute by traditional evidence which was accepted by the trial court, and by acts of ownership namely, the payment of rents by their customary tenants, long possession for over two hundred years and possession of connected E and adjacent land. Section 45 of the Evidence Act was cited and relied upon.

The learned counsel for the respondents submitted that the pieces of evidence which the appellants claim to be in support of ;their case were not pleaded and were not even given in evidence by the plaintiffs. He submitted that parties are bound by their pleadings and referred to the case of Total (Nig) F Ltd. & Or. v. Nwankwo (1978) 5 S.C.1 at 17. It was his further submission that the plaintiffs should succeed on the strength of their own case and that the defendants' case does not even support the plaintiffs' case. He referred to the cases of Kodilinye v. Odu 2 W.A.C.A. 236, Ehimare & Ors. v. Emhonyon and George & Ors. v. Dominion Flour Mills Ltd. (1963).

G As to the reliance of the plaintiffs/appellants on tributes paid by P.W.4, P.W.5, P.W.6, 4th and 5th defendants, learned counsel referred to paragraph 26 of the amended statement of claim where the plaintiffs pleaded that the statement of claim where the plaintiffs pleaded that the alleged tributes were paid in respect of the land in dispute and not that P.W. 4, P.W.5 and P.W.6 H paid tribute on land adjacent to the one in dispute. We were referred to Exhibit "A" which was filed and tendered by the plaintiffs; that in Exhibit "A" the entire land claimed by the plaintiffs is verged RED while the land in dispute is verged GREEN and that the holdings and houses of P.W.4, P.W.5 and P.W.6 were neither shown in the area verged RED nor in the portion verged GREEN

or even outside the boundaries of the land verged RED.

It was contended by the respondents' counsel that the court below was right both in law and on the facts when it held that the appellants had no credible evidence to prove the averments in paragraphs 12 - 17, 19 - 22 and 24 of their amended statement of claim and that the judge's note of visit to the locus in quo did great damage to the plaintiffs' case.

The plaintiffs/appellants complaint in a nutshell is that the findings of fact are matters specially reserved for a court of trial and that the Court of Appeal, Ibadan was wrong to substitutes its own views of the facts for those of the trial judge who heard the evidence and watched the witnesses testify.

It is the case of the plaintiffs that their ancestor Adibo settled on the land in dispute over two hundred years ago having migrated from Ifonyin. He built a house on the land and was farming on it. He planted cash and food crops on it. After his death his children inherited it and after the death of his children, the plaintiffs and other descendants inherited it and have been cultivating it. That the fathers of the 4th and 5th defendants were hunters and when they got to Aferiku, the father of the 1st plaintiff placed them on part of aferiku land as yearly tenants and they were paying tributes. After the death of the fathers of the 4th and 5th defendants, the 4th and 5th defendants refused to pay the tributes and collaborated with 1st, 2nd and 3rd defendants to enter the land in dispute and reaped palm fruits between February and March, 1976.

Both parties relied on traditional evidence and acts of long possession in proof of their ownership of the land in dispute. On this the learned trial judge said:

" On the whole I believe the evidence of the traditional history given by the plaintiffs. The fact that the plaintiffs did not sue the 4th and 5th defendants when they stopped paying tribute after the death of their fathers does not destroy their case once it is realised that the tribute was for land on which they were allowed to build their houses" "

But the court below held a contrary view when it found as follows:

" When both parties gave traditional evidence of title which differ considerably as the parties claimed from different ancestor rendering the traditional histories propounded by the warring parties unsatisfactorily (sic) or inconclusive, then the judge must resort to consideration of the facts in recent years as established by evidence to see which of the confliction traditional histories is more probable in a claim for declaration of title. See Kofi (sic) v. Bonsie (1957) 1 W.L.R. 1226 or on the hand, the court may have to consider evidence of acts of ownership numerous and positive by the plaintiffs to warrant the inference of ownership. See Ekpo v. Ita 11 N.L.R, 6.

These were not done by the learned trial judge. "

After reviewing the traditional evidence led by the parties, I entertain no doubt that there is conflict. This conflict cannot be resolved by believing the evidence of one party or the other as the learned trial judge has done. The correct approach as stated by the court below is to test the traditional history by reference to the facts in recent years as established by evidence, and by seeing which of the two competing histories is the more probable. See Kojo v. Bonsie (1957) 1 W.L.R. 1226.

On facts in recent years as established by evidence, the visit to the locus in quo by the court would have removed any doubt in the mind of the learned trial judge as to the ownership of the land if he had made proper use of the note of what transpired during the visit. The note made by the court at the locus in quo reads in part:

"On the land in dispute, the court went to the house of the 5th defendant. On the spot, there were three houses. One of the houses was shown as belonging to the father of the 5th defendant and a room attached to this house was shown as the grave of the 5th defendant's father. I was shown a shrine, and two (2) houses belonging to both the 5th defendant and his brother. There were also two "Ekus", that is, two spots where palm-oil is produced. From this place, the Court proceeded to the residence of the 4th defendant which is about 1 kilometre away. I was shown three (3) house. One of them belongs 4th defendant, another to the 4th defendant's father and the 3rd to Sesefun. There is a room in the house of Sesefun where I was told is the grave of Aferiku. There is also a room in the house of the 4th defendant's father which according to the defendant is Sesefun's grave. Finally, I was shown a house completely in ruins which is said to be Aferiku's house. From this spot, the court meandered through a circumference of a road to see the house of the witnesses for the plaintiffs. The location of the areas on which the houses of the plaintiffs' witnesses and the defendants are built is such that one is located on the end of the radius while the other is on the other end. The distance between the location is within hearing distance. The distance of the radius is about 1 kilometre. I was shown two (2) rooms by the plaintiffs which are supposed to contain the graves of Adeyeri and Akinbo."

The learned trial judge did not consider the above items found on the land in dispute which the defendants canvassed both in their pleadings and evidence. The respondents made futile attempt to show that P.W.4, P.W.5 and P.W.6 have pieces of land on Aferiku land as their tenants.

In their evidence, P.W.4, P.W.5 and P.W.6 stated thus:

P.W.4

" I know the land in dispute. My farmland is in the same

area within the land in dispute. It is within a hearing distance."

P.W.5

" My land is not far from the land in dispute."

P.W.6

" I know the land in dispute. My house and that (sic) of others are not located on the land in dispute." B

In Exhibit "A", the survey plan tendered by the plaintiffs, the respective holdings of P. W. 4, P.W.5 and P.W.6 in respect of which tributes are alleged to be paid to the plaintiffs were not shown either in the whole of Aferiku land verged Red in Exhibit "A" or the area in dispute verged Green therein. The holdings of these three customary tenants of the plaintiffs were C also not shown to the court during the visit to the locus in quo. There is nothing in the whole of Exhibit "A" verged Red to show the presence of the plaintiffs on the land for the two hundred years they and their ancestors settled on it.

In the face of these, the learned trial judge held as follows: D

"It is my view that the payment of tributes by the 4th, 5th and 6th witnesses for the plaintiffs on Aferiku land to the plaintiffs is evidence of acts of ownership exercised by the plaintiffs on Aferiku land."

There is no factual or legal basis for the above conclusion. The defendants on the other hand gave evidence of acts of ownership and the learned trial judge E saw a greater part of it when he visited the locus in quo. I am in agreement with the court below when it held as follows:

"I am of the view that the evidence led on acts of ownership preponderates more in favour of the appellants than in the respondents' favour and that it will work injustice and occasion mis-carriage of justice if the findings F of facts complained herein about are allowed to stand. I therefore come to the conclusion that ground 1, to this extent succeeds The learned trial judge did not make any reference to facts in recent years and acts of ownership for which evidence were adequately led by the appellants if only to show that the traditional history proffered by the respondents is G not probable."

The final point to be considered is the evidence of D.W.4 (Okanse) the Oba of Ilashe. In answer to cross-examination, he stated that Falade was a Bale at Aferiku and that the 2nd plaintiff is the son of Falade. The learned trial judge accepted this portion of the evidence of D.W.4 and held that if the H father of the 2nd plaintiff was Bale of aferiku, the family must have come from Aferiku and that this piece of evidence supports the case of the plaintiffs that they and their ancestors come from Aferiku.

On this finding the court below held that the trial judge was grossly

in error to have acted and relied heavily on the inadmissible evidence and to have come to the conclusion that such evidence supports the case of the plaintiff.

In this case, the plaintiffs relied heavily on traditional evidence and acts of ownership/possession in proof of their claim. They failed woefully on both methods of proof of title. It is trite law that a plaintiff must succeed on the strength of his own case, and not on the weakness of the defendant's case. The plaintiffs having failed to prove their claim, their claim ought to have been dismissed as a result of its own weakness. See Kaiyaoja v. Egunla (1974) 12 S.C. 55, Kodilinye v. Odu 2 W.A.C.A. 336 and Adesanya v. Otuewu & Ors. C (1993) 1 N.W.L.R. (pt. 270) 414.

Furthermore, facts are pleaded and evidence are led in support of those facts. Whether the father of the 2nd plaintiff was a Bale of Aferiku was not an issue arising from the pleadings. Where evidence is led which is not based on facts pleaded, it goes to no issue. See Emegokwe v. Okadigbo (1973) D 4 S.C.113. Where a plaintiff has not sufficiently proved his case, he cannot rely on the weakness of the defendant's case. See Olowu v. Olowu (1985) 2 N.W.L.R. (pt. 13) 372 at 376.

The Court of Appeal acted properly in disturbing the findings of fact made by the trial court because the findings are unsound.

E In the final result, the appeal of the plaintiffs must fail and I hereby dismiss it. I affirm the decision of the court below. The plaintiffs' claim is accordingly dismissed. The respondents are entitled to the costs of this appeal which I assess at N1,000.00.

F

WALI JSC

I have read before now the lead judgment of my learned brother Ogwuegbu JSC, and I agree with his reasoning and conclusion for dismissing the appeal.

G For the same reasons stated in the lead judgment, I also hereby dismiss the appeal and I adopt the consequential orders contained therein, including that of costs.

H

MOHAMMED JSC

I have had the privilege of reading in the judge of my learned brother, Ogwuegbu, J.S.C., in draft, and I agree with him that the lower court is right in disturbing the decision of the trial High Court. Where there is ample evidence and the trial judge failed to evaluate it and make correct findings on the issue

the appellate court may deal with the facts and make proper findings provided the credibility or reliability of witnesses is not an issue. Samson Awoyale v. Joshua O. Ogunbiyi (1986) 1 NSCC 487.

I agree that from the report of the inspection of the Locus in quo the appellants had nothing to show to the trial court indicating a house of their own or the ruin or ruins of houses of their ancestors. In fact at the locus in quo B only the houses of 4th and 5th Defendants/Respondents were seen in the land in dispute. The learned trial judge saw this vital evidence of ownership but failed to consider it in his judgment. His judgment is therefore rightly overturned.

This appeal has no merit at all and I agree with the opinion of my C learned brother Ogwuegbu, JSC, to dismiss it. I abide by the consequential orders made in the lead judgment.

ADIO JSC

D

I have had a preview of the judgment just read by my learned brother, Ogwuegbu, J.S.C., and I agree that this appeal fails. I too dismiss it and I abide by the consequential orders, including the order for costs.

IGUHJSC

E

I have had the privilege of reading in draft the leading judgment just delivered by my learned brother, Ogwuegbu, J.S.C. and I entirely agree with the reasoning and conclusion therein reached.

I do not think there is anything more I can usefully add.

F

Consequently, I, too, dismiss this appeal as lacking in substance. I subscribe to the order for costs therein made.

G

H