

**SUPREME COURT OF NIGERIA**  
18TH JULY, 1997. SC. 111/1990  
**CORAM:- M.E. OGUNDARE, E.O. OGWUEGBU, U. MOHAMMED,**  
**S. U ONU, A. I. IGUH, JJSC**

CLAY INDUSTRIES (NIG.) LTD. .... DEFENDANT/APPELLANT  
AND  
ADELEYE AINA & ORS ..... PLAINTIFFS/RESPONDENTS  
SHOLA IDOWU & 2 ORS  
(Trading under the name and style of  
Idland Contract and Supply Company)

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**APPEALS** - *Issues for determination - Issues Not raised nor argued by parties - Decision of courts cannot be founded on them.*

**EQUITY** - *Estoppel - Can only be raised on appeal - If it was pleaded before trial court.*

**EQUITY** - *Lis pendens doctrine - Will only affect a purchaser who buys subject matter during pendency of litigation - The doctrine is not applicable in this case.*

**ESTOPPEL** - *Res judicata - Will not apply to affect a person not a party to an action - Unless he is a privy.*

**LAND LAW** - *Title - Burden of proof - Plaintiff must succeed on the strength of his own case - Where defendant's case supports plaintiff's case - Court cannot ignore it in deciding which side to believe.*

**LAND LAW** - *Title - Burden of proof - Where a party has established title through an agreed original owner - Substantial burden placed on the other party - Can only be discharged by establishing a better possession - To oust that of the original owner.*

**LAND LAW** - *Declaration of title - Being a discretionary cannot be granted - Where plaintiffs fail to establish remedy - Entitlement to that relief.*

**LAND LAW** - *Traditional sale of land - Under native law and custom - Is valid without conveyance or written contracts.*

**FACTS**

Before the Lagos State High Court, the plaintiffs/respondents brought an action against the defendant/appellant for declaration of title, injunction and damages for trespass in respect of the land in dispute situate at Oregun Village, Ikeja, in Lagos State. The plaintiffs' case was that they bought the land from the original owners, the Ajose family. This was evidenced by a deed of conveyance. They went into possession thereafter and also engaged labourers who cultivated the land. They claimed that the defendant trespassed on the land and laid claim thereto.

At the conclusion of hearing, judgment was entered for the defendant. The plaintiffs' appeal to the Court of Appeal was unanimously allowed. The defendant has now appealed to the Supreme Court raising 13 issues which the ultimate court rejected and condemned for being prolix and preferred the 4 issues raised by the respondents.

**ISSUES FOR DETERMINATION**

*"1. Whether the plaintiffs were estopped by the decision in Exhibit D1 from maintaining this action against the Defendant".*

*2. Whether, having regard to the (fact that both parties rely on a common root of title,) the plaintiffs have discharged the burden of proving a better title to the land in dispute.*

*3. Whether the doctrine of Lis pendens applies to defeat the title of the plaintiffs in this case.*

*4. Whether the Defendant was entitled to judgment on the basis of the Limitation Decree, long and adverse possession".*

**HELD** (Unanimously allowing the appeal per lead judgment of **IGUH JSC**)

**Onus of proof in land cases**

1. In dealing with the second issue, I think it is right to bear in mind the recognized and basic principle in land cases that the plaintiff when claiming a declaration of title must succeed on the strength of his case. The onus lies on the plaintiff to satisfy the court that he is entitled on the evidence brought by him to the declaration of title claimed. The plaintiff must rely on the strength of his case and not on the weakness of the defendant's case. If this onus is not discharged, the weakness of the defendant's case may not generally help him and the proper judgment will be for the defendant. Where, however, the case of the defendant lends support to the case of the plaintiff, it is recognized that the court cannot ignore it in arriving at a conclusion as to which side to believe. (p. 1614 E)

**Issues not raised by parties**

2. With the greatest respect, the question of whether the respondents were bona fide purchasers without notice neither arose from the pleadings of the parties nor was it an issue before the trial court or the Court of Appeal. This court has frequently warned against decision of courts being founded on any ground in respect of which it has neither received argument on behalf of the litigants before them, nor even raised by or for the parties or either of them. Courts of law must, as a rule, limit themselves to the issues raised by the parties in their pleadings as to act otherwise might well result in the denial to one or the other of the parties of his constitutional right to fair hearing. (p. 1616E)

**Declaration of title - Being a discretionary remedy**

3. The onus was clearly on the respondents, as plaintiffs, who were seeking a declaration of title to establish that they were entitled to the reliefs they claimed. This onus the respondents failed to discharge. Besides, a declaratory claim, as in the present case, is a discretionary remedy which shall be refused where the plaintiff fails to establish his alleged entitlement to the satisfaction of the court. (p. 1617D)

**Where a party established title through agreed original owner**

4. The law is well settled that in a claim for declaration of title to land where one of the parties has established a root of title emanating from an agreed original owner, the burden cast upon the other party is clearly substantial. Indeed it has been said that it may be difficult to find any instances in which that other party can obtain a declaration of title. It has, however, to be a case where a plaintiff or one of the parties successfully traces his title to one whose title to ownership has been established. It is in such a cast that the onus is case upon the defendant or the other party to establish that his own possession of the land is of such a nature as to oust that of the original owner. (p. 1617 F)

**Estoppel - When can it be raised**

5. It is a general principle of the law that, estoppel must be pleaded before the trial court otherwise it cannot be raised on appeal. It is clear to me in the instant case that all the facts necessary to raise the issue estoppel canvassed in this case are fully pleaded in paragraphs 5 and 9 of the amended Statement of Defence and contained in Exhibits D1 and D3 therein pleaded. (p. 1619 B)

**When res judicata will apply**

6. The law is settled as a matter of general rule that no person is to be ad-

versely affected by a judgment in an action to which he was not a party because of the injustice in deciding an issue against him in his absence unless he is a privy to a party in which case he is equally bound as the parties and is estopped by res judicata or he has so acted as to preclude himself from challenging the judgment in which case he is estopped by his conduct. (p. 1619 C)

B

**Traditional sale of land without a conveyance confers valid title**

7. The law has long been settled that if land, as in the present case, is held under native law and custom, no such thing as written contracts or registered conveyances are necessary to effect a valid sale thereof. Payment of purchase price and delivery of possession by the vendor to the purchaser create a valid sale or title under native law and custom. Any such out and out sale of land held under native law and custom can by no stretch of the imagination be treated as inferior to other modes of sale, such as by way of conveyance or other written contracts. (p. 1620 H)

D

**Effect of the doctrine of lis pendens**

8. At all events, the doctrine of lis pendens affects a purchaser, who buys property, the subject matter of litigation during the pendency of such litigation because the law does not allow parties to a suit, pending the litigation, rights to real property in dispute, so as to prejudice the opposite party on the principle, pendent lite nihil innovetur. The property in dispute in the suit under appeal was at no time sold to the respondents during the pendency of the relevant suit by Bisiriyu Akintola, Chief T.A. Doherty or the appellant, the parties to Exhibits D1 and D3. In the circumstance I agree entirely that the doctrine of lis pendens is inapplicable in the present case. (p. 1623 C)

F

**NOTABLE POINT OF INTEREST**

**IGUHJSC**

*1. Object and nature of issues for determination*

G It cannot be over-emphasized that the object of the formulation of issues for determination in an appeal is to enable the parties narrow the issues arising from the grounds of appeal filed in the interest of clarity, brevity and accuracy, thus enabling the court to consider together a number of associated and related grounds of appeal within the issue to which they are related in the determination of the appeal. Issues must not only be related to the grounds of appeal filed, it is improper to formulate unnecessarily lengthy and repetitive issues. An unnecessary proliferation of issues is totally undesirable and has times without number been frowned at and discouraged by this court. The issues formulated should also not be so prolix and proliferate as to outnumber

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the grounds of appeal on which they are based. Whereas, therefore, an issue to be determined can take care of, and relate to a number of grounds of appeal, it is undesirable to split a ground of appeal unnecessarily into several or a number of issues.(p. 1610 G)

**REPRESENTATION**

B

A. Ayanniyi Esq. for the appellant  
Chief G. O. K Ajayi, S.A.N., with O. T. Morohundiya (Miss) for the respondent

**CASES REFERRED TO**

C

Agu v. Ikewibe (1991) 3 N.W.L.R. (Part 180) 385

Ugo v. Obiekwe (1989) N.W.L.R. (Part 99) 566

Ayinla v. Sijuwola (1984) 5 S.C. 44 at 77

Atta v. Bonsra (1957) 3 W.L.R. 830 at 836

Osagie v. Oyeyinka (1987) 3 N.W.L.R. 144

D

Kodilinye v. Odu 2 W.A.C.A. 336 at 337

Woluchem v. Gudi (1981) 5 S.C. 291

Akinola v. Oluwo (1962) 1 ALL N.L.R. 224 at 225

Ogunlowo v. Ogundare (1993) 7 N.W.L.R. (Part 307) 610 at 624

Akingbade v. Elemosho (1964) 1 ALL NLR 154

E

Oni v. Arimoro (1973) 8 N.S.C.C. 108

Ekpoke v. Usilo (1978) N.S.C.C. 413 at 422

**LEAD JUDGMENT BY IGUH JSC**

This is an appeal against the judgment of the Court of Appeal, Lagos Division, which had on the 25th day of January, 1989, allowed the appeal by the plaintiffs from the decision of Ajose-Adeogun, J, sitting at Ikeja in the High Court of Justice, Lagos State.

The plaintiffs who were partners, trading under the name and style of Idland Contract and Supply Company, had on the 17th day of September, 1970 instituted an action against the defendant claiming as follows-

*"(a) A declaration of Title to all that piece or parcel of land situate, lying and being at Oregun Road, Morekete Village, Ikeja Division of Lagos State of Nigeria;*

*(b) Injunction restraining the Defendants their servants and /or H agents against further acts of trespass on the said land and*

*(c) Two Hundred Pounds (#200:==) damages for the said acts of trespass."*

Pleadings were ordered in the suit and were duly settled, filed and

exchanged.

At the subsequent trial, both parties testified on their own behalf and called witnesses.

The case for the plaintiff as pleaded before the trial court is that all four of them are partners doing business under the name and style of Idland B Contract and Supply Company. This business name was duly registered in 1962 under the Registration of Business Names Act, 1961. The land in dispute situate at Oregun village, Ikeja, in Lagos State was bought by them from the original owners, the Ajoye family in 1963. This is evidenced by the Deed of Conveyance, Exhibit p2, dated the 31st October, 1963. They went into pos- C session of the land immediately thereafter. They also engaged labourers and caretakers who cultivated the land.

It was sometime in 1964 that Chief T. A. Doherty, now deceased, came on the land and claimed it to be his own. He brought a quash-criminal action, Exhibit p3, against the 3rd plaintiff in respect of the land which action D was dismissed by the Ikeja Chief Magistrate's court. This was on the ground of want of jurisdiction as the issue of title to land was therein raised in the proceedings. They claimed that Chief T.A. Doherty wrongfully sold part of the said land to Cappa and Dalberto Ltd. on the 1st day of August 1967 as per the registered conveyance, Exhibit p4. Cappa and Dalberto Ltd. in turn resold E the land to the defendant on the 22nd day of September, 1967 as per the conveyance, Exhibit p5. They claimed that the defendant trespassed on the land and laid claim thereto, hence this action. Akanbi Ajoye, one of the descendants of the original owner of the land testified for the plaintiffs at the hearing. He admitted under cross-examination that it was a portion of the land F sold to Doherty that was later resold to one Bisiriyu Akintola by some members of his faction of the Ajoye family.

On the other hand the case of the defendant, as pleaded, is that it lawfully entered and is in lawful possession of the land in dispute. This is by virtue of exhibit p4 whereby the land was sold by the land was sold by the late G Chief T.A. Doherty to Cappa and Dalberto Ltd. By Exhibit p5, Cappa and Dalberto in turn resold the land to the defendant in 1967. It stressed that Chief T.A. Doherty had by himself and his agents been in undisturbed continuous possession of the land in dispute, having bought a more extensive piece or parcel of land within which situate the land in dispute from the Ajoye family. H They explained that the said Ajoye family owned a much larger area of farm-land including the land in dispute under native law and custom through one Taiwo Ijon, their great grand father who died many years ago. He was survived by several children. One of them, Kusemi, was the father of Ajoye whose children were known as the Ajoye family. It was the said Ajoye family

who made an absolute out and out sale of a large tract of their family land, including the land in dispute, to the late Chief T. A. Doherty.

The defendant further averred that title of the late T. A. Doherty to the land sold to him and including the land in dispute by the Ajose family was confirmed by the then High Court of Western Nigeria, holden at Ikeja, in suit No. HK/14/62, Exhibit D1 between Bisiriyu Akintola as plaintiff and Clay Industry (Nigeria) Ltd. and T.A. Doherty as defendants. This High Court judgment in Exhibit D1 was affirmed by this court in Exhibit D3. The defendant claims that it has been in possession of the said land in dispute without any interference from any one whatever.

At the conclusion of hearing the learned trial Judge, Ajose-Adeogun J. after a careful evaluation of the evidence on the 31st October, 1977 found for the defendant and dismissed the plaintiffs' claims. He noted that both parties to the dispute claimed to have derived their respective root of title from the same radical owners, namely, the Ajose family. He considered both claims by the parties and came to the conclusion that the title of the defendants was better and preferable than that of the plaintiffs.

Dissatisfied with this decision of the trial court, the plaintiffs lodged and appeal against the same to the Court of Appeal, Lagos Division, which in a unanimous decision on the 25th day of January, 1989 allowed the appeal, set aside the judgment of the trial court and found for the plaintiffs.

Aggrieved by this decision of the Court of Appeal the defendants have now appealed to this court. I shall hereinafter refer to the plaintiffs and the defendant in this judgment as the respondents and the appellant respectively.

Six grounds of appeal were filed by the appellant against this decision of the court of Appeal. It is unnecessary to reproduce them in this judgment. It suffices to state that the parties pursuant to the Rules of this court filed and exchange their written briefs of argument.

Although six grounds of appeal were filed by the appellant against this decision of the Court of Appeal, they formulated thirteen issues for the determination of this court.

These issues were set out as follows:-

*"4.1 By giving evidence for the looser in the Bisiriyu Akintola v. T. A. Doherty without applying to join the same as parties , were the Ajose family not deemed parties to that case for the purposes of estoppel by conduct?*

*4.2 Were the plaintiffs' predecessors-in-title, the Ajose family, not estopped by the judgment in Exhibit "D1" from re-litigating upon the land in dispute and from challenging the defendant's predecessor-in-title's (T. A.*

*Doherty's) title to the land in dispute.*

4.3 *Were the plaintiffs, as privies of the Ajoye family, not estopped from maintaining this action?*

4.4 *Was the Lower Court not wrong in holding that the plaintiffs obtained their conveyance (Exhibit "P2") after the conclusion of the case B (Exhibit "D1") and not during the pendency of that case?*

4.5 *If the above is answered in the negative, was the purchase by the plaintiffs in Exhibit "P2" during the pendency of the case in Exhibit "D1" not caught by lis pendens?*

4.6 *Was the use of Exhibit "D" by the High Court contrary to the C decision in Alade v. Aborishade (1960) 5 FSC 167?*

4.7 *Was the question of the absence of notice by the plaintiffs of the defendant's prior equitable title and knowledge of the case of Akintola v. Doherty in issue in the appeal before the Lower Court?*

4.8 *Did the Lower Court not Wrongly reverse the finding of the D High Court that the plaintiffs knew of the Akintola v. Doherty case before obtaining their conveyance?*

4.9 *Was the defendant's prior possession and the plaintiffs' knowledge of the case not enough notice to the plaintiffs of the defendant's prior equitable interest through Doherty?*

4.10 *Was the Lower Court not wrong in holding that the conveyance, Exhibit "P2", passed a legal estate to the plaintiffs?*

4.11 *Did the plaintiffs discharge the onus of proof on them to be entitled to a declaration of title?*

4.12 *Having agreed that the defendant had an equitable interest in F the land in dispute through Doherty, its predecessor and that the defendant was in prior possession, was the Lower Court not wrong in holding that the equitable interest did not ripen into a Legal Estate?*

4.13 *Was the action not barred or defeated in the circumstances by Limitation Law and/or the equitable defences of long possession, laches G and acquiescence?"*

I cannot fail to condemn in the strongest possible terms the unnecessarily lengthy and repetitive nature of the issues set out by the appellant for the determination of this court. It cannot be over-emphasized that the object of the formulation of issues for determination in an appeal is to enable the H parties narrow the issues arising from the grounds of appeal filed in the interest of clarity, brevity and accuracy, thus enabling the court to consider together a number of associated and related grounds of appeal within the issue to which they are related in the determination of the appeal. See Raphael Agu v. Christian Ikewibe (1991) 3 N.W.L.R (part 180) 385 at 401. Issues must not



only be related to the grounds of appeal filed, it is improper to formulate unnecessarily lengthy and repetitive issues. An unnecessary proliferation of issues is totally undesirable and has times without number been frowned at and discouraged by this court. See Ogbunyinya v. Obi Okudo (No.2) (1990) 4 N.W.L.R. (part 146) 551 at 567 and Anie v. Uzorka (1993) 8 N.W.L.R. (part 309) 1 at 17. The issues formulated should also not be so prolix and proliferate as to outnumber the grounds of appeal on which they are based. Whereas, therefore, an issue to be determined can take care of, and relate to a number of grounds of appeal, it is undesirable to split a ground of appeal unnecessarily into several or a number of issues. See A.G. Bendel State v. Aideyan (1989) 4 N.W.L.R. (part 118) 646, Ugo v. Obiekwe (1989) 1 N.W.L.R. (part 99) 566, Adelaja v. Fanoiki (1990) 2 N.W.L.R. (part 131) 137.

The issues formulated in this appeal by the appellants in their brief of argument constitute, quite clearly, an unnecessary proliferation of issues in the case. They are so prolix and proliferate that they more than double the grounds of appeal on which they are based. Additionally they are unnecessarily lengthy and grossly repetitive in nature. In my view, the issue formulated by the appellants are, without doubt, improper and I entertain the hope that counsel ought in future to be more careful and precise in the manner issues for determination in an appeal are formulated and/or identified.

The respondents, on the other hand submitted four issues for the determination of this court. These are as follows -

*"1. Whether the plaintiffs were estopped by the decision in Exhibit D1 from maintaining this action against the Defendant".*

*2. Whether, having regard to the (fact that both parties rely on a common root of title,) the plaintiffs have discharged the burden of proving a better title to the land in dispute.*

*3. 'Whether the doctrine of Lis pendens applies to defeat the title of the plaintiffs in this case'.*

*4. "Whether the Defendant was entitled to judgment on the basis of the Limitation Decree, long and adverse possession".*

I have closely examined the two sets of issues identified in the respective briefs of the parties and it is clear to me that the thirteen issues raised in the appellants brief are, without doubt, adequately covered by those set out in the respondents' brief which I find sufficiently comprehensive for the determination of this appeal.

At the oral hearing of the appeal before us, both learned counsel for the parties adopted their respective briefs of argument and proffered additional submissions in amplification thereof. Learned counsel for the appellant, Mr. Ayanniyi, in his submissions, stressed that although it is common

ground that the parties derived their respective title to the land in dispute from a common root, the Ajose family, it is clear from the pleadings and the evidence before the trial court that only a branch of the Ajose family headed by P.W.3, Akanbi Ajose, purported to convey the land in dispute to the respondents. He pointed out that this is as against the larger Ajose family which together sold a more extensive piece of land of which the land in dispute formed a part to the late Chief T.A. Doherty through whom the appellant based its title to the land. He contended that the branch of the Ajose family headed by P.W.3, Akanbi Ajose, could not unilaterally and lawfully confer good title in respect of the communal Ajose family land to the respondents without involving the Ajayi Kushemi and Kelani Odumaye branch of the said Ajose family. Although the respondents gave vague evidence of partition in respect of the Ajose family land, no partition deed was tendered and the only evidence of P.W.3 on the issue was disbelieved by the trial court. Learned counsel submitted that the court below overlooked this aspect of the case, that is to say, the case on partition and wrongly held that the respondents acquired a legal title to the land in dispute when the conveyance Exhibit p2 did not involve both branches of the Ajose family.

On the issue of priorities of title, learned counsel relied on the decision in Karinu Ayinla v. Sifawu Sijuwola (1984) 5 S.C. 44 at 77 and argued that where a purchaser acquires an equitable interest in land which is coupled with possession, he thereby acquires a legal title. He contended that the title of the appellant to the land in dispute was clearly superior to that of the respondents as the predecessor in title of the appellant, the late Chief, Doherty, got his title to the land in dispute upheld by the Ikeja High Court in Exhibit D1. He stressed that this judgment was affirmed by this court. He submitted that the Ajose family are estopped from claiming the land in dispute as they had litigated over it with the appellant in Exhibit D1 and lost. The plaintiff in that case, one Bisiriyu Akintola, claimed his root of title to the land in dispute from certain members of the Ajose family and P.W.3, a member of the family, testified for the said plaintiff in that case. He called in aid the decision of privy Council in Nana Ofori Atta v. Nana Abu Bonsra (1957) 3 W.L.R. 830 at 836 and submitted that estoppel applies against the respondents in this case.

On the issue of lis pendens, it was argued on behalf of the appellant that Exhibit D was concluded on the 27th November, 1963 whereas the respondents purportedly purchased the land in October, 1963 during the pendency of the suit. It was thus submitted that the alleged conveyance was caught by the doctrine of lis pendens. He finally submitted that the respondents' action was barred by the Limitation Law.

Chief G.O.K. Ajayi, S.A.N., learned counsel for the respondents in his

reply pointed out that it is common ground that the land in dispute forms part of a whole that belonged to the Ajoye family. Both parties based their root of title on the said Ajoye family. The respondents produced the Deed of Conveyance, Exhibit p2 from the Ajoye family. He submitted that the burden is on the appellant to prove a better title, stressing that there is no deed of conveyance as between the appellant's predecessor in title, Chief T. A. Doherty and the appellant. He stated that all the appellant relied on were the judgments, Exhibits D, D1 given in favour of Chief Doherty in a suit between a third party, Bisiriyu Akintola, as plaintiff, and Chief Doherty and the appellant, as defendants. Learned counsel conceded that the basis of the judgments, Exhibits D, D1, is that the Ajoye family had sold the land in dispute to Chief Doherty. He however argued that estoppel was neither pleaded by the appellant on the pleaded by the appellant on the pleading nor are the parties or their privies the same. He contended that the respondents are not privies of Akintola as they did not buy any land from him. He argued that the Ajoye family are not parties to Exhibits D, D1. He therefore submitted that those judgments cannot bind the respondents.

On the issue of priorities of title, learned Senior Advocate submitted that the respondents proved that they obtained the legal estate of the land in dispute from the owners of the land by Exhibit p2. He argued that the legal estate the respondents obtained from the said owners was registered four years before the Deed of Conveyance relied upon by the appellant and which deed, in any case, could have conveyed only an equitable estate in the property. He submitted that the doctrine of lis pendens is not applicable to the facts of this case as the property in issue was not sold to the respondents by either of the parties to Exhibits D, D1 but by the Ajoye family who were not parties thereto. For this proposition, he relied on Osagie v. Oyeyinka (1987) 3 N.W.L.R. 144. He finally argued that no defence based on the Limitation Decree was made out by the appellant.

Issues 1 and 2 are easily the main issues raised in this appeal for the determination of this court. I will firstly take issue 2 which poses the question whether, having regard to the fact that both parties relied on a common root of title, namely, the Ajoye family, the respondents succeeded in discharging the burden of proving a better title to the land in dispute.

In this regard, it is necessary to draw attention to certain facts from the pleadings and the evidence before the court which appear to be common place in so far as both parties are concerned. These are as follows. -

(1) That the land in dispute forms part or parcel of a larger tract of land which is situate at oregun Road, Morekete Village, Ikeja.

(2) That the said larger tract of land was originally owned under

native law and custom by the Ajose family through their great grand father, Taiwo Ijon. This is clearly recited in the respondents' conveyance, Exhibit p2 and pleaded in paragraph 4 of the appellant's amended Statement of Defence.

(3) That the parties claimed to have derived their respective title to the land in dispute from a common root, the Ajose family.

B (4) That the Ajose family comprised of two sections which were joint owners of the land in dispute, namely, the Akanbi Ajose (P.W.3) branch and the Ajayi Kusheni section of the said Ajose family.

(5) That the land in dispute was part and parcel of the subject matter of a dispute at the Ikeja High Court in suit No. HK/14/62, Bisiriyu Akintola C versus Clay Industries (Nig.) Ltd., the appellant, and Chief T. A. Doherty wherein the plaintiff therein claimed declaration of title, possession, damages for trespass and perpetual injunction but lost. That is Exhibit D1.

(6) That in Exhibit D1, Bisiriyu Akintola had relied on the Deed of Conveyance executed in his favour by the Akanbi Ajose family which conveyance did not involve the Ajayi Kusheni branch of the said Ajose family.

(7) That the late Chief T. A. Doherty had purchased the land in dispute from both sections of the Ajose family before the said sale to Bisiriyu Akintola.

(8) That it was after the sale of the land in dispute to Chief T. A. Doherty and later to Bisiriyu Akintola that the Akanbi Ajose branch of the Ajose family subsequently resold the same land to the respondents.

**In dealing with the second issue, I think it is right to bear in mind the recognized and basic principle in land cases that the plaintiff when claiming a declaration of title must succeed on the strength of his case. The onus F lies on the plaintiff to satisfy the court that he is entitled on the evidence brought by him to the declaration of title claimed. The plaintiff must rely on the strength of his case and not on the weakness of the defendant's case. If this onus is not discharged, the weakness of the defendant's case may not generally help him and the proper judgment will be for the defendant. See G Kodilinye v. Mbanefo Odu 2 W.A.C.A. 336 at 337, Ayitey Cobbblah v. Tettey Gbeke (1947) 12 W.A.C.A. 294 at 295, Woluchem v. Gudi (1981) 5 S.C. 291 etc. Where, however, the case of the defendant lends support to the case of the plaintiff, it is recognized that the court cannot ignore it in arriving at a conclusion as to which side to believe. See Oduaran and others v. Asara and H others (1972) 1 All N.L.R. (part 2) 137, Akinola v. Oluwo (1962) 1 All N.L.R. 224 at 225 etc. I will now examine the issue of competing titles raised in this appeal against the above principles of law.**

Paragraphs 5 and 6 of the amended Statement of Defence averred as follows -

"5. The title of the said Chief T.A. Doherty to the portions of land including the land in dispute sold to him by the said Ajose Family was confirmed by the judgment of the then High Court of Western Nigeria holden at Ikeja in Suit No. HK/14/62 Bisiriyu Akintola versus Clay Industry (Nigeria) Limited and T.A. Doherty and this was upheld by the Supreme Court on Appeal in Supreme Court No. (Sc) 539/66 which judgments the Defendant B will rely upon.

6. The land in dispute as well as the Defendants' land is shown on the attached composite plan as within the land in dispute in the said suit No. HK/14/62."

It is clear that part of the appellant's case is that the title of the late Chief T. A. Doherty to the larger area of land more particularly shown in Exhibit p4 and including the land in dispute, sold to the said Doherty by both sections of the Ajose family had been confirmed by the then High court of Western Nigeria in suit No. HK/14/62. The said High Court decision was affirmed by this court in suit No. SC.539/66. The learned trial judge in dealing with this question of competing titles of the parties stated as follows -

"As already indicated, both parties are claiming to have derived their respective titles from an agreed original owner, the Ajose Family. I such a situation, the party that can successfully trace his title to that owner has the best chance of obtaining a declaration in his favour. All that the defendants are saying in their pleading is that the original owners had previously sold a larger area, including the land in dispute, to their own predecessor in title, the late Chief Doherty. They even went further that the said title of their predecessor had already been confirmed by the High Court and the Supreme court. Thus, it is their case that the same original owners had nothing left, as far as the land in dispute is concerned, to sell to the plaintiffs."

A little later in his judgment, the learned trial Judge went on -

"In this case, the defendant had not only pleaded the sale by Ajose family to their predecessor in title, the late Chief T. A. Doherty, they went further to plead that the said sale by that family had been confirmed by the High Court and the Supreme Court. They pleaded their reliance on the said two judgments Exhibit ("D1" & "D3"). In addition they produced the plan used in the former case as well as the evidence of Akanbi Ajose therein. See Exhibits "D2" and "D5" ..... I have no doubt, from the evidence, that the land in dispute forms portion of the larger area litigated upon in the two judgments pleaded by the defendant.

There is, in my view sufficient indication on the pleadings to hint the plaintiffs that both parties derived their titles from agreed original own-

ers and that defendants' title from their owners had already received the blessings of competent courts (See Exhibits "D1" and "D3"). In such circumstances the onus which must rest on the plaintiffs has been settled by the pleadings. Unfortunately, the plaintiffs have failed to discharge that onus and thus to satisfy me that their own title should be preferred to that of the defendant."

He concluded as follows -

*"For the above reasons, I have come to the conclusion that the title of the defendant should be preferred and that the plaintiffs have failed to discharge the onus which the law places on them before they can be entitled to a declaration of title which they now seek. Finally, I accept in toto the evidence given on behalf of the defendant by their witness, Alfred Ronald Cordon (D.W.I.), regarding longer possession of the land in dispute by the defendant. The 3rd plaintiff J.O. Talabi (P.W.1), also admitted that the defendant had been in possession of some portions of the larger area before the plaintiffs' purchase. In the circumstances, the plaintiffs cannot equally succeed in the rest of their claim for damages for trespass and for an order of injunction. This is all the more so as I have found that the defendant has a better title to the land in dispute. Accordingly, the entire claim of the plaintiffs is dismissed with costs to be assessed after listening to both counsel."*

The Court of Appeal in allowing the respondents' appeal held that the said respondents acquired a legal estate to the land in dispute by virtue of their conveyance, Exhibit p2 because they were bona fide purchasers for value without notice of the appellant's prior equitable interest.

**With the greatest respect, the question of whether the respondents were bona fide purchasers without notice neither arose from the pleadings of the parties nor was it an issue before the trial court or the Court of Appeal. This court has frequently warned against decision of courts being founded on any ground in respect of which it has neither received argument on behalf of the litigants before them, nor even raised by or for the parties or either of them.** See Shitta-Bey v. Federal Public Service Commission (1981) 1 S.C. 40, Saude v. Abdullahi (1989) 7 S.C.N.J. 216 at 229, Chief Ebba v. Chief Ogodu v. Another (1984) 4 S.C.84 at 112, Florence Olusanya v. Olufemi Olusanya (1983) 3 S.C. 41 at 56-57 etc. **Courts of law must, as a rule, limit themselves to the issues raised by the parties in their pleadings as to act otherwise might well result in the denial to one or the other of the parties of his constitutional right to fair hearing.** See Metalimpex v. A.G.Leventis and Co. Ltd. (1976) 2 S.C. 91, George v. Dominion Flour Mills Ltd (1963) 1 S.C.N.L.R. 242, Shell B.P. Ltd. v. Abedi (1974) 1 All N.L.R. (part 1) 13, Alhaji Ogunlowo v. Prince ogundare (1993) 7 N.W.L.R. (part 307) 610 at 624 etc.

In the second place, although it is common ground that the parties claimed to have derived their respective titles to the land in dispute from a common root, namely, the Ajose family, it is clear from the pleadings and the evidence before the court including the Exhibits, particularly the recital to the respondents' conveyance Exhibit p2, the High Court Judgment Exhibit D1 and the Magistrates Court case, Exhibit p3 that the larger tract of land inclusive of the land in dispute belonged to one Taiwo Ijon, the great grand father of members of the Ajose family. It is recited in Exhibit p2 that the said larger tract of land was shared under native law and custom between the two branches or groups of the surviving descendants of the said Taiwo Ijon. These are the branch of the family headed by P.W. 3, Akanbi Ajose and a second branch comprising of 'Ajayi Kushemi, Kelani Olumaiye and others. Although it was alleged that the said land was partitioned under customary law, no reliable evidence of the alleged partition was before the court. This would have established details of the alleged partition, which branch of the family got what land, the branch that became owners of the land in dispute as well as whether the conveyance, Exhibit p2, is consequently valid or otherwise worthless as not emanating from the appropriate and entire owners of the land involved. **The onus was clearly on the respondents, as plaintiffs, who were seeking a declaration of title to establish that they were entitled to the reliefs they claimed. This onus the respondents failed to discharge. Besides, a declaratory claim, as in the present case, is a discretionary remedy which shall be refused where the plaintiff fails to establish his alleged entitlement to the satisfaction of the court.** See Oni and others v. Arimoro (1983) 8 N.S.C.C. 108, Anyaoko v. Adi (1986) 3 N.W.L.R.. (part 31) 731 at 748 etc.

The learned trial Judge in the present case came to the conclusion that the title of the appellant to the land in dispute was preferable to that of the respondents and it seems to me that he was perfectly entitled to come to that decision.

**The law is well settled that in a claim for declaration of title to land where one of the parties has established a root of title emanating from an agreed original owner, the burden cast upon the other party is clearly substantial. Indeed it has been said that it may be difficult to find any instances in which that other party can obtain a declaration of title.** See Raimi Sanni and Another v. Jimoh Oki and Another (1971) 1 All N.L.R. 116. It has, however, to be a case where a plaintiff or one of the parties successfully traces his title to one whose title to ownership has been established. It is in such a case that the onus is cast upon the defendant or the other party to establish that his own possession of the land is of such a nature as to oust that of the original owner. See Thomas v. Preston Holder (1946) 12 W.A.C.A. 78.

In the present case, as I have indicated, it cannot be said that the respondents from the evidence before the court, traced their titles to one whose title to ownership was established. In this regard attention must be drawn to the fact that in the suit, Exhibit D1, between Bisiriyu Akintola as the plaintiff and the present appellant with the late Chief Doherty as the 1st and B 2nd defendants respectively in respect of the aforementioned larger tract of family land in issue, the trial court found thus -

*" I have already held that the whole land did not belong to the children of Ajose alone and therefore they cannot convey the legal estate. The plaintiff's title is therefore defective. The 2nd defendant had receipts of C purchase from five of Ajose's children plus Ajayi Kushemi and kelani Olumaiye who are members of the family; these confer equitable title on the 2nd defendant and coupled with his long possession of the land has a better title to the land than the plaintiff.*

*I hold that the plaintiff has failed to prove his case and it is therefore dismissed."*

It is part of the land in dispute in Exhibit D1 that is now in dispute in the present case.

The appeal to this court against this High Court decision in Exhibit D1 was on the 12th February, 1969 dismissed as lacking in substance per E Exhibit D3. The question now must be whether it was established that the vendors of Bisiriyu Akintola in Exhibit D1 who are also the vendors of the plaintiffs/respondents in the present case are the exclusive owners of the land in dispute or that their exclusive title to the land in dispute to the exclusion of the Ajayi Kushemi section of the Ajose family in issue was satisfactorily F established by evidence. I think not for the simple reason that the land in dispute was owned by both sections of the Ajose family and not by only the Akanbi Ajose branch.

The position therefore is that whilst the respondents purchased the land in dispute from only one section of the Ajose family, the late Chief T. A. G Doherty, the appellant's unchallenged predecessor in title, purchased the same land from both sections of the Ajose family, to wit, the Ajose section and the Ajayi Kushemi section on the one hand, Akintola's title to the land in dispute was pronounced defective in Exhibit D1, a judgment which was affirmed in Exhibit D3. The late Chief T. A. Doherty, on the other hand, was H pronounced the equitable title holder in long possession of the land with better title than Akintola's defective title. It was this same land in dispute that the same Akanbi Ajose section, notwithstanding the findings of the courts in Exhibit D1 and D3, later sold to the respondents. The next question must be whether the Ajose family is bound by the findings of both the High Court and



this court in Exhibits D1 and D3. It is a question that relates to issue 1 which I will now proceed to examine. The court below was of the opinion that from the facts of the case, no estoppel arose against the respondents who are privies of the Ajose family.

With profound respect, I find it difficult to accept that no estoppel arose on the facts of this case. **It is a general principle of the law that, estoppel must be pleaded before the trial court otherwise it cannot be raised on appeal.** See Micheal Obanye v. Okwunwa and Another (1930) 10 N.L.R. 8, Orku Sowa v. J.G. Amachree (1933) 11 N.L.R. 82, Dedeke and others v. Williams and Another (1944) 10 W.A.C.A. 164. **It is clear to me in the instant case that all the facts necessary to raise the issue estoppel canvassed in this case are fully pleaded in paragraphs 5 and 9 of the amended Statement of Defence and contained in Exhibits D1 and D3 therein pleaded.**

The law is settled as a matter of general rule that no person is to be adversely affected by a judgment in an action to which he was not a party because of the injustice in deciding an issue against him in his absence unless he is a privy to a party in which case he is equally bound as the parties and is estopped by res judicata or he has so acted as to preclude himself from challenging the judgment in which case he is estopped by his conduct. See Ekpoke v. Usilo (1978) N.S.C.C. 413 at 422. In the present case, the Akanbi Ajose section of the Ajose family purportedly conveyed the land in dispute to Akintola after they had joined the Ajayi Kushemi section of their said family in selling the same land to the late Chief T. A. Doherty through whom the appellant got land conveyed to it. In an action for title to the said land by Akintola against the appellant and Chief Doherty at the Ikeja High Court, an action in which the validity of the title of the Akanbi Ajose section of the family was seriously and directly in issue, instead of applying to be joined as plaintiffs in that case, they were content to stand by and to see their case fought by Akintola for whom they merely gave evidence at the trial. This evidence they gave through P.W.3, Akanbi Ajose. The said Akanbi Ajose branch of the family stood by while the validity of title to the land they had conveyed to Akintola was being fought in the court proceedings. This, in my view, is a classical case of estoppel by standing by and it is my view that the Akanbi ajose branch of the Ajose family must be bound by the result in the case, Exhibit D1 and D3 and estopped from reopening the issue of their exclusive title to the land in dispute they had conveyed to Akintola, See Isaac Marbeth v. Richard Akwei (1952) 14 W.A.C.A. 143 and Ben Ikpong and others v. Chief Sam Edoho and Another (1978) All N.L.R. 196 at 207. See too Nana Ofori Atta 11 v. Nana Abu Bonsra 11 (1957) 3 All E.R. 559 at 562 where the rationale in this proposition of law was re-stated by Lord Denning as follows -

*"It seems to be the recognized thin in this part of West Africa for all persons with the same interest in a land dispute to range themselves on one side or the other. Sometimes they apply to be joined as parties. On other occasions they regard the named party as their champion and support him by giving evidence. If he wins, they reap the fruits of victory. If he fails, they fall with him and must take the consequences."*

The Akanbi Ajose branch of the family having stood by to see their interest fought by Akintola in Exhibits D1 and D3 and were merely content to support him by giving evidence on his behalf must fall with him and be bound with the ultimate decision of the courts against their interest.

There is finally another aspect of this case touching on which of the parties that proved a better title to the land in dispute with which I propose to round up issues 1 and 2. This concerns the legal position of the appellant's predecessor in title, Chief T. A. Doherty under native law and custom with regard to the land in dispute.

Dealing with this matter, the court below observed as follows-

*"The position of the Defendants was therefore that the Ajose Family had nothing left to sell to the plaintiffs i 1963. I shall come to Exhibit D1 anon but the point that must be made here and now is that while it may well be true that the Ajose family had previously sold the larger area to Doherty, what sort of title did Doherty obtain?"*

It went on -

*"In other words did T.A. Doherty have a legal estate to transfer to Cappa and D' alberto who, in turn, transferred same to the present Defendants? I do not think so. I emphasize this point because if T. A. Doherty obtained his title under native law and custom,, but without a conveyance, then had (sic) a legal estate to transfer."*

It would thus appear that the point being made by the court below is that the appellant's equitable title to the land in dispute must under native law and custom be overridden by the respondents' conveyance, Exhibit p2. The impression being given therefore would appear to be that a conveyance of land held under native law and custom was stronger and constituted better title than a traditional sale.

With profound respect, I am unable to accept this proposition of law as well founded. In the first place, I have pointed out earlier on in this judgment that the land in dispute was held by the Ajose family under native law and custom. **The law has long been settled that if land, as in the present case, is held under native law and custom, no such thing as written contracts or registered conveyances are necessary to effect a valid sale thereof. Payment of purchase price and delivery of possession by the vendor to the purchaser**

**create a valid sale or title under native law and custom.** See Isaac Ogunbambi v. Abowaba (1951) 13 W.A.C.A. 222 at 225. **Any such out and out sale of land held under native law and custom can by no stretch of the imagination be treated as inferior to other modes of sale, such as by way of conveyance or other written contracts.**

In the Ogunbambi case at page 225, Verity, Ag. P. succinctly put the B matter as follows -

*"There is however, another aspect of the question which has not been argued, but which would, I think, be equally fatal to the appellant's case. The land was held by the Oloto family under native law and custom. There can be no doubt that by such law and custom no such things as written C contracts or conveyances are necessary to effect a valid sale. The payment of purchase money and the delivery of possession are enough. If, therefore, the transaction between the respondent's vendor and the Oloto family in 1927 were to be viewed from the standpoint of native law and custom, then, long prior to the conveyance under which the respondent claims, the Oloto family D had divested themselves of their interest in the land."*

So, too, in Aboyade Cole v. Folami (1956-60) N.S.C.C. 59 at 61, Jibowu, Ag. F.C.J. explained the same principle of law in the following terms -

*"Appellant's counsel further argued that by native law and custom a valid sale of land could be conducted without the necessity for a convey- E ance as under English law by the mere handing over of the purchase money by the purchaser and by the delivery of possession on the other hand by the vendor. There is no question about this but the transaction must be before witnesses. He further submitted that the payment #25 to Chief Oloto, coupled with possession of the land, made a complete and valid sale to the appellant F under native law. It is to be observed that the making and giving of receipt are unknown to native law, and that the giving of the receipt Exhibit "J" is not within the rule of native law and custom."*

There is also the decision of this court on Oloyede Akingbade v. Elemosho (1964) 1 All N.L.R. 154, (1964) All N.L.R. 146 Where Ademola, C.J.N. G delivering the judgment of this court restated this principle of law as follows -

*"Further, since the sale to pearse in 1911 was an out and out sale of land held by the Oloto family by native law and custom, no conveyance or written contract was necessary to effect a valid sale. The payment of the purchase price and the delivery of possession to pearse created a valid title H by native law and custom."*

Another apt statement of the law is, perhaps, contained in the judgment of this court per Nnamani, J.S.C. in Ayinla v. Sijowola (1984) 5 S.C. 44 at 77 where he explained the principle in issue as follows -

*"All these cases appear to lay emphasis on possession. Even if it was an equitable interest, if it is coupled with possession it cannot be over-ridden by a legal estate, This principle accords with the decisions of the privy Council in Oshodi vs Balogun & Ors 4 W.A.C.A. 1 at P.6 and Suleiman and Another vs Johnson 13 W.A.C.A. 213. Whether land is sold under native law and custom or merely sold but without executing a formal deed, it seems to me that if the purchaser is in possession for a long time the equitable interest thus created cannot be superseded by a subsequent legal estate. In effect it matures into a legal estate."*

In the present case, there is evidence that the land in dispute was held by the Ajoye family under native law and custom. Both sections of the said Ajoye family together made an out and out sale of the land under native law and custom to Chief Doherty who paid the full purchase price. Possession of the land was duly delivered to him in accordance with customary law and he immediately went into possession thereof. The sale under native law and custom to Chief Doherty was admittedly much earlier in time than the purported conveyance to the respondents. I agree entirely that whether under English or under native law and custom, Chief T.A. Doherty who was vested with legal estate in the land as soon as he bought it and went into possession thereof acquired a better title to the land in dispute than the respondents. So, too, the appellant who is Chief Doherty's successor in title to the property similarly acquired a better title than the respondents.

To conclude, on issues 1 and 2, I think the Court of appeal, with respect, was in error to have held that no estoppel arises in this case. There is, in my view, a clear estoppel established on the facts of this case whereby the Akanbi Ajoye branch of the Ajoye family, the predecessors in title to the respondents, are estopped from relitigating the question of title to the land in dispute against the appellant which was the first defendant in Exhibits D1, D3 and successor in title of the late Chief T. A. Doherty to whom valid title of the land in dispute was lawfully vested in by both sections of the Ajoye family before the purported conveyance to Akintola or the respondents by the Akanbi Ajoye section of the Ajoye family which only comprised a fraction of the said Ajoye family. I am in no doubt that the Court of Appeal, with due respect, fell into a serious error when it held that the respondents established a better title to the land in dispute than the appellants. The land in dispute having been validly sold to Chief Doherty, the Predecessor in title, and, through whom the appellant claimed title, the subsequent or latter purported conveyance of the same land by only the Akanbi Ajoye section of the Ajoye family to the respondents was nothing but nudem pactum and of no effect. The court below was therefore in error when it held that the conveyance, Exhibit p2 passed a legal

estate of the land in dispute to the respondents. It did not so pass, as nemo dat quod non habet; the Akanbi Ajose section of the Ajose family not being the exclusive owners of the land were not in a position to convey the same to the respondents.

Turning now to the 3rd issue which questions whether the doctrine of lis pendens operated to defeat the claims of the respondents, it ought to be observed that the observation of the court below thereupon was purely by way of obiter dictum as the point was not an issue in the case between the parties. Lis pendens was neither pleaded as a ground for the defeat of the respondents' case before the trial court nor was its judgment based thereon. In my view, it is now too late in the day for the appellant to raise this new defence which did not form the basis of his case before the trial court. See Oredoyin v. Arowolo (1989) 4 N.W.L.R. (part 141) 172.

**At all events, the doctrine of lis pendens affects a purchaser, who buys property, the subject matter of litigation during the pendency of such litigation because the law does not allow parties to a suit, pending the litigation, rights to real property in dispute, so as to prejudice the opposite party on the principle, pendent lite nihil innovetur. See Barclays Bank of Nigeria Ltd v. Alhaji Ashiru and others (1978) 6 and 7 S.C. 99 at 123, 124-125, 128 and 129. The property in dispute in the suit under appeal was at no time sold to the respondents during the pendency of the relevant suit by Bisiriyu Akintola, Chief T.A. Doherty or the appellant, the parties to Exhibits D1 and D3. In the circumstance I agree entirely that the doctrine of lis pendens is inapplicable in the present case.**

On the issue of the Limitation Decree, I need only state that the appellant failed to make out a defence based thereunder.

In the final result, this appeal succeeds and it is hereby allowed. The decision of the Court of Appeal is hereby set aside together with the order for costs therein made. The judgment of the trial court which dismissed the respondents' claims in their entirety is hereby restored. There will be costs to the appellant against the respondents which I assess and fix at N600.00 in the court below and N1,000.00 in this court.

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### OGUNDARE JSC

I have read before now the judgment of my learned brother Iguh JSC H just delivered. I agree entirely with his reasonings and conclusion that there is merit in this appeal.

As the Akanbi Ajose branch of the Ajose family are bound by the decision of the trial High Court in Akintola v. Clay Industries (Nig.) Ltd. &

Chief T.A. Doherty (Exhibit D1) (affirmed by this court in Exhibit D3) under the doctrine of standing-by, respondents who claim title through them are equally bound by it and are, therefore, estopped from relitigating the issue of Chief Doherty's title to the land in dispute. To hold otherwise would leave subsequent purchasers of the same land from Akanbi Ajoye branch free to continue to harass the Appellants with litigations notwithstanding the decisions in Exhibit D1 now D3. That cannot be a correct state of the law.

On the issue of better title to the land in dispute, the sale under customary law of the land (of which the land in dispute is only but a part) by the entire Ajoye family, the original owners of the land to Chief T.A. Doherty (who went into possession) conferred on the latter the absolute title to the land - See: Akingbade v. Elemosho (1964) 1 All NLR 154; (1964) ANLR 14; Ajadi v. Olarewaju (1969) 1 All NLR 382; (1969) ANLR 374; Cole v. Folami 1 FSC 66 at 68; Erinosho v. Owokoniran (1865) NMLR 479 at 483; Egonu v. Egonu (1978) 11-12 SC 111 at 131-132. Nor could this title be defeated by a subsequent conveyance executed in favour of a subsequent purchaser from the same Ajoye family - see Ayinla v. Sijuwola (1984) 1 SCNLR 410 at 424-425; (1984) 5SC 44 at 76-77. The position of the Respondents is made worse here that the subsequent sale to them was by a section of the family. The claim of that section to a partition was rightly rejected by the learned trial Judge. The Appellant derived its title to the land in dispute from Chief Doherty ; that title is a better title to that of the Respondents who have none. To make matters still worse, Respondents could not claim to be purchasers for value without notice of Appellant's interest in the land as they found the Appellant already in possession of the land and working thereon when they purchased from their vendors.

With these comments and for the fuller reasons given in the lead judgment of my learned brother Iguh JSC, I, too, allow this appeal and set aside the judgment of the trial High Court. I subscribe to the order for costs made in the lead judgment.

G \_\_\_\_\_

### OGWUEGBU JSC

I have had the advantage of reading in draft the judgment delivered by my learned brother Iguh, J.S.C. I am in full agreement with him that the appeal be allowed for the reasons so ably set out in the said judgment.

The appeal involves the competing titles of two purchasers who derived their titles from agreed original owners, the Ajoye family. The defendant/appellant derived its title through one Chief T.A. Doherty who got an outright sale of a larger parcel of land which includes the portion now in

dispute from the entire Ajose family while the plaintiffs/respondents bought the portion of land in dispute from Akanbi Ajose, a branch of the said Ajose family. It was the case of the defendant company herein called the appellant that the Akanbi Ajose section of Ajose family is bound by the judgment of the Ikeja High Court in suit No. HK/14/62 (Exhibit "D1") between Bisiriyu Akintola as plaintiff and Clay Industries (Nig.) Ltd. and Chief T. A. Doherty as defendants. It was the defendant's case that the title of late Chief Doherty to the land in dispute in the present proceedings as well as the larger parcel of land sold to late Chief Doherty by Ajose family was confirmed by this court when it affirmed the decision of the learned trial judge (Exhibit "D1") in Exhibit "D3".

The defendant's counsel contended that Ajose family having supported the plaintiff (Akintola) in the proceedings which terminated in Exhibit "D3" by giving evidence for him through Akanbi, the head of the family and two other principal members of their family instead of joining in the case as parties, are deemed parties and cannot relitigate on the land or any portion of it against Chief Doherty or his privies which the defendants are. Putting it the other way, the plaintiffs who claim through Akanbi Ajose branch of the family are also bound by the decisions in Exhibits "D1" and "D3" and are estopped from relitigating the issue of Chief Doherty's title.

In dealing with the above issue, the learned trial judge found as follows:

*"The plaintiffs could also have shown that it was not the title of the same family in respect of the same land that was at stake in the former case. Again, they have failed completely on this aspect. I do not believe that the 3rd plaintiff was not aware of the said former case as disclosed by him. In any event, I have already held that Akanbi Ajose, the only male member of the family that sold the parcels of land in question, is not a truthful witness. He gave evidence in the former case and was quite aware, in my view, that it was part of the same land that was in dispute then that the plaintiffs are laying claim to in the present case. On the contrary, the defendant has satisfied me fully on all these aspects. .... The land is the same as in the previous case and the parties have privity of interests therein. The Ajose family had every opportunity, which they took, to defend their title in that previous case and they failed against the same defendant therein. They cannot now use the present plaintiffs who are now claiming title through the same family to relitigate the same issue of the same title to the same land."*

He dismissed the plaintiffs' claim in its entirety. The Court of Appeal got it all wrong when it observed as follows:

*"At this point, and in my opinion, what called for determination*

*was whether or not this equitable interest plus possession had ripened into a legal estate, and whether or not the plaintiffs had notice of the earlier equitable interest of the defendants' predecessor-in-title? The possession of the defendants is that the equitable interest plus possession equalled a legal estate and so the Ajose family had nothing left to which they could convey B legally later to the plaintiffs. With respect I do not agree....."*

The threshold issue which the Court of Appeal should have determined is whether the plaintiff were estopped by the decisions in Exhibits "D1" and "D3" from maintaining this action against the defendant. That is the first issue identified by the respondents for determination in that court. If it had C first answered that question in the affirmative as the learned trial judge rightly did, it would not have been necessary for it to consider competing titles and whether the plaintiffs knew of equitable interest of the defendant's predecessor-in-title.

This is a clear case of standing-by which constitutes estoppel. Where D any person having an interest may make himself a party a suit by intervening and knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to reopen the case. See Wytcherley v. Andrews (1871) L.R. 2 P. & D; 327 at 328, Nana Ofori Atta 11 & Or. v. Nana Abu Bonsra E 11 & Or. (1957) 3 All E.R. 559 and Obodo & Or. v. Ogba & Ors. and Nnaeme & Ors. v. Maduekwe & Ors. (1987) 2 N.W.L.R. (pt. 54) 1 at 15 where Oputa, J.S.C. observed that estoppel by standing by is but a specie of estoppel by conduct and that it is a kind of equitable estoppel applicable to a situation where because a party omitted to intervene in a pending action affecting his interest, F he is concluded by the result of the action although he was not a party to it.

The learned trial judge was right when he found that Ajose family, the plaintiff's predecessor-in-title were, by their conduct standing by (even though he did not use the exact expression) when the earlier case on the land Akintola v. Doherty was going on and were content in giving evidence for G Akintola instead of intervening and we therefore estopped by Exhibits "D1" and "D3" from relitigating in respect of the land in dispute against the defendant. The plaintiffs as privies of the Ajose family, their immediate vendors are also estopped from relitigating on the land in dispute or any portion of it.

As to the questions of competing titles and whether the plaintiffs H knew of the equitable interest of late Chief Doherty in the land in dispute these do not arise having regard to the fact that the entire Ajose family made an outright sale of the larger portion of land held by them under native law and custom to late Chieftaincy Doherty who paid the purchase price and was let into possession and a valid title under native law and custom was created. No



such thing as written contract or conveyance is necessary to effect a valid sale under native law and custom. See Ogunbambi v. Abowab 13 W.A.C.A. 222 at 225, Akingbade v. Elemisho (1964) 3 N.S.C.C. 96 and Cole v. Folami 1 F.S.C. 66 at 68.

Where a party received title to land under native law and custom and entered into possession, and the same vendor purports to convey the same B piece of land to another purchaser executing a deed of conveyance, a claim that the first party's interest was an equitable interest and was cut off by the latter bona fide purchaser cannot be upheld by this Court. See Ayinla v. Sijuwola (1964) 15 N.S.C.C. 301 at 312 and Orasanmi v. Idowu (1959) 4 F.S.C. 40.

For the above reasons and the reasons set out in the judgment of my C learned brother Iguh, J.S.C., I hereby allow the appeal and set aside the judgment of the Court of Appeal. The judgment of the learned trial judge dismissing the plaintiffs' claim in its entirety is restored. I abide by the order as to costs made in the lead judgment.

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**MOHAMMED JSC**

I agree with, and do not desire to add to, the opinion of my learned brother, Iguh, J.S.C., in the judgment, just read. I have had the privilege of reading the judgment in draft. I agree to allow the appeal and restore the E judgment of the trial High Court. I abide by all the consequential orders made in the lead judgment.

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**ONU JSC**

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Having had a preview of the judgment just delivered by my learned brother Iguh, JSC, I am in entire agreement with it that the appeal is meritorious and ought therefore to succeed.

My learned brother has painstakingly and exhaustively dealt with both the law and facts which arose for our determination that I have nothing G further to add thereto. I accordingly adopt the same as mine and make similar consequential orders inclusive of costs awarded therein.

H