

SUPREME COURT OF NIGERIA

17TH JULY, 1997. SC. 206/1993

**CORAM:-A.B. WALL, M.E. OGUNDARE, E. O. OGWUEGBU,
U. MOHAMMED, S. U. ONU, JJSC.**

OKEMIAMERAYE EGBARAN & 2 ORS.

(For themselves and on behalf of APPELLANTS
Ajija family of Okwetolor)

AND**1. IGBAKPAN AKPOTOR**

(For himself and on behalf of
Odionvbare family)

2. ESEVWENUGHWU ODU

(For himself and on behalf of
Oyaka family)

..... **RESPONDENTS****3. WARRI ONOVIIBA**

(For himself and on behalf of
Egorota family)

4. EFURHIEME OGHOJUMI

(For himself and on behalf of
Obajere Emafidon family)

APPEALS - *Ground of appeal - That was not amended to take care of the issue being raised - Any argument thereon will be discountenanced.*

APPEALS - *Interference - Findings of fact - should not easily be interfered with by appellate Court - Save there is an obvious error.*

COURTS - *Bias - Findings of trial Court - On the credibility of witnesses - Where not tainted with bias - It should be upheld.*

EVIDENCE - *Exhibit - Admissibility of previous judgment Exh. D - Where the Exhibit was not tendered for purpose of estoppel - It need not be pleaded - If it is sought to be used in proving any other pleaded fact.*

EVIDENCE - *Exhibit - That was properly admitted - It is not open to appellants to impeach the exhibit.*

LAND LAW - *Traditional histories - Conflict therein - Court is to test the two stories by reference to acts in recent times.*

LAND LAW - *Traditional history - Where not properly pleaded nor proved*
 - *Concurrent finding in respondents' favour - Will not be disturbed.*

FACTS

Before the High Court of the defunct Bendel State at Orerokpe (now Delta State), the plaintiffs/appellants sued the defendants/respondents claiming entitlement to right of possession and occupation of the land in dispute, and forfeiture of the defendants' customary tenancy. Appellants who relied on traditional history, contended that the respondents were their customary tenants. Respondents claimed that their original ancestors who were once sued, were joint founders of the land in dispute. Respondents tendered exhibit D (a previous judgment) to discredit appellants' evidence on the issue of founder of the land.

The trial Court believed the respondents' witnesses and dismissed the appellants' claim. Appellants' objection to the admission of Exhibit D was overruled and their main complaint which is on the issue of admissibility of that exhibit was not covered by any proper ground of appeal. Appellants' appeal to the Court of Appeal was dismissed. They have further appealed to the Supreme Court raising 5 issues, but the set of issues raised by the respondents were preferred.

ISSUES FOR DETERMINATION

- (i) *Was exhibit "D" inadmissible?*
- (ii) *If exhibit "D" was inadmissible which is not conceded, did it have any adverse effect on the judgment appealed against or any as disabled the said judgment?*

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

1. What is more, since ground 4 had not been amended to take account of the admissibility or otherwise of Exhibit "D", any argument proffered thereon goes to no issue and ought to be discountenanced. (p. 1863 H)

Admissibility of a previous judgment Exh D

2. As can be seen, therefore, Exhibit "D" was tendered to support the oral testimony given by the Respondents to discredit the Appellants' traditional evidence that Ejija or Ajija sojourned at Okwetolor and was the founder thereof. Clearly, it was not tendered as res judicata or estoppel and it was not so pleaded. On the issue or the purpose for which it was therefore tendered and received in evidence, Exhibit "D" was, in my view, relevant and material. See

the case of Dugbo & ors. v. Kporoaro & ors. (1958) WNLR 73 wherein it was held at page 75 that where a party relying on a judgment does not rely on it as an estoppel, it is not necessary to plead the said judgment. Such a judgment as Exhibit "D" in the instant case, can be relied upon purely as a matter of evidence to disprove an issue of title. From the foregoing, there is no other sense in which Exhibit "D" can be said to be inadmissible or such that if the learned trial Judge gave it weight in his judgment, which in the case in hand he did not, will disable the judgment. (p. 1864 G)

Exhibit - That was properly admitted

3. In the instant case, since Exhibit "D" was properly admitted as an admissible evidence and the persons to complain are not the Appellants but the Respondents who tendered it as a relevant piece of evidence through the 3rd Respondent, the Appellants' impeachment of it will ill-avail them. (p. 1865 F)

Appeals - Interference

4. Now, in appeals on findings of fact such as the one under consideration, a Court of Appeal would, and indeed should be loath to interfere with the facts found by the trial Judge unless there is an obvious error in the appraisal of the evidence and the ascription of probative values thereto. (p. 1866 A)

Traditional histories - Conflicts therein

5. Where, from the pleadings of the parties and the evidence led at the trial there are two conflicting histories relating to the land in dispute and it is difficult to determine which is more probable, resort to the demeanour of the parties and their witnesses is not the best guide; the duty of court is to test the two stories by reference to acts in recent times. See Kojo II v. Bonsie & Anor.³ (supra). (p. 1868 A)

Traditional history - Where not properly pleaded

6. Thus, as their pleading leaves their traditional history hanging in the air, the self contradictory evidence adduced in support thereof goes to no issue. As the trial Court therefore on the evidence adduced, following strictly the pleadings, found in Respondents' favour and the Court below justifiably confirmed the same, the decisions of the two courts below constituted concurrent findings of facts, which not having been shown to be perverse, erroneous or led to a miscarriage of justice from my perusal of the entire record, the same is accordingly affirmed by me. (p. 1868 D)

³ (1957) 1 W.L.R. 1223 at 1226

Courts - Bias

7. Where such was not the case, (in other words, nothing to suggest bias or the semblance of it) and the credibility or non-credibility stemmed from the evaluation of the evidence as was found in the majority judgment of the Court below, such findings should be upheld as was done in this case. It is trite law that a Court of Appeal should not lightly reverse or disturb the views or conclusions of the trial Judge based on credibility of witness. (p. 1869 F)

NOTABLE POINT OF INTEREST**OGUNDARE.JSC***1. Wrongful admission of evidence per se - May not vitiate judgment*

Assuming, without deciding, that Exhibit D was wrongly admitted in evidence, its wrongful admission, per se, is not sufficient to vitiate the judgment of the trial court; Plaintiffs must show that it affected that judgment - Section 227(1) Evidence Act. Where it is clear, as in the case on hand, that the trial judge did not rely on the inadmissible evidence, the judgment will not be set aside. (p. 1871 A)

REPRESENTATION

T. E. Williams Esq. for the Appellant

S. S. U. Enemeru Esq. for the Respondents.

CASES REFERRED TO

Dugbo v. Kporoaro (1958) WNLR 73

Owonyin v. Omotosho (1961) 1 ALL NLR 304

Awoyegbe v. Ogbeide (1988) 1 NWLR (Part 73) 6 at 15

Balogun v. Agboola (1974) 10 S.C. 111

Ebba v. Ogodo (1984) 4 S.C. 84 at 90

Kojo II v. Bonsie (1957) 1 W.L.R. 1223 at 1226

Piaro v. Tenalo (1976) 12 S.C. 31 at 42

Omeregbe v. Edo (1971) 1 ALL NLR 282

Ogundairo v. Gbadamosi (1974) 4 WSCA 27 at 31

Ajayi v. Fisher 1 FSC 90

STATUTE REFERRED TO

Evidence Act s. 227(1)

LEAD JUDGMENT BY ONU JSC

The main complaint of the Plaintiffs/Appellants in this appeal emanating from the Court of Appeal, Benin Division (hereinafter referred to as the court below) dated 16th April, 1993 and which falls within a narrow compass, B is the admission in evidence of Exhibit "D", to wit: Suit No. S/32/74 which the Defendants/Respondents during their defence, having hitherto pleaded it, sought to tender same but was vehemently opposed by the Plaintiffs/Appellants on grounds that it was not relevant to the suit since the parties, subject-matter and issues therein were not the same. The aim of the Defendants/C Respondents in tendering it through the 3rd Respondent (a request which the learned trial Judge eventually acceded to by admitting it as Exhibit "D") was, as I shall seek to demonstrate, to discredit the traditional history of the Plaintiffs/Appellants.

At the High Court, Orerokpe in Bendel (now Delta) State the Plaintiffs/Appellants commenced the action giving rise to the appeal herein against the Defendants/Respondents (both of whom are hereinafter referred to as Appellants and Respondents respectively) with the former claiming jointly and severally in their further Amended Statement of Claim against the latter, the following reliefs:-

E *"(i) A declaration by the court that the Plaintiffs are the persons entitled to the right of possession and occupation of the land in dispute known as Okwetolor land situate in Okpe clan as delineated in the plaintiffs' Plan No. KP. 1256A filed with this Further Amended Statement of Claim.*

F *(ii) An order of forfeiture of the defendants customary tenancy on the land in dispute for persistently challenging the Plaintiffs' right of possession and occupation of the land in dispute as delineated on the Plaintiffs' Plan No. KP. 1256A in accordance with Okpe Native Law and Custom."*

Pleadings having been ordered, filed and exchanged by the parties, the case went to trial. In a well considered judgment delivered on 21st July, 1988 G Okungbowa, J., dismissed the Appellants' case on both heads of claim set out above with costs. The appeal by the Appellants to the court below was by a majority decision (per Ejiwunmi and Ogebe, JJ.CA, Akpabio, J.C.A. dissenting) also dismissed.

Briefly put, the Appellants who claimed to be descendants of Ajija, H sometimes spelt Ejija, asserted that Ajija was the son of Onakpobeyi born of Udugbeme who was the direct son of Orhue, one of the four founders of Orerokpe, the ancestral home of the Okpe people, along with the three other children of Okpe namely, Enezi, Orhoro and Evbreke. It was also Appellants' contention that Ajija founded Okwetolor and that the Respondents were their

customary tenants.

The Respondents on the other hand claimed that their respective ancestors who were once sued in such capacities, were the joint founders of Okwetolor land. During the defence, the Respondents sought to tender the judgment in Suit No. S/32/74 which was later admitted as Exhibit "D" albeit that the Appellants objected very strongly thereto because, as they put it, Exhibit "D" was not relevant to this suit as the parties, subject-matter and issues were not the same. The Counsel for the Respondents argued that Ejija in Exhibit "D" is the same as Ajija in this suit on appeal and that since Ejija died in Okolovu, he could not have come to Okwetolor, a view which the learned trial Judge upheld, and thus admitted this controversial document in his Ruling.

An interlocutory appeal against this ruling was finally withdrawn from the court below by the Appellants when counsel for the Respondents said that he had only two witnesses more to end his defence and that the interlocutory appeal would delay the trial indefinitely. Appellants took the hint and withdrew the appeal to speed up the trial as the point could be raised on appeal depending on the consideration given to the document by the learned trial judge.

The main contention of the Appellants against the judgment of the trial court to the court below, as transpired, was the wrongful admission of Exhibit "D". The appellants' appeal to the court below as hereinbefore alluded to upon its being dismissed by a split decision of two justices to one, the Appellants have further appealed to this court upon a Notice of Appeal containing six grounds.

The parties subsequently filed and exchanged briefs of argument in accordance with the rules of Court.

The Appellants submitted five issues for our determination, to wit:

"2a Whether a judgment sustained by the Appellate Court without considering the influence which a document such as Exhibit "D" has on the Trial Judge as in this case can be allowed to stand.

2b Whether the judgment of the Court of Appeal which sustains the judgment of a Lower Court by reference to extraneous evidence not given in the Court of trial as was done in this case by reference to quotation of Exhibit "D" is not enough serious misdirection in law occasioning substantial miscarriage of Justice to set aside the Majority Judgment of the Appeal Court.

2c Whether a Majority Judgement which failed to pronounce on the attitude of a Judge who introduces his own evidence into a document Exhibit "D" in order to make the document relevant does not constitute himself

into a witness for the Respondents and abdicated his right to hold a fair balance between the parties in accordance with the rules of natural justice as was done in this case.

2d Whether a Majority Judgment which failed to consider the relevants (sic) and admissibility of an important document as Exhibit "D" in this proceeding which greatly influenced the Trial Court Judgement sustained by the Majority Judgment is not serious error in law which occasioned substantial miscarriage of justice as was done in this case.

2e Whether the failure of the Appellate Court in the Majority Judgment to consider material wrong evaluation of evidence pointed out in the Appellate Court by the Appellants in this case does not occasioned (sic) substantial miscarriage of justice to set aside the Majority Judgment of the Appellate Court."

The Respondents for their part, after pointing out that in their view, the issues arising for determination in the appeal herein do not lend themselves to classification under the five heads and designation given them by the Appellants in their Brief, albeit submitted that in view of the ground of appeal and the arguments proffered in support touching only on Exhibit "D", coupled with an alleged failure by the court below to re-evaluate evidence in the case, the following four issues arise in this appeal for determination, namely:

- E (i) Was exhibit "D" inadmissible?
- (ii) If exhibit "D" was inadmissible which is not conceded, did it have any adverse effect on the judgment appealed against or any as disabled the said judgment?
- (iii) Was the Court of Appeal wrong in its decision that there was a proper evaluation of the evidence in the case by the learned trial Judge especially on the main issues in the case namely traditional history and acts of ownership and possession?
- (iv) In view of the concurrent findings of the trial court and the court below in respect of issue No. (iii) above is there basis or material in this case for the Supreme Court to upset the said concurrent judgment of the two lower courts?

When the appeal came up for hearing on 26th May, 1997, counsel on either side adopted their briefs and made oral expatiation in elaboration thereof.

In my consideration of the appeal herein, I deem it necessary to adopt the Respondents' issues which are fewer and more concise than the Appellants'. As the success or failure of issue No. (ii) depends on the success or otherwise of issue No. (i), I shall deal with both issues together which overlap grounds 2, 3, and 4 of the Appellants' grounds of appeal.

ISSUES NOS. (i) AND (ii)

In the first place, neither in this Court nor in the court below did the Appellants specifically raise the issue of the inadmissibility of Exhibit "D", not least, in any of the grounds of appeal. For instance, ground 4 of the Appellants' grounds of appeal to which our attention was adverted at the hearing by learned counsel for the Appellants at page 474 of the Record. For the avoidance of doubt, ground 4 therein without its particulars complained B as follows:-

"GROUND 4

The learned Judge of the Court of Appeal in his lead judgment erred in law in his failure to consider the relevants or the irrelevant of Exhibit "D" which was the main contention of the appellants in the Court of Appeal, C since the Respondents regard the document as the connerstone of their defence."

However, as rightly conceded by learned counsel when questioned, that the admissibility or non-admissibility of Exhibit "D" was never the focus of the trial court's judgment, he nevertheless added that from the trial Judge's ruling D wherein he admitted that document (Exhibit "D") in evidence, it could be seen that he had it (Exhibit "D") in mind.

This latter submission by the Appellants' counsel overlooks what the majority judgment is all about on the point. Said the court below among other things:-

"..... It ought to be pointed out that during the trial of this action E Exhibit D was admitted through one of the witnesses for the respondents, and in admitting the exhibit, the learned trial Judge delivered a considered ruling after hearing learned Counsel for the parties Exhibit D on behalf of Ejija family of Okolovu. The judgment was admitted because it was contended for the respondents that the Ejija family mentioned in that case is the F same as the Ejija in the instant appeal. Following that ruling, the appellants filed an appeal to this court which they later withdrew, and the trial of the case leading to the instant appeal was continued. It is however now argued for the appellants that the learned trial Judge on account of Exhibit D was unable to evaluate the appellants' evidence properly and impartially. G But contrary to that argument it is contended for the respondents that the learned trial Judge did not any where in his judgment advert or refer to Exhibit D during his evaluation of the evidence led by the parties before concluding that the appellants have not made out a case to support their claims". (The underlining is mine for emphasis). H

What is more, since ground 4 had not been amended to take account of the admissibility or otherwise of Exhibit "D", any argument proffered thereon goes to no issue and ought to be discountenanced. Thus, I am of the firm view that the arguments touching on Exhibit "D" and its alleged adverse effect on

the mind of the learned trial Judge are based on false premise and assumption that Exhibit "D" was inadmissible. It is pertinent to remark that Exhibit "D" is copied at pages 175 to 215 of the Record while the interlocutory ruling on its admissibility is at pages 172 to 174 of the Record. Accordingly, all arguments on Exhibit 'D' based on its admissibility should and ought to be discounted on that score since it (Exhibit "D") and all facts on which they are based were pleaded in paragraph 11 of the Respondents' Further Amended joint Statement of Defence wherein they averred that

"II. They defendants deny vehemently paragraph II of the Plaintiffs statement of claim. Defendants aver that Udugbeme was not the father of Ejija and will contend at the hearing of this suit that Ejija never existed in Okwetolor nor was Ejija known or heard of in Orerokpe. Plaintiffs will be put to the strictest proof thereof. Defendants aver that if Ejija existed at all he did not "go beyond Okolovu where he founded, lived and died."

thus traversing and joining issues with the appellants in paragraph 11 of the D Further Amended Statement of Claim wherein they averred

"II. The land was originally founded by Ajija the son of Udugbeme who was a descendant of Orhue one of the four founding Fathers of Orerokpe. At the time Ajija founded Okwetolor, Udugbeme and Onakpobeyi were very old and when Ajija founded the land, he kept Udugbeme and his father E Onakpobeyi on the land where they lived and died. As farmers, the Plaintiffs have various food and economic crops scattered all over the land and also fish ponds, farm camps such as Onoshimidede's camp also called Ajokorata camp and other occupied by the plaintiffs' Amended Plan No. KP 1256A. Ajokorata camp abandoned as a camp, still has the economic crops of F Onoshimidede who occupied the camp as the tenants of the plaintiffs ancestor, Ajija many many years ago."

As pointed out hereinbefore, Exhibit "D" was tendered by the Respondents through the 3rd Respondent in support of the contention by them that Ejija or Ajija the Appellants' alleged ancestor and founding father was a native of a G village or settlement called Okolovu, not Okwetolor, the village and land in dispute. As can be seen, therefore, Exhibit "D" was tendered to support the oral testimony given by the Respondents to discredit the Appellants' traditional evidence that Ejija or Ajija sojourned at Okwetolor and was the founder thereof. Clearly, it was not tendered as res judicata or estoppel and it was not H so pleaded. On the issue or the purpose for which it was therefore tendered and received in evidence, Exhibit "D" was, in my view, relevant and material. See the case of Dugbo & ors. v. Kporoaro & ors. (1958) WNLR 73 wherein it was held at page 75 that where a party relying on a judgment does not rely on it as an estoppel, it is not necessary to plead the said judgment. Such a

judgment as Exhibit "D" in the instant case, can be relied upon purely as a matter of evidence to disprove an issue of title. From the foregoing, there is no other sense in which Exhibit "D" can be said to be inadmissible or such that if the learned trial Judge gave it weight in his judgment, which in the case in hand he did not, will disable the judgment. See section 226(1) (now section 227(1) Evidence Act Cap. 112 Laws of the Federation 1990 which B provides:

"227(1) The wrongful admission of evidence shall not of itself be a ground for the reversal of any decision in any case where it shall appear to the court on appeal that the evidence so admitted cannot reasonably be held to have affected the decision and that such decision would have been C the same if such evidence had not been admitted."

See Ajayi v. Fisher (1956) 1 F.S.C. 90 at 92 in which the Federal Supreme Court (per de Lestang, F.J.) held inter alia that

"It remains to consider whether notwithstanding the wrongful admission of evidence the learned Judge was justified in entering judgment for the respondent. Section 225 of the Evidence Ordinance (Cap. 63 Laws of Nigeria, 1948) Provides that the wrongful admission of evidence shall not of itself be a ground for the reversal of any decision in any case where it shall appear to the Court of Appeal that the evidence so admitted cannot reasonably be held to have affected the decision and that such a decision would E have been the same if such evidence had not been admitted. Conversely the wrongful admission of evidence may be a ground for the reversal of a decision when it appears to the Court of Appeal that the evidence has affected the decision and that such decision would have been different if the evidence had not been admitted."

In the instant case, since Exhibit "D" was properly admitted as an admissible evidence and the persons to complain are not the Appellants but the Respondents who tendered it as a relevant piece of evidence through the 3rd Respondent, the Appellants' impeachment of it will ill-avail them. Contrast Owonyin v. Omotosho (1861) 1 ALL NLR 304; Awoyegbe v. Ogbeide (1988) 1 NWLR G (Part 73) 6 at 15 and N.I.P.C. Ltd v. Thompson Organization Ltd. (1969) NMLR 99 for the principle that where inadmissible evidence is admitted it must be expunged, it being immaterial whether such evidence was objected to or not. See Saraki v. Kotoye (1992) 9 NWLR (Part 254) 156 at 202.

Issue No. (i) is accordingly answered in the negative and with it, the H answer to issue No. (ii), becomes Otoise.

ISSUENO. (iii)

Issue No. (iii) which overlaps grounds 1 and 5 of the grounds of appeal enquires whether the court below was wrong in failing to disturb the

judgment or findings of the learned trial Judge on the basis that he did not fail to evaluate the evidence led before him and properly did so.

Now, in appeals on findings of fact such as the one under consideration, a Court of Appeal would, and indeed should be loath to interfere with the facts found by the trial Judge unless there is an obvious error in the appraisal of the evidence and the ascription of probative values thereto. Thus, the Court below in upholding the trial court's findings of fact held among other things as follows:-

"The second principle is whether the learned trial Judge in the consideration of the evidence and its evaluation had raised the wrong inference from accepted and proved facts. It is for the appellants to establish that the lower Court has erred in the manner outlined above for the appellate Court to intervene. Where the appellant has not succeeded in bringing to the attention of the appellate court matters which would compel such intervention, then the appellate Court would refuse to intervene with the findings and conclusions of the Lower Court. See Kodilinye v. Odu (1935) 2 WACA page 336; Okoye v. Ejiefo (1934) 2 WACA page 130; Kuma v. Kuma (1936) 5 WACA page 4; Akinloye v. Eyiola (1968) NMLR 92 at 99; Onowan v. Iserhien (1976) 9-19 S.C. 95; Akinola v. Oluwo & ors. (1962) ALL NLR 264.

From my reading of record of proceedings and the judgment of the lower court, (sic) my conclusion is that the appellants failed to discharge their claim. Secondly, I do not see anything in the judgment to justify the intervention in the findings and conclusion reached by the lower court. "

See also Federal Commissioner for Works and Housing v. Lababedi & ors. (1977) 11-12 S.C. 15 at 24 and Akinola v. Oluwo (1962) 1 All NLR (Part 2) 224 at 227.

It is settled law that a trial court must endeavour to make a proper appraisal of evidence, oral and documentary adduced or produced before it. See S.B. Fashanu v. M.A. Adekoya (1974) 1 ALL NLR (part 1) 35 at 91; Balogun v. Agboola (1974) 10 S.C. 111 and Ebba v. Ogodo (1984) 4 S.C. 84 at 90.

Thus, the above stated approach of the court below is, in my opinion, correct for the following reasons.

(a) The Appellants based their claim for the declaration sought on evidence of traditional history and acts of ownership and possession of the land in dispute. The learned trial Judge found against them in respect of both.

(b) Further, in respect of traditional history, not only because the evidence of it led by the Appellants through 2nd Appellant was confused, contradictory and conflicting, but also because he did not believe the Appellants for good reason on the recent acts of ownership and possession led by

them to support the tradition in line with the decision of Ekpo v. Ita (1932) 11 NLR 68 and Titiloye v. Olupo (1991) 7 NWLR (Part 205) 519.

On acts of ownership and possession generally, the learned trial Judge preferred and accepted the testimony of the Respondents for good reasons. To exemplify the fact that the court below fully considered the judgment of the trial court, it adverted to the observations of the trial court based on the following extract which states:

"Since the complaints of the appellants in respect of these issues have to do with the evaluation of the evidence led at the trial, reference has to be made to the judgment of the Lower Court to see whether their complaints could be upheld

After making further observations on the trial court's findings in respect of the 2nd Appellant's testimony it quoted from the trial Judge's judgment thus:

"In their pleadings at paragraph 11 of their Further Amended Statement of Claim the plaintiffs stated that Ojokorate camp abandoned as a camp still has the economic crops of Onotseidede who occupied the camp as a tenant of the plaintiffs ancestors wherein his evidence under cross-examination he stated "it is not true that the founder of Onotseidede (Ojokorate) was the relation of Ajija. I see Exhibit A, and Onotseidede camp. I now say that the founder of Onotseidede was Ajija."

Commenting further on the point, the court below held:

"It would be recalled that Exhibit A is the survey plan tendered by the appellants in support of their case and this witness is 'P.W.², who had earlier given evidence that he engaged the services of their surveyor P.W.¹, a Mr. T.K. Kpeji and took the surveyor round the disputed land before the surveyor round the disputed land before the surveyor drew the survey plan. It is therefore expected that if the witness was a witness of truth he would not have given such contradictory evidence on a matter which he is expected to have known about prior to the trial"

From the foregoing, it could now with due respect, be right as stated in the minority and dissenting judgment of Akpabio, J.C.A. that the learned trial Judge approached the resolution of the above stated issues on a wrong footing. On the contrary, it appears to me clear that the learned trial Judge demonstrated in his judgment that he was alive to the applicable principles of law, to wit: the traditional history which was relied on and applied. Nor could it be said as Akpabio, J.C.A. put it, that the learned trial Judge ran foul of the principle of law laid down by Lord Denning M.R. in Kojo II v. Bonsie (1957) 1 W.L.R. 1223 at 1226. Or in the subsequent cases decided by this court and followed by the courts below such as Piaro v. Tenalo (1976) 12 S.C. 31 at 42; Adenle v. Oyegbade (1967) 1 NLR 136 at 139; Iriri v. Erhurhobara (1991) 2

NWLR (Part 173) 252 and Ogbuokwelu v. Umeanafunkwa (1994) 4 NWLR (Part 341) 676 to the effect that credibility or the truth of traditional evidence should not be based on the demeanour of witnesses.

Where, from the pleadings of the parties and the evidence led at the trial there are two conflicting histories relating to the land in dispute (compare for instance, paragraph II of the Appellants' Further Amended Statement of Claim and paragraph II of Respondents' Further Amended Joint Statement of Defence vis a vis the evidence of P.W.²", Samson Edigbe Erhabor, as opposed to the evidence of D.W. 3, Warri Onovbioba, respectively) and it is difficult to determine which is more probable, resort to the demeanour of the parties and their witnesses is not the best guide; the duty of court is to test the two stories by reference to acts in recent times. See Kojo II v. Bonsie & Anor. (supra), Agedegudu v. Ajenifuja (1963) 1 ALL NLR 109 at 115/116; Ekpo v. Ita NLR 68 and Owoade v. Omitola (1988) 2 NWLR (Part 77) 413. In the instant case, as the appellants' traditional evidence adduced by them was inconclusive, the case then must rest on question of fact. See Omogbe v. Edo (1971) 1 ALL NLR 282; Ogundairo v. Gbadamosi (1974) 4 WSCA 27 at 31; P.M Alade v. Lawrence Awo (1975) 4 SC. 215 at 228.

Thus, as their pleading leaves their traditional history hanging in the air, the self contradictory evidence adduced in support thereof goes to no issue. See Mogaji v. Cadbury (1985) 2 NWLR (Part 7) 393; Onyido v. Ajemba (1991) 4 NWLR (Part 184) 203 at 223; Piario v. Tenalo (supra) and Kalio v. Woluchem (1985) 1 NWLR (Part 4) 610.

As the trial Court therefore on the evidence adduced, following strictly the pleadings, found in Respondents' favour and the Court below justifiably confirmed the same, the decisions of the two courts below constituted concurrent findings of facts, which not having been shown to be perverse, erroneous or led to a miscarriage of justice from my perusal of the entire record, the same is accordingly affirmed by me.

It was further contended on behalf of the appellants firstly that the learned trial Judge after admitting Exhibit. "D" made himself part of the Respondents' case by firstly condemning every witness the Respondents called and accepted everything said by the Respondents; but that he even refused to credit the Appellants' case with evidence given by the Respondents which supported the appellants' case.

Secondly, that the learned trial Judge not happy about the evidence let in by 2nd D.W. to the effect that "I do not live in Okwetolor but I was told that Ajija founded the place", drew the learned trial Judge's anger when in his judgment he queried *inter alia*:

"Who told the 2nd defence witness that Okwetolor was founded by

Ajija? What was the source of his information and in what situation was it said? He may have heard it at a drinking bar or from someone belonging to Ajija family who has an interest to serve. It could have been, too that his source of information came from the Defendants".

Thirdly, that the trial Judge's mind was so heavily prejudiced by his admission of Exhibit "D" into which he introduced his own evidence suo motu, and that he did not want to hear anything about or in favour of Appellants e.t.c.

Fourthly, that the expression "I believe" became a magic wand for the trial court which believed everything the Respondents said and about which the Appellants' complaint was ignored by the court below in its majority judgment, while the minority judgment alone treated the complaint with the seriousness it deserved. The cases of Ahmed Ayub-Khan v. The State (1991) 2 NWLR (Part 172) 127; Fallon v. Calvert (1960) 1 ARE 281 and S.B. Bakare v. African Continental Bank Ltd. (1986) 5 S.C. 48 at 65 were called in aid and the first case above in which Karibi-Whyte J.S.C. had held inter alia that

"The Judge is not a party to the proceedings before him. He is bound to do nothing to promote the case of either party. He is only bound to do everything to achieve justice in the dispute between the parties before him and on the evidence provided."

With profound respect, it was no objection to the learned trial Judge's decision on this issue that the evidence of acts of ownership and possession which the minority judgment made capital out of, the learned trial Judge had in fact made use or excessive use of the words "I believe" when a reciprocal suggestion was not made as to how he could otherwise have approached the matter or further-still as decided in Aroyewun & ors. v. Awoloesi Osolaru (1985) 6 S.C. 105, that he made up his mind right from inception not to believe the Appellants. **Where such was not the case, (in other words, nothing to suggest bias or the semblance of it) and the credibility or non-credibility stemmed from the evaluation of the evidence as was found in the majority judgment of the Court below, such findings should be upheld as was done in this case. It is trite law that a Court of Appeal should not lightly reverse or disturb the views or conclusions of the trial Judge based on credibility of witness.** See Akinola v. Oluwo (supra); Egri v. Uperi (1974) 1 NMLR 22 at 26 and Chief Frank Ebba v. Chief Warri Ogo (supra).

The Appellants in the minority judgment of the court below raised matters not specifically raised by the grounds of appeal hence the issue herein is answered in the affirmative.

Having resolved issues (i), (ii) and (iii) against the Appellants, it becomes inevitable to resolve issue No. 4 against them. The end result is that all in all, the decisions by the two Courts below clearly constitute concurrent

findings of facts with which this court will decline to intervene to set them aside moreso, in the absence of any obvious error of law or irregularity in procedure occasioning a miscarriage of justice, to warrant such interference. See Enang v. Adu (1981) 11 S.C 25 at 42; Ibodo v. Enarofia (1980) 5 - 7 S.C. 42 at 55; Chinwendu v. Mbamali (1980) 3-4 S.C. 31; Elike v. Nwankwoala (1984) 12 B S.C. 301 at 325 and Sanyaolu v. The State (1976) 6 S.C. 37.

Thus, it would be gratuitous in such a situation, in my view, to order a retrial as did the minority and dissenting judgment.

In the result, this appeal fails and it is accordingly dismissed with N1,000.00 costs to the Respondents.

C

WALI JSC

I have the advantage of reading in advance, a copy of the lead judgment of my learned brother Onu JSC, I agree with the reasons he gave for D dismissing the appeal.

Having read the record of proceedings and the briefs filed in this appeal, I also agree that the appeal lacks merit. I also hereby dismiss it with N1,000.00 costs to the respondents.

E

OGUNDARE JSC

I have been privileged to read in draft the judgment of my learned brother Onu JSC just delivered. I agree with him that this appeal is totally lacking in substance and I too dismiss it.

F The issues placed before us are two-fold, to wit

1. Exhibit D and the use made of it; and
2. Evaluation of the evidence as a whole.

On (1) above, it is true exhibit D was admitted in evidence notwithstanding the objection to its admissibility by the Plaintiffs. Appellants are G however not challenging, in this appeal, its admissibility. Speaking for myself, I cannot fathom their complaints on this document. The document, though admitted in evidence, was never made use of by the learned trial Judge in coming to his decision. By introducing Exhibit D in evidence the defendants sought to show that Plaintiffs' traditional history could not be true. But they H were saved from discharging this task by the contradictory and unsatisfactory evidence led by the Plaintiffs in support of the traditional history pleaded by them. The learned trial Judge had no hesitation in rejecting, quite rightly in my view, the Plaintiffs' traditional history on which they built their claim to title to the land in dispute.

Assuming, without deciding, that Exhibit D was wrongly admitted in evidence, its wrongful admission, per se, is not sufficient to vitiate the judgment of the trial court; Plaintiffs must show that it affected that judgment - Section 227(1) Evidence Act; Ajayi v. Fisher, 1 FSC 90; Akadile v. The State (1971) 1 ALL NLR 18; (1971) ANLR 19; Ugbala v. Okorie (1975) SC1, 13-15; Idundun v. Okumagba (1976) 9-10 SC 227, 245. Where it is clear, as in the case B on hand, that the trial judge did not rely on the inadmissible evidence, the judgment will not be set aside - Timitimi v. Amababe, 14 WACA 374.

On (2), there are in this case concurrent findings of fact of the two Courts below against the Plaintiffs. These findings have not been shown in the arguments in Plaintiffs' brief nor in oral arguments of their counsel to be C perverse; I have no reason, therefore, to disturb them. Plaintiffs, having failed to establish their traditional history which is their root of title, by credible evidence, their claims were rightly dismissed.

As this appeal fails, it is dismissed by me. I affirm the judgment of the Court below with N1,000.00 costs to the Defendants. D

OGWUEGBU JSC

I had the advantage of reading in draft the judgment delivered by my learned brother Onu, J.S.C. I agree that the appeal be dismissed. E

The main complaints of the appellants in this court are based on the admissibility of Exhibit "D" in evidence by the learned trial judge and if inadmissible, whether it had any adverse effect on the judgment appealed against. The facts on which Exhibit "D" were based were pleaded by the defendants in paragraph 11 of the further amended statement of defence in reply to para- F graph II of the further amended statement of claim of the plaintiffs.

Exhibit "D" was not tendered by the defendants as res judicata or estoppel but to discredit the plaintiffs' traditional evidence that Ejija or Ajija the son of Udugbeme who was a descendant of Orhue one of the four founding fathers of Orerokpe founded Okwetolor. The defendants in paragraph 11 G of their further amended statement of defence denied that Udugbeme was the father of Ejija and that Ejija never existed in Orerokpe.

On the traditional evidence adduced by both parties, the learned trial judge found as follows:

"On the totality of the evidence before me both oral and documentary on Traditional evidence I prefer the evidence of the defendants to that of the plaintiffs. I believe and accept the evidence of the defendants that their ancestors Odionvbere Imafidon who were grand children of Orhue one of the founding fathers of Orerokpe left Mereje to found the land in dispute now

known and called Okwetolor. Their traditional evidence is flawless and very impressive."

Before coming to the above conclusion, the learned trial judge examined in great detail the evidence given by each witness called by both parties. In affirming the findings of the learned trial judge on the traditional evidence B and Exhibit "D", the Court of Appeal stated as follows:

"It is argued for the appellants that the learned trial judge was unable to appreciate the evidence of traditional history led by the appellants because the learned trial judge was prejudiced by Exhibit D. I ought to point out that during the trial of this action Exhibit D was admitted through C one of the witnesses for the respondents, and in admitting the exhibit, the learned trial judge delivered a considered ruling after hearing learned counsel for the parties. The judgment was admitted because it was contended that the Ejija family mentioned in that case is the same as the Ejija in the instant appeal. It is however now argued for the appel- D lants that the learned trial judge on account of Exhibit D was unable to evaluate the appellants' evidence properly and impartially. I have hitherto considered the evidence led at the trial and its evaluation by the learned trial judge. It is my view that there is merit in the contention of the respondents that no where in the judgment of the lower court did the learned E trial judge place reliance upon, Exhibit D in determining the merits of the case presented by the two sides to this appeal. I accept that contention of the respondents as it is clear from a careful reading of the judgment of the lower court that there is no finding or evidence that the learned trial judge based his decision on Exhibit D, and I so hold."

F I am satisfied that the learned trial judge was not influenced by Exhibit "D" in coming to his decision in this case. Exhibit "D" was not even alluded to in his exhaustive and painstaking evaluation of the evidence.

Assuming that Exhibit "D" was wrongly admitted in evidence, which was not the case, section 227(1) of the Evidence Act Cap. 112 Laws of the G Federation of Nigeria provides that:

"227(1) The wrongful admission of evidence shall not of itself be a ground for the reversal of any decision in any case where it shall appear to the court on appeal that the evidence so admitted cannot reasonably be held to have affected the decision and that such decision would have been H the same if such evidence had not been admitted."

See Ajayi v. Fisher (1956) 1 F.S.C. 90 at 92, Ugbala v. Okorie & Ors. (1975) 9 N.S.C.C. 429 and Anthony Akadile v. The State (1971) ALL N.L.R. 19 at 21. In each of these cases, this Court held that the admission of incompetent evidence, not essential to the result, is not a ground for allowing the appeal, and

that the dominant question is the broad one of whether, notwithstanding the wrong admission of the evidence, substantial justice had been done.

On the findings of facts by the learned trial judge, the Court of Appeal observed that the appellants did not succeed in bringing to its attention matters which would compel it to disturb the findings and conclusions of the learned trial judge. It refused to intervene. It has been established by several authorities that a court of appeal must approach the findings of fact of a trial court with extreme caution and the principles under which it can interfere have been well settled. The Court of Appeal was justified in not interfering with the findings of fact made by the learned trial judge. See Akinloye v. Eyiola & Ors. (1968) N.M.L.R. 92 at 95, Steamship Houtestroom (owners) v. Steamship Cagaporack (owners) (1927) A.C. 37, Fatoyinbo & Ors. v. Williams (1956) 1 F.S.C. 87, Lawal v. Dawodu & Ors. (1972) ALL N.L.R. 707 at 722 and Watt (or Thomas) v. Thomas (1947) 1 ALL E.R. 582. This Court will not disturb the concurrent findings of fact of the High Court and the Court of Appeal unless there is some miscarriage of justice or some violation of some principle of law or procedure. There was enough evidence to support the findings of fact that were made and I will refuse to intervene.

The appeal therefore fails and I hereby dismiss it with N1,000.00 costs to the respondents.

E

MOHAMMED JSC

I agree with the opinion of my learned brother, Onu, JSC, in the judgment just read, that the concurrent findings of fact made by the two lower courts should not be disturbed. I will also dismiss this appeal for the reasons given in the lead judgment of my learned brother. I have nothing more to add.

The appeal is dismissed. I also award N1000.00 in favour of the respondents.

G

H