

**SUPREME COURT OF NIGERIA**  
 18TH JULY, 1997. SC.74/1990  
**CORAM:- A. B. WALL, I. L. KUTIGI, U. MOHAMMED,**  
**S. U. ONU, A. I. IGUH, JJSC**

DANIEL E. IDEHEN ..... APPELLANT  
 (On behalf of himself and the  
 Children of late Okhomina Idehen)

AND

DAVID EHIGIE OSEMWENKHA ..... RESPONDENT

**EVIDENCE** - Evaluation - Identity of land in dispute - Evaluation of evidence thereto - Must be thorough.

**LAND LAW** - Declaration of title - Onus of proof - Plaintiff is to establish the title he is claiming - He cannot rely on the weakness of defendant's case.

**LAND LAW** - Survey plan - Identity of land in dispute - Plaintiff may rely on survey plan made by PW2 - To prove the identity.

**LAND LAW** - Identity of the land - Mere admission by defendant that he knows the land - Cannot cure plaintiff's failure to prove the identity.

### **FACTS**

Before the Benin High Court, the plaintiff appellant brought a representative action claiming a declaration of title to land damages and injunction against the defendant/respondent. The appellant claimed that the land in dispute was allocated to his father in 1972, measured 70 ft x 150 ft, and situate at Oregbanim Opposite Airewele Grammar School, Benin City. The respondent contested the identity of the land. The trial judge found for the appellant.

Dissatisfied with the judgment of the trial court, the respondent appealed to the Court of Appeal, and his appeal was allowed. The appellant has now appealed to the Supreme Court raising four issues.

### **ISSUES FOR DETERMINATION**

"(1) Whether or not a survey plan is an absolute requirement in every land matter with particular reference to Bini Customary Mode of land ownership.

(2) If a survey plan is not an absolute necessity in every land case, then whether or not the Court of Appeal wrongly reversed the judgment of

*the learned trial Judge in the circumstances;*

(3) *Having regard to the evidence before the trial Court that both parties and their witnesses knew the land in dispute, whether the Court of Appeal was wrong in reversing the said judgment on ground that the description of the land was scanty.*

(4) *Whether or not the Court of Appeal should have made an order of retrial or non-suit in the face of the plaintiff/Appellant's proof of title (Exhibit "I") as against the Defendant/Respondent who had nothing in form of title to the land in dispute."*

**HELD** ( Dismissing the appeal per lead judgment of **WALI JSC**, Kutigi JSC dissenting)

**Identity of the land - Mere admission by defendant**

1. With all the lapses in the plaintiff's case, can any tribunal come to a reasonable conclusion that there was definitive description of the plot of land, its location and certainty? The answer must obviously be in the negative having regard to the evidence adduced by the plaintiff. The fact that the defendant said in his evidence that he knew the land in dispute does not in my view amount to an admission that it is the same land referred to in Exhibit 1, the exact location and certainty of which remains vague. (p. 1594 C)

**Declaration of title**

2. In a case involving declaration of title to land the onus is on the plaintiff to establish the title he is claiming. He cannot rely on the weakness of the defendant's case see Kodilinye v. Mbanefo 2 WACA 336. (p. 1594 E)

**Evidence - Evaluation**

3. If the learned trial judge had properly considered and evaluated the evidence adduced, he would not have come to the conclusion that the identity of the land in dispute is clear and unambiguous and that it had been proved with definitive certainty to dispense with a survey plain. (p. 1594 F)

**Survey plan**

4. The plaintiff could have only related the beacons in Exhibit I to a survey plan if one was produced and tendered, since there is no evidence that the physical location and identity of the said land was known to him. The survey plan made by P.W. 2 and relating to the land in dispute could have been used by the plaintiff to prove the location and identity of the land. (p. 1594 G)

**NOTABLE POINTS OF INTEREST**

**KUTIGI, JSC** (Dissenting)

*1. When survey plan may become unnecessary*

And talking about the plaintiff's failure to tender any plan of the land in dispute, the law is clearly that although in a declaration of title the plaintiff must prove amongst others, the identity of the land, the production of a plan is not a necessity in every case. Where there is no difficulty in identifying the land as in this case, a declaration of title may be made without it being based on a plan. (p. 1598 F)

**ONU, JSC**

*2. Statement of claim must fill lacuna in the writ to supersede*

Besides, although it is trite that a statement of claim supersedes the writ where, as here, there is nothing to show that the plaintiff's statement of claim filled the lacuna left by the writ in the description of the location of the land in dispute and the evidence led by the plaintiff which failed also to do just that, then the scantiness and unascertainability of the location of the land in dispute persist to disable the plaintiff from getting declaration for which he craved. (p. 1601 D)

**REPRESENTATION**

Appellant absent. Not represented

Chief Ihensekhien SAN with Chief E. L. Akpofure

Prince M. O. Ignodehe and H. I. A. Ihensekhien for the Respondent

**CASES REFERRED TO**

Nwabuoku v. Ottih (1961) ALL NLR (Pt. 3) 487 at 488

Dada v. Ogunremi (1967) NWLR 181

Baruwa v. Ogunsola 14 WACA 259

Fabunmi v. Agbe (1985) 3 SC 28

Kodilinye v. Mbanefo 2 WACA 336

Etiko v. Aroyewun (1959) 4 FSC 129

Akinhami v. Daniel (1977) 6 SC. 125

Imah v. Okogbe (1994) 1 KLR 151 ; (1993) 9 NWLR (Part 316) 159

Nta v. Anigbo (1972) 5 SC. 156

**STATUTE AND RULES REFERRED TO**

Supreme Court Act s. 22

Supreme Court Rules 1985 (as Amended) O. 6 r. 8(6)

### LEAD JUDGMENT BY WALLJSC

In his writ of summons filed in Benin High Court of the defunct Bendel State, the plaintiff claimed as follows:-

*"1. A Declaration that, being vested with the customary and traditional title to a piece of land in Benin City within the jurisdiction of this Court, he is entitled to a certificate of Occupancy in accordance with the Land Use Decree 1978.*

*2. A sum of N100.00 being damages in that about the year 1975 the defendant broke and entered into the said land which measures 70 feet by 150 feet and covered by plot approved paper dated 20th December, 1972.*

*3. An injunction restraining both the defendant, his servants, agents and assigns from further trespass. The value of the said land being N100.00."*

The claims were denied by the defendant, and pleadings were ordered, filed and exchanged. The case proceeded to trial. The plaintiff gave evidence and called two witnesses who testified in support of his case. The defendant also gave evidence and called two witnesses in support of his case. At the end of the hearing, the learned trial judge delivered a reserved judgment in which he found in favour of the plaintiff as follows:-

*"(1) A Declaration that the plaintiff is entitled to a certificate of Occupancy over a piece of land in the New Layout in Ward 40A Oregbeni measuring 70' x 150' and bounded by beacon numbers 38, 24 and 37 on the Benin/Agbor Road Opposite Airewele High School;*

*(2) A sum of N100.00 as damages for trespass in that the defendant in about 1975 broke and entered the said land measuring 70' x 150' and covered by plot approval paper dated 20th December, 1972; (3) An injunction restraining both the defendant, his servants, agents and assigns from further trespass."*

Dissatisfied with the judgment of the trial court, the defendant appealed to the Court of Appeal, Benin Division, at the end of which the appeal was allowed with the following conclusion:-

*"In conclusion, I must hold that, on the record, the plaintiff had not discharged the onus on him to prove, with certainty, the land he was laying claim to. This appeal, therefore, succeeds and it is hereby allowed. The judgment of the court below including the order for costs given in this matter on 30/3/82 is set aside. Plaintiff's claims are dismissed in toto."*

Aggrieved by the Court of Appeal decision, the plaintiff has appealed to this court.

The facts of the plaintiff's case as contained in his statement of Claim can be stated thus:-

The land in dispute was allocated to the plaintiff's father by ward

40A Allotment Committee in 1972. It is a plot of land measured seventy feet by one hundred and fifty feet [70ft x 150ft] situate at Oregbemi opposite Airewele Grammar School, Benin City, demarcated by beacons Nos. 38-24-37. On the allocation of the plot his father was issued with allocation paper Exhibit 1, signed by Oba of Benin in line with Benin native law and custom. On the death of the plaintiff's father intestate all his estates, movable and real, were vested in his children. When his late father acquired the plot of land he paid compensation to one Madam Dorah for the rubber trees on it for which she issued him with a receipt Exhibit 2.

Some time in May, 1972, the defendant without a claim of right trespassed onto the land and started a building thereon, utilizing the building materials that were stored on the land by their late father. The defendant has persisted in his trespass and has refused to give up. The plaintiff being the eldest son of deceased father, filed this case for and on behalf of himself and the other children of the deceased to recover the land.

I shall refer to the appellant and respondent in this judgment as plaintiff and respondent.

The plaintiff and the defendant in compliance with order 6 rule 5(i)(a) and (2) of the Supreme Court Rules, 1985 (as amended) filed and exchange briefs of argument.

In the brief filed by the plaintiff the following four issues have been formulated for determination by this court:

- (1) *Whether or not a survey plan is an absolute requirement in every land matter with particular reference to Bini Customary Mode of land ownership.*
- (2) *If a survey plan is not an absolute necessity in every land case, then whether or not the Court of Appeal wrongly reversed the judgment of the learned trial Judge in the circumstances;*
- (3) *Having regard to the evidence before the trial Court that both parties and their witnesses knew the land in dispute, whether the Court of Appeal was wrong in reversing the said judgment on ground that the description of the land was scanty.*
- (4) *Whether or not the Court of Appeal should have made an order of retrial or non-suit in the face of the plaintiff/Appellant's proof of title (Exhibit "I") as against the Defendant/Respondent who had nothing in form of title to the land in dispute."*

The defendant formulated only one issue in his brief. It reads:-  
*"Whether or not the land claimed by the plaintiff/Appellant and in respect of which judgment was entered in his favour was certain having regard to the pleadings and the evidence."*

On the date the appeal came up for hearing neither the appellant nor his counsel was present in Court. Since appellant's brief had been filed his appeal was treated as having been argued vide Order 6 rule 8(6) of the Supreme Court Rules, 1985 (as Amended).

The solitary issue framed by the defendant is covered by issue 3 of the plaintiff's brief. Both issues 1 and 2 can conveniently be taken together B with issue 3 since all of them are related to facts.

It was the submission of learned counsel for the plaintiff that by producing Exhibit 1 and the further evidence adduced in support of his pleading, the plot of land, the subject matter of this litigation had been sufficiently proved with certainty as to its identity, location and size. It is further submitted that the land in dispute was well known to the parties and in the circumstance, a survey plan as regards the identity of the land was unnecessary. Learned Counsel referred to the following pieces of evidence-

- (a) Exhibit I which is the application for and the grant of lease of the plot by ward 40A to the O. Idehen (now deceased) and father of the plaintiff. D
- (b) The size of the plot which is 70ft by 150ft.
- (c) Its demarcation by beacons Nos. 34, 24 and 37.
- (d) Its location - Oregbemi opposite Airewele Grammar School.
- (e) It was shown to the allottee - the plaintiff's father by P.W. 1.
- (f) That Exhibit 'I' was signed by Oba of Benin. E

and submitted that the identity of the land was sufficiently proved since the evidence referred to was not controverted by the defendant Nwabuoku v. Ottih (1961) All NLR (pt. 3) 487 at 488; Olujinle v. Adeagbo (1988) 2 NWLR (pt. 75) 238 and Umar v. Bayero University, Kano (1988) 4 NWLR (pt. 86) 85.

Learned counsel made the alternative submission that in case this F court agrees with Court of Appeal that the parcel of land has not been sufficiently described he urges that, in the circumstances of the case, the provision of s. 22 of the Supreme Court Act, 1960 be invoked and order a retrial. In support of this submission he cited and relied on Dada v. Ogunremi [1976] NWLR 181 and Arabe v. Asanlu [1980] 5 - 7 SC 78. G

In reply to the submissions of the plaintiff learned counsel for the defendant contended that a survey plan is not an absolute necessity in every land matter, but such a survey plan is necessary where the identity of the land is made an issue. He submitted that in the case in hand the identity of the parcel of land in dispute was made an issue and the plaintiff had failed to H prove it. He referred to the evidence adduced by the plaintiff and submitted that the beacons mentioned were not related to the land claimed by him. He contended that only where the identity of the land was proved with certainty can a declaration related to it be made. He cited and relied on Baruwa v.

Ogunsola and ors. 14 WACA 259; Fabunmi v. Agbe [1985] 3 SC 28 and hosts of others decided cases.

Now having stated in a nutshell the argument advanced learned counsel in their respective brief, I shall proceed to consider the evidence adduced by the plaintiff in proof of his case as regards the identity of the land B in dispute.

In paragraphs 3, 4 and 8 of the Statement of Claim, the plaintiff pleaded as follows:

*"3. That among such real properties left behind is a piece of building plot re commended for him by ward 40A Oregbeni plot Allotment Committee and approved by the Oba of Benin Akenzua II.*

4. That this property was acquired on the 24th of October, 1972 and approved by the Oba of Benin Akenzua II on the 20th of December, 1972.

xx

D 8. That the said building plot is situate at Oregbemi opposite Airewele Grammar School, Benin City and measures, as per ward approved paper, seventy feet by one hundred and fifty feet with bounding ward beacons Nos. 38 - 24 - 37 within the jurisdiction of this Court."

The averment in paragraphs 3, 4 and 8 of the Statement of Claim were traversed in paragraphs 4, 10 and 11 of the Statement of Defence in which it was averred thus:

"4. The Defendant denies paragraphs 3, 4, 5 and 6 of the Statement of Claim and avers that if the plaintiff had any approval from the Oba of Benin, that approval has no nexus with the land where the Defendant has his F building which he completed in 1979 December. The building operation started in 1977 after Defendant had surveyed the piece of land in property Survey plan No. B/GA 2036/77."

xx

*"10. The Defendant shall contend at the trial that under the Bini Customary laws, plot Allotment Committee can only allot vacant lands and not piece of land long owned and possessed by individuals under the Bini Customary laws.*

11. *The Defendant denies paragraph 8 of the Statement of Claim and avers that the beacon numbers mentioned in paragraph 8 of the statement of Claim have never been and could not have had any nexus with Defendant's land.*"

Mr. Daniel Idehen, the plaintiff, on the ownership and identity of the land in dispute said in his evidence in-chief:

*"The land in dispute is part of the property left behind. My father*

*acquired the property from ward 40A Oregbeni PAC. He had an approval from the Ward over the said land. This is the approval. Counsel seeks to tender it. Defence Counsel has no objection. Approval tendered, admitted and marked Exhibit 1.*

*In 1979 I met the defendant erecting a house on the land. I said nothing to him but I went to the plot Allotment Committee and they told me certain things. As I did not want to take the law into my hands I had to come to court."*

When cross-examined he said:

*"My father had several pieces of land at Oregbeni. He had approval for all of them. I don't know when he acquired all the pieces of land. After his burial I got the approval papers. I got Exhibit I from his box. My father did not survey the land covered by exhibit I. I know the land covered by Exhibit 1."*

P.W. 1, Gabriel Ogunsuyi, who was also the secretary of ward 40A Oregbeni plot Allotment Committee gave the following evidence on the ownership and identity of the land in dispute:

*"In 1972 a piece of land was allocated to late Ohomina Idehen on the right when going to Agbor. The land measurement was 70' x 150' with beacon Nos. 38, 24 and 37. There were no buildings when the land was allocated. But there were rubber trees. There are now buildings on the land. The defendant erected the buildings."*

Under cross-examination he stated:

*"Chairman and Secretary don't go to the bush. The applicant was a pointer that was why I went to the bush with Mr. Igbinovia. I acted as a pointer only on this occasion. We approved up to seven plots for late Ohomina in the whole village."*

P.W. 2 Osifo Igharo who was the last witness for the plaintiff also testified as follows:-

*"I know the plaintiff. I know the father he is dead. When the father was alive he bought rubber crops from me. I sold the rubber for N100. I gave him a receipt was written by my son but I signed it. The land on which the rubbers were grown was allocated to the plaintiff's father by the plot Allotment Committee."*

When cross-examined P.W. 2 further said:

*"I know the plaintiff I sold rubber to him. I gave him a receipt when he paid for the rubber trees. I described the land in the receipt ..... The land was allocated first before he paid for the rubber trees ..... The dimension is in the survey plan which I own. I survey plan which I own. I surveyed the rubber plantation. Government acquired the land. The plot Allotment*



Committee demarcated the land into plots after I had surveyed it. I don't know the name but the name is on the plan. He put beacons on the land..... I paid the surveyor N40."

This is the total sum of the evidence adduced by the plaintiff in proof of his case. In order to appreciate the judgments of the trial court and the B Court of Appeal respectively, it is pertinent to set out the relevant facts as contained in Exhibits 1 and 2 relied on by the plaintiff in proof of his case.

"Exhibit 1

Thro: The plot Allotment Committee,  
ward 40A OREGBENI,  
C Benin City.  
To: His Highness Akenzua II C.M.G.,  
The Oba of Benin,  
Benin city.  
His Highness

D Application for building plot

I have the honour most respectfully to apply for a piece of land measuring 70 seventy feet by 150 one hundred and fifty feet in the new layout in the above ward 40A. It is intended for building and sundry purposes. This plot has been inspected by the above ward 40A Oregbeni and certified free E from dispute of all kind.

The beacons Nos. are 38 - 24 - 37  
I am,

Your Highness,  
.....  
Applicant

F Your Highness,  
The above application is recommended for your approval. The allocation of this plot does NOT entitle the applicant to claim ownership of the permanent crops therein. The Non-Native applicant takes only a lease G of the allotted plot as prescribed by Bini Customary Land Law.  
We are.

Yours Highness's Servant  
Secretary, ward .....

- |                      |          |
|----------------------|----------|
| Chairman, ward ..... |          |
| 1. ....              | 7. ....  |
| H 2. ....            | 8. ....  |
| 3. ....              | 9. ....  |
| 4. ....              | 10. .... |
| 5. ....              | 11. .... |
| 6. ....              | 12. .... |

Approved.

20/12/72

Exhibit 2

*On the 27th day of February, 1976 I mister Ohonmina Idehen paid Madam Dorah Osifo the sum of one hundred Naira (100) for the Rubber trees (about 25 trees) with Beacons Nos. 38-24-37 which are on my plot at opposite Airewele High School Benin City.*

B

*The above statement was drawn up in the presence of Mr. Osifo and Madam D. Osifo the recipient (sic) and Master Emmanuel Idehen, Miss. Elizabeth Idehen and Madam O. Idehen the payer*

.....

Payer

.....

Received by

C

.....

Witness

.....

Witness

.....

Writer"

The point upon which the judgment of the trial court revolves is the identity of the land in dispute.

The learned trial judge in the course of the review of the plaintiff's evidence observed and stated:-

*"Looking at the entire, case it seems as if the land the plaintiff is claiming is not the same as the land being defended by the defendant. The plaintiff says that his land measures 70' x 150', the defendant says that his measures 100' x 200'; the plaintiff says that his land is on the right on the Benin/Agbor road, the defendant says that his land is behind Airewele Grammar School; the plaintiff says that his land was a rubber plantation but the defendant said that his was an Igiogbe and before that a plain land."*

F

There is no dispute that from Exhibit I the plot measuring 70ft by 150ft at ward 40A Oregbeni was applied for by the plaintiff's father O. Idehen on 24th October, 1972. The allocation by the Allotment Committee of ward 40A was made on 7th December, 1972 and same was approved by the Oba of Benin, from the face of the Exhibit I, on 20th December, 1972. The beacons Nos. 38-24-37 related to the plot allocated were inserted in Exhibit I.

This is all that Exhibit I showed. It did not state with sufficient particularity the location of the plot in Oregbeni ward. However the plaintiff in paragraph 8 of Statement of Claim (supra) pleaded the location of the land as "situate at Oregbeni opposite Airewele Grammar School, Benin City." The plaintiff did not lead evidence in proof of this averment. P.W. 1 who acted as a pointer when the land was allocated to the plaintiff's father, did not say any thing either on the location of the land as pleaded in paragraph 8 supra. His evidence shows that he identified the plot of land to the plaintiff's father and

not to the plaintiff. The plaintiff did not say in his evidence who identified the land to him or how he was able to know its location since there was no survey plan attached to Exhibit I. All he said was that after the death of his father he found Exhibit I in his [father's] box and went to allotment committee which confirmed to him that the plot shown in Exhibit I was allotted to his father.

B As regards Exhibit 2 which was admitted in evidence by consent, P.W. 2 said in his evidence that he sold the rubber trees to the plaintiff's father. This is contrary to what was pleaded in paragraph 11 of the Statement of Claim in which it was averred that one Madam Dorah Osifo and not Osifo Igharo sold the rubber trees to the plaintiff's father. This contradiction was not C explained. Also not explained was the contradiction between what was pleaded in paragraph 8 to wit "Airewele Grammar School" and "Airewele High School" contained in Exhibit 2. Is Airewele Grammar School" the same - thing as Airewele High School?

**With all the lapses in the plaintiff's case, can any tribunal come to D a reasonable conclusion that there was definitive description of the plot of land, its location and certainty? The answer must obviously be in the negative having regard to the evidence adduced by the plaintiff.**

**The fact that the defendant said in his evidence that he knew the land in dispute does not in my view amount to an admission that it is the same land E referred to in Exhibit 1, the exact location and certainty of which remains vague.**

**In a case involving declaration of title to land the onus is on the plaintiff to establish the title he is claiming. He cannot rely on the weakness of the defendant's case see Kodilinye v. Mbanefo 2 WACA 336.**

F **If the learned trial judge had properly considered and evaluated the evidence adduced, he would not have come to the conclusion that the identity of the land in dispute is clear and unambiguous and that it had been proved with definitive certainty to dispense with a survey plain. See Baruwa v. Ogunshola 4 WACA 159 and Kwadozo v. Adjei 10 WACA 274.**

G **The plaintiff could have only related the beacons in Exhibit I to a survey plan if one was produced and tendered, since there is no evidence that the physical location and identity of the said land was known to him. The survey plan made by P.W. 2 and relating to the land in dispute could have been used by the plaintiff to prove the location and identity of the land.**

H I agree with the unanimous decision of the Court of Appeal after a re-consideration and re-evaluation of the evidence [as per Ogundare JCA as he then was] wherein he stated in the lead judgment:

*"In my respectful view, taking the evidence of the plaintiff and his witness together it cannot be said that the evidence of the two of them could*

pass the acid test laid down by the West African Court of Appeal in KWADZO v. ADJEI (supra). The defendant having put in issue the identity of the land plaintiff was claiming it behoved the latter to establish same with certainty. The learned trial Judge found that on the writ of summon -and I dare add, and the statement of claim - the description of the land plaintiff was claiming was scanty and the land unascertainable. The learned Judge had earlier B observed that "looking at the entire case it seems as if the land the plaintiff is claiming is not the same as the land being defended by the defendant." In spite of this observation and his finding about the "scantiness and Unascertainability" of the land in the writ of summons, he nevertheless concluded that these defects were cured by evidence. With respect to the learned C Judge, I cannot agree with him. The correct position, in my humble view, is that the evidence led by the plaintiff and his witness was equally caught in the same web of "scantiness and unascertainability."

In conclusion, I must hold that, on the record, the plaintiff had not discharged the onus on him to prove, with certainty, the land he was laying D claim to. This appeal, therefore, succeeds and it is hereby allowed. The judgment of the court below including the order for costs given in this matter on 30/3/82 is set aside. Plaintiff's claims are dismissed in toto."

Having regard to my observations on the plaintiff's evidence, I am of the view that this is not a proper case to order a retrial. The plaintiff failed to E prove his case and the correct order of its dismissal was made.

The appeal fails and it is dismissed. The judgment of the Court of Appeal is hereby affirmed with N1,000.00 costs to the respondent.

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**KUTIGIJSC (DISSENTING)**

The plaintiff's writ of summons against the defendant was endorsed thus -

"1. A Declaration that being vested with the Customary and traditional title to a piece of land in Benin City within the jurisdiction of this G Court, he is entitled to a Certificate of Occupancy in accordance with the Land Use Decree, 1978.

2. A sum of N100.00 being damages in that about the year 1975 the defendant broke and entered into the said land which measures 70 feet by 150 feet and covered by plot approved paper dated 20th December, 1972. H

3. An injunction restraining both the defendant, his servants, agents and assigns from further trespass."

After the exchange of pleadings the case proceeded to trial. The plaintiff testified and called two other witnesses. The defendant also testified and

calling two witnesses as well.

In a reserved judgment, the learned trial judges after reviewing the evidence on both sides and relying on a number of authorities entered judgment in favour of the plaintiff with costs.

The defendant appealed to the Court of Appeal to the Court of Appeal holden at Benin City. The only issue contested was the identity of the land claimed by the plaintiff. The Court of appeal in a unanimous judgment held that the plaintiff "did not discharge the onus of proof on him to prove, with certainty the land he was laying claim to". The judgment of the High Court was then set aside and plaintiff's claims were dismissed in toto.

C The plaintiff has now appealed to this Court against the judgment of the Court Appeal. Parties filed and exchanged their briefs of argument as provided by our Rules of Court. At the hearing the plaintiff was absent and not represented. The appeal was therefor taken as argued vide Order 6 Rule 8(6) of the Supreme Court Rules. Chief Ihensekhien, SAN. who appeared for D the defendant adopted his brief and made additional oral submissions.

The only narrow issue for determination before this Court is whether or not the plaintiff discharged the burden on him of proving the identity or certainty of the land in dispute which he claimed.

The plaintiff in his Statement of Claim pleaded as follows -

E "4. That this property was acquired on the 24th of October, 1972 and approved by the Oba of Benin Akenzua II on the 20th of December, 1972.

5. That after the death of the said Okhomina Idehen their father, and according to the Bini Native Law and Custom all his property vests in F his children because he died and was buried by us the children according to the same law and custom.

6. That on or about the month of May 1979, the defendant without a claim of right went on to the land and started to erect a building thereon utilizing the building materials that were stored on the land by our late G father.

7. That when challenged by us he claimed ownership and when the members of the said Ward 40A plot Allotment Committee was contacted on his claim, the Committee denied ever giving the said plot to him.

H 8. That the said building plot is situate at Oregbemi opposite Airewele Grammar School, Benin City and measures, as per ward approved paper, seventy feet by one hundred and fifty feet with bounding ward beacons No. 38-24-37 within the jurisdiction of this Court.

The defendant on his part pleaded thus -

"4. The Defendant denies paragraphs 3, 4, 5 and 6 of the Statement

of Claim and avers that if the plaintiff had any approval from the Oba of Benin, that approval has no nexus with the land where the Defendant has his building which he completed in 1978 December. The building operation started in 1977 after defendant had surveyed the piece of land in property survey Plan No. B/GA 2036/77.

5. In further answer to paragraphs 3, 4, 5 and 6 of the Statement of Claim the Defendant avers that after the Customary burial of his late father by the late F. I. E. Osemwenkhae Esq his late senior brother, the said late senior brother inherited a large track of land including the land in dispute as part of the estate of the father of late Osemwenkhae and the Defendant.

6. The property of late Osemwenkhae's father devolved on late C F.I.E. Osemwenkhae by native laws and custom and under the same Bini native laws and custom the late F.I.E. Osemwenkhae partitioned the property and gave the piece of land on which Defendant had built to the Defendant. It measured about 822.78 sq. yards as shown in property survey plan No. B/GA 2056/77 and on which the Defendant shall rely on at the trial. D

9. In answer to paragraph 7 of the Statement of claim the Defendant states that his late father from whom the late Osemwenkhae inherited the land under native laws and custom acquired customary title to the land long before the turn of this century and before the establishment of plat Allotment Committee. E

11. The defendant denies paragraphs 8 of Statement of Claim and avers that the beacon number mentioned in paragraph 8 of the Statement of Claim have never been and could not have had any nexus with the defendant land."

The learned trial judge in his judgment found on page 39 as follows F

"There is evidence that the defendant has erected a house on the land in dispute. P.W. 1 was a pointer to the land when it was allocated to the plaintiff's father. The land measures 70' by 150' and bounded by beacon numbers 38, 24 and 37; it is in the New Layout at Ward 40A, Oregbemi, on G the right side on the Benin/Agbor Road opposite Airewele High School. In my view the identity of the land in dispute is clear and unambiguous. BELLO v. EWEKA (1981) 1 SC. 124. The scantiness and unascertainability in the writ of summons has been cured by evidence.

The Statement of Claim and evidence of the plaintiff showed that H late Okhomina Idehen bought the rubber trees from one Dora Osifo. However, in court one Osifo Igbaro PW.2 testified that and said that he sold the rubber trees to late Okhomina Idehen for N100.00 (one hundred naira). Exhibit 2 shows that it was drawn up in the presence of Mr. Osifo and Madam

*Dora Osifo and other. In my view there is no contradiction here but rather a question of emphasis. What mattered was that there were rubber trees on the land in dispute which the allottee of the land paid for the sum of N100.00 (one hundred naira). In view of all that I have said judgment is hereby entered in favour of the plaintiff....."*

B I think the learned trial judge was correct when he found as above. I have not a shadow of doubt that the plaintiff clearly discharged the onus on him of establishing the identity of the land claimed. Both the plaintiff and the defendant knew the land in dispute. Witnesses on both sides also knew the land in dispute. After all the claim of the plaintiff was based on Bini customary C law, and Exhibit I is clearly a document of title under that law signed by the Oba of Benin. The land in dispute was in addition shown to the grantee, plaintiff's father, by the land pointer PW.1 in the proceedings.

The Court of Appeal was therefore wrong in my view when it said on page 90 that -

D *"The land was never described with certainty either in the writ of summons or in the statement of Claim. And no plan of the land was tendered in evidence".*

It is true that the land was not described with certainty in the writ of summons. But that defect as stated by the learned trial judge above was cured E by the pleadings and evidence led at the trial as shown above. At the risk of repetition paragraph 8 of the Statement of Claim reads -

*"8. That the said building plot is situate at Oregbemi opposite Airewele Grammar School, Benin City and measure as per ward approved paper, seventy feet by one hundred and fifty feet with bounding ward bea-*  
F *cons Nos. 38-24-37 within the jurisdiction of this court."*

And talking about the plaintiff's failure to tender any plan of the land in dispute, the law is clearly that although in a declaration of title the plaintiff must prove amongst others, the identity of the land, the production of a plan is not a necessity in every case. Where there is no difficulty in identifying the G land as in this case, a declaration of title may be made without it being based on a plan (see IBULUYA v. DIKIBO (1976) 6 SC. 97, ETIKO v. AROYEWUN (1959) 4 FSC. 129, AKINHAMI v. DANIEL (1977) 6 SC. 125).

My humble opinion therefore is that the Court of Appeal was wrong to have held that the plaintiff failed to discharge the onus on him of proving H the identity of the land in dispute. I think the identity of the land in dispute as found by the learned trial judge was clear and unambiguous (BELLO v. EWEKA (supra)).

I find merit in the appeal. It therefore succeeds and it is hereby allowed. Consequently, the judgment of the Court of Appeal together with

the order for costs are hereby set aside. The judgment of the trial High Court delivered on 30th March, 1982 is restored. The plaintiff is awarded costs assessed at one Thousand (N1,000) naira only.

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**MOHAMMED JSC**

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I entirely agree with the opinion of my learned brother, Wali, J.S.C., in the judgment just read. I have had the advantage of reading the judgment in draft before now. I have gone through the excerpts of the evidence adduced by the appellant which my learned brother Wali, JSC, reproduced in his judgment and I entirely agree that the appellant had failed to prove with certainty the land he claimed to be entitled for a grant of a Certificate of Occupancy.

For the reasons given in the lead judgment which I adopt as mine, I hereby dismiss this appeal. I also award N1,000.00 costs to the respondent.

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**ONU JSC**

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I had the privilege before now to read in draft the judgment of my learned brother, Wali, JSC just delivered. I entirely agree with him that the appeal lacks merit and ought therefore to fail.

A word or two ought to be said by me in view of the stand I have irrevocably taken after a careful reading of the record and briefs filed by both the plaintiff and the defendant with regard to the "scantiness and unascertainability" verdict inevitably arrived at by the Court of Appeal in respect of the land in dispute which, in my opinion, is unimpeachable and cannot be jettisoned with a wave of the hand.

F

The case in hand being one in which the plaintiff is claiming inter alia for a customary and traditional title (of Bini) to the piece of land in dispute, the burden to satisfy the court by adducing evidence for the purpose lies on the plaintiff. In attempting to discharge that burden plaintiff ought, in my opinion, to have relied on the strength of his case and not on the weakness of the defendant's for the purpose of discharging that burden. See Kodilinye v. Mbanefo Odu (1935) 2 WA CA 336; Imah Okogbe (1993) 9 NWLR (part 316) 159. This preposition of law is true subject of course, to the important point that the defendant's case may itself support the plaintiff's case and contain evidence on which the plaintiff is entitled to rely. See J. Akinola v. Fatoyinbo Oluwo (1962) 1 All NLR 224 at 227; Alhaji A. I. Adebambo ors. v. Alhaji L.D. Olowosago & ors. (1985) 3 NWLR (part 11) 207 at 215 and Bello v. Eweka (1981) 1 SC. 101. The plaintiff in the instant case failed to discharge that burden as I shall now seek to demonstrate.



The plaintiff's averments in paragraphs 3, 4 and 8 of the Statement of Claim as well as his oral testimony having been traversed by the defendant in paragraphs 4, 10 and 11 of the Statement of Defence as well as in his (defendant's) evidence, rendered in the trial court, his (plaintiff's) failure to establish or prove the identity of the land in dispute would render his case B liable to be dismissed. See Makanjuola v. Balogun (1989) 3 NWLR (part 108) 192. It is the established law that in a declaration of title to land case, the burden which is plaintiff's to discharge is not so discharged even where the scales are evenly weighted between him and the defendant. See Odiote & ors. v. Okotie & ors. (1975) 1 NMLR 178 and Saka Owoade & Anor. v. John C. Abodunrin Omitola & ors. (1988) 2 NWLR (part 77) 417. This is the more so that the plaintiff in Exhibit I which sets out the measurements of the land in dispute as being 70 feet by 150 feet and bounded by beacons Nos. 38-24-37 at Oregbeni Ward, Benin where his late father had seven similar plots, gave no matching evidence by way of production of a survey plan or master plan fixing D its identity beyond doubt.

This short-coming or failure, gave room to the contradictions created in the evidence of P.W.2 a mission impossible for the plaintiff's case. The plaintiff's dilemma became more compounded because, before a declaration of title is granted, the land must be ascertained with certainty, the test being E whether a surveyor can, from the record produce an accurate plan of such land. See Kwadzo v. Adjei 10 WACA 274. Thus, while it is also the proposition of law that a plan is not in all cases a sine qua non, albeit some description is necessary to made a disputed land ascertainable. See Sokpui 11 v. Agbozo 111 13 WACA 241; Ajadi B. Awere v. Suleiman Lasoji (1975) NMLR 100 at 101; F Odesabya v. Ewedemi (1962) 1 All NLR 320 at 321; Colonel Olusegun Rotimi & ors. v. F. O. Macgregor (1970) 1 All NLR 321 at 324; Akpagbue v. Ogu (1976) 6 SC. 63. Compare Ezeudu v. Obiagwu (1986) 2 NWLR (part 21) 208 at 220.

I take the firm view in the instant case that the learned trial judge was not entitled to speculate as indeed he did regarding the identity of the land in G dispute. Thus, it was palpably wrong when he held inter alia that -

*"In my view the identity of the land in dispute is clear and unambiguous. Bello v. Eweka (1981) 1 SC. 124. The scantiness and unascertainability in the writ of summons has been cured by evidence."*

No sufficient evidence was adduced to give flesh to the writ of summons to remove its scantiness and unascertainability. For purposes of clarity H the writ of summons in its endorsement form reads:

"INDORSEMENT

*The plaintiff suing in a representative capacity claims against the defendant, his agents, assigns and servant as follows:-*

1. *A Declaration that, being vested with the Customary and traditional title to a piece of land in Benin City within the jurisdiction of this court, he is entitled to a Certificate of Occupancy in accordance to the Land Use Decree 1978.*

2. *A sum of N10,000.00 being damages in that about the year 1975 the defendant broke and entered into the said land which measures 70 feet by 150 feet and covered by plot approved paper dated 20th December, 1972.*

3. *An injunction ..... Dated this 3rd day of August, 1979."*

What is missing from the writ of summons above and continues to be missing from the evidence adduced by the plaintiff at the hearing of the case giving rise to the appeal herein, was the location of the land in dispute which remained uncertain. For instance, what is the difference between the Airewele Grammar School and Airewele High School? Granted that the disputed land's existence at Oregbeni Ward 40A was accepted as known to both parties, what of its exact location thereon? And how can one reconcile its location as "situate at Oregbeni opposite Airewele Grammar School, Benin City," with "Airewele High School," adjacent which the land in dispute is situated or supposed to be situated? I must say it remained and remains vague. Besides, although it is trite that a statement of claim supersedes the writ (see Ekan v. Uyo (1986) 3 NWLR (part 26) 70 and Nta v. Anigbo (1972) 5 E SC. 156) where, as here, there is nothing to show that the plaintiff's statement of claim filled the lacuna left by the writ in the description of the location of the land in dispute and the evidence led by the plaintiff which failed also to do just that, then the scantiness and unascertainability of the location of the land in dispute persist to disable the plaintiff from getting declaration for which he craved.

Thus, I must with conviction and firmness accept as justifiable and correct the view taken by the Court of Appeal when it concluded among other things that -

*"In conclusion, I must hold that, on the record, the plaintiff had not discharged the onus on him to prove, with certainty, the land he was laying claim to. This appeal, therefore, succeeds and it is hereby allowed. The judgment of the court below including the order for costs given in this matter on 30/3/82 is set aside. Plaintiff's claims are dismissed in toto."*

It is for the above reasons and those more elaborately set out in the lead judgment of my learned brother Wali, JSC with which I had earlier signified my concurrence, that I too dismiss the appeal as lacking in merit. I make the same consequential orders inclusive of costs as contained therein.

**IGUHJSC**

I have had the privilege of reading in draft the leading judgment just delivered by my learned brother Wali, J.S.C. and I agree entirely that this appeal is without substance and should be dismissed.

B            It cannot be doubted that from the pleadings the identity of the land claimed by the plaintiff was in issue. The land was neither described with certainty in the writ of summons nor in the Statement of Claim. There was also no survey plan of the land in dispute tendered by the plaintiff at the hearing.

C            It is well settled that in an action for declaration of title to land and an injunction, the plaintiff, to succeed, must prove among other things, the identity of the land in respect of which his claims relate. See Baruwa v. Ogunsola and others 4 W.A.C.A. 159, Kwadze v. Adjei 10 W.A.C.A 274, Epi and Another v. Aigbedhion (1972) 10 S.C. 53, Elias v. Omo-Bare (1982) 5 S.C. 25, Owada v. Lawal (1984) 4 S.C. 145. It is clear that in the present case, the identity of the land in dispute was not established. This is fatal to the plaintiff's case.

D            In the result, this appeal fails and the plaintiffs's case is hereby dismissed. I abide by the order for costs contained in the leading judgment.

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