

**SUPREME COURT OF NIGERIA**  
18TH JULY, 1997 SC. 47/1991  
**CORAM:- I.L. KUTIGI, E.O. OGWUEGBU, U. MOHAMMED,**  
**S. U. ONU, A. I. IGUH, JJSC.**

JOSEPH LADEPO & 2 ORS ..... PLAINTIFFS/APPELLANTS  
AND  
WILLIAM AJANI ..... DEFENDANTS/RESPONDENTS

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***APPEALS** - Issues for determination - Appeal Court not to raise issues suo motu - Where raised - Parties should be heard.*

***LAND LAW** - Possession - Survey pillars alteration by the defendants - Where some plaintiffs' pillars are still buried on the land - Trial court was right in finding possession in favour of plaintiffs.*

***LAND LAW** - Possession - Abandonment of possession of ownership by plaintiffs on hearing that government had acquired the land - Cannot be the case in this matter - As wrongly held by the Court of Appeal.*

***LAND LAW** - Trespass and injunction claims - Can only be maintained by person in possession - Act sufficient to ground possession - Is a question of fact.*

**FACTS**

Before the High Court of Justice at Ibadan, the plaintiffs/appellants brought an action for damages for trespass and perpetual injunction against the defendants/respondents in respect of the land in dispute. The plaintiffs' case is that sometime in 1977, the defendants trespassed on the land in dispute by destroying the plaintiff's crops, whereupon they were warned by the plaintiffs. Again, in 1979 the defendants went back to the land and they refused to leave. Both parties relied on traditional evidence and deeds of conveyance in proof of title.

At the conclusion of hearing, the learned trial judge found in favour of the plaintiffs. The defendants' appeal to the Court of Appeal was allowed. The plaintiffs have now appealed to the Supreme Court raising six issues but the matter was decided on a single issue.

**ISSUE FOR DETERMINATION**

*Whether the plaintiffs discharged the onus on them of proving that they had a better title to the land in dispute than the 1st defendant, since both parties claim title to the same land . In other words where a defendant*

*is in possession of the land in dispute as in this case, a plaintiff who wants to oust the defendant out of possession must prove a better title.*

**HELD** (Unanimously allowing the appeal per lead judgment of **KUTIGI JSC**)  
**Issues raised by the court suo motu**

1. The short answer to the points enumerated from (2) - (8) above, is that the parties did not join issues on their pleadings on any of the points. Moreover, the issues were clearly raised by the court itself suo motu, without giving the plaintiffs any opportunity of being heard before using same against them and thereby tried to destroy their case. This is a wrong approach altogether. It is not open to the Appeal Court to raise or make issues which the parties did not raise or make for themselves either at the trial or at the hearing of the appeal. The parties should first be given an opportunity to be heard. At any rate I am unable to see how any of the points listed above could have adversely affected the case of the plaintiffs. The foundation of their case remained unshaken throughout. (p. 1716 B)

#### **Trespass and injunction claims**

2. It is trite law that the claim for trespass and injunction postulates that the plaintiff is in possession. And possession in law means exclusive possession. But whether or not the act proved is sufficient to establish possession is a question of fact to be decided on the merits of each particular case. Cultivation of a piece of land, erection of a building or fence thereon, demarcation of land with pegs or beacons are all evidence of possession. A person can also be in possession through a third party such as servant, agent or tenant. Possession of a predecessor in title is in law deemed to be continued by his successor. (p. 1717 G)

#### **Possession - Survey pillars alteration**

3. It is significant in this appeal that the learned trial judge had found as shown above, that out of 15 original survey pillars on the land in 1973 (see plaintiffs' Exhibit B, F, K & L) only seven survived after the 1st defendant's survey in 1976 (see 1st defendant's Exhibit Q). The learned trial judge must therefore be right when he said that he was "satisfied that it was the 1st defendant for whom the plan in Exhibit Q was prepared in 1976 who first tampered with the pillars and made several substitutions himself." So even for the seven plaintiffs' pillars still subsisting buried in the land in dispute, the plaintiffs must still be held to be in possession. (p. 1718 A)

**Abandonment of possession by plaintiffs**

4. The Court of Appeal was therefore clearly wrong when it came to the conclusion that the plaintiffs were not in possession or lost possession when they withdrew from the land in 1975 after the radio announcement that the Federal Government had acquired the land. Even if they withdrew, the pillars were still on the land. They were therefore in possession. And as the learned trial judge rightly said the evidence showed that the 3rd plaintiff did not by that act alone abandon his ownership or possession of the land as he was making effort to obtain compensation from the Federal Government. The plaintiffs thus being in possession, the defendants' entry in 1977 and 1979 was on each occasion adverse to plaintiffs' possession. In short, defendants' possession from 1976 up to the time of the institution of this suit in 1980 must be taken to be that of a trespasser. (p. 1718 C)

**NOTABLE POINT OF INTEREST****ONU JSC***1. Findings of fact by trial court - How treated*

This is a decision that demonstrates once more in clear and unambiguous terms the principle of law this court has stated and restated many times over that a Court of Appeal must approach the findings of fact of a trial court with extreme caution and would only disturb those findings where it is satisfied that the trial Judge has made no use of the advantage which he had enjoyed of seeing the witnesses and watching their demeanour. If therefore the trial judge has evaluated the evidence led before him, as he did in the instant case, it is not for the Appeal Court to re-evaluate the same evidence and come to its own decision. (p. 1721 A)

**CASES REFERRED TO**

Kuti v. Jibowu (1972) All NLR 619  
 Odiase v. Agho (1972) ALL NLR 175  
 Atanda v. Lakanmi (1974) 3 SC. 109  
 Mogaji v. Cadbury (1972) 2 S.C. 97  
 Ofei v. Danquah (1961) 3 AER 596  
 Emegwara v. Nwamo 14 WACA 347  
 Alatishe v. Sanyaolu (1964) All N.L.R. 391  
 Chukwueke v. Nwankwo (1985) 2 NWLR 195  
 Mogaji v. Odojin (1978) 4 SC. 91 at 93

**REPRESENTATION**

Plaintiffs/Appellants absent not represented  
Chief O. A. Ogundeji for Defendants/Respondent

**RULES REFERRED TO**

B Supreme Court Rules O.6 r. 8(6)

**LEAD JUDGMENT BY KUTIGI JSC**

In the High Court of Justice holden at Ibadan, the plaintiffs claim as follows:-

"(a) SPECIAL DAMAGES

(i) *Cost of replacing Survey*

*pillars destroyed .. .. N5,000.00*

(ii) *200 Trees of Oranges*

*D at N5,00 each .. .. 1,000.00*

(iii) *150 Trees of Cocoa at*

*N10.00 each .. .. 1,500.00*

(iv) *20 palm Trees at 3,00 each 60.00*

(v) *20 Pawpaw Trees at 2,00 each 40.00*

E (vi) *240 Tipper lorries of*

*laterite at N10 each .. 2,400.00*

(b) *GENERAL DAMAGES .. 5,000.00*

*TOTAL = N15,000.00*

F (c) *An order of perpetual injunction restraining the defendants, their servants, agents and or privies from committing further act of trespass on the said land."*

After the filing and exchange of pleadings between the parties the case proceeded to trial. At the trial seven witnesses testified for the plaintiffs while the defendants called eight witnesses.

The case for the plaintiffs was simply that one ANLA APAKO originally settled on the land in disputes. After his death the land was inherited by his daughter called OKETOPE. In 1937 Oketope sold the land to GBADAMOSIN LANIYAN.s After the death of Gbadamosin Laniyan his two children, ALHAJI HAJI LANIYAN AND ALHAJI MURANA LANIYAN, inherited the land. It was Alhaji Raji Laniyan and Alhaji Murana Laniyan who in 1973 sold the land to the plaintiffs. In favour of the plaintiffs the two brothers executed three separate deeds of conveyance covering the three different parcels of land on the 26th November, 1973. The deeds of conveyance were tendered as Exhibits

F, L & K in the proceedings. Sometimes in 1977, the defendants trespassed on the land in dispute destroying plaintiffs crops. They were warned by the plaintiffs to keep off the said land. In 1979, the defendants went back to the land in dispute again and when they refused to leave, the plaintiffs instituted this suit in court. The land in dispute is verged red on the plaintiffs' plan (Exhibit B). Two small portions of the land in dispute verged purple were B acquired by the Federal Government for purposes of the construction of Lagos-Ibadan expressway.

The case for the defence on the other hand was that it was one OGUNMOLA who first settled on the vast area of land of which the land in dispute formed part. That it was Ogunmola who put AKINWUMI SAPE and C his brother ADIO OLATUNJI on the land in dispute as his customary tenants. Their descendants also held the land as customary tenants of Ogunmola family. It was in 1976 that the 1st defendant approached the Ogunmola family for the sale of the land to him. The sale was effected and a deed of conveyance dated the 16th July, 1976 was executed in his favour (see Exhibit Q). In D 1977, the 1st defendant let out the land to the 2nd defendant for one year for the purposes of excavation of gravel therein for their construction of Lagos-Ibadan Expressway. After the said excavations and completion of the expressway, the top soil was put back by the 2nd defendant. The survey pillars which were uprooted during the work were also restored by them. The 2nd defen- E dant vacated the land in August, 1978 and never went back.

The learned trial judge in a reserved judgment in which he properly evaluated the evidence and appraised the facts, found in favour of the plaintiffs in respect of claims (b) and (c) above. He found claim (a) for special damages not to have been proved. He concluded his judgment thus:- F

*"I must say that the plaintiffs have not proved to my satisfaction the special damages that they are claiming..... I find as a fact that the defendants have trespassed on land belonging to the plaintiffs and since I am not satisfied that they have established their claim to special damages, what they are entitled to against the defendants jointly and severally is G general damages. This I assess, after taking into consideration all the circumstances of this case, at N2,000.00. The defendants, their servants, agents and privies are hereby restrained from committing further acts of trespass on the said land."*

Being dissatisfied with the judgment of the High Court, the two H defendants appealed to the Court of Appeal, Ibadan Judicial Division. The Court of Appeal by majority of two to one allowed the appeal, set aside the judgment of the High Court and dismissed plaintiffs' claims with costs.

Aggrieved by the decision of the Court of Appeal, the plaintiffs

have now appealed to this Court. The parties filed and exchanged briefs of argument as provided by the Rules of Court. At the hearing of the appeal only the defendants were represented by counsel, Chief Ogundeji. He adopted his brief and made a few oral submissions in addition. The plaintiffs who filed their brief will be taken as having argued their appeal as provided under order B 6 Rule 8(6) of the Supreme Court Rules.

In the plaintiffs' brief six issues are submitted as arising for determination in this appeal. But having regard to the grounds of Appeal, the pleadings of the parties, and the evidence led by them, the single most important issue is:-

C *Whether the plaintiffs discharged the onus on them of proving that they had a better title to the land in dispute than the 1st defendant, since both parties claim title to the same land (see AROMIRE & ORS. v. AWOYEMI (1972) 1 All NLR. AMAKOR v. OBIEFUNA (1974) 3 S.C. 67.) In other words where a defendant is in possession of the land in dispute as in this D case, a plaintiff who wants to oust the defendant out of possession must prove a better title (THOMAS v. HOLDER 12 WACA 78, ABDULAH v. MANUE 10 WACA 172).*

I shall therefore deal with the main issue first before considering any subsidiary issue raised in the brief which may still require attention.

E I have endeavored above to set out albeit briefly the case for the plaintiffs as well as that of the defendants and I do not need to repeat them here. The learned trial Judge after reviewing the evidence adduced by the parties said:-

"I am more impressed by the evidence given by the plaintiffs on how F they got the land than by the one tendered for the Defence on how the 1st defendant got the same. That for the plaintiffs was one straight, unbroken chain-from the inheritance of land by Oketope to the sale thereof by Gbadamosi Laniyan; from the inheritance of the land (upon Gbadamosi Laniyan's death) by his two children to the sale thereof by them to the G plaintiffs. These were transactions backed by evidence and the purchase receipt, Exhibit J and the deeds of conveyance, Exhibits K, F and L. It seems to me that the plaintiffs had maintained a straight, consistent story. The 1st defendant, on the other hand, averred that certain people were customary H (Ishakole) to them. Yet no evidence of payment of any customary tenants was given by anybody who gave evidence for the Defence - not even by the Defendant themselves - or even by any member of Ogunmola family or any customary tenant so-called. The traditional story told by the Defence lies hollow compared with that tendered for plaintiffs - backed, as the latter was,

with documentary evidence like Exhibit J."

He had before then held that:-

*"The evidence tendered for the plaintiffs seems to me to be more credible than that tendered for the Defence. They were already on the land in 1973 and had remained there until 1976 when the 1st defendant came along to "purchase" it from Ogunmola family and lease it in 1977 to the 2nd defendant. By common consent, there were found survey pillars on it which the 2nd defendant admitted uprooting when they were construction the Lagos - Ibadan Expressway for the Federal Government, although the 2nd defendant claimed to have restored them after completing their road construction work. One would have thought that if they did restore them as they said they did, the plaintiffs in 1981 (sic). Yet the surveyor said he found no survey pillars on the land in 1981. I am satisfied that it was the 1st Defendant for whom the plan in Exhibit Q was prepared in 1976 who first tampered with the pillars and made several substitutions of his own. Hence the difference in the identification numbers and marks on the plans attached to Exhibit K, F and L on the one hand and on the plan attached to Exhibit Q on the other."*

It is implicit in the above passages therefore that the learned trial judge found that the plaintiffs had proved a better title to the land in dispute than the defendants.

The court of Appeal in its lead majority judgment (delivered by Ogundare JCA. (as he then was) and concurred by Sulu-Gambari JCA.) however, held that the plaintiffs had failed to prove a better title because:-

(1) It was not plaintiffs' case that Apako settled on the land and farmed thereon and that his niece Oketope Anla was granted portion of it.

I say immediately that plaintiffs' case is certainly and clearly that Anla Apako settled on the land in dispute and that Oketope inherited it after Apako's death. Apako could not have "granted" it after his death. In any event the evidence of a "grant" which was not pleaded went to no issue.

(2) The evidence of 3rd plaintiff that the land was all "virgin forest" when he bought it in 1973 did not rhyme with the story that the land had been under cultivation since settlement 100 years ago.

(3) 1st defendant claimed title through Ogunmola who granted land to Akinwunmi Sape and Adebayo Olatunji, his warriors. PW.4 under cross-examination said he knew both Akinwunmi Sape and Olatunji and that their lands formed boundary with his own.

(4) PW.7 said he belonged to the same family with Akinwunmi Sape but he did not say when and by who Idi-Osau village was founded.

(5) Exhibit 'B', the plan of the land in dispute drawn in 1973 does not show that there were any crops on the land.

(6) Recitals in Exhibit D, F & L do not appear to support plaintiffs' case that Gbadamosi Laniyan (the father of Raji and Murana) bought from Oketope in 1937 the land sold by his children to the plaintiffs in 1973 because one cannot be talking in 1973 of 1937 as time immemorial.

(7) Exhibit C has not helped plaintiffs' case because it shows that B after the sale to Gbadamosi Laniyan, the Anla family had land left in the area. Oketope Anla could not have sold all the land she inherited to Gbadamosi.

(8) There was no evidence to show that the land edged red in Exhibit B answered to the description of the land sold in Exhibit J.

**The short answer to the points enumerated from (2) - (8) above, is C that the parties did not join issues on their pleadings on any of the points. Moreover, the issues were clearly raised by the court itself suo motu, without giving the plaintiffs any opportunity of being heard before using same against them and thereby tried to destroy their case. This is a wrong approach altogether. It is not open to the Appeal Court to raise or make issues which D the parties did not raise or make for themselves either at the trial or at the hearing of the appeal. The parties should first be given an opportunity to be heard (see KUTI & ANOR. v. JIBOWU & ANOR. (1972) All NLR 619. ODIASE & ANOR. v. AGHO & ORS. (1972) All NLR 175. ATANDA v. LAKANMI (1974) 3 SC. 109). At any rate I am unable to see how any of the points listed above E could have adversely affected the case of the plaintiffs. The foundation of their case remained unshaken throughout.**

Apart from evidence of traditional history, there is clearly evidence and proof by oral and documentary evidence partly of acts of ownership and possession which the learned trial judge accepted in favour of the plaintiffs F (see IDUNDUN v. OKUMAGBA (1976) 1 NMLR 200). On the contrary the defendants failed to establish any title at all. They relied on Exhibit Q dated 16th July, 1976. In his judgment the learned trial judge inter alia found as follows:-

*"If we pause for a moment and take a look at the exhibits in this G case, we would find that the first survey of the land in dispute was conducted by one Alhaji Kadiri and a survey plan No. RAK 25 A-C was drawn by him on the 16th May, 1973 (see the note below the plan in Exhibit B). That plan was reproduced by the plaintiffs' surveyor after he had himself further surveyed the land and produced Exhibit B on the 23rd September, 1981, with some H other details added to it. In the words of the said surveyor, Bamgbose:-*

*"The 3rd plaintiff gave me a plan and I worked on it. It is that plan that I reproduced in my own plan. I did not see the pillars I showed on my own plan. The areas verged purple are within the portion acquired by the Federal Government for purposes of an expressway."*



*The survey pillars on the land in dispute in 1973 when the land was sold to the plaintiffs were zz 5581, ZB 5403, ZB 5404, ZB 5405, ZB 5406, ZB 5407, AD 327, AD 326, AD 325, AD 324, ZD 4265, ZD 4266, AD 323, XS 1169 and XS 1170 (see the plans attached to the 1st, 2nd and 3rd plaintiffs' deeds of conveyance marked Exhibit K, F and L).*

*The deeds were themselves executed by the plaintiffs' vendors in B plaintiffs' favour on the 26th November, 1973.*

*Now, by the 28th March, 1976 when the land was surveyed for the 1st defendant by one Laoye, a Licensed Surveyor for purposes of a deed of conveyance later executed in the said 1st Defendant's favour on the 16th July, 1976 (see Exhibit Q), the survey pillars had become ZZ 5581, ZB 5403, C BB 4318, ZB 5404, BB 4317, BB 4316, BB 4315, BB 4314, BB 4313, ZD 4265, ZD 4266, AM 9076, XS 1169. AM 9077 and XS 1170. Of the original 15 survey pillars on the land in 1973, only seven survived after the 1st defendant's surveyor had conducted his survey in 1976 (compare Exhibits Q with Exhibit K, F and L). These were ZZ 5581, ZB 5403, ZB 5405, ZB 4265, D ZB 4266, XS 1169 and XS 1170). The other survey pillars shown on the plans attached to the plaintiffs' conveyances in 1973 had disappeared from the plan attached to the 1st defendant's conveyance drawn in 1976 and been substituted with different ones.*

*Yet the Defence claim that they had exhaustive enquiries and search, E but did not discover any encumbrance on the land in dispute both before the 1st Defendant bought his land from Ogunmola family in 1976 and when the 2nd defendant leased it from the 1st Defendant in 1977 for a period of about one year for gravel excavation purposes.*

*A number of witnesses who gave evidence for the Defence claimed F that the land in dispute formed a boundary with the land of Omishade family; also that Jangan and Olafa family lands are not far from the land in dispute. Yet none of these boundary lands appear in Exhibit B, and the Defendants filed no counter-plan to show the point they were making."*

**It is trite law that the claim for trespass and injunction postulates G that the plaintiff is in possession. And possession in law means exclusive possession. But whether or not the act proved is sufficient to establish possession is a question of fact to be decided on the merits of each particular case. Cultivation of a piece of land, erection of a building or fence thereon, demarcation of land with pegs or beacons are all evidence of possession (see H for example MOGAJI v. CADBURY (1972) 2 S.C. 97. ALATISHE v. SANYAOLU (1964) 1 All NLR 398. WUTA OFEI v. DANQUAH (1961) 3 AER 596). A person can also be in possession through a third party such as servant, agent or tenant. Possession of a predecessor in title is in law deemed to be contin-**

ued by his successor.

It is significant in this appeal that the learned trial judge had found as shown above, that out of 15 original survey pillars on the land in 1973 (see plaintiffs' Exhibit B, F, K & L) only seven survived after the 1st defendant's survey in 1976 (see 1st defendant's Exhibit Q). The learned trial judge must therefore be right when he said that he was "satisfied that it was the 1st defendant for whom the plan in Exhibit Q was prepared in 1976 who first tampered with the pillars and made several substitutions himself." So even for the seven plaintiffs' pillars still subsisting buried in the land in dispute, the plaintiffs must still be held to be in possession (ALATISHE v. SANYAOLU (supra) WUTA OFEI v. DANQUAH (supra)).

The Court of Appeal was therefore clearly wrong when it came to the conclusion that the plaintiffs were not in possession or lost possession when they withdrew from the land in 1975 after the radio announcement that the Federal Government had acquired the land. Even if they withdrew, the pillars were still on the land. They were therefore in possession. And as the learned trial judge rightly said the evidence showed that the 3rd plaintiff did not by that act alone abandon his ownership or possession of the land as he was making effort to obtain compensation from the Federal Government.

The plaintiffs thus being in possession, the defendants' entry in 1977 and 1979 was on each occasion adverse to plaintiffs' possession. In short, defendants' possession from 1976 up to the time of the institution of this suit in 1980 must be taken to be that of a trespasser (EMEGWARA v. NWAMO 14 WACA 347).

I am satisfied that on the whole the findings and conclusions of the learned trial judge were amply supported by credible evidence and justifiable. The Court of Appeal was clearly wrong in my view to have interfered with those findings and conclusions when same were not shown to be perverse or unjustifiable.

I find merit in the appeal. It is hereby allowed. The majority judgment of the Court of Appeal (including the order for costs), is hereby set aside while the minority judgment of Omololu-Thomas, JCA. and the judgment of the Ibadan High Court delivered on 29th April, 1983 are confirmed. The plaintiffs are entitled to costs of this appeal which is assessed at one thousand naira (N1,000.00) only.

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**OGWUEGBU JSC**

I have had the advantage of reading in draft the judgment delivered by my learned brother Kutigi, J.S.C. I am in full agreement with his reasoning

and conclusions.

The appellants' claim is in trespass and it is an established principle of law that trespass is an interference with possessory right and an action can only be maintained at the suit of the person in possession or one with a right to possession. See Adebanjo v. Brown (1990) 6 SCNJ 1 at 19, Amakor v. Obiefuna (1976) 3 S.C. 67 and Atunrase v. Sunmola (1985) 1 N.W.L.R. 105. The learned trial judge rightly found that it was the 1st defendant who tampered with some of the survey beacons planted on the land by the appellants and substituted them with his own hence the difference in the identification numbers and marks in the survey plans attached to Exhibits "K", "F" and "L".

The evidence that the 1st defendant tampered with about eight of the plaintiffs' survey beacons which the learned trial judge accepted clearly established that the plaintiffs were in possession. Where possession sought to be maintained is against the person who never had any title to the land, as the defendants in this case, the slightest amount of possession would be sufficient to maintain an action for trespass. See Wuta-Ofei v. Danquah (1961) 3 All E.R. 596 and Alatishe v. Sanyaolu (1964) All N.L.R. 391.

In this case, each party put his title in issue and the learned trial judge adequately appraised the relevant evidence before him including relevant documentary evidence. He preferred the evidence tendered by the plaintiffs and found for them as follows:

*"I am more impressed by the evidence given by the plaintiffs on how they got the land than by one tendered for the Defence on how the 1st defendant got the same. That for the plaintiffs was one straight, unbroken chain from the inheritance of the land by Iketope to the same thereof by Gbadamosi Laniyan; from the inheritance of the land (upon Gbadamosi Laniyan's death) by his two children to the sale thereof by them to the plaintiffs. There were transactions backed by evidence and the purchase receipt, Exhibit J and deeds of conveyance, Exhibits K, F and L."*

The appellants failed to establish any title at all. They relied on Exhibit Q dated 16:7:76. The recitals in Exhibit Q (1 and 2) contradict paragraphs 3, 4, 5, 6, 7, 8 and 9 of the statement of defence of the 1st defendant and the learned trial judge could not have relied on Exhibit Q having regard to the state of the pleadings.

The court below per Omololu-Thomas, J.C.A. x-rayed the contradiction thus:

*"On the contrary, the appellants failed to establish any title at all. They relied on Exhibit Q dated 16th July, 1976, recitals 1 and 2 of which cannot be reconciled with paragraphs 11, and 3 to 8 of the statement of defence which by themselves are self-contradictory. .... The said*

*recitals speak of imigration of Ogunmola over 120 years when he first settled at Ojoo. Paragraph 3 of the statement of defence speaks of settlement "from time immemorial". But Ijaiye war was fought in 1851 - 64 (vide paragraph 5), after which the victor Ogunmola made a grant of the land in dispute to his warriors, Akinwumi Sape and his brother Adio Olatunji (vide paragraphs 6 and 7), who were said to have cultivated the land over 700 years ago (vide paragraph 11) if the land had been under cultivation by the grantees as described through only two generations spanning over 700 years (Quarter) how can the land be virgin land over 120 years ago? ..... There was no amendment of the conflicts in the facts pleaded, and if they are related to the recitals in Exhibit Q., it is impossible to determine which pleading the facts recited supported."*

The trial judge could not have relied on exhibit Q in the circumstances, having regard to the pleadings and evidence as to the root of title and ownership of the land in dispute by the appellants. Since the plaintiffs were found to be in possession, the entry of the 2nd defendant in 1977 and in 1979 must be regarded as an act of trespass on each occasion. See Emeagwara v. Nwimo 14 W.A. C.A. 347. The plaintiffs having established a prima facie title, the onus shifted on the defendants to show a better title. They failed to do that. I am satisfied that all the findings of the trial court are supported by evidence. The Court of Appeal in its majority judgment was in error to have disturbed the findings of fact made by the learned trial judge which are quite sound.

The appeal therefore succeeds and it is hereby allowed. The minority judgment of Omololu-Thomas, J.C.A. is hereby affirmed. The respondents are entitled to the costs of this appeal which I assess as N1,000.00.

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### MOHAMMED JSC

I am in entire agreement with, and do not desire to add to, the conclusions expressed by my learned brother Kutigi, JSC, in the judgment just read. For those reasons I concur in holding that the majority judgment of the Court of Appeal is wrong. It is hereby set aside and the appeal is allowed. I affirm the minority judgment of Omololu-Thomas J.C.A., in allowing this appeal. I also award N1,000.00 costs in favour of the appellants.

H \_\_\_\_\_

### ONU JSC

I have had the advantage to read in advance the judgment of my learned brother Kutigi, JSC just delivered. I entirely agree with it that the

appeal succeeds and it is allowed by me.

This is a decision that demonstrates once more in clear and unambiguous terms the principle of law this court has stated and restated many times over that a Court of Appeal must approach the findings of fact of a trial court with extreme caution and would only disturb those findings where it is satisfied that the trial Judge has made no use of the advantage which he had enjoyed of seeing the witnesses and watching their demeanour. If therefore the trial judge has evaluated the evidence led before him, as he did in the instant case, it is not for the Appeal Court to re-evaluate the same evidence and come to its own decision. See Abdullahi v. The State (1985) 1 NWLR 523 at 528; Chukwueke v. Nwankwo (1985) 2 NWLR 195; and Frank Ebba & ors. v. Chief Warri Ogoto & ors. (1984) 4 S.C. 84 at 98. In the instant case, the trial court which saw and heard the witnesses testify for the parties carefully and meticulously made an impeccable appraisal (as well as evaluation of the evidence led before it) before entering judgment in favour of the plaintiffs. It was not therefore the function of the Court of Appeal which neither saw, heard nor observed the demeanour of the witnesses to have disturbed that decision. See Mogaji & ors. v. Odojin & ors. (1978) 4 SC.91 at 93; Akinloye v. Eyiola (1968) NMLR 92; and Akinola & ors. v. Oluwo (1962) 1 All NLR 224. For so doing, the Court of Appeal went wrong and this Court for its part must intervene to set the conclusion arrived at by it aside.

It is for these and the fuller reasons contained in the lead judgment of my learned brother Kutigi, JSC that I allow this appeal and make similar consequential orders inclusive of costs as contained therein.

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### IGUHJSC

I have had the privilege of reading in draft the leading judgment just delivered by my learned brother, Kutigi, J.S.C. and I agree that there is substance in this appeal and that the same should be allowed.

For the same reasons set out in the said judgment, I too, allow this appeal and abide by the consequential orders including those as to costs therein contained.