

SUPREME COURT OF NIGERIA
18TH JULY, 1997. SC. 98/1993
CORAM:- S. M. A. BELGORE, A. B. WALI, M. E. OGUNDARE,
Y. O. ADIO, A. I. IGUH, JJSC.

OSIBAKORO D. OTUEDON & ANOR. PLAINTIFFS/
(Substituted by Order of Court dated APPELLANTS
16th May 1995)
(For themselves and on behalf of Gbolokposo people)
AND
AMBROSE OLUGHOR & ANOR.
(For themselves and on behalf of DEFENDANTS/RESPONDENTS
Ugbomro Village)
SHELL B. P. PETROLEUM
DEVELOPMENT COMPANY OF NIGERIA LIMITED
A. EMAKPO & 3ORS.
(For themselves and on behalf of Abadi and Ogbe
Families of Erovie Quarter, Effurun)

EVIDENCE - *Unchallenged evidence - Should be accepted by the court - As proof of the fact or issue in question.*

EVIDENCE - *Issue - Where defendants have not joined issue with plaintiffs - Minimum evidence on that issue would suffice.*

LAND LAW - *Boundary - Plaintiffs having established the area of the peninsula in dispute - Court of Appeal erroneously dismissed their claims.*

LAND LAW - *Boundary - Finding of lower courts thereon - Raises presumption of ownership in plaintiffs' favour - And the burden shifts to defendants to show how they came to own the land.*

LAND LAW - *Traditional evidence - Rejection of plaintiffs' traditional evidence by the lower courts - Are perverse concurrent findings.*

LAND LAW - *Title - Five ways of proving title - Declaration can be founded upon proof of one of the ways.*

LAND LAW - *Title - Acts of possession by plaintiffs - Lower courts' findings thereon being perverse - Plaintiffs' claims will succeed.*

FACTS

Before the High Court Warri, the plaintiffs/appellants sued the various sets of defendants/respondents claiming declaration of ownership, compensation and injunction in respect of the land in dispute. The land in dispute is a peninsula. Plaintiffs who are Itshekiri claimed to have first settled on the land and to have founded the villages of Gbolokposo and Gbomro on it. Their ancestors gave permission to defendants' ancestors who were Urhobo to live with the Itshekiri and to found two other villages on the land. They paid tribute to the Itshekiri owners of the. The defendants on the other hand claimed that their ancestors first settled on the land and gave grants to the Itshekiri who paid tribute to them. In 1964, the 3rd Defendant (Shell B.P.) established oil mining locations and laid pipeline across the land. Plaintiffs demanded for compensation which they refused to pay on the ground that they have already paid to the defendants. Plaintiffs then instituted this action.

The trial court found the boundaries established in line with the plaintiffs' claim. Plaintiffs also relied on evidence of traditional history and acts of possession which were erroneously rejected by the lower courts. The trial court found partly in favour of both parties. Being dissatisfied they all appealed to the Court of Appeal. That Court dismissed the plaintiffs' claim in toto and found in favour of the defendants. The plaintiffs have further appealed to the Supreme Court raising 2 issues.

ISSUES FOR DETERMINATION

1. *"Having accepted (or having not disturbed) the finding of the learned trial judge that:*

(a) The land claimed by the plaintiffs and put in dispute by the parties was a peninsula bounded on three sides by the Warri river and the Kerekere Stream and on the South by the boundary fixed by the Native Court presided over by Chief Dore in 1925.

(b) The plaintiff had proved all the four boundaries, was the Court of Appeal right in dismissing the plaintiffs' claim?

2. *"Was the Court of Appeal right in holding that the way in which the learned trial judge arrived at his conclusion on the Traditional evidence could not be faulted."*

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

Plaintiffs having established the area of the peninsula

1. What was (and still is) in issue between the parties is the peninsula and tin area of that peninsula having been established by the plaintiffs who had the

primary duty to do so, the Court below was clearly in error to dismiss the claims of the plaintiffs for their failure to prove the boundary between Gbolokposo and Gbomro villages, which was not in issue between the parties. (p. 1746 G)

Boundary - Findings of lower courts thereon

2. The Native Court fixed the boundary between the two communities. And on the finding of the two Courts below, that boundary is the 4th boundary shown on Exhibit A (plaintiffs' plan). With this findings, the presumption would be that the plaintiffs owned the peninsula and the burden would be on the Defendants to show how they came to own land on the Gbolokposo side of the boundary. Their claim to any part of the peninsula becomes much more difficult to established. Their presence on parts of the peninsula has been explained in the plaintiffs' traditional history which, if believed, makes their possession not exclusive. (p. 1747 A)

Unchallenged evidence

3. Contrary to what the Court below, per Omo JCA said, there are a number of authorities which lay it down that an unchallenged piece of evidence ought to be accepted by the court as proof of the fact or issue in respect of which the evidence was given It is my respectful view that on a proper appraisal of the E evidence, the Courts below ought to have accepted plaintiffs version as to the origin of the names of the two villages of Gbolokposo and Gbomro. (p. 1753B)

Rejection of plaintiffs' traditional evidence

4. From my examination of the reasons adduced by the learned trial Judge for rejecting plaintiffs' traditional history, I am of the firm view that all the reasons given were unjustified. Had the learned trial Judge properly directed his mind he would have unhesitatingly accepted the evidence of the 1st plaintiff on traditional history, unshaken as it were, under cross-examination. True some of the lapses taken separately are not serious as opined by the Court below but the cumulative effect of all the misdirections and wrongful appraisal of the evidence should have informed that court there was, indeed, a miscarriage of justice. Shorn of the many reasons given by the learned trial Judge, there are then no reason(s) for rejecting the plaintiffs' evidence of traditional history which should have been accepted and given effect to. With respect to their Lordships of the Courts below, their concurrent findings on plaintiffs' traditional history are perverse. (p. 1756 B)

Five ways of proving title

5. Proof by evidence of traditional history is one of the five ways laid down by this Court in *Idundun v. Okumagba* (1976) 9-10 SC. 227 of proving title to land. A declaration of interest in land can be founded upon each proof- *Aikhinbare v. Omoregie* (supra). Thus, with the conclusion that plaintiffs' traditional history ought to have been accepted by the Courts below, it follows that on that alone, judgment ought to have been entered in plaintiffs' favour on then claims. (p. 1756 E)

Where defendants have not joined issue

C 6. That being so, it is erroneous to say that the 1963 action was of no assistance to the plaintiffs. It would have been more helpful if the plaintiffs' surveyor had superimposed Exhibit B1 on Exhibit A. But failure to do so was not harmful in this case where the Defendants have not joined issue with the plaintiffs on the area in dispute in that earlier action. Plaintiff's minimum evidence would suffice. (p. 1762 F)

Acts of possession by plaintiffs

E 7. The conclusion I reach is that the findings of the learned trial Judge on plaintiffs' acts of possession and ownership are also perverse. And the affirmation of those findings by the Court below is equally perverse. Those findings are set aside. Whether from the view point of traditional history or that of acts of possession and ownership, plaintiffs' case, in my respectful view, is proved. If the case for either side is put on that imaginary scale, that for the plaintiffs, in my judgment, preponderates. I have no hesitation in entering F judgment in their favour as per their claims. Consequently, I allow this appeal and set aside the judgment of the Court of Appeal dismissing plaintiffs' claims. (p. 1763 B)

NOTABLE POINT OF INTEREST

G **BELGORE.JSC**

1. Previous judgment operates as estoppel

H It must however be clearly stated that when there are previous judgments on a land or part of it, clearly finding in favour of a party and not appealed against and which confirmed the facts of that judgment as to the traditional history of the land, its operation as estoppel per rem judicatam cannot be ignored in a subsequent litigation between the same parties, their privies and descendant in title. (p. 1764 D)

PEPRESENTATION

Chief G. O. K Ajayi, SAN with O. A. Akomoplafe for the Appellants
Dr. M. Odje, SAN, with A. Akpomudje & E. I. Esene for 1st and 2nd Respondents

Kehinde Sofola, SAN with A. Idris for 4th - 7th Respondents

3rd Respondent is not represented by counsel.

B

CASES REFERRED TO

Adebayo v. Ighodalo (1996) 5 NWLR 507 at 527B, 529-530 A-B

Chinwendu v. Mbamali (1980) 34 SC 31

Sobakin v. The State (1981) 5 SC 75 C

C

Seismograph Service Ltd. v. Akporuovo (1974) 10 SC 9

WASA v. Kalla (1978) 3 SC 21

Ekpo v. Ita 11 NLR 68

Ibodo v. Enarofia (1980) 5 - 7 SC 42

Enang v. Adu (1981) 11-12 SC 25

D

LEAD JUDGMENT BY OGUNDARE JSC

The Plaintiffs who are now Appellants in this appeal, had sued the 1st set of Defendants (now 1st and 2nd Respondents) and Shell B. P. Petroleum Development Company of Nigeria Limited (now 3rd Respondent) in the High Court of the former Bendel State (Warri Judicial Division) claiming as herein under:

“1. AS AGAINST the 1st to 4th Defendants a Declaration that the Plaintiffs are the owners of all that piece or parcel of land Gbolokposo/ Gbomro Village within the jurisdiction of this Honourable Court on which the 5th Defendants established a drilling location, and are entitled to all compensations, rents and other monies paid and/or payable by the 5th Defendants in respect of the said Defendants’ operations on the said land, - Annual rent is 10 Pounds.

2. An order of Court that all compensations, rents and other monies payable by the 5th Defendants for rights of user enjoyment or disturbance of the said land be paid to the Plaintiffs.

3. An Order of Injunction restraining the 5th Defendants and their Agents and/or servants from making payment of any compensation for rights of user, enjoyment or disturbance to the 1st to 4th Defendants or any other family or Community.”

Pleadings were ordered, filed and exchanged. In the course of the proceedings, the 2nd set of Defendants (that is, 4th-7th Respondents) were, by order of Court, joined as Defendants in the action. This necessitated the claims

being amended as herein under:

“1. AS AGAINST the 1st to 4th, 6th and 7th Defendants a Declaration that the Plaintiffs are the owners of all that piece or parcel of land at Gbolokposo/Gbomro Village within the jurisdiction of this Honourable Court on which the 5th Defendants established a drilling location, and are entitled to all compensations, rents and other monies paid and/or payable by the 5th Defendants in respect of the said Defendants’ operations on the said land.

2. An Order of Court that all compensations, rents and other monies payable by the 5th Defendants for rights of user enjoyment or disturbance of the said land be paid to the plaintiffs.

3. An order of Injunction restraining the 5th Defendants and their Agents and/or servants from making payment of any compensation for rights of user, enjoyment or disturbance to the 1st to 4th, 6th and 7th Defendants or any other family or community.”

The parties, except the 3rd Defendants (formerly 5th defendant), with leave of Court, amended their pleadings several times. The action had a chequered history in the High Court. It went through the hands of a number of Judges of that Court. There were two aborted trials each before Aluyi and Akpata JJ, as they were then. A third, and final trial commenced before Uwaifo E J, as he then was, in April 1983. After further amendments to the pleadings, the trial came to an end with the judgment of the Court on 10th July 1985-16 years after the writ was taken out!

At the final trial, the parties led evidence in support of their respective case and after addresses by their learned counsel, the learned trial Judge, in a reserved judgment, adjudged as follows:

“In view of what the parties can really contest in respect of this peninsula, I think that a judgment that is capable of limiting any future contest to mere boundary dispute (if need be) is desirable. That boundary can then be ascertained. It will be unfair to leave the parties with any idea that either side can ever hope to claim exclusive ownership of the peninsula. It will be a forlorn hope for them to start all the full contest all over again. The plaintiffs have at least since 1925 (a period of 60 years) been engaged in litigation from being overrun by Effurun people, the home people of the defendants.

I have not considered a non-suit appropriate. There is no question of dismissing the plaintiffs’ claims in toto because of its consequences. I suppose the best and right thing that can be done is to make it possible for both parties as Nigerians to live on the land, each on their own as landlords not tenants. Let it even be like the Greeks and Turks as Cypriots on the

island of Cyprus! Not as warring parties but as kith and kin permitting their long history of intermarriage to meliorate their relationship.

The declaration I make therefore is that the plaintiffs are the owners of Gbolokposo village right from the boundary already found established between Gbolokposo and Effurun, and shown in survey plan No. WE 2866 (exhibit A) but does not extend into any part of Gbomro village. The boundary between Gbolokposo and Gbomro may remain to be determined as an issue - just as a boundary-line issue. Subject to this, the claim as formulated is dismissed."

The learned trial Judge had found -

1. "The land in dispute is a peninsula marked by Warri River and Erere or Kerekere or Ekerekere Stream. It is completely surrounded (and this is a common fact) by Urhobo lands. Within it is one obviously predominant Itsekiri settlement. The said Itsekiri settlement is Gbolokposo village while the Urhobo such settlements are Gbomro and Okwatata villages. There is also Efoghere village inhabited, by Urhobos. However, the land can almost be regarded as "waterside" land mass, which type of land, from the overall evidence in this case, was and is of most attraction to Itsekiri people."

2. "The plaintiffs are Itsekiri community while the title defending defendants in this suit (sometimes referred to in this judgment as the defendants) are Urhobo community and families."

3. "I think it can safely be said that the parties know the physical location and extent of the land in dispute. I have already referred to it as a peninsula. It is clearly so. This is borne out by the waterways shown in exhibit A (Plaintiffs survey plan), exhibit C, (Gbomro people's survey plan) and exhibit F (Abade and Ogbe Families' plan. The prominent settlements earlier referred to, namely, Gbolokposo, Gbomro and Okwatata are within the said land in all three survey plans. The only extra comment is that the plaintiffs through their surveyor gave oral evidence of what he was told constituted the boundary with Effurun. The 1st plaintiff himself gave the same evidence of that with Effurun. The defendants gave no such oral evidence. In my view the land verged green as shown to belong to Ogbe family is an incursion and appears to create an arbitrary boundary."

"I also accept the evidence that there is established boundary between Gbolokposo and Effurun. In my view the boundary is as shown in the plaintiffs' survey plan No. WE. 2866 (exh. A) and given, in evidence by the surveyor, Ivharayi Williams (P.W.1.). The defendants did not effectively controvert this by stating what the boundary line comprises. It is not sufficient that their survey plans, exhibits C and F, simply show a boundary not supported by evidence."

He thus accepted the boundaries of the land as given in Plaintiffs' Plan Exhibit 'A'

4. The traditional history given in evidence by the Defendants was contradictory and confused. He rejected same.

5. The traditional history given by the Plaintiffs was also rejected for reasons given in the judgment which I shall comment on later.

6. The judgment in suit No. W/28/1963 did not help Plaintiffs' case.

7. *"The Defendants themselves did not do much by way of evidence to show their numerous acts of possession claimed in their survey plan, exh. C and F."*

C (Italics are mine)

"I do not think much of the acts of possession of ownership claimed by the defendants all over the land in dispute in their said plans. I think a lot of untrue claims have been made whereby all sorts of names related to Abade family were inserted in the said plans which themselves were prepared by a licensed surveyor who admitted that he is a member of Abade family"

D I must say pointedly that from the evidence I do not accept that Gbolokposo people are on the land with the permission of Gbomro people or of Abade and Ogbe families. I also do not accept that Ghomro people, Okwatata people and Igoghere people are on their respective lands with the permission of Gbolokposo people.

(Italics are mine)

9. The boundary between Gbolokposo and Gbomro villages is not established.

F Upon these findings, the learned trial Judge adjudged as hereinbefore mentioned.

Being dissatisfied with the judgment of the trial court, both the Plaintiffs and the Defendants (except the 3rd) appealed to the Court of Appeal. I may mention at this stage that the battle was all along between the Plaintiffs and the 1st, 2nd, 4th - 7th Defendants who are hereinafter referred to as the Defendants simpliciter. The 3rd Defendant played the role of a stake-holder - and no longer participated in the proceedings both in the Court of Appeal and, subsequently in this Court. The Plaintiffs in their appeal sought that judgment be entered in their favour on their claims while the Defendants sought that Plaintiffs' claims be dismissed in toto. The Court of Appeal dismissed Plaintiffs' appeal but allowed those of the Defendants and dismissed Plaintiffs' claims in their entirety. It is against that judgment that the Plaintiffs, with leave of this court, have now appealed upon 11 grounds of appeal.

Both the Plaintiffs and the Defendants filed and exchanged their respective Briefs of argument. In their Brief settled by Chief G.O.K. Ajayi, SAN

and filed on 16/11/95, the Plaintiffs put forward the following two questions as arising for determination, to wit:

1. *“Having accepted (or having not disturbed) the finding of the learned trial Judge that:*

(a) The land claimed by the Plaintiffs and put in dispute by the parties was a peninsula bounded on three sides by the Warri river and the Kerekere Stream and on the South by the boundary fixed by the Native Court presided over by Chief Dore in 1925.

(b) The Plaintiffs had proved all the four boundaries, was the Court of Appeal right in dismissing the Plaintiffs’ claim?

2. *“Was the Court of Appeal right in holding that the way in which the learned trial Judge arrived at his conclusion on the traditional evidence could not be faulted.”*

The Plaintiffs have, in effect, raised two main issues, that is to say: (a) the boundaries of the land claimed by the plaintiffs, and (b) the rejection by the trial court and affirmed by the court below, of their traditional history.

The 1st and 2nd Defendants (hereinafter are referred to as the 1st set of Defendants) formulated three questions, to wit:

“I. Whether the Court of Appeal was right in setting aside the declaration of title granted by the learned trial Judge relating to land whose four boundaries were not fully established.

Grounds (vii) - (x) of Appeal.

II. Whether the Court of Appeal was right in affirming the findings of the trial court concerning the failure of the appellants to discharge the onus of proof of title on the evidence in the case.

Grounds (i) - (vi) and (xi) of Appeal

III. Whether the Court of Appeal was justified in dismissing the Appellants’ claim in its entirety. Grounds (i) - xi) of Appeal”

The 4th - 7th defendants (hereinafter are referred to as the 2nd set of Defendants) raised five issues in their Brief. These are:

“(1) Whether the Appellants claimed a declaration over the whole land covered by their plan, Exhibit A.

(2) What precise piece of land, if any, was claimed by the Appellants in this suit.

(3) In view of the conclusions of facts made by the learned trial Judge on the evidence of tradition, acts of possession by the Appellants and the situation of Appellants’ land which the Court of Appeal accepted, whether the court below was right to have dismissed the Plaintiffs’ appeal and dismissed their claim in its entirety, while allowing the Defendants’ Cross-appeal.

(4) *Whether the Courts below were right in their approach to and conclusions on the evidence of possession and ownership called by the Respondents.*

(5) *Whether any boundary was established between the Appellants and the Respondents, as well as other villages, the kith and kin of the Respondents.* “

I am of the view that Issues, 1, 2 and 5 raise the same question as in Plaintiffs’ Question 1, that is, the ascertainment of the boundaries of the land claimed by the plaintiffs. Issues 3 and 4 above relate to the issue of plaintiffs’ traditional history, the subject of their Question 2.

C Having regard, therefore, to the judgment appealed against and the grounds of appeal I think this appeal can be conveniently resolved under two broad headings

(a) Boundaries of the land in dispute, and

(b) Plaintiffs’ traditional history.

D This is a convenient stage to state the facts, how-be-it briefly. The land in dispute is, as found by the learned trial Judge and accepted by all sides, a peninsula with Warri River as its boundary on two sides and Kerekere stream on a third side. The boundary on the 4th side which is the neck of the peninsula is a line marked by two pillars and demarcated in 1925 by the Native
E Court presided over by Chief Dore Numa. The finding of the learned trial Judge on this fourth boundary has not been challenged either in the court below or in this court by either side, particularly the Defendants. Plaintiffs who are Itsekiri claimed to have first settled on this land and to have founded the villages of Gbolokposo and Gbomro on it. Their ancestors before them
F gave permission to defendants’ ancestors who were Urhobo to live with the Itsekiri and to found two other villages on the land. They paid tribute to the Itsekiri owners of the land until recently when dispute started. The defendants, on the other hand, claimed that their ancestors first settled on the land and gave grants to the Itsekiri who paid tribute to them. The 3rd Defendant in
G 1964 entered the land and established oil mining locations thereon; they laid a pipeline across the land. Plaintiffs claimed compensation from the 3rd Defendant but the latter refused to pay them as it had paid compensation for both land and crops to the Defendants. Plaintiffs then instituted the action leading to this appeal, claiming as hereinbefore mentioned.

H **BOUNDARIES OF THE LAND:**

THE Plaintiffs pleaded, inter alia:

“5. *The land in dispute is bounded by Effurun on the West, the KEREKERE STREAM, which forms the boundary between Plaintiffs’ land and the land of OKPE people on the North, and Warri River on the East and*

South as shown in the Plan filed by the Plaintiffs in this action.

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9. When the news of this invasion got to OFO, UWOYO and EJULUWA and their people, they decided to and did move further inland in order to conceal themselves from any attack or invasion by the Benin Army. The new settlement was then called Gbolokposo. Gbolokposo is an Itsekiri word B which is derived from two Itsekiri words: UGBO (meaning forest) and OLOKPOSO (meaning powerful spiritual woman) whose abode was believed to be in the forest. The Plaintiffs' plan shows the shrine of the said spirit.

10. The Plaintiffs' ancestors lived and inhabited the land under the over lordship of the Olu of Warri and firmly established themselves and their C jujus and lived there undisturbed.

11. Later in time, the people of Effurun who are now neighbours of the Plaintiffs came in to settle there from Effuruntor.

12. In 1925 after many unsettled disputes between the Plaintiffs D and the people of Effurun on a boundary issue the boundary between the Plaintiffs' village and people of Effurun was finally settled by order of Native Court presided over by Chief Dore Numa who personally supervised the erection of concrete pillars to mark the said boundary.

13. After a few years of settlement Plaintiffs' ancestors were later E joined by one CHIEF UDEFI whose mother was the daughter of Odogun the son of Ofo one of the founding fathers of the Plaintiffs: Chief Udefi was accompanied by his wives and children.

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The Plaintiffs' ancestors also granted permission to two other F Urhobo families to settle within Plaintiffs' land, the first of these other settlements is OKUFOGHERE named after IFOGHERE who first settled at GBOMRO but after a few years of his settlement a misunderstanding arose between his family and that of OROROBÉ. In order to avoid any clash between these two families, Chief Otuedon a descendant of Uwoyo who was then the head of the Gbolokposo Community granted permission to IFOGHERE to settle else- G where within the Plaintiffs' land which he did and which settlement is now known and called OKUFOGHERE. The said IFOGHERE was not a native of Effurun but a native of UMOGBA in Eastern Urhobo Division. The second settlement is OKWATATA named after ATATA the son of ORO ROBE who also H desired to live separately from his Kith and Kin in GBOMRO and to whom Chief Otuedon also gave permission to found a settlement within the Plaintiffs' land subject to the payment of annual tribute and of good behaviour. These settlements are shown in the Plaintiff's plan filed in this case.

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21. *Plaintiffs' claim is supported by Plan No. WE2866 prepared by Mr. I. A. Williams, Licensed Surveyor, and counter-signed by the Surveyor-General, Bendel State of Nigeria.* "....

The substance of the above pleadings is that Plaintiffs claimed that their B ancestors settled on a piece of land known as GBOLOKPOSO and shown on their plan (Exhibit A) and founded thereon two settlements known as Gbolokposo and Gbomro. Their ancestors granted permission to some Urhobo families to settle on Gbomro and to found two other villages of Okufoghere and Okwatata on their land. It is this land described in paragraph 5 and delin- C eated on Exhibit' A' that is the peninsula in dispute in these proceedings.

The 1st set of Defendants, in their own pleadings, averred -

4. *As regards paragraphs 5 and 21 of the amended statement of claim, the defendants admit only that Plaintiffs have filed a survey plan in this case but they categorically deny all other averments contained in the D said paragraphs of the statement of claim, including the boundaries as stated therein, the correctness and/or accuracy of the survey plan, and put the plaintiffs to the strictest proof thereof.*

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9. *In further answer to paragraph 12 of the amended statement of E claim, Defendants aver that the boundary issue as finally settled by Order of the Native Court presided over by Chief Dore Numa who personally supervised the erection of concrete pillars to mark the said boundary confined the Plaintiffs to within a hundred yards radius of the area now occupied by the Plaintiffs at the village of Gbolokposo. The correspondences which passed F between the then Resident Warri Province. the District Officer and Chief Dore, the Sketch plan of the area referred to in the said correspondence and the petitions to the said Resident by the representatives of the Plaintiffs expressing their dissatisfaction with the decision and demarcation made by Chief Dore during the settlement aforementioned in 1925 and 1926 will be G relied upon by the Defendants at the trial of this action.*

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11. *The land and the area on which the 5th Defendants established their drilling location is but a part of a larger tract of land which together with Defendant's village Ugbomro or Gbomro and the plaintiffs village H Gbolokposo and its environs was founded at a time beyond human memory by Defendants' ancestor Uwherume.*

19. *The land in dispute in this case, which forms part of Ayakowo Bush or Abade land. is verged pink on survey plan No. AR ..1781 prepared by Chief E. O. Arubayi Licensed Surveyor which will be used by the o Defen-*

dants in this suit. the said Survey Plan is to be filed and served on the Plaintiffs.

20. Survey Plan No. AR.1781 aforesaid also shows part of the Defendants' land outside the area occupied by the 5th Defendants, claimed by Plaintiffs. The Defendant's Crops and other acts of possession and ownership including the boundaries of this part of their land are as shown on B Survey Plan No. AR. 1781."

In their own 3rd amended statement of defence, the 2nd set of Defendants pleaded, *infer alia*. as follows:

"3. The defendants deny paragraph 5 of the 3rd Amended Statement of Claim and will require strict proof of the allegations in this paragraph. In further answer to this paragraph the defendants aver that they have boundaries with Okpe people of Os ubi and Okwokoko at Erere stream and Ogbe family land of Effurun and on the Eastern side by the land of Jeremi people of Urhobo and on the South by Okpe people's land as shown in the defendants' Plan No. AE. 1561 prepared by Chief E. G. Arubayi al- D ready filed by the defendants.

7. The defendants deny that the suit S/28/63 referred to in paragraph 19A of the 3rd Amended Statement of Claim was not between the Plaintiffs and the defendants but admit that the plaintiffs bury their dead on different areas of the land as the Itsekiri whether the dead is pronounced E innocent or not by their Oracle which must be consulted after the death of such persons before they are buried.

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2. The defendants admit paragraph 21 of the 3rd Amended Statement of Claim only to the extent that they filed a plan but deny that the plan F is correct. The plaintiffs will be put to prove strictly the other allegations in this paragraph."

The Defendants tendered Exhibits C and F respectively as the plans, they claimed, that represented the correct boundaries of, and features on, the land in dispute. An examination of Exhibits A, C and F shows that they all depict one and the same land, the boundaries of which are the same. The only major difference is that on Exhibits C and F is shown a boundary said by the Defendants to depict the extent of part of the land in dispute granted to the plaintiffs by the Native Court in 1925. The defendants thus admitted there was a 1925 boundary demarcation between the Plaintiffs and Effurun (Defendants' H people).

The learned trial Judge accepted Plaintiffs' Plan Exhibit A as correctly showing the boundaries of the land in dispute. He observed, in respect of the boundary on the three sides:

"I think it can safely be said that the parties know the physical location and extent of the land in dispute. I have already referred to it as a peninsula. It is clearly so. This is borne out by the waterways shown in Exhibit A (Plaintiffs Survey Plan), Exhibit C, (Gbmro People's Survey Plan) and Exhibit F (Abade and Ogbe Families' Plan). The prominent settlements B earlier refelTed to, namely, Gbolokposo, Gbmro and Okwatata are within the said land in all three survey plans."

In respect of the 4th side, he found:

"I also accept the evidence that there is established boundary between Gbolokposo and Effurun. In my view the boundary is as shown in the C Plaintiffs' Survey Plan No. WE. 2866 (exh. A) and given in evidence by the surveyor, Ivharayi Williams (P. W. I)."

Having found as above, the learned trial Judge, curiously enough observed, later in his judgment:

"I must however advert to the obvious difficulty in dealing with the D Plaintiffs' claim. They have shown that they are in possession of part of the land mass. The defendants admit this. In fact, D.W. 9 went further than that; he said Gbolokposo village belongs to the plaintiffs. Three sides of the boundaries of that village, have been shown to my satisfaction. I know that the fourth boundary must lie between Gbolokposo village and Okwatata vil- E lage from the finding I have made upon the evidence."

(Italics mine)

It is this passage that has raised the first major question in this appeal.

Chief G. O. K. Ajayi, SAN, learned leading counsel for the Plaintiffs, observed that the Plaintiffs pleaded in paragraph 5 of their pleadings the land F they claimed. He submits that the learned trial Judge having found the boundaries as pleaded and as depicted in Exhibit A (Plaintiffs' plan) proved, he was in error to reverse himself by finding that the 4th boundary between Gbolokposo and Gbmro villages was not proved. He submitted that the boundary between the two villages was never an issue between the parties. He submitted G further that on the earlier findings on the boundaries of the land in dispute, judgment ought to have been given to the Plaintiffs. Learned Senior Advocate agreed with the Court of Appeal that the trial court could not declare title to an undefined area but submitted that the court below was wrong in dismissing Plaintiffs' case. He observed that the court below did not resolve this issue H that was raised before it.

Dr. M. Odje, SAN learned leading counsel for the 1st set of Defendants (id est, 1st and 2nd Defendants), in the Respondents' Brief, submitted that the Court below was right in dismissing Plaintiffs' claims as the Plaintiffs failed to discharge the primary duty on them to prove, with certainty, the

boundaries of the land they claimed. He submitted that, on the findings of the learned trial Judge, the fourth boundary was not proved.

Kehinde Sofola Esq, SAN learned leading counsel for the 2nd set of Defendants (4th -7th Defendants) made submissions in his Brief in substantial agreement with Dr. Odje.

I think the point raised by Chief Ajayi is well taken. On the pleadings, the issue raised at the trial by the parties was the ownership of the peninsula - the land in dispute. The evidence led, oral and documentary, including the plans, was directed at this issue. His findings as to the boundaries of the peninsula have never been challenged by the Defendants. It is the desire of the learned trial Judge to do what he honestly believed to be some justice to the plaintiffs that led him into the serious error that is now under attack. He had found -

"I must say pointedly that from the evidence, I do not accept that Gholokposo people are on the land with the permission of Ghomro people or of Abade and Ogbe families. I also do not accept that Ghomro people, Okwatata people and Igoghere people are on their respective lands with the permission of Gholokposo people."

(Italics are mine)

He later observed:

The plaintiffs strived to claim the entire peninsula. They failed to achieve that. Notwithstanding that their boundary with Effurun has long been decided and also specifically defined in this judgment, that has not given them the right over the entire peninsula. But their existence in and ownership of Gbolokposo village is not in doubt. The existence of Ugbomro and Okwatata villages as Urhobo villages occupied by the defendants is also not in doubt. The defendants have equally not impressed me in their assertion of ownership over the entire peninsula.

He then asked the question:

"What ought to be done in the circumstances as regards the reliefs sought by the plaintiffs?"

In his attempt to answer this question, he led himself to veer into a case not canvassed before him by either party. He saw the case before him as being on all fours with *Arabe v. Asanlu* (1980) 5-7 SC 78 at 86 and applying the dictum of Bello JSC, (as he then was) to the effect:

"Now in the case on appeal, the trial court found, and there is ample evidence to support the finding, that the Appellant has been in exclusive possession of part of the land in dispute while the respondent has been in exclusive possession of the other part. That being the case, either party is entitled to a declaration in respect of the part or other part in his possession

provided the boundary of either part can be ascertained.

(Italics are mine)

the learned Judge went on to say:

“There is no doubt that the plaintiffs are in exclusive possession of Gbolokposo village. The defendants are also in exclusive possession of B Ugbomro and Okwatata villages; I should also add Ifoghere village. The boundary between Effurun and Gbolokposo has been ascertained. The issue that remains is the boundary between Gbolokposo of Itsekiri stock and Ugbomro, or to put it better, including Okwatata which is firmly occupied by Urhobos of the defendants’ stock.”

C and concluded:

“In view of what the parties can really contest in respect of this peninsula, I think that a judgment that is capable of limiting any future contest to mere boundary dispute (if need be) is desirable. That boundary can then be ascertained. It will be unfair to leave the parties with any idea D that either side can ever hope to claim exclusive ownership of the peninsula.”

He proceeded ‘to make a declaration in favour of the Plaintiffs on the terms earlier stated in this judgment.

The Court of Appeal per Omo J. C. A. (as he then was) remarked:

E *“.....the learned trial Judge after on balance having displayed a proper mastery and appreciation of the issues before him, and making findings on the facts and the law, allowed sentiments to becloud his judgment. The Plaintiffs/appellants on his findings on the facts and the law had woefully failed to establish their claim and the penultimate decision of the court, F which cannot be in any doubt, must be that their claim must be dismissed in its entirety.”*

Although that court had earlier in the lead judgment of Omo JCA intimated that it would deal, if necessary, with issue of the boundaries of the land in issue, it never came back to it.

G **What was (and still is) in issue between the parties is the peninsula and the area of that peninsula having been established by the Plaintiffs who had the primary duty to do so, the court’ below was clearly in error to dismiss the claims of the Plaintiffs for their failure to prove the boundary between Gbolokposo and Gbomro villages, which was not in issue between the parties.**

H The significance of the 1925 boundary demarcation between the plaintiffs and the people, of Effurun (that is, Defendants’ people) appeared to have been overlooked by the two courts below. The dispute leading to the demarcation was as regards the boundary between the two communities of Effurun and Gbolokposo. Gbolokposo is the name the Plaintiffs give to the whole penin-

sula, although the village thereon predominantly inhabited by them also bears that name. **The Native Court fixed the boundary between the two communities. And on the finding of the two courts below, that boundary is the 4th boundary shown on Exhibit A (Plaintiffs' plan). With this finding, the presumption would be that the plaintiffs owned the peninsula and the burden would be on the Defendants to show how they came to own land on the Gbolokposo side of the boundary. Their claim to any part of the peninsula becomes much more difficult to establish. Their presence on parts of the peninsula has been explained in the Plaintiffs' traditional history which, if believed, makes their possession not exclusive.**

I answer Question I posed by the Plaintiffs in the affirmative. **TRADITIONAL HISTORY:**

It is not enough for the Plaintiff to prove the area of land they claim; they must also show how they came to own the land. Plaintiffs in this appeal relied on evidence of traditional history of founding of the land by their ancestors. The 2 sets of Defendants also relied on evidence of traditional history of the founding of the land by their ancestors. The learned trial Judge rejected both versions of traditional history. The court below affirmed the learned trial Judge's findings. The Plaintiffs, but not the Defendants, have further appealed to this court against the rejection by the courts below of their traditional history of the founding, by their ancestors, of the land in dispute.

The learned trial Judge summarised the evidence led in support of Plaintiffs' traditional history in these words:

"Plaintiffs' version

(i) Gbolokposo

The traditional history in support of the plaintiffs' case was given by the 1st plaintiff, Eghologbin Oletie. He said three people, Ofo, Ejuluwa and Uwoyo founded Gbolokposo. They came with Ginua I from Benin up to Big Warri also called Ode Itsekiri. I think he was obviously mixed up about that first part of the history because he at first said that those three persons left Ginuwa I at Ode Itsekiri and proceeded upstream to the Warri river after having landed in a place called Ugbo Agberen, a name they gave the place because of the presence of many pepper fruit trees there. But he later said that Ginuwa I founded the place called Ijala where he settled and died without ever getting to Ode Itsekiri.

As to who founded Big Warri, he said it was one of the sons of Ginuwa I called Ijijen and that it was Ijijen who was the Olu of Warri when Ofo, Ejuluwa and Uwoyo left Big Warri to found Ugbo Agberen. That confused state of evidence leaves an open question whether Ofo, Ejuluwa and Uwoyo accompanied Ginuwa I from Benin and found Ugbo Agberen on their

way or set out for the first time during the reign of Ijijen from Ode-Itsekiri to found Ugbo Agheren. If those three persons originally left Benin, it has not been explained whether their names are Bini names or Itsekiri names; and if Itsekiri names, why this? The founding of the said Ugbo Agheren becomes even more difficult to accept as it was admitted by the 1st plaintiff that that B place is part of Effurun now.

However, the 1st plaintiff said that while Ofo, Ejuluwa and Uwoyo were at Ugbo Agheren, a native doctor warned them that war was imminent and that they should hurry out of Ugbo Agheren. They then left and on getting to another place the native doctor told them that there was a female C juju there which would assure them peace. He advised them to settle there and they did so. He told them that the name of the female juju was Ukposo hence the place was named after the juju and became known as Ugbolokposo. One Chief Udefi who was one of the sons of Olu of Warri was said to be very old when his father died. So he refused to be crowned the Olu but instead got D his half brother to be crowned. But after the dispute between him and the new Olu they left Ode Itsekiri for Ugbolokposo village said to be his mother's village, and there settled.

(ii) Gbomro

Chief Udefi had a son called Otsoye. He also had his E brother's son called Sansan living with him at Ugbolokposo. They both left Chief Udefi at Ugbolokposo and settled at a place called Ugbo-Omomoron named after a fruit called Omomoron. That is the place known today as Ugbomoro or Ugbomro or Gbomro. It is claimed that there is a juju called Etokowa or Atokowa at the riverside of Ugbomro. The masquerade of the F said juju used to be performed by Ugbolokposo people as a yearly event until, it is alleged, the actual defendants in this action disturbed Ugbolokposo people.

As to how Urhobos came to live at Gbomro, the evidence through the 1st plaintiff is that one Orhorhobe who was a son of Abade of Effurun G sought permission of Otsoye and Sansan to settle at Gbomro and be allowed to farm and collect palmnuts there. He was so allowed to be a tenant by paying tributes with one large gourd of palmoil, a big basket of yams and the right leg of any bush animal caught by him. In recent times payment of tributes by the defendants of Orhorhobe was in the form of plantain, yams, H palmoil, fish and the sum of 12s. (N1.20) during Etokowa festival. Later one Ifoghere was allowed to settle on the same conditions as Orhorhobe was given. That is how Ifoghere village came into being.

(iii) Okwatafa

After the death of Orhorhobe one of his sons called Atata

asked for permission from one Otuedon of Ugbolokposo to settle. He was given a place which is now named after him as Okwatata village.

In rejecting the evidence, the learned Judge gave the following reasons:

1. "It is strange that nothing is mentioned about the worship of the Ukposo juju at Gbolokposo, a juju said to have assured peace; rather emphasis was placed all through on the Etokowa juju at Gbomro." B

2. "Another aspect of the evidence is that when Otsoye and Sansan left Gbolokposo and allegedly founded Gbomro, why is it that the plaintiffs simply assumed that they of Gbolokposo founded Gbomro as part of Gbolokposo when there is no evidence that at the time of such founding the extent of Gbolokposo by way of acts of possession such as farming or fishing C had been known. If that was not known then will it not be more consistent with the way villages were founded by those who migrated from other villages or areas to assume that Gbomro was a separate village of its own established by its founders as such?"

3. "The 1st plaintiff mentioned two ceremonial places which were D not however shown in the survey plan filed by the plaintiffs. The first is a place which he called Moluje where certain ceremonies are performed when an Olu is about to be crowned before going to Big Warri. This is a place of immense importance which, in my view, ought to have been located prominently in the survey plan by Gbolokposo people to see how near it is to E Gbomro and how far from Gbolokposo to indicate, at least, their extent of dominion over Gbomro land area. The other place is Ugbo-Egbe where some traditional rites are performed so as to avert war."

In his general comments on the traditional history of the plaintiffs, the learned Judge observed: F

"I have examined the traditional histories of both the plaintiffs and the defendants in this case. I am not for instance impressed with how the names and the villages of Ugbolokposo and Ugbomro originated as given on behalf of the plaintiffs. The juju called Okposo which the plaintiff said they were told by a native doctor would assure peace never seemed to be of G any significance thereafter in the lives of Gbolokposo people. One should have expected that such a juju would have its shrine installed in Ugbolokposo and worshipped by the people instead of giving undue prominence to a certain Etokowajuju in Ugbomro. The name of the native doctor was not even given. There are other issues of doubtful significance about Ugbolokposo H which I have not bothered to point out but I have already referred to the unsatisfactory evidence as to the connection between the Olu who founded Big Warri and the founder of Ugbo-Agberen• from where Ofo, Uwoyo and Ejuluwa allegedly left to found Gbolokposo.

As to the founding of Ugbomro, the genesis seems to be traceable to Chief Udefi according to the plaintiffs. He was said to be too old to be crowned Olu and therefore brought the son of his half brother to be so crowned. Nothing is said about who this his half brother was and what was the name of his said son. Nothing is also said about which Olu by name B was the said son crowned so as to know what time in history that could have been. It is said that after the crowning, Chief Udefi left Ode Itsekiri for Ugbolokposo in company of his son called Otsoye and his nephew called Sansan. According to the claim, it was these two persons who left Ugbolokposo to found Ugbomro. I do not feel convinced about the history C and in any event I cannot accept that Ugbomro was founded in that circumstance as part of Ugbolokposo whose extent at that time is not shown from the evidence to have been established by any act of occupation, possession or indeed surveillance. The fact that some persons may have arrived at a spot before others does not give ownership to other parts of the area to the D exclusion of later settlers."

On appeal to the Court of Appeal, the Plaintiffs questioned the correctness of the reasons given by the learned trial Judge for rejecting their traditional history. The court below found some of the complaints established but was of the view that they did not occasion a miscarriage of justice and E dismissed their appeal.

The Plaintiffs, through their learned leading counsel, contended in this court as follows:

1. On the origin of the names "Gbolokposo" and "Gbmro", it is submitted that as the evidence on this was uncontradicted and bearing in F mind the nature of the evidence given coupled with the rejection of the Defendants' evidence, Plaintiffs' evidence should have concluded the matter in favour of the plaintiffs. It is submitted also that the trial Judge misdirected himself when he stated that the name of the juju priest who told the plaintiffs' ancestors of the existence of the female juju (Okposo) was not given, in that G the name of the juju priest was in fact given in evidence. It is further submitted that "once the learned trial Judge rejected the evidence of the Defendants that the true name of the village was an Urhobo name, and there is no dispute that the village today bears the name Gbolokposo then the learned trial Judge had to accept that the only name the village ever bore was the H Itsekiri name of Gbolokposo and that the plaintiffs' version that they first settled on the land of the village and gave it that name must be true, and be evidence in support of their original ownership."

2. It is also submitted that the two courts below were in error in basing the rejection of plaintiffs' traditional history on the prominence' given

to Atokwa juju instead of Okposo, a more important juju of the plaintiffs. It is pointed out that as the Atokwa juju is situated close to the main village (Gbomro) occupied by the Defendants as Plaintiffs' customary tenants, the juju deserved greater prominence for the purpose of Plaintiffs' case.

3. It is submitted that the trial court misdirected itself on the non-indication of the two important ceremonial forests in Plaintiffs' plan, Exhibit A B as these features were indeed indicated on the plan. The Court of Appeal rightly found there was a misdirection but wrongly held it did not occasion a miscarriage of justice. It is further submitted that *"the attitude of the Court of Appeal to the exposed errors of the learned trial Judge leaves one with the unhappy impression that the Court of Appeal was ready to condone any C error on the part of the trial Judge in order to arrive at the conclusion that the appeal of the Plaintiffs should be dismissed."*

4. It is submitted that the two courts below misconstrued the evidence of PW4 as to Plaintiffs' act of possession and ownership and that if the evidence of this witness had been properly considered they would have found D that far from being damaging to the plaintiffs, the evidence of the witness supported plaintiffs' case.

Dr. Odje submitted that the judgments of the two courts below were right on the facts. He submitted that the Plaintiffs' surveyor ought to have superimposed Exhibit B1 on Exhibit A if plaintiffs' case was to be accepted that E the suit W/28/63 related to a part of the land now in dispute. Learned Senior Advocate contended that the onus was on the Plaintiffs to prove their case, the weakness of the defence notwithstanding. As the defendants did not counterclaim, learned counsel submitted, there was no burden on them. He urged the court not to disturb the concurrent findings of the two courts below F rejecting plaintiffs' traditional history. He cited Adebayo v. Ighodalo (1996) 5 NWLR (Pt.450) 507 at 527B, 529-530 A-B.

Mr. Sofola, for the 2nd set of Defendants, submitted that Exhibit B did not assist the appellants in this case. He pointed out that Exhibit B was an action against' the defendant therein in his personal capacity. Learned Senior G Advocate adopted the reasoning of the learned trial Judge on Exhibit B. He submitted that the duty was on the Plaintiffs to show the relationship between the land in litigation in 1963 (Exhibit B) with the land now in dispute (Exhibit A) but that the Plaintiffs failed to discharge this burden. Learned counsel submitted that plaintiffs' traditional history was rightly rejected by the two courts H below and urged this court not to disturb those findings.

The law is clear and that is that this court does not make it a practice to disturb concurrent findings of the courts below unless they are shown to be perverse Chinwendu v. Mbamali (1980) 3-4 SC 31; Ibodo v. Enarofia (1980)

5-7SC 42; Sobakin v. The State (1981) 5Se. 75; Enang v. Adu (1981) 11-12 SC 25; Adebayo v. Ighodalo (supra).

The 1st Plaintiff gave evidence in support of the traditional history pleaded by the plaintiffs. It is not that the evidence led was contradictory or confused, as the learned trial Judge found in the case of the Defendants' traditional history. The learned Judge, however, rejected plaintiffs' history for the reasons given by him. Some of these reasons the court below found, and quite rightly in my respectful view, were wrong. That court however, found that the misdirection occasioned thereby did not result in a miscarriage of justice. It is plaintiffs' contention in this appeal that the other reasons given and upheld by the court below were untenable as well and that the misdirections found by the court of Appeal ought to vitiate the finding of the trial court rejecting plaintiffs' traditional history. How far are these contentions right?

I begin with the origin of the names "Gbolokposo" and "Gbomro".

The court below, per Omo JCA, had observed:

"In pages 5 to 7 of Brief C, Plaintiffs/Appellants counsel has set out five main and specific reasons why the learned trial Judge refused to accept the plaintiffs/appellants traditional history. The first is as to the origin of the names Gbolokposo and Ugbomro. His reasoning is set out at page 349 lines 28 to page 350 line 11 of the records and I do not intend to reproduce same in this judgment. It is not the contention of the plaintiffs/appellants that the reasoning of the learned trial Judge is illogical, but it is submitted that the evidence of the plaintiffs/appellants on this issue was 'uncontradicted' and therefore should have been believed. The fact that the defendants/appellants, whilst claiming Ugbomro village/land to be theirs, did not give any evidence as to the origin of the word 'Ugbomro' does not mean that the learned trial Judge is bound to accept the testimony of the plaintiffs/appellants thereon on the ground that it is 'uncontradicted'. It is also important to note that the learned trial Judge also took into account in coming to this conclusion the traditional evidence led as to the founding of Ugbo-Agberen from where the land in dispute was subsequently founded, vide page 350 lines 8-11 of the record of proceedings where he stated as follows:

'I have already referred to the unsatisfactory evidence as to the connection between the Olu who founded Big Warri and the founding of Ugbo-Agberen from where Ofo, Uwoyo and Ejuluwa allegedly left to found H Gbolokposo.

I therefore find no reason for disagreeing with the view expressed by the learned trial Judge on this specific finding.

It is not in dispute that the evidence of 1st Plaintiff on the origin of the name of Gbomro village was unchallenged. On the pleadings and evidence, Gbomro

village is Defendants' staff village on the land in dispute and predominantly populated by their people. They gave an account of how the village was founded but said nothing about the origin of the name of the village notwithstanding that Plaintiffs had given, in both their pleadings and evidence, their own account of how the village derived its name Gbomro. In the case of Gbolokposo, both parties gave different versions of the origin of the name of the village. The learned trial Judge, for good reasons shown, rejected Defendants' version. The village is admittedly Itsekiri village.

Contrary to what the court below, per Omo J.C.A. said, there are a number of authorities which lay it down that an unchallenged piece of evidence ought to be accepted by the court as proof of the fact or issue in respect of which the evidence was given - see: *Odulaja v. Haddad* (1973) 11 SC 375 at 362; *Oni v. L. C. C.* (1974) 10 SC 9; *Seismograph Service Ltd. v. Akporuovo* (1974) 6 SC 119 at 136; *Wiri v. Wuche* (1980) 1-2 SC 1 at 6-7; *Obembe v. Wemabod* (1977) 5 SC 115; *WASA v. Kalla* (1978) 3 SC 21; *Adeyemi v. Bamidele* (1968) 1 All NLR 31 at 36; *Akhionhare v. Omoregie* (1976) 12 SC 11 at 18. **It is my D respectful view that on a proper appraisal of the evidence, the courts below ought to have accepted Plaintiffs version as to the origin of the names of the two villages of Gbolokposo and Gbomro.**

The next issue is the prominence given to the Atokwajuju over Okposo juju. The learned trial Judge was of the view that if Plaintiffs' traditional history was to be believed, plaintiff should have given greater prominence to the Okposo juju over Atokwa. The court below had this to say:

"The second relates to the Judge's query on the prominence given to the Atokwa juju instead of the Okposo juju. Counsel for plaintiffs/appellants has submitted that this has no legal significance and that the reason F why the Atokwa juju was stressed upon is to strengthen the claim of the plaintiffs/appellants to Ugbomro village, to which the Atokwa juju is nearer. This is obviously no answer to the 'query' of the learned trial Judge. Whilst prominence should be given to Atokwa juju in the hope that if the evidence that it was placed on the land and worshipped by the plaintiffs/appellants is G believed, it may persuade the trial court because of its relative juxtaposition thereto to accept the contention that Ugbomro village was founded by and belongs to the plaintiffs/appellants, why was the very juju to which the land owes its name and which is a symbol of peace not even shown on Exhibit A?"

Here again, it would appear that the learned trial Judge failed to grasp H the case before him. The Plaintiffs in paragraph 16 of their 3rd amended statement of claim pleaded thus:

"16. After the founding of Gbomro settlement, one OROROBÉ, who was the son of Abade of Erovie Quarter in Effurun and the grandson of

OVIERO of the same Erovie Quarter, left Effurun for Ugbomro and obtained permission from Otsoye and Sansan to settle in there for the purpose of cutting and collecting palm nuts which also were present in abundance in settlement. He was given permission to stay and to make his living out of farming, hunting and collection of palm nuts subject to payments of annual B tribute of puncheon of palm oil and basketful of yams to Otsoye and Sansan. In addition, he was also requested to offer the right forearm of any sizable game caught in his trap or got from hunting. In the course of time he was joined by one Ifoghere son of Itive from Umogha whose stay was also made subject to the same conditions. These stranger elements in Gbomro paid C these tribute until it was later revised to payment of 12/- some quantity of yams, plantain and fish during the annual festival of Plaintiffs' juju; ATOKOW A which festival they jointly participated until when they refused to honour their obligation in 1952 as a result of the Itsekiri/Urhobo crisis. They also unlawfully attempted to destroy the said ATOKOWA which act led to several D charges against some people of GBOMRO who were tried at the Magistrates' Courts, Warri and Sapele. The proceedings of the said criminal cases may be used at the hearing of this action. (Italics is mine)

In paragraph 6 of their 3rd amended statement of defence, the 2nd set of Defendants averred-

E "The defendants aver that Ifoghere who is a descendant of Abadi of Effurun founded Oke-Ifoghere by virtue of his relationship to the defendants and not as pleaded by the plaintiffs. The same applies to Atata and Ororobe who were related to the defendants and occupied their respective camps as of right and not by the permission of the plaintiffs' ancestors who were strang- F ers on the land and whose descendants are still strangers on the land and that the defendants have never taken part in the plaintiffs' Atokwa juju".

(Italics are mine)

From the above pleadings, one cannot be left in doubt as to the importance of the Atokwajuju to the dispute. One would, therefore, expect the Plaintiffs to G pay more attention to that fact over the juju that, though has a place of pride in their history, is of little significance to the issue in dispute between the parties. After all, the Defendants conceded Gbolokposo village (where Okposo juju is situate) to the plaintiffs. The court below acknowledged the prominence of the Atokwajuju to the present proceedings but the significance of its H latter question is unclear to me.

The third reason given by the learned trial Judge for rejecting Plaintiffs' traditional evidence was held by the court below to be, rightly faulted. This finding of the court below has not been challenged in this appeal. I agree with it.

The fourth reason which the court below also, rightly in my view, held to be a misdirection, relates to the finding of the learned trial Judge that two ceremonial landmarks of great importance to the plaintiffs were not shown by them on their plan. Again, the court however felt that the lapse was not serious.

In his commentary on Plaintiffs' version of the founding of B Gbolokposo, the learned trial Judge was of the view that 1st Plaintiff was somewhat mixed up in his account as to whether Ofo, Ejeluwa and Uwoyo accompanied Ginuwa I from Benin and founded Ugbo Agberen from where they founded Gbolokposo or that they set out from Ode-Itsekiri (or Big Warri) during the reign of Ijijen (son to Ginuwa I) to found the land. The court below, C per Omo JCA, observed as follows:

"The fourth merely states that the query on the connection between the Olu who founded Big Warri and the founding of Gbolokposo has no factual or legal justification. There is no substance in this complaint. The learned trial Judge treated this matter in extenso his judgment at pages 339/ D 340 of the record of proceedings. His findings therein set out have not been faulted. Counsel for 1st set of defendants/appellants also exposed the weakness in the plaintiffs/appellants rendering of this aspect of its traditional history in page 6 of their Brief."

This is what 1st Plaintiff said in his evidence:

"The three founding fathers accompanied Ginuwa I from Benin up to Big Warri (Ode Itsekiri). They left Ginuwa I there and proceeded upstream of the Warri River. They landed first at a place called Ugbo Agberen which is given after the presence of many pepper fruit trees in that place. I know a place called Ijala. It was founded by Ginuwa I the Olu of Warri. Ginuwa I F settled at Ijala and died there. One of his sons called Ijijen became the Olu and later founded Big Warri (Ode Itsekiri). It was Ijijen who was the Olu when Ofo, Ejuluwa and Uwoyo (the founders of Ugbo kposo left Big Warri to found Ugbo Agberen. A native doctor who was in their company told them that there was war coming and that they should run away from Ugbo Agberen. G They left and on getting to another place the native doctor told them there was a juju called Okposo and that they should settle there; and that there would be peace. Ukposo was a female juju and became known as Ugbolokposo. The village has since then been known by that name."

Under cross-examination the witness explained:

"What I meant by saying that Ofo, Ejuluwa and Uwoyo went with Ginuwa I to Ugbolokposo, is that they went with the Olu to Ugbolokposo after Ginuwa I died at Ijala. The Olu I meant was the son of Ginuwa I. After H

GINUWA I died at Ijala, Ijijen his son was crowned the Olu at Ijala before he moved to Ode Itsekiri or Big Warri. Ofo, Ejuluwa and Uwoyo accompanied the Olu to Ode Itsekiri. It was the elders of Ugbolokposo who told me this history. It is not correct to say Ijijen the Olu died at Ode Itsekiri before Ofo, Ejuluwa and Uwoyo left Ode Itsekiri." (Italics are mine)

B Whatever "mixing up" there was in the evidence of this witness was clarified by him under cross-examination.

From my examination of the reasons adduced by the learned trial Judge for rejecting Plaintiffs' traditional history, I am of the firm view that all the reasons given were unjustified. Had the learned trial Judge properly directed his mind he would have unhesitatingly accepted the evidence of the 1st plaintiff on traditional history, unshaken as it were, under cross-examination. True some of the lapses taken separately are not serious as opined by the court below but the cumulative effect of all the misdirections and wrongful appraisal of the evidence should have informed that court that there was, indeed, a miscarriage of justice. Shorn of the many reasons given by the learned trial Judge, there are then no reason(s) for rejecting the plaintiffs' evidence of traditional history which should have been accepted and given effect to. With respect to their Lordships of the court below, their concurrent findings on plaintiffs' traditional history are perverse.

E **Proof by evidence of traditional history is one of the five ways laid down by this court in *Idundun v. Okumagha* (1976) 9-10 SC. 227 of proving title to land declaration of interest in land can be founded upon each proof - *Akhonhare v. Omoregie* (supra). Thus, with the conclusion that plaintiffs' traditional history ought to have been accepted by the courts below, it follows**
 F **that on that alone, judgment ought to have been entered in plaintiffs' favour on their claims.**

The learned trial Judge, following his finding that plaintiffs' traditional history was unacceptable to him (a finding now held by me to be erroneous), considered evidence of acts of possession and ownership proffered in support of plaintiffs' case. This approach in line with decided cases. It has been held that where, in an action for declaration of title, evidence of traditional history is inconclusive, the case may be decided on evidence of contemporary acts of ownership - See: *Ekpo v. Ita* 11 NLR 68; *Sir Adesoji Aderemi v. Adedire* (1966) NMLR 398 at 402-403. where Idigbe JSC observed:

H *"Learned counsel for appellant has argued that the principle of law enunciated in the well known case of Ekpo v. Ita, 11 NLR 68 is inapplicable to the present case since, in his submission, the respondents can only succeed in this claim on a clear and satisfactory proof of a specific grant in their favour, of the communal land (i.e. the land in dispute). We are unable to*

accede to that submission and we take the view that, as decided in Ekpo's case (supra), in a claim where as in the case in hand, the evidence of 'traditional history' given by plaintiffs in an attempt to establish their ownership of the land in dispute is inconclusive, a court may yet determine ownership of the disputed land in their favour if they succeed in establishing acts of ownership, numerous and positive enough to warrant the inference that their possession of the land is to the exclusion of the defendants. "

See also: Agedegudu v. Ajemfuja (1963) 1 All NLR 109; (1963) 1 SCNLR 205 Okiji v. Adejobi (1960) 5 FSC 44 (1960) SCNLR 133.

Plaintiffs produced PW4 Mambo Oguora, a palmnut collector as their tenant on the land in dispute. He testified thus:

"I got to Gbolokposo village in 1960....I know the 1st plaintiff. He was present among those who permitted me to stay at Gbolokposo. I told them I would stay there to collect palmnuts. They agreed and a yearly rent of 'a32.10/- was agreed which I would pay. They took me into the bush and said there I was permitted to collect palmnuts. There were other three palmnut collectors at that time. They have since left. They were all Isoko people. There were also some Ibo people who were tapping palm wine in the bush. They have also since left. There is a village called Okwatata near Gbolokposo. There is a camp nearby where Isoko people settle. After this camp, the next village is Gbomro. Nobody has ever challenged me since I have been collecting palmnuts in Gbolokposo bush."

Cross-examined, the witness testified further:

"It is true that Urhobo people inhabit Gbomro. It was I and three others that were introduced to Gbolokposo people at the same time for permission to collect palmnuts in Gbolokposo bush. It is true also that Isoko people live at Gbomro. Apart from me, there are other Isoko people collecting palmnuts at Gbolokposo as at now. I know one Isoko man called Awa. It is true he lives at Gbomro. I also know one Isoko man called Egrujakpo. It is true that Awa and Egrujakpo are Isoko from Emede. I do not know who is called James in Gbomro. Awa and Egrujakpo are palmnut collectors. It is true that I collect palmnuts at Gbolokposo and Gbomro. There is no boundary in the course of my doing this. Awa and Egrujakpo also collect in the bush of Gbolokposo and Gbomro but we do not meet in the course of this. (Italics are mine)

Further cross-examined, he answered:

"The three Isoko people with whom I met Gbolokposo people for permission for us to collect palmnuts are Edward Ogba, C. K. C. Umukoro and Sergeant Ugheghe. These people as palmnut collectors collected in Gbolokposo and Gbomro without barrier. It is true I used to see Effurun

people in the bush collecting palmnuts while I was also collecting mine. I do not know the boundary between Gbolokposo and Gbomro and Effurun. It is true that there are two camps for Isoko people at Gbomro. I do not collect palmnuts up to Shell Company Location. It is too far from me. It is true that as at now there are more Isoko people in Gbomro than in Gbolokposo.

B (Italics are mine)

Cross-examined by Mr. Akpomudjere, the witness deposed thus:

"It is true that the people who inhabit Okwatata are Urhobo people from Effurun. It is true that there are rubber plantations in the bush between Gbolokposo, Gbomro and Okwatate. There are also cassava farms. There are kolanuts trees in the bush. There are also coconut trees in Gbolokposo, Gbomro and Okwatata villages. I know the 6th defendant now in court. I used to meet him in the bush but he never once challenged me not to collect palmnuts. It is true that when I was clearing the bush to make cassava farm, he claimed the spot as his own. I paid him for it and he allowed me to farm there. I cannot recollect how much I paid. It is a long time now. I told Gbolokposo people about that incident. They advised me not to worry as the 6th defendant according to them was also Gbolokposo man. It is true that I have always known the 6th defendant to live at Effurun."

(Italics are mine)

E Re-examined, he said:

"I know that the 6th defendant has a sister who is married at Gbolokposo."

Commenting on the evidence of this witness, the learned trial Judge said:

F *"There was also the claim that they put tenants on the land. The main witness to this effect was P.W.4, Mambo Oguara, an Isoko man who claims to be a palmnut collector and tenant of Gbolokposo people. He alleged that he collects palmnuts in Gbolokposo and Gbomro bush but that there is known boundary between these two places when he and other G palmnut collectors meet in the bush. He also used to see some Effurun people collecting palmnuts in the same bush and does not know the boundary between Gbolokposo, Gbomro and Effurun. He said specifically, which is rather significant, I do not collect palmnuts up to Shell Company Location. It is too far from me. That location is a major cause of action in this case. He H also said that Gbomro people have more tenants than Gbolokposo."*

On Plaintiffs' appeal to the Court of Appeal, that court, per Omo J. C. A. observed:

"The very feeble submission of plaintiffs/appellants in reply to this is that 'what the trial Judge intends to infer from this piece of evidence is

irrelevant to the facts of the case. Nothing can be farther from the truth. The findings of the trial Judge quoted are very damaging to the plaintiffs/appellants' claim and cannot be so easily shrugged off. If the main witness as to tenancy can be so equivocal and give evidence which is inimical to the case of his landlords as to acts of ownership, how can the learned trial Judge be blamed if he regards such acts as insufficient in establishing title to the whole of the land claimed which includes Gbolokposo, Gbomro, Okwatata and some section of what is now called Effurun? (Italics are mine) B

With profound respect to their Lordships of the two courts below, I do not share their views. First it is incorrect to say that this witness deposed that *"Gbomro people have more tenants than Gbolokposo."* The learned trial Judge misdirected himself in this respect. I have gone through the evidence of this witness as contained on the printed record and I can find no such statement in his evidence. The witness said: . C

"It is true that as at now there are more Isoko people in Gbomro than in Gbolokposo." D

If this is what the learned trial Judge took to be

"He also said that Gbomro people have more tenants than Gbolokposo."

then he was grievously wrong.

Secondly, I cannot share the view of the court below that the witness E was "equivocal" and that his evidence was "inimical to the case of his landlords." I have set out above the essential parts of the evidence of the witness; I cannot see in what respect he could be said to be equivocal nor did the court below explain this. If anything, the evidence of the witness, in my respectful view, strengthened the case for the plaintiffs. If they had tenants collecting F palmnuts in Gbomro undisturbed, the plaintiffs' version of the founding of Gbomro village and their putting Defendants and other tenants on the land in the Gbomro area must be nearer the truth than Defendants' version. It must be noted that the learned trial Judge did not disbelieve this witness. So a consideration of his evidence does not turn on credibility but on inferences to be G drawn from it.

I now come to Suit No. W/28/63 relied on by the plaintiffs as an important act of ownership on their part. Exhibits B, B1 and B2 deal with this aspect of the case. They were tendered by the plaintiffs. In paragraph 19(a) of their 3rd amended statement of claim, they pleaded as follows: H

"19(a) A portion reserved for the burial of those who after death but before burial were traditionally proclaimed 'witches and wizards' and/or 'Dad' (sic) deaths as it was and is against Itsekiri customary law and practice to bury such persons in their houses in the town. This area was the

subject matter of the suit No. W/28/63: *Eghologbin Oletie and 2 Others v. Ukperukewhe Buleke (of Abade family)* decided in favour of the plaintiffs both at the High Court, Warri and the Supreme Court, Lagos. The said area edged yellow in plaintiffs' Plan as shown on Plan No. W/GA 150/63 tendered and admitted as Exhibit P. 1. in W/28/63 and the proceedings and judgments of the said Suit will be relied upon at the hearing of this action."

In their own pleadings the 1st set of Defendants averred:

"22. In answer to paragraph 19 of the amended statement of claim, the defendants deny the first sentence in sub-paragraph (a) and the whole of sub-paragraph (b) thereof and say further as regards the other averments in sub-paragraph (a) therein that defendants were not parties in Suit No. W/28/63."

And in their 3rd amended statement of defence the 2nd set of Defendants pleaded

"7. The defendants deny that the suit S/28/63 referred to in paragraph 19A of the 3rd Amended Statement of Claim was not between the plaintiffs and the defendants but admit that the plaintiffs bury their dead on different areas of the land as the Itsekiri do by their custom any where they live depending on whether the dead is pronounced innocent or not by their oracle which must be consulted after the death of such persons before they are buried."

By their pleadings and evidence the area in dispute in the 1963 action was the area traditionally used by the plaintiffs for the burial of certain disadvantaged elements of their community. The 2nd set of Defendants admitted in their pleadings that the plaintiffs buried their dead on different areas of the land in dispute in accordance with their Itsekiri custom.

In his judgment, the learned trial Judge observed:

"In Suit No. W/28/63: *Eghologbin Oletie and Others for themselves and on behalf of Gbolokposo people v. Ukperukewhe Buleke*, judgment was given by the Warri High Court on 30th October, 1968 for Gbolokposo people. The claim was for (1) a declaration of title to a parcel of land known as 'Igbale' in Gbolokposo village land area; (2) general damages for trespass; (3) injunction. Gbolokposo people were granted possessory title in respect of the said land, and also damages. The survey plan No. W/GA 150/63 used in that case was tendered as exh. B1 in the present case while the judgment was tendered as exh. B.

The plaintiffs here no doubt rely on that judgment together with the said plan as evidence of ownership. The land shown in the said survey plan (exh. B 1) was said to be used exclusively as a burial ground of persons whose death offended the custom and belief of the Itsekiri people. Such

people were said to have died a bad death and were not allowed to be taken to Ode Itsekiri or Big Warri for burial.

The said land as shown in exhibit B1 is allegedly verged yellow in the plaintiffs' litigation plan, exh. A. There are obvious doubts about the relationship between the land in exh. B1 and that verged yellow in exh. A. In the first place the plaintiffs' surveyor, Ivbarayi Williams (P. W. 1) was cross-examined about the plan, exh. B1, in relation to the litigation plan exh. A. He said: 'It is true that I did not see the plan used in the said suit No. W/28/63 before I verged the area in question yellow.' He later said further: 'I did not calculate the area verged yellow in exh. A. It is true I cannot vouch for the extent and location of the land in the said 1963 litigation except what the 1st plaintiff showed me which was cleared round.'

Secondly, a comparison of the area verged yellow in exh. A with the land shown in exh. B1 reveals that the shape is quite different while that shown yellow in Exhibit A resemble the shape of a car facing the west, that shown in exh. B1 is like a helicopter facing the east.

Thirdly, in exh. B1 arrows are shown indicating the direction of Ugbomro and also that of Gbolokposo. From a very careful look at the way the arrows are directed, particularly that pointing to Ugbomro, it is obvious that the area verged yellow in exh. A should be pushed considerably towards Gbolokposo direction along the Warri River in order that the said arrow pointing to Ugbomro in exh. B1 would mean that it tries to indicate, namely, the true, direction of Ugbomro village somewhat inland.

Fourthly, I think it ought to be mentioned that contention of the plaintiffs that the land shown in exh. B1 is used exclusively as a burial ground is defeated when one refers to the area verged yellow in exh. A. It is indicated in the said area verged yellow 'Orhurhu's rubber plantation of Gbolokposo'. If it is true that both represent the same land which is said to be reserved exclusively for burial and for nothing else, not even for farming, then no Gbolokposo man could have been allowed to do anything contrary to the purpose for which that land is reserved.

From exh. B1, it is not possible to imagine how near the area therein shown is to Ugbomro village. The result is that the judgment in exh. B can hardly be understood as relating to any parcel of land close to Ugbomro as to make it appear that Gbolokposo people control land reasonably proximate to or around Ugbomro.

In other words, that judgment does not help the plaintiffs in their present claim in this action as far as the area shown in exh. B1 is concerned.

“ On appeal to the Court of Appeal, that Court, per Omo JCA, set out relevant portions of the above passage and observed:

“Counsel in his submission seems to have lost sight of the fact that from the evidence of the surveyor the land litigated in 1963 (Exhibit B) cannot be said to be the area verged yellow in Exhibit A. If the surveyor had worked a little harder he would have, by use of his working instruments ‘lifted’ the area litigated as shown in Exhibit B1 and fitted it at its exact spot B within Exhibit A. The complaint here also fails.”

The court below had earlier found -

“The submission that the 1st set of defendants/respondents are bound by these findings of fact on acts of ownership are true on the basis of Exhibit B.”

C The finding of the two courts below that the Defendants are bound by Exhibit B has not been appealed against. They cannot now be heard to argue against that finding.

Be that as it may, I regrettably find myself unable to subscribe to the views of their Lordships of the two courts below on the effect of Exhibits B, B1 D & B2 on Plaintiffs’ case. In my respectful view, the 1963 action strengthened that case. Plaintiffs prepared Exhibit A on which is shown edged yellow, the area of plaintiffs’ cemetery said to be in dispute in 1963. In the pleadings they averred that the area in dispute in the 1963 action was the area of the cemetery. The 2nd set of Defendants admitted that plaintiffs had burial grounds on the E land in dispute. Defendants did not deem it fit to indicate on their plans the area of land they thought was in dispute in 1963. They merely pleaded that they were not parties to that action, an assertion which is not supported by the concurring findings of the two courts below and against which there has been no appeal. They thus did not join issue with the plaintiffs on the area in F dispute in 1963 as indicated on the latter’s plan, Exhibit ‘A’. **That being so, it is erroneous to say that the 1963 action was of no assistance to the plaintiffs. It would have been more helpful if the plaintiffs’ surveyor had superimposed Exhibit B1 on Exhibit A. But failure to do so was not harmful in this case where the Defendants have not joined issue with the plaintiffs on the area in G dispute in that earlier action. Plaintiffs minimum evidence would suffice.**

Obaseki J, (as he then was) in Exhibit B found that the plaintiffs in the 1963 action (who are also plaintiffs in the present proceedings) were the owners of the land in dispute in the action before him. On the land in dispute in the action the learned Judge found

H *“I am only concerned with the area of land known as ‘Igbele’ in Gbolokposo described in Exhibit ‘P1’. I am satisfied with the evidence adduced by plaintiffs’ witnesses describing the area and in particular Exhibit ‘P1’. The defence has not contradicted the fact that the area is a grave yard.”*This tallies with the description of the area edged yellow in Exhibit A. It

is significant to note that on Exhibit P1 (now B1 in these proceedings) cassava, rubber and other plantations were shown to be all over the land. This fact did not dissuade Obaseki J from holding that the area was a grave yard. It is not plaintiffs' case in this action that the area was "exclusively used as a burial ground" as erroneously stated by the learned trial Judge. Nor do I see any substantial difference in the shape of the land shown on Exhibit B1 vis-a-vis that edged yellow on Exhibit A. All the reasons given by the learned trial Judge in support of his finding that Exhibit B is not helpful to plaintiffs' case do not just hold on a careful examination of Exhibit B1 vis-a-vis Exhibit A.

The conclusion I reach is that the findings of the learned trial Judge on plaintiffs' acts of possession and ownership are also perverse. And the affirmation of those findings by the court below is equally perverse. Those findings are set aside.

Whether from the view point of traditional history or that of acts of possession and ownership, plaintiffs' case, in my respectful view, is proved. If the case for either side is put on that imaginary scale, that for the plaintiffs, in my judgment, preponderates. I have no hesitation in entering judgment in their favour as per their claims. Consequently, I allow this appeal and set aside the judgment of the Court of Appeal dismissing plaintiffs' claims. I enter judgment for the plaintiffs as per the claims in their amended writ of summons.

I award to the plaintiffs against each set of Defendants costs assessed at N1,000.00 in the High Court, N600.00 in the Court of Appeal and N1,000.00 in this court.

BELGORE JSC

There is no dispute that the land in issue is a peninsula. Also not in dispute is the fact that there was a native court decision on the land in 1925, presided over by Chief Dore Numan against which there was no appeal. The judgment of 1925 placed two pillars at the neck of the peninsula as the demarcation between the Effurun and the predecessors of the present appellant. The land in dispute is surrounded on three sides by Rivers Warri and Kerekere, making it look like a pear with the neck at the western end, it is on this neck that the two pillars of 1925 were erected as shown in Exhibit A, the plaintiffs/appellants' plan. The plans of the defendants, though on the same scale with Exhibit A, and having been drawn after Exhibit A was served on them, completely ignored the two pillars (supra). It was only in evidence the defendants/respondents testified that the land of the plaintiffs was only two hundred yards radius from the pillars, a contention not indicated on their plan.

Assuming the defendants' contention is true, the two pillars as cardinal points would encroach into Effurum land when a circle is made round each pillar. Certainly this is not the case of the parties on their pleadings.

Right inside the disputed land, sitting on Warri River, was a small piece of land the respondents sued upon in 1963 and subject of a judgment by B Obaseki J (as he then was) and affirmed by Supreme Court that the boundary between the present parties and their privies had been settled in 1925 by the native court judgment.

The learned trial Judge in a lengthy judgment found the two previous judgments on the same land or part thereof were in favour of the appellants, but in a sudden twist of fate held that he never believed the traditional history of either party. Not only this, the trial Judge advanced further that because the boundary of two settlements on the land - Gbolokposo and Gbomro- was not established, and that Gbomro being of the respondents' people, were not on the land with the permission of the appellants; this with D great respect, was not a contended matter at the trial as neither the pleadings nor any evidence alluded to this.

It must however be clearly stated that when there are previous judgments on a land or part of it, clearly finding in favour of a party and not appealed against which confirmed the facts of that judgment as to the traditional history of the land, its operation as estoppel per rem judicatam cannot be ignored in a subsequent litigation between the same parties, their privies and descendants in title. It is therefore surprising that the Court of Appeal without diligent consideration of all evidence before the trial court went on to affirm the lower court's judgment. To my mind, the Court of Appeal, in its lead F judgment, never adverted enough to the issues properly and its conclusion is not coherent.

I therefore agree with my learned brother, Ogundare, J.S.C. that there is great merit in this appeal. The trial court's judgment affirmed by the Court of Appeal, was greatly at variance with the evidence before it and ought not to G stand. I also for the fuller reasons contained in the lead judgment allow this appeal and make the same consequential orders.

WALI JSC

H I have had a preview of the lead judgment of my learned brother Ogundare J.S.C. and I entirely agree with his reasoning and conclusion for allowing the appeal.

Had the learned trial Judge abode by the findings made in his judgment in favour of the plaintiffs he would have entered judgment for them.

Apart from the traditional evidence there was sufficient evidence of acts of ownership of the land in dispute by the plaintiffs as found by the learned trial Judge, and that alone could be a basis for judgment to be given in plaintiffs' favour. See Ekpo v. Ita II NLR 68.

The Court of Appeal was wrong to reverse the partial decision made by the trial court in favour of the plaintiffs and to dismiss their case in toto. B

Both the trial court and the Court of Appeal are perverse in their decisions having regard to the evidence. These decisions are set aside and in place thereof, judgment is entered in plaintiffs' favour. See Ibodo v. Enarofia (1980) 5-7 SC 42 Enang v. Adu (1981) 11-12 SC 25 and Abusomwan v. Mercantile Bank (Nig.) Ltd. (No.2) (1987) 3 NWLR (Pt. 60) 196. C

I abide by the order of costs contained in the lead judgment.

ADIO JSC

I have read, in advance, the judgment just delivered by my learned D brother, Ogundare, J. S. C., and I agree that this appeal should be allowed. I too allow the appeal and I abide by the consequential orders, including the order for costs.

IGUHJSC

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

I am afraid I have nothing more to add. F

Consequently, I too, allow this appeal and set aside the decisions of both the trial court and the Court of Appeal.

I subscribe to the consequential orders including those as to costs contained in the leading judgment.

G

H