

SUPREME COURT OF NIGERIA
2ND OCTOBER, 1998. SC. 129/1994
CORAM:- M. L. UWAIS CJN, S. M. A. BELGORE,
U. MOHAMMED, S. U. ONU, A. I. IGUH, JJSC

NATHANIEL UDE & 2 ORS. PLAINTIFFS/APPELLANTS
(For themselves and as representing the
other members of the Amawom Community,
Oboro, Ikwuano)

AND

1. N. CHIMBO & 2 ORS. DEFENDANTS/APPELLANTS
For themselves and as
representing the other members of Ihim
Community, Ibere, Ikwuano)
4. Imo State Schools Management Board

APPEALS - *Interference with findings of fact - Will not Ordinarily be done by appellate court - Save in some exceptional circumstances - Such as where the findings are perverse.*

COURTS - *Issue - Not placed before the Court - Should not be dealt with - To avoid denial of right to fair hearing.*

LAND LAW - *Possession - Trespass - Is essentially a tort against possession - Failure of claim for title - Does not mean claim for trespass must also fail.*

LAND LAW - *Possession - Trial court's finding of possession and better title in favour of appellants - Was erroneously interfered with by the Court of Appeal.*

LAND LAW - *Title - Reliance on a particular mode of acquisition of title - Where not proved - It is not permissible to substitute other matters such as acts of possession - To warrant inference of the ownership not pleaded as root of title.*

PLEADINGS - *Evidence - Lower courts holding that appellants' evidence was at variance with their pleadings - Is a total misconception of their case.*

FACTS

Before the High Court Umuahia, the appellants claimed against the respondents declaration of entitlement to customary right of occupancy, N50,000.00 special and general damages for trespass and perpetual injunction in respect of the land in dispute. Appellants claimed that the land was donated to them for development projects by the heads and principal members of the land owing families sometime in 1952/1953. They had since then retained ownership and exclusive possession. Respondents averred that from time immemorial, the land has been in the ownership and possession of their ancestors through whom they inherited the same.

The trial court found for the appellants as per their claim awarding N1,000.00 as general damages for trespass. Respondents' appeal to the Court of Appeal was allowed. Appellants have now appealed to the Supreme Court raising a lone issue.

ISSUE FOR DETERMINATION

Whether the Court of Appeal was right in setting aside the High Court Judgment and dismissing the plaintiffs' claim in its entirety without granting the claims for trespass and injunction, simply because the plaintiffs failed to technically prove their title, even though there was evidence (and finding by the trial court) of possession by the plaintiffs.

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

Issues - Not placed before the court

1. With the greatest respect to the Court of Appeal, it cannot be over-emphasized that when an issue is not placed before the Court of Appeal, it has no business whatsoever to deal with it. See Florence Olusanya v. Olufemi Olusanya (1983) 3 S.C. 41 at 56, Chief Ebba v. Chief Ogodo and Another (1984) 4 S.C. 84 at 112. Courts of Law, except where an issue such as jurisdiction arises, ought at all times to limit themselves

only to the issues raised by the parties in their pleadings as to act otherwise might well result in the denial to one or the other of the parties of the right to fair hearing. See Alhaji Ogunlowo v. Prince Ogundare (1993) 7 N.W.L.R. (Part 307) 610-625. I entertain no doubt that the court below was in definite error when, from no where, it raised issues neither pleaded nor relied on or canvassed by the parties or either of them at the trial in the determination of the appeal before it. (p. 2367 H)

Pleadings - Evidence

2. The Court of Appeal, with profound respect, was in gross error and totally misconceived the case of the appellants when it held that the evidence led on their behalf was at variance with the facts averred in their Statement of Claim or that the testimony of P.W.6 and P.W.7 was to the effect that it was the Ugboaja family as against the Amawom Community that granted the parcel of land verged blue to the respondents for the establishment of a school. It seems to me crystal clear that the only two reasons advanced by the court below for interfering with the decision of the learned trial Judge on the question of title to the said land in dispute are again with respect, untenable. (p. 2371 F)

Interference with findings of fact

3. It is trite law that an appellate court will not ordinarily interfere with the findings of fact made by a trial court except in certain circumstances such as where it is clear or established that such findings are perverse or are not supported by evidence or have not been arrived at as a result of a proper exercise of judicial discretion or that the trial court has not made a proper use of the opportunity of seeing and hearing the witnesses at the trial or where it has drawn wrong conclusions from accepted credible evidence or has taken an erroneous view of the evidence adduced before it or where they were reached as a result of a wrong application of some principle of substantive law or procedure. See Okpiri v. Jonah (1961) All N.L.R. 102 at 104-105, Woluchem v. Gudi (1981) 5 S.C. 291 at 295-296, 326-329. In the absence of compelling evidence indicating erroneous appraisal of facts and erroneous conclusions, an appellate court

must show the utmost restraint and reject any temptations to interfere with well considered findings made by a trial court after hearing the evidence of relevant witnesses. See Ogbechie and others v. Onochie and others (1988) 1 N.W.L.R. (part 70) 370. (p. 2371 H)

B

Possession - Trespass

4. It is trite law that trespass is essentially a tort against possession and only a person in possession of a land in dispute at all material times can maintain an action in damages for trespass. See Olagbemi v. Ajagunbade 111 (1990) 3 N.W.L.R. (part 136) 37, Adebanjo v. Brown (1990) 3 N.W.L.R. (part 141) 661 etc. Accordingly, possession alone is sufficient to maintain an action in trespass although for such possession to found an action in trespass, it must be clear and exclusive. And even where a plaintiff has established sufficient acts of exclusive possession, the mere fact that his claim for title has failed does not mean that his claim for trespass to the same land must necessarily fail. (p. 2373 A)

E Possession - Trial court's finding of possession

5. I have myself given a close consideration to the evidence before the learned trial Judge and his findings thereupon. In my view, the Court of Appeal, with respect, was in complete error to have interfered with the said findings of the trial court on the issue of possession of the land in dispute and which of the parties had a better title thereto. I think the trial court, having regard to the evidence and its findings thereupon, cannot be faulted in its judgment in favour of the appellants and that the court below was wrong to have interfered with the same. The conclusion I therefore reach in this appeal is that the sole issue for the determination of this court must be resolved in favour of the appellants, having regard to the undisturbed findings of the learned trial Judge on the questions of exclusive possession of the land in dispute by the appellants and their better title to the said land than the respondents. (pp. 2375 C/2376 E)

Title - Reliance on a particular mode of acquisition

6. Without doubt, where a party pleads and relies on a particular mode of

acquisition as his root of title, he is under a duty to prove such mode of acquisition to the satisfaction of the trial court before his claim on declaration of title can succeed. Where, however, the radical title pleaded is not proved, it is long settled that it is not permissible to substitute a pleaded particular root of title that has failed with other matters such as acts of possession, numerous and positive to warrant the inference of the ownership not pleaded as root of title. See Chief Odofin v. Isaac Ayoola (1984) 11 S.C. 72 at 116-117 and Fasoro and Another v. Beyioku and others supra. But this is in so far as a claim for declaration of title goes, for as I have already observed, the failure of a claim for declaration of title will not necessarily lead to the dismissal of an independent claim in trespass or injunction in respect of such land where a plaintiff has pleaded and proved acts of exclusive possession of the land and the defendant's unlawful trespass thereon. (p. 2375 G)

NOTABLE POINTS OF INTEREST

IGUHJSC

1. Trespasser in possession cannot sue one with a better title

Generally speaking a claim in trespass is rooted in exclusive possession and all a plaintiff needs prove is that he has exclusive possession of the land in dispute, once a defendant claims ownership of the same land, title is put in issue and the plaintiff, to succeed, must show a better title than that of the defendant to the land in dispute. See Amakor v. Obiefuna (1974) 1 N M L.R 331 at 336. Consequently, a trespasser in possession is only entitled to sue in trespass, persons who are not the true owners of the land in dispute or have no better title thereto than himself. Such a trespasser in possession cannot therefore succeed in an action in trespass where he sues one who has a better title to the land in dispute than himself. See Mogaji and others v. Cadbury Nigeria Ltd. and others (1985) 2 NWLR (part 7) 395 at 429. (p. 2365 A)

2 Title - Lower court interfered wrongfully - But no appeal on that issue

It is clear to me that in the present case, the findings of fact of the learned trial Judge on the issue of the ownership of the land in dispute

would appear to be fully supported by the averments in the appellants Statement of Claim and the evidence in support thereof and I find it difficult, with due respect to the Court of Appeal, to see any justification for its interference with the same. The appellants have, however, not
 B appealed against the dismissal of their claim in respect of title to the land in dispute by the Court of Appeal. Accordingly I will say no more on that issue. (p. 2372 E)

REPRESENTATION

C Appellants absent - unrepresented
 Messrs. Amaechi-Nwaiwu and A. E. Obiekwe for the respondents

CASES REFERRED TO

- D Olusanya v. Olusanya (1983) 3 S.C. 41 at 56
 Chief Ebba v. Chief Ogodu (1984) 4 S.C. 84 at 112
 Ogunlowo v. Prince Ogundare (1993) 7 N.W.L.R. (Part 307) 610-625
 Okpiri v. Jonah (1961) All N.L.R 102 at 104-105
 E Woluchem v. Gudi (1981) 5 S.C. 291 at 295-296,326-329
 Ogbechie v. Onochie (1988) 1 N.W.L.R. (part 70) 370
 Olagbemiro v. Ajagungbade 111 (1990) 3 N.W.L.R. (part 136) 37
 Adebajo v. Brown (1990) 3 N.W.L.R. (part 141) 661
 Chief Odojin v. Ayoola (1984) 11 S.C. 72 at `116 -117
 F Amakor v. Obiefuna (1974) 1 N M L.R 331 at 336
 Mogaji v. Cadbury Nigeria Ltd. (1985)2 NWLR (part 7) 395 at 429

LEAD JUDGMENT BY IGUH JSC

G The proceedings leading to this appeal were first initiated in the High Court of Justice of the former Imo State of Nigeria, Umuahia Judicial Division, holden at Umuahia on the 9th day of April, 1986. In that court, the appellants, for themselves and as representing members of the
 H Amawom Community, Oboro, Ikwuano claimed against the defendants, for themselves and as representing members of the Ihim Community, Ibere, Ikwuano as follows:-

1. A declaration that the plaintiffs are entitled to the customary

right of occupancy of all those pieces or parcels of land known as and called "INYINUKWU" lying, situate and being in Amawom, Oboro, Ikwuano within the Umuahia Judicial Division which land are more particularly delineated and shown in the plaintiffs' survey plan No. VEN/D82/86 therein verged pink and whose annual rental value is about N20.00. B

2. N50,000.00 being special and general damages for trespass on the said land in that on or about the 10th day of January, 1982, and on divers other dates, the defendants broke into and entered the said land in the plaintiffs' customary occupation or possession without their leave, C licence or consent and destroyed a vast quantity of farm crops of the plaintiffs.

3. An order of perpetual Injunction restraining the defendants, their servants, agents and/or workmen from further entry into or any other acts of interference with the said land in dispute. D

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

By an application dated the 24th day of December, 1986, the 4th defendants applied to be joined in the suit and to defend their interest in the subject matter of the action. In the affidavit in support of their application, they claimed ownership of the land in dispute which they deposed was part and parcel of their Ihim Primary School Premises. This application was accordingly argued and granted by the trial court as prayed. F The 4th defendants duly filed and served their Statement of Defence on the plaintiffs and the 1st -3rd defendants respectively as ordered by court.

The case accordingly proceeded to trial at the close of pleadings and the parties testified on their own behalf and called witnesses. G

The plaintiff's case, as pleaded and testified to, is that the land in dispute comprises of three pieces or parcels of land. One parcel is situate roughly north of Amawom - Nkalunta road. The two pieces are both situate south of the said road. All three parcels of land are clearly indicated and shown verged pink on the plaintiffs' survey plan No. VEN/D82/86 dated the 3rd June, 1986, Exhibit A. The said land is known as and called "Inyinukwu." They were said to situate within the plaintiffs H other land not in dispute shown verged green in their plan, Exhibit A. The

said area verged green within which is situate the land in dispute was originally owned and possessed from time immemorial by various families of the plaintiffs' community, inclusive of the Ugboaja family. The plaintiffs people of Amawom had owned and inherited it from their fore-
B fathers.

Sometime in 1952/1953, the plaintiffs claimed that the heads and principal members of the land owning families in issue donated to the said plaintiffs, at the instance of the Amawom Community to which they all belonged, the said area of land verged green in Exhibit A for develop-
C ment projects. This donation was in accordance with the customary law and usages of the plaintiffs and it thereby vested the ownership and possession of the said land exclusively on the plaintiffs. The plaintiffs, since the said customary donation, retained ownership and exclusive posses-
D sion of the area verged green in Exhibit A and cultivated various crops thereon without any disturbance from neither the defendants nor any one else.

The plaintiffs stated that sometime in 1957, P.W.6, Chief Robert
E Okoro, the traditional head and ruler of the plaintiffs' community, at the request of the late Chief Johnson Ikeogu, the defendants' community leader, granted the piece or parcel of land verged blue within their parcel of land verged green on Exhibit A to the defendants for the establishment
F of a Local Authority School. They customary grant to the defendants was made after due consultations with the principal members of the plaintiffs' community and was made by the plaintiffs' traditional ruler for and on behalf of the said plaintiffs. The said Local Authority School later become Ihim Primary School. This customary grant was not in writing.
G It was the plaintiffs' case that the entire school premises granted to the defendants lied south of and on the right hand side of the Amawom to Nkalunta road. They claimed that the land which situate roughly north of the said road was never granted to the defendants for any purpose what-
H ever.

The plaintiffs remained the owners in possession of the rest of their land verged green, including the portions in dispute therein contained and verged pink until the 1st -3rd defendants about the month of

January, 1982 broke and entered the said land in dispute without their leave and/or licence hence this action.

For their part, the 1st -3rd defendants averred that the land in dispute together with the adjoining pieces of land verged green and violet in their survey plan, Exhibit B, had from time immemorial been in the ownership and possession of their ancestors through whom they inherited the same. They claimed that it was about the year 1957 that they made a grant of the land in dispute to the then Government of Eastern Nigeria for the purpose of building Ihim Primary School. They claimed that this school was built without let or hindrance from the plaintiffs or from any other person else. They denied that the plaintiffs' fore fathers gave their ancestors where they live. They also denied the alleged grant to them of the piece of land on which their Community Primary School was erected. They asserted that the plaintiffs did nothing whatever on the land in dispute. They admitted, however, that there were portions of farm land adjacent to the school premises, south of the Amawom/Nkalunta road, which were being cultivated by the plaintiffs but claimed that the plaintiffs farmed on those areas by force. In their plan, Exhibit B, the defendants showed their Inyiala -Ukwu land verged green. They also indicated their school.

They stated that the land in dispute was part of their school land. It was their case that they were the owners of the land in dispute by inheritance from their ancestors.

At the conclusion of hearing, the learned trial Judge, Njiribeako, J. after a careful review of the entire evidence found for the plaintiffs and decreed as follows-

"In the light of my findings above, the plaintiffs are entitled to succeed. I award in favor of the plaintiffs title to right of occupancy of that portion of Iyinnukwu land verged pink which lies roughly North of Amawom/Nkalunta road and shown in plaintiffs' plan No. Ven/D82/86 received as Exhibit A in these proceedings. The other portions verged pink in the said plan appear to me farmlands of PW7, Samuel Ugboaja's family and for clarity, the declaration of title does not affect them.

I want in favour of the Plaintiffs against the defendants 1-4,

jointly and severally, the sum of N1,000.00 being general damages for trespass.

I hereby make an order for perpetual injunction restraining all the defendants, their servants and/or agents from committing any acts of trespass in the said land."

B Being dissatisfied with the said judgment, the defendants lodged an appeal against the same to the Court of Appeal, Port Harcourt Division, which court in a unanimous decision allowed the appeal and dismissed the plaintiffs' claims in their entirety.

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

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

E The one issue distilled from the appellants' grounds of appeal set out on their behalf for the determination of this appeal is as follows -

"Whether the Court of Appeal was right in setting aside the High Court Judgment and dismissing the plaintiffs' claim in its entirety without granting the claims for trespass and injunction, simply because the plaintiffs failed to technically prove their title, even though there was evidence (and finding by the trial court) of possession by the plaintiffs."

F The respondents, on the other hand, submitted that the single issue for the determination of this appeal is in their opinion, as follows -

G *"Is it in every case of declaration of title to land, trespass and injunction that a court is bound to consider the claim for trespass and injunction when the root of title in support of the claim for declaration of title is not proved? In other words, is it in all cases that a claim for declaration of title is a separate and distinct claim from the claim for trespass and injunction so that when the claim for declaration of title fails the court is bound to consider the claims for trespass and injunction.?"*

I have examined the two sets of issues identified in the respective briefs of the parties and it is clear to me that having regard to the grounds of appeal filed, the issue formulated on behalf of the appellants firmly clinches the sole question for the determination of this appeal. I shall, therefore, adopt the same for my determination of this appeal.

At the oral hearing of the appeal before us, both the appellants and Chief Bayo Kehinde, S.A.N. the learned Senior Advocate of Nigeria who settled their brief of argument were absent, although duly served. Chief Bayo Kehinde, S.A.N., had in the appellants' brief of argument, however, submitted that the respondents action consisted of three independent claims, to wit, declaration of title to land, damages for trespass and perpetual injunction. He argued that all three of the claims were carefully considered and granted by the trial court. He contended that the Court of Appeal, inspite of all the issues formulated before it by the respondents, then appellants, only considered issues 1,2 and 6 which exclusively dealt with the appellants' claim in respect of declaration of title to the land. It held that title was not established and proceeded to set aside the decision of the trial court and to dismiss all three arms of the appellants' claims. This, it did, without considering any of the other issues raised by the appellants in that court in respect of their claims for trespass and perpetual injunction. Reliance was placed on the decision of this court in Osafile v. Odi (1994) 2 N.W.L.R. (Part 325) 125 in which it was stressed that failure of a claim for declaration of title to land will not necessarily entail the dismissal of the claims in respect of trespass and perpetual injunction. Learned Senior Advocate submitted that the court below gave no consideration whatever to the vital issue of possession of the land in dispute which the learned trial Judge carefully considered in great detail and made specific finding thereupon in favour of the appellants. He contended that in the absence of any finding by the Court of Appeal to the effect that the respondents had established a better possessory right or title to the land in dispute, it was wrong for that court to have interfered with the judgment of the trial court in respect of the award in damages for trespass and perpetual injunction. He therefore urged the court to set aside the judgment of the Court of Appeal and to

restore the judgment of the trial court in favour of the appellants for damages for trespass and perpetual injunction as ordered by that court.

Learned counsel for the respondents, Mr. Amechi Nwaiwu in his reply submitted that the appellants who based their title on grant cannot now be heard to rely on numerous and positive acts of possession of the land in dispute as their root of title. He argued that the appellants having failed to prove the alleged grant which is the root of title they relied on must have all the three arms of their claims dismissed. For this proposition, he relied on the decision of this court in Chief Odofin v. Isaac Ayoola (1984) 11 S.C. 71 at 116-117. Further reference was made in the respondents' brief of argument to the decisions of this court in Ogbechie and others v. Gabriel Onochie and others (1988) 1 N.W.L.R. (part 70) 370 at 392 Fasoro and another v. Beyioku and others v. Cadbury (Export) Ltd. and others (1985) 2 N.W.L.R. (part 7) 393) and 429 and it was argued that the appellants having failed to prove the grant, their alleged root of title, there was no other option open to the court below than to dismiss their claims in toto. Learned counsel contended that the appellants neither showed any acts of possession in their survey plan, Exhibit A, nor did they establish possession of the land in dispute to justify their claims in trespass and perpetual injunction. He conceded that there must be occasions when a plaintiff can succeed on a claim for damages for trespass and perpetual injunction even though his claim for declaration of title has failed. He contended, however, that in the present case, the appellants' claims in respect of damages for trespass and perpetual injunction cannot be said to be independent of or distinct from the claim for declaration of title. He therefore urged the Court to dismiss this appeal.

As already indicated, the sole issue for determination in this appeal is whether the court below was right in setting aside the decision of the learned trial Judge and dismissing the appellants' claims in their entirety without granting the reliefs in respect of trespass and perpetual injunction in spite of the undisturbed finding of the trial court that the appellants were in possession of the land in dispute. It is, perhaps, desirable before considering this issue to examine the treatment by both courts below of

the question of title to the said land in dispute. This seems to me of importance as, although, generally speaking a claim in trespass is rooted in exclusive possession and all a plaintiff needs prove is that he has exclusive possession of the land in dispute, once a defendant claims ownership of the same land, title is put in issue and the plaintiff, to succeed, must show a better title than that of the defendant to the land in dispute. See Amakor v. Obiefuna (1974) 1 N M L R 331 at 336. Consequently, a trespasser in possession is only entitled to sue in trespass, persons who are not the true owners of the land in dispute or have no better title thereto than himself. Such a trespasser in possession cannot therefore succeed in an action in trespass where he sues one who has a better title to the land in dispute than himself. See Mogaji and others v. Cadbury Nigeria Ltd. and others (1985) 2 N.W L R (part 7) 395 at 429.

Turning now to the issue of title to the land in dispute, it is beyond argument that where a plaintiff pleads a particular root of title and fails to prove the title as pleaded, it will be wrong for him to turn round to rely on other mode of acquisition of land not pleaded as his root of title in support of his claim. See Fasoro and Another v. Beyioku and others (1988) 2 N.W.L.R. (part 76) 263 at 271. However, this well settled principle of law, with the greatest respect to the Court of Appeal, is hardly applicable to this appeal, having regard to the facts of the case as pleaded and presented by the appellants. What, then, are the facts of this case as pleaded and presented by the appellants before the trial court.

These are that the larger piece or parcel of land verged green in their plan, Exhibit A, and within which is situate the parcels of land in dispute was originally owned from time immemorial by various named families of their community which included the Ugboaja family. The sum total of the evidence of the appellants as testified to by P.W.6, Chief Robert Okoro, and P.W.7, Samuel Ugboaja, was inter alia that sometime in 1952/53, the heads and principal members of the said families donated to the Amawom Community to which they all belonged, the parcel of H land verged green in Exhibit A for development projects. By this donation which, according to these witnesses, was in accordance with their customary law, the said piece or parcel of land verged green became

vested in the appellants who thereby acquired ownership and possession in thereof. The appellants remained the owners in possession of the said land until in 1957 when, as a community, they granted the parcel of land verged blue to the respondents for the establishment of a school.

B The learned trial Judge painstakingly evaluated the entire evidence led before the court by the parties and accepted the appellants' evidence in respect of their ownership of the land in dispute. He stated -

" The defendants 1-4 agree that the areas verged pink which border the Ihim Primary school premises verged Blue are farmed by Amawom people although as D.W.2 said it was pledged to them by their fathers. D.W. 1 said they farm there by force having refused redemption. If that is so, have they sued for redemption? Have they taken the matter to any of the so many organizations in these parts that look into such disputes. D The whole question of pledge is hollow and false . These areas and the School premises formed one parcel of land owned by P.W.7 Samuel Ugboaja's family. I believe P.W. 6 Chief Robert Okoro's and P.W. 7 Samuel Ugboaja's evidence as to how it was granted for the establishment of L.A. School, Ihim. As for trespass, defendants 1-4 did not deny bulldozing the land in dispute which lies North of Amawom/ Nkalunta road opposite Ihim Primary School. They destroyed crops planted by Amawom people and are clearly liable in trespass. The 5th defendant was not sued and is therefore not liable.

F In the light of my findings above, the he plaintiffs are entitled to succeed. I ward in favour of the plaintiffs title to right of occupancy of that portion of Inyinnukwu land verged pink which lies roughly North of Amawom/Nkalunta road and shown in plaintiffs' plan No. VEN/D82/86 received as Exhibit A in these proceedings. The other portions verged pink in the said plan appear to me farmlands of P.W.. 7, Samuel Ugboaja's family and for clarity, the declaration of title does not affect them."

G It is clear to me that the learned trial Judge not only found favour H with the evidence led by the appellants in respect of their ownership of the entire piece or parcel of land verged green in their plan, Exhibit A, he also specifically accepted the grant of the area verged blue by the appellants to the respondents for the establishment of a Local Authority School

which later became known as the Ihim Primary School. He described as "hollow and false" the respondents claim that they pledged to the appellants, the areas in dispute verged pink, south of the Amawom to Nkalunta road and bordering the Ihim Primary School premises. It was the case of the respondents that these pieces of land were in possession of the appellants by virtue of a pledge, a claim which the trial court dismissed outright as false. As to the respondents' claim to ownership of the land in dispute, the learned trial Judge dismissed the same as follows -

"The Ihim people have never farmed in that area neither did the school farm there. On the other hand, the Plaintiffs' evidence of farming activities in the area was very positive and unchallenged that the scale tilts heavily on their side. Any verdict that the land belongs to the defendants must indeed be very perverse."

In the opinion of the learned trial Judge, the appellants were the owners of the land in dispute. I will return to this aspect of the case later in this judgment.

In allowing the appeal of the respondents, as appellants, in the court below, the Court of Appeal firstly restated the law governing the "sale" and, "transfer" of land under customary law. This, it stated, citing the decisions in Cole v. Folami (1956) 1 F.S.C. 66, Egonu v. Egonu (1978) 11-12 S.C.111 at 131 and Erinosho v. Owokoniran and Another (1965) N.W.L.R. 479 at 483 is that in order to constitute a valid sale and transfer of land under customary law, there must be payment of money and delivery of possession of the land sold in the presence of witnesses. Neither in the pleadings for at any stage of the trial was it raised as an issue between the parties, no matter how remotely, any question of the non-payment of money by and/or the non-delivery of possession of the land in issue to the appellants in the presence of witnesses. The court below none-the-less, found itself able to hold that the appellants failed to prove a customary grant of the land in dispute as they averred because of the non-payment of money in respect of the land and the non-delivery of possession of the land to the appellants in the presence of witnesses.

With the greatest respect to the Court of Appeal, it cannot be over-emphasized that when an issue is not placed before the

Court of Appeal, it has no business whatsoever to deal with it. See Florence Olusanya v. Olufemi Olusanya (1983) 3 S.C. 41 at 56, Chief Ebba v. Chief Ogoto and Another (1984) 4 S.C. 84 at 112. Courts of Law, except where an issue such as jurisdiction arises, ought at all times to limit themselves only to the issues raised by the parties in their pleadings as to act otherwise might well result in the denial to one or the other of the parties of the right to fair hearing. See Alhaji Ogunlowo v. Prince Ogundare (1993) 7 N.W.L.R. (Part 307) 610-625. I entertain no doubt that the court below was in definite error when, from no where, it raised issues neither pleaded nor relied on or canvassed by the parties or either of them at the trial in the determination of the appeal before it.

A second and last reason advanced by the Court of Appeal for holding that the appellants failed to prove their case of a customary grant of the parcel of land verged green by the component land owning families of Amawom was the alleged contradiction in the evidence of P.W. 6 and P.W. 7 as against the averments in paragraph 9 of the appellants' Statement of Claim. Alluding to the alleged contradiction, the Court of Appeal had this to say -

"..... whereas in paragraph 9 of the statement of claim the respondents as plaintiffs averred that in 1957, the Amawon Community persuaded by their traditional ruler, Robert Okoro, PW6 made a grant of the land to the Appellants for the siting of the L.A. Primary School, Ihim, the evidence of PW6 and PW7 is to the effect that the land on which the school was sited belonged to the family of PW7, Samuel Ugboaja and that it was this family that made the grant."

It stressed -

" While PW6 and PW7 stated that they witnesses the grant to the land on which the primary School Ihim was established to the appellants, their evidence that the said land was the land of Ugboaja family and that it was this family that made the grant to the appellants is totally at variance with the averments in paragraph 9 of the plaintiffs' pleadings that the land belonged to the plaintiffs' Amawon Community and also it was the said Community that made the grant to the appellants."

The Court below then went on -

"In the present case, it will be seen clearly that the evidence of PW6 and PW7 was at variance with paragraphs 5,6, and 9 of the Statement of Claim. Such evidence goes to no issue. The plaintiffs have thereby failed to make out a case they set out to make. The learned trial judge was therefore in grave error when he acted on the evidence of PW6 and PW7."

It concluded -

The result is that the plaintiffs had not established the case they set out to establish. In other words, the alleged grant by the plaintiffs' Amawon Community to the appellants has not been proved."

Paragraphs 5,6 and 9 of the appellants' Statement of claim averred as follows-

"5 (a) The entire area verged Green within which is situate the land in dispute was originally owned, possessed or customarily occupied by various families of the Plaintiffs Community, namely, Ngbasi, Irozuru, Okalaobu, Okogbue, Okorie, Ikeri, Ukpa, Emamandu, Elele, Ajuka, Uga, Okoroihe who as the owners and in possession thereof exercised maximum rights including farming from time immemorial to the knowledge of the Defendants or their ancestors without interference from either the Defendants, their ancestors or any other person or group of persons. Among members of the aforesaid land owning families who farmed the area verged Green planting cassava, Yam, mellon, vegetables, groundnut and other farm crops were Uzoma, Onyekwere, Ude, Ochiulo, Nkpoku, Amajo, Ugboaja, Chinyere"

5 (b) The exercise of the rights of ownership and possession by the persons aforementioned covered several generations without interference by the Defendants or their ancestors before them.

6. Sometime in 1952 and 53, heads and other principal members of the families stated above at the instance of the Community donated the area verged Green to the Plaintiffs for various development projects which the Plaintiffs might wish to undertake. That donation, was in accordance with the customary law of the Plaintiffs and by the donation, the families divested themselves of their ownership and possession of the

land which ownership and possession became vested communally and exclusively on the plaintiffs. The donation was not documented. Those who donated the lands For themselves and on behalf of their respective families were: Onuegbu Ude Onulobi, Onwuzurumba Ude, Mark Ude, B Mgbechi Ude for Ngbasi family, Ukandu, Onwuajulam..... for Amaonwu family Onigbo, Ugboaja, Ebila, Samuel, Iroegbu for Ikeri family; Anyinche, Ukamma for Anama family, Obasi

7.

8.

C 9. Sometime in 1957, late Chief Johnson Ikeogu Defendants' Community leader accompanied by other principal members of that community, for themselves and on behalf of their community, requested Chief Robert Okoro, traditional ruler and head of the Plaintiffs' Community D for land on which to locate a Local Authority School sited in the Defendants' Community. Before then there was neither a Local Authority nor any other voluntary agency school in the Defendants' home. Chief Robert Okorie after consultations with the plaintiffs and acting on their E behalf and with concurrence of other principal members of the Plaintiffs Community, allowed a portion of the area verged Blue for the establishment of the L.A. School. As at that date a similar institution was established in the plaintiffs' Community. The portion allowed by the Plaintiffs to the Defendants for the school has been indicated in the Survey F Plan filed with this Statement of claim. The grant by the plaintiffs to the Defendants was not reduced to writing. It was in accordance with Customary law.

G b. The defendants' L. A. School later grew into a Community Primary School and additional land was allowed to the Defendants by the plaintiffs for the institution - buildings, garden. The area occupied by both the former "L.A. School" and the Primary School is verged Blue in the Plaintiffs Survey plan filed with this Statement of Claim; it is not H in dispute. The area verged Blue is not fully occupied by the Primary School. It is not the intention of the plaintiffs to interfere with that area, or any other land allowed to the Defendants. The land in dispute was never allowed to the Defendants by the plaintiffs who are the owners and

in possession or customary occupation, till the act of trespass complained of, the plaintiffs were communally cultivating the land in dispute planting yam, cassava, Okro, vegetables, mellon etcetera therein to the knowledge of the Defendants without interference. They still cultivate the land in dispute communally."

A close study of the testimonies of P.W.6 and P.W.7 discloses in very clear terms that they are in line with the material averments pleaded and relied on by the appellants in support of their case and did not in any way contradict any of the said averments. I need stress however that it was never the case of the appellants that the land verged blue which was said to have been given to the respondents for the establishment of the Local Authority Primary School belonged to the Ugboaja family at the time of the grant or that it was the said Ugboaja family that made the grant in issue to the respondents. Their case was that the entire piece or parcel of land verged green within which is situate the area verged blue was originally owned and possessed from time immemorial by various families of the appellants' community until in 1952 /1953 when the heads and principal members of the said families donated the same under customary law to the appellants' Amawon Community for development projects. Thenceforth, the said land became vested in the appellants as owners in possession thereof until in 1957 when the appellants, as a community, granted the area verged blue to the respondents for the establishment of a school. **The Court of Appeal, with profound respect, was in gross error and totally misconceived the case of the appellants when it held that the evidence led on their behalf was at variance with the facts averred in their Statement of Claim or that the testimony of P.W.6 and P.W.7 was to the effect that it was the Ugboaja family as against the Amawom Community that granted the parcel of land verged blue to the respondents for the establishment of a school. It seems to me crystal clear that the only two reasons advanced by the court below for interfering with the decision of the learned trial Judge on the question of title to the said land in dispute are again with respect, untenable.**

It is trite law that an appellate court will not ordinarily inter-

fere with the findings of fact made by a trial court except in certain circumstances such as where it is clear or established that such findings are perverse or are not supported by evidence or have not been arrived at as a result of a proper exercise of judicial discretion
 B or that the trial court has not made a proper use of the opportunity of seeing and hearing the witnesses at the trial or where it has drawn wrong conclusions from accepted credible evidence or has taken an erroneous view of the evidence adduced before it or where
 C they were reached as a result of a wrong application of some principle of substantive law or procedure. See Okpiri v. Jonah (1961) All N.L.R 102 at 104-105, Woluchem v. Gudi (1981) 5 S.C. 291 at 295-296, 326-329, Balogun v. Agboola (1974) 10 SC 111 at 118-119, Adegbite v. Ogunfaolu and Another (1990) 21 N.S.C.C. (part 3) 65 etc.
 D In the absence of compelling evidence indicating erroneous appraisal of facts and erroneous conclusions, an appellate court must show the utmost restraint and reject any temptations to interfere with well considered findings made by a trial court after hearing the
 E evidence of relevant witnesses. See Ogbechie and others v. Onochie and others (1988) 1 N.W.L.R. (part 70) 370.

It is clear to me that in the present case, the findings of fact of the learned trial Judge on the issue of the ownership of the land in dispute
 F would appear to be fully supported by the averments in the appellants Statement of Claim and the evidence in support thereof and I find it difficult, with due respect to the Court of Appeal, to see any justification for its interference with the same. The appellants have, however, not
 G appealed against the dismissal of their claim in respect of title to the land in dispute by the Court of Appeal. Accordingly I will say no more on that issue. It must however, be stressed that it became necessary for this court to examine the findings of both courts below on the question of
 H title to the land in dispute in view of its relevance to the appellants' claims in trespass and perpetual injunction which are directly in issue in this appeal..

Turning now to the main question for determination, it is beyond dispute that the court below in allowing the respondents' appeal before it

and dismissing the appellants' claims in their entirety was mainly concerned with proof in respect of their claim for a declaration of title to the land in dispute and never, for one moment, gave any consideration whatsoever to the appellants' claims for damages for trespass and perpetual injunction. **It is trite law that trespass is essentially a tort against possession and only a person in possession of a land in dispute at all material times can maintain an action in damages for trespass.** See Olagbemiro v. Ajagunbade 111 (1990) 3 N.W.L.R. (part 136) 37, Adebanjo v. Brown (1990) 3 N.W.L.R. (part 141) 661 etc. Accordingly, possession alone is sufficient to maintain an action in trespass although for such possession to found an action in trespass, it must be clear and exclusive. And even where a plaintiff has established sufficient acts of exclusive possession, the mere fact that his claim for title has failed does not mean that his claim for trespass to the same land must necessarily fail. See Adegbite v. Ogunfaolu and Another (1990) 21 N.S.C.C. (part 65) George Oluwi v. Daniel Eniola (1967) N.S.C.C. 248 etc. This was lucidly explained in the judgment of this court in Osafire v. Odi (1994) 2 N.W.L.R. (part 325) 125 where Uwais J.S.C. as he then was, stated the principle as follows -

"It is settled law that a plaintiff can succeed in a claim for damages for trespass and junction even where his claim for a declaration of title fails."

So long as a claim in damages for trespass is quite separate and independent of the claim for declaration of title, the incidents of which may be entirely different, and the plaintiff establishes not only his actual possession of the land in dispute but that the defendant is neither the owner of nor has he a better title to the said land than the plaintiff, and that the said defendant trespassed on the land, failure of the claim for declaration of title will not necessarily lead to the dismissal of the claims in respect of trespass and injunction. In such circumstances the plaintiff will be entitled to succeed in his claim in trespass and/or perpetual injunction depending on the essential ingredients of those reliefs he has established. Even where a plaintiff's title is defective and the defendant's title is also defective but the plaintiff is in possession of the land, he can still maintain

an action in trespass against the defendant. See Alhaji Adeshoye v. Shiwoniku (1952) 14 W.A.C.A. 86.

In the present case the learned trial Judge gave a detailed and most careful consideration to the evidence of both parties on the issue of possession of the land in dispute and came to the conclusion that the appellants were in exclusive possession thereof. Said the learned trial Judge-

"To answer the question, who have been in possession of the land, it becomes necessary to find out who indeed have been farming in the land in dispute and areas bordering the Ihim Primary School premises before 1957. It is not disputed that all the area is farmland. The Plaintiffs say that they have been farming in the area from time immemorial without any disturbance. Of course the defendants have denied that assertion and made similar claims for themselves. This raises a major issue of fact which I must now examine in great detail."

He went on -

"On the all important question of farming activities in the land verged pink in the plaintiffs' plan Exhibit A i.e land which lie on left of Amawom/Nkalunta road and opposite Ihim Primary School, the defendants 1-4 and indeed 5th defendant have nothing whatever to put on their own side of the imaginary scale."

The learned trial Judge concluded thus -

"The Ihim people have never farmed in that area neither did the school farm there. On the other hand, the plaintiffs' evidence of farming activities in the area was very positive and unchallenged that the scale titles heavily on their side. Any verdict that the land belongs to the defendants must indeed be very perverse."

There can be no doubt, from the above findings of fact of the learned trial Judge, that the respondents were never in possession, whilst on the other hand, the appellants were found to have always been in possession of the land in dispute.

It is significant that the above vital finding of the trial court on possession in favour of the appellants was neither reviewed nor interfered with by the Court of Appeal. There was no suggestion whatever

from the judgment of the Court of Appeal that, the respondents were either in possession of the land in dispute or had a better title thereto. The court below, with the greatest respect, had no grounds, in my view, for interfering with the decision of the trial court in this appeal. The learned trial judge rightly appreciated that the claims for trespass and injunction, B on the particular facts of the present case were independent of the claim for declaration of title. He was rightly not unaware that the success of the claim in trespass must turn on whether the appellants had proved their possession of the land in dispute.

In this regard, he found that they had. The court below neither reviewed C nor reversed these findings of the trial court. **I have myself given a close consideration to the evidence before the learned trial Judge and his findings thereupon. In my view, the Court of Appeal, with respect, was in complete error to have interfered with the said find-** D **ings of the trial court on the issue of possession of the land in dispute and which of the parties had a better title thereto. I think the trial court, having regard to the evidence and its findings there-** E **upon, cannot be faulted in its judgment in favour of the appellants and that the court below was wrong to have interfered with the same.**

Learned counsel for the respondents, in his brief of argument, relied on the decisions of this court in Ogbechie and others v. Gabriel F Onochie and others (1988) 1 N.W.L.R (part 70) 370 at 392, Fasoro and Another v. Beyioku and others (1988) 2 N.W.L.R. (part 70) 263 and Mogaji and others v. Cadbury (Export) Ltd. (1985) 2 N.W.L.R (part 7) G 393 at 429 and submitted that a plaintiff who has failed to prove his root of title cannot fall back on acts of possession in proof of his ownership of the land in dispute.

Without doubt, where a party pleads and relies on a particular mode of acquisition as his root of title, he is under a duty to prove such mode of acquisition to the satisfaction of the trial court H **before his claim on declaration of title can succeed. Where, however, the radical title pleaded is not proved, it is long settled that it is not permissible to substitute a pleaded particular root of title**

that has failed with other matters such as acts of possession, numerous and positive to warrant the inference of the ownership not pleaded as root of title. See Chief Odofin v. Isaac Ayoola (1984) 11 S.C. 72 at `116 -117 and Fasoro and Another v. Beyioku and others

B supra. But this is in so far as a claim for declaration of title goes, for as I have already observed, the failure of a claim for declaration of title will not necessarily lead to the dismissal of an independent claim in trespass or injunction in respect of such land where a plaintiff has pleaded and proved acts of exclusive possession of the land
C and the defendant's unlawful trespass thereon. See Osafile v. Odi, supra.

In Ogbechie and others v. Onochie and others, supra, for instance, the plaintiffs' claim for trespass was not dismissed simply because their
D claim of title to the land in dispute failed. The dismissal of the claim in trespass, as found by this court, was for the more fundamental reason that -

E *"the plaintiffs had failed woefully to prove that they were in exclusive possession (of the land in dispute) at the time of the alleged trespass. "(Words in brackets supplied)*

The conclusion I therefore reach in this appeal is that the sole issue for the determination of this court must be resolved in
F favour of the appellants, having regard to the undisturbed findings of the learned trial Judge on the questions of exclusive possession of the land in dispute by the appellants and their better title to the said land than the respondents.

In the final result, this appeal succeeds and the decision of the
G Court of Appeal, delivered on the 13th day of April, 1994 dismissing the appellants' claims in damages for trespass and perpetual injunction together with the orders as to costs therein made are hereby set aside. The judgment of the trial court delivered on the 27th day of July, 1990 in so
H far as it relates to the appellants' claims in damages and perpetual injunction is hereby restored. There is no appeal against the decision of the Court of Appeal on the question of title to the land in dispute and I therefore make no order in that regard. There will be costs to the appellants

against the respondents which I assess and fix at N1,500.00 in the court below and N10,000.00 on this court.

UWAIS CJN

B

I have had the opportunity of reading in draft the judgment read by my learned brother Iguh, J.S.C. I entirely agree with his reasoning and conclusion. I do not wish to add anything.

I too, therefore, allow the appeal and adopt the consequential order in the lead judgment. C

BELGORE JSC

A party who claims title to land must prove his mode of acquisition of that title; and if this fails that is the end of the matter for it is not for the claimant to turn around and rely instead on act of possession not pleaded in the claim (odofin vs Ayoola (1984) 11 SC 72, 116, 117). The appellants have maintained in this case undisturbed possession of the land in dispute, a claim clearly pleaded by them giving rise to order for injunction for trespass. I therefore find merit in this appeal and for the fuller reasons in the judgment of Iguh, J.S.C. I also allow it and restore the judgment of trial court. I make the same consequential order as to costs made by Iguh, J.S.C. F

MOHAMMED JSC

I have had the advantage to read the opinion of my learned brother Iguh, JSC, in the judgment just read and I agree with him that the appeal against the decision of the Court of Appeal on the award of damages for trespass and perpetual injunction ought to be allowed. The learned trial Judge was right to make an award of N1000.00 being general damages for trespass. He is also right to make an order for perpetual injunction restraining the defendants/respondents, their servants and or agents from committing any acts of trespass in the land in dispute. G

I therefore allow this appeal and restore the decision of the trial High Court on damages for trespass and perpetual injunction. I abide by the award on costs made in the lead judgment.

B
ONU JSC

Having had the advantage of reading before now the judgment just delivered by my learned brother Iguh, JSC, I take the view that this appeal is meritorious and must perforce succeed.

C In expatiation thereof, I wish to elucidate by pointing out that the single issue submitted at the Appellants' instance for our determination asks:

D *"Whether the Court of Appeal was right in setting aside the High Court judgment and dismissing the Plaintiffs' claim in its entirety without granting the claims for trespass and injunction, simply because the Plaintiffs failed to technically prove their title, even though there was evidence (and finding by the trial court) of possession by the plaintiffs."*

E To begin with, it is common ground that the Appellants (Plaintiff at the trial) pleaded possession - vide paragraph 7 of the Statement of Claim in the following terms:-

F *"7. Since the donation, the plaintiffs have retained ownership, possession or customary occupation of the area verged Green in the Plaintiffs' Survey Plan cultivating same communally and planting yams, cassava, groundnut, vegetable, mellon, Okro without disturbance from the Defendants or any other group of persons."*

G This piece of pleading was given support in the evidence of P.W.1, Nathaniel Onwuzurumba Ude, who said among other things in examination in chief as follows:-

H *"..The land in dispute has always been a farmland. Our people have been farming in it from time immemorial and I have personally been farming there. We of the Amawom people own it. We inherited it from our fathers. Nobody has ever disturbed us or challenged us over our use of the land."*

Another piece of supporting evidence came from P.W.2, Nwankwo

Edake, who said inter alia thus:-

"The one in dispute which shares boundary with my land is owned by Amawom people. They farm in the land."

P.W.3 Mbama Aboaja, in his testimony stated crisply of the land in dispute thus :-

"The plaintiffs farm in the land in dispute and we farm on our own."

P.W.4 , Oriakwu Oporuwa, had the following to say of the land in dispute:

"..... The land in dispute lies on the left of Amawom/Ihim/Amufo Road."

P.W.5. Nworie Onyeari, in his short testimony said as follows :-

" I know the land in dispute. I have farmed there for several years. I was born in Amawom and married in Amawom and have been farming there. It is our farmland."

P.W.6, Chief Robert Okoro, said in examination in chief regarding the land in dispute inter alia thus:-

"I knew the land in dispute It is owned by Amwom people. It has always been the farmland of Amawom people..."

Finally, P.W.7, Samuel Ugboaja under examination in chief said as follows:-

"I know the land in dispute. It is called Inyinnukwu. It lies in left side of Amawom/Kalunta trunk road. We farm on the land We still have a small portion on that side we gave for school which we still culture....."

The Respondents (Defendants at the trial) joined issue with the Appellants (Plaintiffs thereat) in paragraph 6 of their (Respondents') Statement of Defence and proffered evidence through notably, D.W 1 Uwaulu Chimbo, who admitted amongst other things under cross-examination that :-

"The plaintiffs farm in those areas by force," an admission connoting that the Appellants were in possession "but by force." It is also worthy of note too that DW2, Chief Joseph Nwankpa Oji, admitted possession by the Appellants, but added that the land was pledged to the

Appellants by the Respondents' ancestor. Remarkably enough, although in paragraph 7 of the Statement of Defence the Respondents pleaded that they would tender documents showing persons to whom lands were pledged, there was no evidence proffered at the trial or proof of any B pledge.

DW6, Michael Dinnaya Ishionwu, a former headmaster from May 1971 to January, 1972 (now retired) of Ihim Primary School, gave evidence of possession to the effect that:

C *"Since my predecessor was the person who cultivated the land, I claim to have cultivated it." There was significantly no evidence regarding any predecessor cultivating it.*

Finally, DW 7, Ndubuisi Onwuneme Nduka, who claimed to have been headmaster of Ihim Primary School from 1982 to 1985 asserted D that when he was in the school, they (Respondents), used the land as school farm on which they planted yams, cassava, maize, ugu and ground-nuts but that some people came and destroyed what they (Respondents) planted. Asked under cross-examination whom the people were that E challenged him, witness replied they were the Appellants' people.

The learned trial Judge who heard and saw all these witnesses, after giving a careful consideration to the evidence of both sides on possession held, rightly in my view, as follows:-

F 1. *"To answer the question who have been in possession of the land, it becomes necessary to find out who indeed have been farming in the land in dispute and areas bordering the Ihim Primary School premises before 1957. It is not disputed that all the area is farmland. The Plaintiffs say that they have been farming in the area from time immemorial G without any disturbance. Of course, the defendants have denied that assertion and made similar claims for themselves. This raises a major issue of fact which I must now examine in great detail."*

H 2. *"Let me restate here that it is fundamental in our civil cases that a plaintiff discharges the burden of proof which lies on him on the balance of probabilities based on preponderance of evidence. The imaginary scale so often cited in Mogaji v. Odofoin (supra) must tilt on his own side if he must succeed. If the scale remains in a state of equilibrium the*

onus is not discharged and he cannot succeed. On the all important question of farming activities in the land verged pink in plaintiffs 'plan Exhibit A i.e. land which lie left of Amawom/Nkalunta road and opposite Ihim Primary School, the defendants 1-4 and indeed 5th defendant have nothing whatever to put on their own side of the imaginary scale.' B
(Underlining is mine for emphasis).

The learned trial Judge thereafter proceeded to make a specific findings of fact relating to possession and held as follows :-

"The Ihim people have never farmed in that area neither did the school farm there. On the other hand the Plaintiffs' evidence of farming activities in the area was very positive and unchallenged that the scale tilts heavily on their side." C

The only logical conclusion one can arrive at from the above finding of fact is that the Respondents had never been in possession while the Appellants had always been in possession. This is irrespective of what some witnesses called by the Respondents dubbed "forced" possession. Thus, it is, in my opinion, perverse and misconceived for the Court below in the light of the above, to have held, based on no pleadings whatsoever, that:- D

"The law with respect to the sale and transfer of land under native law and custom among Nigerians, there must be payment of money and delivery of possession of the parcel of land sold in the presence of witnesses. Similarly, a grant of land under native law and custom must be handed over in the presence of witnesses. The universality of this custom among Nigerians is not in doubt. See Cole v. Folami (1956) 1 FSC,66; Egonu v. Eginu (1978) 11-12 SC.111 at 131....." F

By the same token, the court below was also palpably wrong to hold as follows:- G

"Although PW6 Chief Robert Okoro and PW7 testified and said that they were present when the land verged Blue in Exhibit A was granted to the appellants, it would appear that they were referring to the land on which the school stands. This is so because whereas in paragraph 9 of the statement of claim the respondents as plaintiffs averred that in 1957, the Amawom Community persuaded by their traditional ruler Chief Rob- H

ert Okoro, PW6 made a grant of the land to the Appellants for the siting of the L.A Primary School, Ihim, the evidence of PW6 PW7 is to the effect that the land on which the school was sited belonged to the family of PW7, Samuel Ugboaja and that it was this family that made the grant.

B In fact, it would appear that these witnesses were speaking from both sides of their mouth at the same time. In the course of their evidence they also said that the "land was owned by Amawom people."

After reproducing portions of the evidence of PW6 and PW7 for an insight into the point as well as contrasting same with paragraph 9 of the Appellants' statement of claim, the court below further held wrongly held that:-

"While PW6 and PW7 stated that they witnessed the grant of the land on which the Primary School Ihim was established to the appellants, their evidence that the said land was the land of Ugbaja family and that it was this family that made the grant to the appellants is totally at variance with the averments in paragraph 9 of the plaintiff's pleadings that the land belonged to the plaintiffs' Amawom Community and also it was the said Community that made the grant to the appellants. The result is that the Plaintiffs had not established the case they set out to establish. In other words, the alleged grant by the Plaintiffs has not been proved."

F In the light of the wrong conclusions arrived at by the court below, it is clear that it did not give any consideration whatsoever to the issue of possession which the trial Judge carefully considered, and in detail made a specific finding thereon. Be it noted in this regard (a) that the finding of the trial court on possession has not been reversed on appeal and therefore stands in favour of the Appellants.

G (b) Besides, the court below did not make any finding in favour of the Respondents and therefore it cannot be said that it made any finding relating to the title in favour of the Respondents. Furthermore, since no finding in favour of the said Respondents was made by the court below, it cannot be said that the issue of who has a better right to possession comes into play at all. See Kuforiji v. V.Y.B. (1981) 6-7 SC. 40 at 84, where this court held inter alia as follows:-

"Appeal Courts do not normally disturb findings of facts arrived at by the courts below especially facts found by the trial court. Indeed they are reluctant and slow to do so unless compelled to go so based upon the errors apparent from the printed record of proceedings. The Appeal Court will however rise to the call of duty in the interest of B justice and disturb, alter, reverse or set aside the lower court's findings cannot be supported or are not proper conclusions and inferences to be drawn from the evidence." See also Okafor & Ors. v. Idigo & Ors. (1994) NSCC 360.

In the instant case, the trial court's findings can be supported since: C

(i) *the claims for trespass and injunction are independent of the claim for title (customary right of occupancy)*

(ii) *the finding was arrived at after a detailed consideration of the evidence before the court as clearly borne out in the Record of proceed- D ings.*

(iii) *PW 7 is from Ugboaja family is part of the Amawom family (owners in occupation).*

It is trite law that the claim for trespass and injunction as in the E instant case postulates that the Plaintiffs (Appellants herein) were in possession - the latter which 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. Thus, cultivation of a piece of land, erection of a building or fence thereon, demarca- F tion of land with pegs or beacons are all evidence of possession. See Mogaji v. Cadbury (1972)2 SC. 97; Alatishe v. Sanyaolu (1964)1 All NLR 398 and Wuta Ofei v. Danguah (1961)3 AER 596. A person can also be in possession through a third party such as a servant, agent or tenant. G Possession of predecessors in title, as exemplified in the instant case, is in law, deemed to be continued by their successors. Thus, the erection of pillars on the land is a sufficient indication of possession vide Okechukwu v. Okafor (1961)1 All NLR 398, while anyone other than the H true owner, who disturbs his possession of the land as did the Respondents in the instant case to the land of the Appellants, can be sued in trespass. See Olayioye v. Oso (1969)1 All NLR 281 at 285 and N.U.J. v.

Military Governor of Lagos State (1995)3 NWLR (part 385)7. It is indeed trite that there cannot be anything like concurrent possession by two parties claiming adversely to each other. Legal possession on by one party, whether de jure or de facto, physical or constructive, excludes the other and renders him liable to damages for trespass. See Amakor v. Obiefuna (1974)3 SC.67, Balogun v. Labiran (1988)3 NWLR (Part 80) 66 at page 82; Udeze v. Chidebe (1990)1 NWLR (part 125) 141 at page 162. Although independent, the claim for injunction is ancillary claim for damages for trespass. In the result, the claim for injunction in the instant appeal ought also to have been upheld and I so hold. However, as in the instant case there is no appeal on the question of title to the land in dispute, no purpose will be served in making an order in that regard.

For these reasons and those elaborately set out in the lead judgment of my learned brother Iguh, JSC I allow this appeal and make the same consequential orders as contained therein.

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