

SUPREME COURT OF NIGERIA
2ND OCTOBER, 1998. SC. 65/1998
CORAM:- M. L. UWAIS CJN, S. M. A. BELGORE,
U. MOHAMMED, S. U. ONU, A. I. IGUH, JJSC

SUARA YUSUF APPELLANT
AND
OLADEPO OYETUNDE & 9 ORS. RESPONDENTS
(For themselves and on behalf of other members
of Samologbe Family except 1st defendant)

APPEALS - Complaint of appellant - That alleged error of trial court - Was not considered by the Court of Appeal - Is not justified - In spite of a slip by that court.

APPEALS - Observation by Court of Appeal - Does not amount to a reversal of trial court's finding - That 1st defendant was not a witness of truth.

LAND LAW - Locus standi - Family land acquired by government - Portion thereof subsequently released - Was released to the 14 sections of the family - And they all have standing to sue.

LAND LAW - Sale of family land - By some members of the family - At a time the land was acquired by government - Is null and void.

LAND LAW - Sale of family land - Where declared void - Court cannot order return of the purchase price - As there was no counter claim to that effect.

LAND LAW - Sale of Family Land - Where declared void for nemo dat quod non habet - It is immaterial that the vendor acted as family head or agent.

PLEADINGS - Admission - Failure by defendant - To admit or deny an

avermment - Amounted to admission - And the fact of acquisition in 1976 stands proved - As no issue was joined on that averment.

PLEADINGS - *Proof - Abandonment of plaintiffs' averment - By failing to call evidence - Defendant cannot call evidence on that averment - Which was not his case.*

FACTS

Before the High Court Ibadan the plaintiffs/respondents filed an action against the 2nd defendant/appellant with 3 others claiming entitlement to statutory right of occupancy, declaration that purported sale of their family land by some family members to the appellant without the authority of the respondents and other principal family members was null and void. Sometime between 1976 and 1977 the then Western State Government compulsorily acquired respondents' family land including the land in dispute. In 1977, some members of respondents' family sought appellant's assistance on how to secure release of part of the land. They sold a portion of the land which was to be released to the appellant. In 1979, the respondents' family petitioned the Western State Government pleading that a portion of the land acquired be released to them. A portion was released to them in 1981. The portion released was meant for all the 14 sections of the family.

Appellant confirmed the sale of the land in dispute to him. He sold plots of it to several purchasers who had built houses on the land. The trial court held that the agreement of sale was null and void since at the time it was made the acquired land had not been released to the respondents' family. In other words, the sellers had no land to sell - *nemo dat quod non habet*. The appellant's appeal to the Court of Appeal was dismissed. He has further appealed to the Supreme Court raising 6 issues.

ISSUES FOR DETERMINATION

"1. Whether the respondents (excepting the 3rd) as plaintiffs had any locus standi to maintain the action.

2. Whether the lower court (sic) was right by failing to hold that

the decision of the trial judge that the sale was merely voidable was conclusive of the case against the respondents whose claim was that the sale was void. In other words, was the lower court (sic) right in upholding the judgment for the respondents based upon a ground other than the one relied upon by them?

3. Is it correct, having regard to Exhibit CAI, to hold that the sale of the land to the appellant in 1978 was void on the ground that it was carried out after Government's acquisition of the land in 1976?

4. Whether the judgment in favour of the 5 families held to have sold their land was proper and equitable in the circumstances.

5. Whether having regard to the totality of the evidence, the respondents are not estopped from denying that Salami Afolabi Aremu Samologbe was the head of Samologbe family or their agent for dealing with the family land.

6. Whether there was not such a misunderstanding of the decision of the High Court by the lower court (sic) as to prejudicially affect the mind of the lower court (sic) against the appellant leading to a miscarriage of justice.

HELD (Unanimously dismissing the appeal per lead judgment of **UWAIS CJN**)

Locus standi - Family land

1. It is clear to me too that by the findings made by the learned trial judge that the land released to the "Samologbe family" was released to all the 14 sections and they all contributed to return the compensation paid for the acquisition, they all have standing to sue against the sale of the land in dispute to the 2nd Defendant by only a section of the family and without the consent or approval of all the sections. It is significant that when the land of Samologbe family was compulsorily acquired, the title of the family on the land acquired became extinguished by reason of the acquisition - see section 28 subsection (7) of the Land Tenure Law, Cap. 202. When a portion of the acquired land was returned to the family, a new root of title by grant was created by the Western State Government for the family. The nature of this new root of title is that all the 14 sections

of the "family" have equal right on the ownership of the land since it was not partitioned amongst members of the "family" but was returned to them en bloc. It is instructive that Exhibit 3 is addressed to Samologbe Family care of Alhaji Bolatilo Lawal and not specially to any of the descendants of Akinrinlo Samologbe. This goes to confirm that Samologbe family does not consist of the descendants of Akinrinlo Samologbe alone but includes other settlers of the Village, thus making the fourteen sections that have been party to this case. The first issue fails. (p.2340 E)

C *Complaint of appellant - Sale of family land - By some members*

2. It appears to me from the foregoing that the complaint of the 2nd Defendant had been satisfactorily considered by the Court of Appeal. There is no justification for his complaint. The only error that I have discovered in the judgment of the Court below is in respect of the underlined sentence. The word "not" therein renders the statement wrong. In actual fact, the learned trial judge declared the sale null and void and of no effect since the land in dispute had been acquired at the time of the sale. He stated the maxim nemo dat quod non habet in that regard. The slip by the Court of Appeal notwithstanding, it came to the right decision in holding that the sale to the 2nd Defendant was void. I find no substance in the 2nd Defendant's complaint under the second issue. (p. 2344 B)

F *Pleadings - Admission*

3. The failure of the 2nd Defendant to either admit or deny the averment in paragraph 18 of the Plaintiffs Further Amended Statement of Claim amounted to admission - Lewis & Peat v Akhimien, (1976) S.C. 157 at pp. 163 and 164; and Akintola v Solana, (1986) 2 N.W.L.R. (part 24) 598 at p. 609. Since there is no issue joined on the averment that the land in dispute was acquired in September, 1976 by the Metropolitan Planning Authority, Ibadan, the fact stands proved. Consequently, the trial court was right to hold that the land in dispute was compulsorily acquired in 1976, and so was the Court of Appeal in upholding the finding. If further evidence were required as per the proviso to section 75 of the Evidence Act, which is not the case here, Exhibits 5B, 5C 5D and 3 are sufficient

to prove that the land in dispute was acquired in 1976 since the standard of proof in civil proceedings is based on the balance of probabilities. (p. 2346 F)

Proof - Abandonment of an averment

4. Even though the Plaintiffs pleaded in paragraphs 19 and 20 of the Further Amended Statement of Claim that the land in dispute was acquired in 1980 by virtue of Public Notice in Oyo State of Nigeria Gazette No.13, volume 5 of 20th March, 1980, they did not call evidence in the High Court to support the averment. There was, therefore, no ground for the learned trial judge to find that the acquisition took place in 1980. The 2nd Defendant joined issue with the Plaintiffs in paragraph 9 of his Amended Statement of Defence when he denied that the land in dispute was acquired in 1980 as pleaded by the Plaintiffs. When the 2nd Defendant gratuitously produced the Gazette Notice in the Court of Appeal - Exhibit CA1 - he did not prove the Plaintiffs case as per paragraphs 19 and 20 of their pleadings since the burden of proof was not on him but the plaintiffs who made the assertion. There is no question of any law shifting the burden to prove the 1980 acquisition to the 2nd Defendant. It was not his case that any acquisition took place in 1980. Although it was the plaintiffs' case, as per their pleadings, they failed to prove the case by omitting to call evidence in support of the averment. The averment is deemed to have been abandoned - Omoboriowo v Ajasin (supra). (p. 2347 C)

Sale of family land - Where declared void

5. The submission by the Plaintiffs that there was no counter-claim by the 2nd Defendant for the return of the purchase money paid, that is, N25,000.00, is well founded. The dictum in Sanyaolu's case (supra) can only apply in this case if the 2nd Defendant had counter-claimed. Neither the trial court nor the Court below would order the return of the N25,000.00 to the 2nd Defendant since he failed to raise a claim for the return to be made. The court is not a father Christmas. It does not award what a party has not claimed. The principle in Sanyaolu's case

(supra) will only apply here had the 2nd Defendant made a counter-claim and that he was denied a refund, of the purchase money, after the purported sale of the land in dispute was declared null and void by the trial court. (p. 2349 B)

B

Sale - Where declared void for nemo dat quod non habet

6. I am unable to see what purpose this complaint will serve having regard to the finding that the land in dispute was sold to the 2nd Defendant in 1978 after it had earlier been acquired in 1976 and that the vendors or Samologbe family had, therefore, no title to pass to the 2nd Defendant. In the light of this, it does not matter whether Salami Afolabi Samologbe acted as the head of the Samologbe family or as their agent and that he had the power to sell the land to the 2nd Defendant. His action could not, in view of the finding that the land was not available to the family to sell, have any significance to the 2nd Defendant's case. Therefore, issue No.5 lacks merit. (p. 2350 D)

Observation by Court of Appeal

7. The Plaintiffs have replied that the observation quoted above was made by the Court of Appeal merely in passing and that it was not a reversal of the decision of the learned trial judge that the 1st defendant was not a witness of truth. I entirely agree. Suppose the observation even contradicted the finding of the learned trial judge, I do not see how it could have been to the detriment of the 2nd Defendant's case since the sale of the land in dispute cannot be sustained for as long as the finding by the learned trial judge that the land was acquired in 1976 stands and that the Samologbe family had no land to transfer to the 2nd Defendant at the time of the sale in 1978. The contention is no more than a storm in a tea cup. It has no merit and so also the issue on which it is founded. (p. 2351 C)

H

REPRESENTATION

A. Aina with Akanbi for the 2nd Defendant/Appellant
Chief O. Esan with R. Ayoola for the Plaintiffs/Respondents

CASES REFERRED TO

Lewis & Peat v Akhimien (1976) S.C. 157 at pp. 163 and 164

Akintola v Solana (1986) 2 N.W.L.R. (part 24) 598 at p. 609

Akintola v Solana, (1986) 2 N.W.L.R. (part 24) 298

Ajibade v Mayowa (1978) 9 &10 S.C.1 at 6

B

Atta v Nnacho (1965) NMLR 28

Erika v Ekpendu (1959) 4 FSC 79

Cook v Taylor (1942) 1 Ch. 349

James Macora Ltd. v. Barclay (1945) 1 Ch. 349

C

Alade v Olukade (1976)2 S.C. 183 at pp. 187-188

LEAD JUDGMENT BY UWAIS CJN

The Respondents were the Plaintiffs in the High Court of Oyo State sitting at Ibadan. The Appellant, as 2nd Defendant, was one of the four Defendants to the claim jointly and severally brought by the Plaintiffs against them seeking the following:-

"(1) Declaration that the plaintiffs are entitled to statutory right of occupancy to all that piece or parcel of land situate, lying and being at Samologbe Ologede village, old Lagos Road, Ibadan, shown on plan No.FA 11576 dated 25th March, 1983 and verged green.

(ii) Declaration that the Purchase Agreement dated 2nd January, 1978, in so far as it purports to sell Samologbe Family land situate at Samologbe Ologede Village, Old Lagos Road, Ibadan, to the 2nd Defendant is wrong, illegal and accordingly null and void and of no effect whatsoever.

(iii) Declaration that the purported sale of the aforesaid Samologbe family land by Salami Afolabi, Oduola Akanni, 1st Defendant and 10th Plaintiff to the 2nd Defendant is illegal, null and void, the said sale having been made without the consent and/or authority of the plaintiffs and other principal members of Samologbe family.

(iv) Perpetual injunction restraining all the defendants, their servants, agents and/or privies from further acting pursuant to or implementing or executing or taking any steps or further steps whatsoever to implement or execute the aforesaid Purchase Agreement."

Pleadings were duly filed and exchanged between the parties. The Plaintiffs filed a Statement of claim which they later amended and further amended. The 1st, 2nd and 3rd Defendants filed their Statement of Defence individually with the 2nd Defendant amending his. The 4th Defendant did not file any pleading.

The facts of the case as found by the learned trial Judge (Yekini Adio, J., as he then was) are briefly as follows. The land in dispute is situate at Samologbe Village which was founded by one Akinrinlo Samologbe who begat Abinde. Abinde begat Oduola Akanni Samologbe and Adebayo Abinde Samologbe, who was the 3rd plaintiff in the case. The 1st, 2nd, 4th, 5th, 6th, 7th, 8th, 9th, and 10th plaintiffs claimed their membership of Samologbe family on the basis of the settlement of their different ancestors at Samologbe Village after Akinrinlo Samologbe founded the village.

The land in dispute constituted the area verged green and marked "B" in the plan tendered by the Plaintiffs which was admitted as Exhibit "I". The area claimed by the plaintiffs is edged red in Exhibit "I" and the land in dispute is within it.

Evidence was adduced by the Plaintiffs which showed that there were fourteen sections or branches of Samologbe family and that Oduola Akanni and Adebayo Abinde, who were the direct descendants of Akinrinlo Samologbe, belonged to Abinwinde section of the family. Each of the fourteen sections of the family had its own head, but all the sections of the family put together, did not have an overall head. Adebayo Abinwinde was dead at the time of the proceedings in the High Court.

Sometime between 1976 and 1977, the then Western State Government compulsorily acquired Samologbe family land, which included the land in dispute, and made it available to Ibadan Metropolitan Planning Authority. Compensation for the Acquisition was paid to the Samologbe family.

Sometime in 1977, some members of Samologbe family contacted the 2nd defendant (now Appellant) and sought his assistance on how to secure the release of part of the Samologbe family land which had been acquired. The 2nd Defendant offered to assist and did take

some action. These members of the family agreed and did sell to 2nd Defendant a portion of the land which was to be released. A document to that effect was executed between the parties and that is Exhibit "4" which is a purchase agreement dated the 2nd day of January, 1978.

In 1979, the Samologbe family had petitioned the Western State Government, as per Exhibit "3", pleading that a portion of the land acquired be released to them. The portion was accordingly released in July, 1981 with the condition that the family would refund to the Western State Government the amount of compensation paid to them on the portion of land being released. The amount came to N57,040.

The land released to the family was meant for all the fourteen sections Samologbe family land and none of the sections claimed that any particular part of the land belonged to it. The principal members of the family were not consulted before or at the time the agreement to sell a portion of the land was entered, and in particular nine out of the fourteen sections of the family.

The 2nd Defendant, in his testimony, confirmed the sale of the land in dispute to him as per Exhibit 4. He said that he surveyed the land after it was released to the family and made layout. He sold plots on the layout to several purchasers who had built houses on the land.

The learned trial judge did not believe the evidence of DW4, Salami Afolabi Samologbe and that of the 1st Defendant to the effect that when they signed Exhibit 4 they did so thinking that it was a power of attorney and not a sale agreement. He, however, held that the agreement was null and void since at the time it was executed the land in dispute had been acquired and was not released to the Plaintiffs by the Western State Government. In other words, the sellers had no land to sell - nemo dat quod non habet. In conclusion, judgment was, therefore, entered for the Plaintiffs against the Defendants. Three heads of the Plaintiffs' claim, namely (i) (ii) and (iv) were granted while head (iii) was refused.

Dissatisfied with the decision, the 2nd Defendant appealed to the Court below complaining inter alia that the Plaintiffs had no locus standi, that since sale of the land in dispute was proved and the trial court stated that the sale was voidable and not void, the Plaintiffs claim should have

been dismissed; that the trial judge was wrong, having regard to the pleadings and evidence in the case, in holding that the land in dispute was acquired in 1976 instead of 1978. The Court of Appeal (Kutigi, JCA, as he then was, Omololu-Thomas, JCA and Ogwuegbu, JCA, as he then was) found no substance in the appeal and it dismissed it.

The 2nd Defendant appealed further to this Court from the decision of the Court of Appeal.. Briefs have been filed and served by the parties and the 2nd Defendant filed a Reply Brief to the Respondents' Brief. Six issues for determination have been formulated by the 2nd Defendant. They read thus:-

"1. *Whether the respondents (excepting the 3rd) as plaintiffs had any locus standi to maintain the action.*

2. *Whether the lower court (sic) was right by failing to hold that the decision of the trial judge that the sale was merely voidable was conclusive of the case against the respondents whose claim was that the sale was void. In other words, was the lower court (sic) right in upholding the judgment for the respondents based upon a ground other than the one relied upon by them?*

3. *Is it correct, having regard to Exhibit CAI, to hold that the sale of the land to the appellant in 1978 was void on the ground that it was carried out after Government's acquisition of the land in 1976?*

4. *Whether the judgment in favour of the 5 families held to have sold their land was proper and equitable in the circumstances.*

5. *Whether having regard to the totality of the evidence, the respondents are not estopped from denying that Salami Afolabi Aremu Samologbe was the head of Samologbe family or their agent for dealing with the family land.*

6. *Whether there was not such a misunderstanding of the decision of the High Court by the lower court (sic) as to prejudicially affect the mind of the lower court (sic) against the appellant leading to a miscarriage of justice.*

For the Plaintiffs, five issues have been formulated, whilst disagreeing with those raised by the Defendant. The issues formulated by them are:-

"(1) Whether on the pleadings and the issues joined at the trial the Respondents have not got Locus Standi to maintain the action against the Appellant?

OR

(1a) Whether or not on the pleadings and the evidence led at the trial the Appellant made out a case that Samologbe Family consisted only the lineal descendants of Akinrinlo Samologbe? B

(2) Whether Exhibit CAI tendered in the Court below had any probative value in favour of the Appellant, having regard to the issue joined by him with the Respondents on the pleadings and evidence at the Court of trial as to the admitted time of the acquisition by the parties? C

(3) Whether or not on the pleadings and the evidence led at the trial by the Appellant a case of sale of a portion of Samologbe family land to Appellant in January 1978 was established by the Appellant? D

(4) Whether there is any misunderstanding of the judgment of the trial court in the judgement of the court below now on Appeal?"

In my opinion, the issues formulated by the 2nd Defendant are more akin to his grounds of appeal than those formulated by the Plaintiffs. I, therefore, prefer the Defendant's issues and will rely on them to determine the appeal. E

On the first issue, It is argued that all the Plaintiffs, with the exception of the 3rd Plaintiff had, on their own showing, no locus standi to maintain the action, which ought to have been dismissed for that reason. It is stated, in support of the argument, that the Plaintiffs' traditional history was that the land in dispute originally belonged to Akinrinlo Samologbe who first settled on it and after whom Samologbe Village had been founded. The rest of the Plaintiffs' ancestors merely went there to live. Akinrinlo Samologbe was succeeded on the land by his son Abinde Samologbe who was in turn succeeded by Oduola Akanni Samologbe, his son (who was originally 1st Defendant to this action but who is now deceased) and his younger brother Adebayo Abinde Samologbe (the 3rd Plaintiff). It is contended that the other Plaintiffs have no connection whatsoever with Samologbe family or land, except on their allegation that their ancestors came to live in the village. Reference is made to F G H

paragraphs 8, 9, 10, 11, and 12 of the Plaintiffs' Further Amended Statement of Claim to exert the point. The testimony of the 4th Plaintiff, who gave evidence as PW2, in support of the averments in the paragraphs in question is alluded to. It is finally submitted that the plaintiffs by their evidence had shown that they were not related to Samologbe family by blood let alone being principal members of the family. The case of Onibudo v. Akibu, (1982) 7 S.C. 60, at pp. 84-85 is cited in support.

It is further argued that the Plaintiffs pleading did not aver that those of them whose ancestors came to the village are customary grantees or even tenants of Samologbe. The evidence adduced by P W.2 merely showed that with the exception of the two children of Samologbe, all the other Plaintiffs were just inhabitants of Samologbe village. But this evidence goes to no issue since there is no averment in the Further Amended Statement of Claim to which it can be related.

In reply, the Plaintiffs argued that the expression "Samologbe family" and their relationship to the family have been explained by paragraphs 1, 5, 6, 7, 12, 13, 14 and 15 of their Further Amended Statement of Claim. Reference was made to the contents of the paragraphs. In paragraph 5 it is stated as follows:-

"5. Apart from Oduola Akanni Samologbe and his brother Adebayo Abinde, 3rd Plaintiff, the 1st, 2nd, 4th, 5th, 6th, 7th, 8th, 9th and 10th Plaintiffs derive and claim their membership of Samologbe family by settlement of their ancestors at Samologbe village in Ibadan after Akinrinlo Samologbe founded Samologbe village."

Again, in paragraph 12, it is averred :-

"12. Apart from the above mentioned Oduola Akanni samologbe and Adebayo Abinde Samologbe who are direct descendants (by blood) of the said Akinrinlo Samologbe the other 13 branches derive and claim membership of Samologbe family by their ancestors' settlement at Samologbe village in Ibadan after Akinrinlo had founded the village."

It is submitted by the Plaintiffs that paragraph 2 of the Defendant's Amended Statement of Defence merely traversed the paragraphs in question in the Plaintiffs' Further Amended Statement of Claim and did not raise any issue thereof. The paragraph reads:-

"2. The 2nd defendant denies paragraphs 1,2,3,4,5,6,7,8,9,10,11,12,13,14,15 and puts the plaintiffs to strictest proof."

Evidence was given by P.w 2, Bamiji Alawuje, on the Plaintiffs relationships with Samologbe family. Therefore, the issue on the plaintiffs' pleadings and evidence is that the term "Samologbe family" is not stricto sensu restricted to the lineal descendants of Akinrinlo Samologbe, as had been made clear in the testimony of PW 3, Adebayo Abiwinde.

The 2nd Defendant neither pleaded that Samologbe family consisted only of the lineal descendants of Akinrinlo Samologbe nor joined issue with the plaintiffs about their relationship with him. It is submitted that in the absence of special traverse the term "Samologbe Family" as described by the Plaintiffs remains unchallenged and untraversed. The cases of Lewis Peat Ltd. v. Akhimien (1976)7 S.C. 157; Atolagbe v. Shorun (1985) 1 N.W.L.R. (part 2) 360; Omantoman v. Okoegbualé, (1986) 5 N.W.L.R. (part 40)79; Ajide v. Kelani (1985) 3 N.W.L.R. (part 12) 248; Lana v. University of Ibadan, (1987) 4 N.W.L.R (part 64) 245 at p.257; Akintola v Solana, (1986) 2 N.W.L.R. (part 24) 298; Ajibade v Mayowa & Anor, (1978)9 &10 S.C.1 at 6 and Atta & Ors. v. Nnacho & Ors., (1965) NMLR 28 were cited in support.

Now in considering whether the Plaintiffs concerned had no standing, the learned trial judge held as follows:-

"The position is that, apart from the evidence led by the plaintiffs, those whose ancestors settled upon parcels of land in Samologbe Village regarded themselves as members of Samologbe family. The evidence of the 2nd P.W. Bamiji Alawuje, was that inhabitants in the area joined together their parcels of land and adopted the name, 'Samologbe! He also told the court that the land released belonged to all of them in the fourteen sections of Samologbe family. The 3rd plaintiff, Adebayo Abiwinde Samologbe, told the court that the land released to them out of the land acquired, belonged to the fourteen sections of samologbe family and that the fourteen sections of the family refunded the compensation paid for the land which was released to the family. He added that when the land was released to members of Samologbe family, there was no

question of returning what used to belong to a particular section to that section. Adebayo Abiwinde Samologbe is the only direct surviving descendant of Akinrinlo Samologbe. His evidence on the point is to me, very convincing and I accept it. I find as a fact that the land released out of the land acquired belonged to members of Samologbe family in the sense aforementioned. For that reason, I hold that the plaintiffs, other than the 3rd plaintiff, have interest in the land in dispute and are, therefore, competent to join the 3rd plaintiff in bringing the present action." (underlining mine).

The Court of Appeal held that in view of the Plaintiffs' pleadings and evidence in support, the learned trial judge was perfectly justified when he held that those whose ancestors settled upon parcels of land in Samologbe village regarded themselves as members of Samologbe family. It was considered as incorrect, the argument by the 2nd Defendant that it was not the Plaintiffs' evidence that those whose ancestors settled upon the parcels of land in Samologbe village regarded themselves as members of Samologbe family. The evidence adduced was in consonance with the pleadings and the findings of fact by the learned trial judge were clearly supported by the evidence.

It is clear to me too that by the findings made by the learned trial judge that the land released to the "Samologbe family" was released to all the 14 sections and they all contributed to return the compensation paid for the acquisition, they all have standing to sue against the sale of the land in dispute to the 2nd Defendant by only a section of the family and without the consent or approval of all the sections. It is significant that when the land of Samologbe family was compulsorily acquired, the title of the family on the land acquired became extinguished by reason of the acquisition - see section 28 subsection (7) of the Land Tenure Law, Cap. 202. When a portion of the acquired land was returned to the family, a new root of title by grant was created by the Western State Government for the family. The nature of this new root of title is that all the 14 sections of the "family" have equal right on the ownership of the land since it was not partitioned amongst members of the

"family" but was returned to them en bloc.

It is necessary here to refer to the letter of release Exhibit "3" which is a letter from the Chief Executive Officer of Ibadan Metropolitan Planning Authority dated 10th July, 1981. The letter reads in part:-

"I am therefore directed by the Board of this Authority to express its feelings on the prevailing situation which your family finds itself. And considering this, the Board has therefore thought it fit and resolved at excising the 36.347 hectares of land which your family owns on the Authority's mentioned scheme (i.e. Lagos Road Mechanic Resettlement Scheme, Old Lagos, Road, Ibadan).

This Authority therefore gives you the power to utilities or develop the family land for the resettlement of the members of the family which your family reported to have been displaced at different places when the family landed properties were acquired. (Underlining mine).

It is instructive that Exhibit 3 is addressed to Samologbe Family care of Alhaji Bolatilo Lawal and not specially to any of the descendants of Akinrinlo Samologbe. This goes to confirm that Samologbe family does not consist of the descendants of Akinrinlo Samologbe alone but includes other settlers of the Village, thus making the fourteen sections that have been party to this case. The first issue fails.

On the second issue for determination, the 2nd Defendant argued that the learned trial judge was right when he stated that the alleged sale of the land in dispute was voidable because a sale of family land by some members of the family without consultation with or consent of some principal members of the family is voidable at the instance of the non-consenting members provided they act timely. However, he complains that on reaching that conclusion, the learned trial judge should have dismissed the Plaintiffs' case but instead he wrongly went further to consider the legal consequences of the sale agreement, Exhibit 4, having found that Pw.4, Salami Afolabi Samologbe, and the 1st Defendant had executed it (Exhibit 4) and reached the conclusion that since Exhibit 4 was executed in 1978 when the land in dispute had been acquired and no part of it had been released to the Samologbe family, neither Samologbe

family nor those who purported to sell the land to the 2nd Defendant had the power to do so at the material time. He consequently declared Exhibit 4 null and void and of no legal effect whatsoever.

The 2nd Defendant complains, that when the forgoing point was mentioned to the Court of Appeal and its attention was drawn to the error of the trial court in that there was no evidence of acquisition of the land in dispute and that the Plaintiffs' case was not based on acquisition, and furthermore, that the trial court was not at liberty to make a case for the parties or to formulate its own case from the pleadings, the Court of Appeal failed to appropriate the contention and was inconsistent in dealing with it. This, it is further submitted, led the Court of Appeal to make several Statements of law and facts unrelated to the complaint of the 2nd Defendant, which was not at all considered.

In reply, it is argued for the Plaintiffs that the 2nd Defendant's contention shows a misconception of the issues raised by the parties to the case on their pleadings in the trial court. The plaintiffs' claims in the High Court were under four heads. The learned trial judge found as a fact that if the principal members of Samologbe family were not consulted before a sale of family land was made, that would prima facie make the sale voidable on the authority of Erika v Ekpendu, (1959) 4 FSC 79. It is then canvassed that it was not the judgment of the learned trial judge that the alleged sale was voidable. The Plaintiffs submitted that their Further Amended Statement of Defence did not dispute this. There was in fact admission by both parties of the acquisition. Contrary to the complaint of the 2nd Defendant, the Court of Appeal considered the aforesaid before concluding that the date of the acquisition was not made an issue in the trial court. In any case, it was the 2nd Defendant's case that the sale of the land in dispute was made to him when the land in dispute was under acquisition. On the authority of Cook v Taylor, (1942) 1 Ch.349 and James Macora Ltd. v. Barclay, (1945) 1 Ch. 349, land under acquisition cannot be validly sold by its original owner.

The Court of Appeal dealt with the complaint of the 2nd Defendant as follows, as per the leading judgment thereof:-

"The main complaint of the appellant in these grounds of ap-

peal (i.e grounds 5,6,10 and 13) is against the approach of the learned trial Judge to the case before him. The issues have already been (dealt with) in my consideration of the foregoing grounds 2 and 9. The appellants' main contention was that the appellants' case was voidable and the learned trial judge ought to have stopped there and dismissed the respondents' claim, sine the claim of the respondents was not to set aside a voidable sale which in law remains valid until set aside. He also said that he could only declare void a purported sale which was not sale at all and that both allegations gave (rise) to different causes of action. He argued in the alternative as in ground 10 of the grounds of appeal that even if the cause of action before him was to seek the setting aside of a voidable sale, he ought not to have done so having regard to the inordinate delay by the respondents, and the evidence that third parties had long built on the land, and are living there with their families."

This is the substance of the argument presented to the Court of Appeal by the 2nd Defendant. The Court of Appeal dealt with the argument thus:-

"It is clear from the pleadings that the claims of the respondents are on four legs, and each of these legs ought to be and were separately considered by the learned trial Judge. That as at the time the agreement was being executed Samologbe family land had been acquired, and no part of it had been released to the respondents, is fully supported by the evidence. It was not (sic) on that basis that he declared the agreement a nullity. His finding on that issue is fully supported by the evidence. It was not the appellants case that the land was acquired only in 1980 as per Exhibit CAI.

In dismissing the claim, the trial judge did not proceed on the basis of his previous finding that the purported sale was voidable. He in fact found it unnecessary to declare the sale void as in leg 3 of the claim.

There is no dispute whatsoever that the land in dispute belongs to Samologbe family. From the pleadings and as postulated by the respondents the onus is indeed on the appellant to prove that the family had property divested itself of its title, since it was the appellant and not the respondents, who was relying on sale of the land from members of the

family ... On the basis of the pleadings alone the appellant failed to satisfy that onus. He cannot now complain ... The requirement of native law and custom has not been satisfied to enable the appellant to establish his case.

B Beside the forgoing, the complaint about the date of acquisition was not made an issue in the Court below (refer to Ezendu & Ors. v. Obiagwu, (1986)2 N.W.L.R. (Part 21) 208 at pp. 210, 220 to 223." (Underlining mine).

C **It appears to me from the foregoing that the complaint of the 2nd Defendant had been satisfactorily considered by the Court of Appeal. There is no justification for his complaint. The only error that I have discovered in the judgment of the Court below is in respect of the underlined sentence. The word "not" therein**
D **renders the statement wrong. In actual fact, the learned trial judge declared the sale null and void and of no effect since the land in dispute had been acquired at the time of the sale. He stated the maxim nemo dat quod non habet in that regard. The slip by the**
E **Court of Appeal notwithstanding, it came to the right decision in holding that the sale to the 2nd Defendant was void. I find no substance in the 2nd Defendant's complaint under the second issue.**

F With regard to the third issue for determination, the 2nd Defendant canvasses that the learned trial judge found that the land in dispute was compulsorily acquired in 1976. That this finding was challenged in the Court of Appeal to be wrong since the acquisition notice - Exhibit CAI, which was tendered in the Court of Appeal, showed that the compulsory acquisition took place in 1980. It is submitted that the evidence
G relied upon by both the High Court and the Court of Appeal to find that the acquisition was in 1976 was illegal and inadmissible in the light of Exhibit CAI, which is a Gazette Notice, and the provisions of sections 75
H and 131 of the Evidence Act. It is further argued that parties to the case cannot by consent, either viva voce or through their pleadings render an inadmissible evidence to be admissible. The case of Alade v Olukade, (1976)2 S.C. 183 at pp. 187-188 is cited. Another arm of 2nd Defendant's

argument is that the Plaintiffs' averment in their further Amended Statement of Claim that the land in dispute was acquired in 1976 was unsupported by evidence and, therefore, ought to be deemed abandoned on the authority of Omoboriowo v Ajasin, (1984)1 S.C. 205 at p.206.

The Plaintiffs, in reply, argued that the 2nd Defendant's complaint is based on misconception of his case, as revealed by his Amended Statement of Defence and testimony in the trial court. The 2nd defendant's case as supported by his evidence at the trial was that he bought the land in dispute when it had been acquired compulsorily. The case which the 2nd Defendant presently advanced is not supported by his pleadings. It is submitted that Exhibit CAI, which was not pleaded, is irrelevant to his Amended Statement of claim. The case of Lana v University of Ibadan (1987)4 N.W.L.R. (part 64) 245 at p.257 was cited in support. Finally, the Plaintiffs quoted to judgment of the Court of Appeal, as follows, to support their submission:-

"The learned trial judge found correctly that as at the time that the agreement was being executed in 1978, Samologbe family land, including the land in dispute, had been acquired and no part of it had been released to the family. Such finding accords with the pleadings. The finding could not by any stretch of the (sic) imagination be said to have been based on a false hypothesis. Neither of the parties, certainly by their pleadings proceeded on any such false hypotheses. They are respectively by law bound by their pleadings - A.C.B Ltd. v. Agbaniyin, (1960) 5 FSC 19 ; Emegokwe v Okadigbo, (1973) 4 S.C. 113 at p. 177 and National Investment Property Co. Ltd. v. Thompson organisation Ltd. & Ors (1969) 1 N.W.L.R 99 at pp. 103-

Furthermore, the learned trial Judge did not particularly rely on the Gazette Notice referred to be the Appellant's counsel in making the finding. He relied mainly on Exhibit 3 The oral evidence of the parties in relation to the acquisition of the land, its purported sale to the Appellant and the release of the part of the acquired land to the family."

Now, the Plaintiffs averred in paragraphs 18, 19, and 20 of their Further Amended Statement of Claim as follows:

"18. Sometime in September, 1976, the Ibadan Metropolitan

Planning Authority published in the Nigerian Tribune Notice of compulsory acquisition of a large parcel of land along Old Lagos Road, Ibadan, part of which land belongs to Samologbe family.

B 19. In 1980, the Ibadan Metropolitan Planning Authority finally acquired compulsorily the aforesaid parcel of land along Old Lagos Road, Ibadan for its Lagos Road Mechanic Resettlement Scheme which parcel of land contained an area of approximately 68.231 hectares and which included the plaintiffs' family land.

C 20. The compulsory acquisition of the parcel of land referred to in paragraphs 19 and 20 above (sic) was duly published in the Oyo State Gazette No. 13 Volume 5 dated 20th March, 1980."

In his Amended Statement of Defence, the 2nd Defendant failed to either admit or deny paragraph 18 of the Further Amended Statement of Claim D but went on to deny paragraphs 19 and 20. The relevant paragraphs of his pleadings read thus:-

"2. The 2nd defendant denies paragraphs 1,2,3,4,5,6,7,8,9,10,11,12,13,14,15 and puts the plaintiffs to the strictest E proof.

3. The 2nd defendant admits paragraph 16 of Statement of Claim.

F 9. The 2nd defendant denies each of the allegations contained in paragraphs 19,20,21,22,23,24,25,26,27,28,29,30,31,32,33,34,35,36,37 and put the plaintiffs to strict proof."

The failure of the 2nd Defendant to either admit or deny the averment in paragraph 18 of the Plaintiffs Further Amended Statement of Claim amounted to admission - Lewis & Peat v Akhimien, (1976) S.C. 157 at pp. 163 and 164; and Akintola v Solana, (1986) 2 N.W.L.R. (part 24) 598 at p. 609. Since there is no issue joined on the averment that the land in dispute was acquired in H September, 1976 by the Metropolitan Planning Authority, Ibadan, the fact stands proved, for section 75 of the Evidence Act, Cap. 112 of the Laws of the Federation of Nigeria, 1990 (formerly section 74) provides -

"75. No fact need be proved in any civil proceedings which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule or pleading in force at the time they are deemed to have admitted by their pleadings: ..."

Consequently, the trial court was right to hold that the land in dispute was compulsorily acquired in 1976, and so was the Court of Appeal in upholding the finding. If further evidence were required as per the proviso to section 75 of the Evidence Act, which is not the case here, Exhibits 5B, 5C 5D and 3 are sufficient to prove that the land in dispute was acquired in 1976 since the standard of proof in civil proceedings is based on the balance of probabilities.

Even though the Plaintiffs pleaded in paragraphs 19 and 20 of the Further Amended Statement of Claim that the land in dispute was acquired in 1980 by virtue of Public Notice in Oyo State of Nigeria Gazette No.13, volume 5 of 20th March, 1980, they did not call evidence in the High Court to support the averment. There was, therefore, no ground for the learned trial judge to find that the acquisition took place in 1980. The 2nd Defendant joined issue with the Plaintiffs in paragraph 9 of his Amended Statement of Defence when he denied that the land in dispute was acquired in 1980 as pleaded by the Plaintiffs. When the 2nd Defendant gratuitously produced the Gazette Notice in the Court of Appeal - Exhibit CA1 - he did not prove the Plaintiffs case as per paragraphs 19 and 20 of their pleadings since the burden of proof was not on him but the plaintiffs who made the assertion. Section 139 of the Evidence Act, Cap. 112 (formerly section 138) provides:

139. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person, but the burden may in course of a case be shifted from one side to the other, in considering the amount of evidence necessary to shift the burden of proof regard shall be had by the court to the opportunity of knowledge with respect to the fact to be proved which may be possessed

by the parties respectively."

There is no question of any law shifting the burden to prove the 1980 acquisition to the 2nd Defendant. It was not his case that any acquisition took place in 1980. Although it was the plaintiffs' case, as per their pleadings, they failed to prove the case by omitting to call evidence in support of the averment. The averment is deemed to have been abandoned - Omoboriowo v Ajasin (supra).

It is arguable whether the Court of Appeal was right in admitting Exhibit CAI in view of the provisions of order 1 rule 20 subrule (3) of the Court of Appeal Rules 1981 (as amended)- see Okpanum v S.G.E.. (Nigeria) Ltd., (1998) 7 N.W.L.R. (part 559) 537 at pp.546 -550 and pp.552-553. What is important, however, is that the Court of Appeal did not act on the additional evidence and rightly too.

I am satisfied that there is no substance in the 2nd Defendant's issue No.3.

In issue No.4 the 2nd Defendant's complaint is that the learned trial judge found that there was a sale of the land in dispute, by a representative of 5 of the 14 families that joined together to bring the action, but that the sale was null and void by reason of the 1976 acquisition. It is submitted that since this is the case, the learned trial judge was not right in granting the plaintiffs' claim for declaration as 5 out of the 14 families had sold their portion of the land in dispute. The 5 families in question should not be allowed to retain both the land in dispute and the purchase price of N25,000.00 paid to them by the 2nd Defendant as part-payment. He argued that the Court of Appeal was wrong in affirming the decision of the learned trial judge in this respect. The dictum in the case of Sanyaolu v Coker, (1983) 3 S.C. 124 at pp.163 -164 was quoted in support, namely:-

"A person cannot, obviously, eat his cake and have it. This is simple common sense. And so, ...a plaintiff cannot have what he himself says he has given away. A plaintiff who says he has sold his land to a purchaser cannot obviously turn round to claim a declaration of title to the very land he has sold" per Eso, JSC.

The Plaintiffs' reply is that the term "Samologbe Family" was

defined in their pleadings and the definition was not traversed by the 2nd Defendant. The relationship between the 14 families was also described in the Plaintiffs' pleadings and similarly this was not traversed by the 2nd Defendant. In addition, there was no counter-claim on his part for the return of the money by the purported vendors. Consequently, it is submitted that no court can grant what a party to a case has not made out in his pleadings and on which he has not led evidence.

The submission by the Plaintiffs that there was no counter-claim by the 2nd Defendant for the return of the purchase money paid, that is, N25,000.00, is well founded. The dictum in Sanyaolu's case (supra) can only apply in this case if the 2nd Defendant had counter-claimed. Neither the trial court nor the Court below would order the return of the N25,000.00 to the 2nd Defendant since he failed to raise a claim for the return to be made. The court is not a father Christmas. It does not award what a party has not claimed. The principle in Sanyaolu's case (supra) will only apply here had the 2nd Defendant made a counter-claim and that he was denied a refund, of the purchase money, after the purported sale of the land in dispute was declared null and void by the trial court. In my opinion, the Court of Appeal was right in rejecting the 2nd Defendant's complaint when it heads thus:-

"The issue now being canvassed by the appellant did not in any case put into proper focus the issues upon which the battle was fought in the lower Court and findings of the learned trial Judge were made. This misconception of the appellant's counsel on those findings is even made more apparent by the fact that all the respondents including one of the vendors (4th P.W.) sued in a representative capacity, and that capacity was not specifically challenged by the appellant."

This issue, therefore, lacks substance.

With regard to issue No.5, the 2nd Defendant canvassed that there was before the learned trial judge sufficient upon which, if properly evaluated, he ought to have held that Salami Afolabi Samologbe was the head of Samologbe family or at least, their agent for dealing with the land in dispute, consequent upon which the Plaintiffs were estopped from

denying his authority as such.

The 2nd Defendant referred to the testimony of P.W 2 where he said that Salami Afolabi Samologbe was the oldest head of the section of Samologbe family and that he was older than the head of any other section of the family. He also referred to the testimony of P.W.3 which he alleged contradicted that of P.W 2. P. W.3 said Akinrinlo Samologbe was the head of Samologbe family. That after the death of Laniyan Aragbenjo he was selected by the whole family as the Mogaji of the family.

It is submitted that the learned trial judge failed to evaluate these pieces of evidence. Had the learned trial judge done so, he would have held that Salami Afolabi Samologbe was the head of Samologbe family and/or their agent for dealing with the family land and that the Plaintiffs were estopped from denying his headship or agency.

I am unable to see what purpose this complaint will serve having regard to the finding that the land in dispute was sold to the 2nd Defendant in 1978 after it had earlier been acquired in 1976 and that the vendors or Samologbe family had, therefore, no title to pass to the 2nd Defendant. In the light of this, it does not matter whether Salami Afolabi Samologbe acted as the head of the Samologbe family or as their agent and that he had the power to sell the land to the 2nd Defendant. His action could not, in view of the finding that the land was not available to the family to sell, have any significance to the 2nd Defendant's case. Therefore, issue No.5 lacks merit.

With regard to the final issue - issue No.6, the complaint is that the judgment of the Court of Appeal displayed a misunderstanding of the case and issues before it to the detriment of the 2nd Defendant as to occasion miscarriage of justice. When the trial court evaluated the evidence of the 1st Defendant, it came to the conclusion that he was not a witness of truth when he denied being a party to the sale of the land in dispute to the 2nd Defendant, but the Court of Appeal visited this finding. In doing so, it observed as follow:-

"I pause here and say straight away that even though the 1st

defendant was said to be signatory to the purchase agreement in issue, the totality of his evidence did not support the appellant's case a bit. He denied executing the said agreement. His evidence was that the agreement he signed was hand-written and not typed. He also denied having alone or in combination with other persons sold any land to the appellant. The witness was held to be inconsistent in his testimony and not a witness of truth. He has not appealed." B

The 2nd Defendant canvasses that the testimony of the 1st Defendant in this respect supported his case since the trial court believed that he executed the sale agreement and that the agreement was typed and not hand written. C

The Plaintiffs have replied that the observation quoted above was made by the Court of Appeal merely in passing and that it was not a reversal of the decision of the learned trial judge that the 1st defendant was not a witness of truth. I entirely agree. Suppose the observation even contradicted the finding of the learned trial judge, I do not see how it could have been to the detriment of the 2nd Defendant's case since the sale of the land in dispute cannot be sustained for as long as the finding by the learned trial judge that the land was acquired in 1976 stands and that the Samologbe family had no land to transfer to the 2nd Defendant at the time of the sale in 1978. The contention is no more than a storm in a tea cup. It has no merit and so also the issue on which it is founded. D E F

On the whole, this appeal is frivolous and without substance. It is hereby dismissed with N10,000.00 costs to the Plaintiffs. The decisions of the trial court and the Court of Appeal are hereby affirmed. G

BELGORE JSC

Samologbe family had no land to transfer to 2nd Defendant and I find this appeal is mere voyage of discovery. For the reasons fully Hadumbrated in the judgment of Chief Justice of Nigeria which I adopt as mine, I also dismiss the appeal with N10,000.00 costs to respondents. H

MOHAMMED JSC

I have had the preview of the judgment written by my learned brother, Uwais, the Chief Justice of Nigeria, in draft. I entirely agree with him that this appeal has no merit at all. It is patently obvious that the sale of the land in dispute to the 2nd defendant could not stand. It is null and void. The evidence is clear on this issue because at the time of the sale the land had already been compulsorily acquired by the Ibadan Metropolitan Planning Authority. The acquisition was published in Oyo State Gazette No.13 volume 5, dated 20th March, 1980.

This appeal has failed and it is dismissed. I affirm the concurrent decisions of the two lower courts. I abide by the award made to the respondents of N10,000.00 costs in the lead judgment.

D

ONU JSC

Having been privileged to read before now the judgment of my learned brother Uwais, Chief Justice of Nigeria just read, I am in entire agreement therewith that this appeal is devoid of any merit and must therefore fail.

I adopt the reasoning and conclusions contained in the lead judgment as mine and have nothing usefully to add thereto.

F

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by the Hon. Chief Justice of Nigeria and I entirely agree that this appeal is devoid of merit and ought to be dismissed.

I have nothing more to add.

Accordingly, I, too, dismiss this appeal and abide by the order as to costs contained in the leading judgment.

H