

SUPREME COURT OF NIGERIA
6TH MARCH, 1998. SC. 195/1991
CORAM:- A. B. WALI, I. L. KUTIGI, E. O. OGWUEGBU,
U. MOHAMMED, S. U. ONU, JJSC

MORRISON UDIH PLAINTIFF/APPELLANT
AND
ELIZABETH IDEMUDIA DEFENDANT/RESPONDENT

***APPEALS** - Retrial order - Is not appropriate where the plaintiff's case failed intoto - And no irregularity is apparent on the records or shown to the court - The order of dismissal was properly made.*

***EVIDENCE** - Trespass - Burden of proof - In a claim for trespass to land - Is on the plaintiff to show that he has a better title than the defendant.*

***EVIDENCE** - Burden of Proof - Based on the state of the pleadings - Is on the party who would fail - If no evidence were given on either side.*

***EVIDENCE** - Proof - Where a party failed to prove an essential requirement of his case on the balance of probabilities - His claim ought to have been dismissed.*

FACTS

The plaintiff instituted an action against the defendant in the Benin Judicial Division of the then Bendel State of Nigeria claiming N50,000.00 being general damages for trespass committed by the defendant on the piece or parcel of land in dispute and an Order of perpetual injunction restraining the defendant her servants, or agents from committing further acts of trespass on the said land. The facts of the case are that the defendant obtained a grant from the Oba of Benin (Exhibit "F") to a parcel of land situate at Okanaruovia village in ward 33A, Benin City. Her application dated 22-2-76 was recommended to the Oba for approval by the Plot Allotment Committee, Ward 33A Okanaruovia Village, Benin City af-

ter the parcel of land was inspected. The Oba gave approval to the application on 25-3-77. By an application dated 16-3-77 (Exhibit "C"), the Plaintiff applied to the Oba of Benin for a grant in respect of a parcel of land situate in Oka through the Plot Allotment Committee for Oka Area Unit Ward 33E, Benin City. The Oba gave approval to this application on 22-11-77. Both parties claimed to have gone into possession after their respective grants. Some time in 1980, the defendant commenced building on the land, prompting the plaintiff to bring the action. The single most important issue that emerged from the averments of the parties is whether it was Ward 33E Plot Allotment Committee or Ward 33A Plot Allotment Committee that had the Power to allocate the land in dispute.

The learned trial judge in his judgment placed the burden on the defendant to prove that it was the Ward 33 E Plot Allotment Committee which was the appropriate Allotment Committee having jurisdiction over the land in dispute. Judgment was entered in favour of the plaintiff. The defendant was dissatisfied with the decision of the learned trial judge and appealed to the Court of Appeal, Benin Division. Her appeal was successful and the plaintiff's claim was dismissed. The latter has now appealed to the Supreme Court against the judgment of the Court of Appeal. From the grounds of appeal filed, the plaintiff/appellant identified the following five issues as calling for determination.

ISSUES FOR DETERMINATION:

"1. Whether having regard to the state of the pleadings, the Court of Appeal rightly defined the onus of proof in this case as an onus on the plaintiff/appellant to prove his title under Bini Customary Law and if so,

2. Whether the respondent having averred by specific facts, the lack of jurisdiction by Ward 33E Plot Allotment Committee to allocate or recommend the land in dispute for the Oba's approval the Court of Appeal was right in reversing the decision of the learned trial judge that the onus to prove such lack of jurisdiction was cast on the Respondent vide Section 138 of the Evidence Act Cap. 62.

3. Whether the said misdirection as to the onus of proof in this case which is not conceded entailed a dismissal rather than a retrial.

4. Whether a Defendant in an action for trespass who relied on

justification by title which was not proved is nonetheless entitled to a judgment of dismissal where the plaintiff proved antecedent adverse possession but not title. In other words, is it proper to dismiss an action in trespass where neither party proved title and the claim rested on adverse conflicting possession merely because the issue of title but not possession was ill resolved in favour of the plaintiff.

5. Whether the vacant nature of the land in dispute is the only factor for determining the quantum of damages, in trespass where other facts or circumstances are also present."

HELD (Unanimously dismissing the appeal per lead judgment of OGWUEGBU JSC)

Trespass - Burden of proof

1. The plaintiff who alleged that the defendant is a trespasser has the onus of showing that he has a better title. See Kponugbo & Ors. v. Kodadja 2 W.A.C.A. 24, Amakor v. Obiefuna (1974) 3 S.C. 67 at 75 and Ogunleye v. Oni (1990) 2 N.W.L.R. (Pt. 135) 745. In the instant case, the party who had the onus was the plaintiff since he claimed that the defendant trespassed on his land. As he relied on a grant (Exhibit "C"), he must prove the validity of it in order to succeed. (p. 432 G)

Burden of proof is on the party who would fail

2. I agree that the learned trial Judge wrongly placed the onus on the defendant. By the state of the pleadings, it was the duty of the plaintiff to establish the validity of his grant and not for the defendant to do so. It was the plaintiff who would fail if no evidence at all, or if no more evidence, as the case might be were given on either side. This burden rested before evidence was gone into on the plaintiff and he failed to establish that Ward 33E Plot Allotment Committee had authority within the area the land in dispute was situated. See Abrath v. N.E. Railway Co. 11 Q.B.D. 440 at 456 and Wakelin v. London and South West RY (1896) 1 Q.B. 189. (p. 434 E)

Where a party failed to prove his case

3. In the circumstances of this case, the plaintiff failed to prove on the balance of probabilities an essential requirement of a valid grant under Bini Customary Law namely, that Ward 33E Plot Allotment Committee B had jurisdiction over the land in dispute. His claim ought to have been dismissed by the learned trial Judge and the Court of Appeal was right in dismissing the claim. The misplacement of the onus of proof occasioned a grave miscarriage of justice and I also agree with the court below that C the plaintiff woefully failed to prove his case. (p. 435 C)

Appeals - Retrial order

4. An order of retrial is not appropriate in this case where it is manifest that the plaintiff's case failed in toto and no irregularity is apparent on the D records or shown to the court to warrant such order. The court below made a proper order of dismissal of the plaintiff's case. See Ayoola v. Adebayo (1969) ALL N.L.R. 154, Automatic Woodturning Co. Ltd v. Stringer 1 ALL E.R. 90 (p. 435 E)

NOTABLE POINTS OF INTEREST

OGWUEGBU JSC

1. Acquiring legal estate under Bini Customary Law

F It is an essential requirement of Bini Customary Law for a person to acquire a legal estate in any given Bini communal land, he must show that his application was recommended to the Oba for approval by the appropriate Ward Plot Allotment Committee having jurisdiction over the area in which the land is situate and such acquisition or transfer is effected on G the endorsement by the Oba, of his approval on the purchaser's application duly recommended by the appropriate Plot Allotment Committee. See Aigbe v. Edokpolor (1977) 2 SC 1 at 13 and Awoyegbe and v. Ogbeide (1988) 1 NSCC 491 at 508. (p. 433 A)

ONU JSC

2. Trespass - Puts title in issue

Where there is a claim for trespass and an injunction, as in the instant

case, title to the land involved is put in issue and this makes it incumbent on the trial Judge to consider the issue of title to the land or exclusive possession to it. See Okorie v. Udom (1960) 5 FSC 62 at 65; Amakor v. Obiefuna (1974) 3 SC 67 at 75-76; (1974) 1 ALL NLR (PART 1) 119 AT 128; As in the case in hand, both parties claim to be in possession of the plot in dispute and each is armed with the Oba of Benin's approval thereto (the disparity between Appellant's plot measuring 300' x 300' and Respondent's measuring 200' x 200' notwithstanding,) the law ascribes possession to the one with better title. See Ogungbemi v. Asamu (supra); Da Costa v. Ikomi & ors. (1968) 1 ALL NLR 394 at 398 and Joseph Ekwere & ors. v. Nakmakosi Iyiegbu & ors. (1972) 6 SC. 116 at 130. This is because in law, there is no such thing as concurrent possession of land by two persons claiming adversely to one another. See Odi v. Osafile (1987) 2 NWLR 510 AT 512; Amakor v. Obiefuna (1974) 3 SC. 67; Balogun v. Labiran (1988) 3 NWLR (Part 80) 66. (p. 443 A)

3. Principle of assessment of damages

The second issue which queries whether on the evidence adduced by the parties and in particular by the Appellant for an award of N10,000.00 for trespass to vacant land and the principle of assessment of damages, the award of N500.00 by the court below was not justified, is in my view, a non-issue as the Appellant neither pleaded nor established special damages he suffered. Moreover, with mere bald averments of entitlement, the reduction in the damages was clearly justified as the high award was not supported by evidence. See Okup v. Ifemembi (1974) 3 SC. 97; (1974) ALL NLR 153 at 157. (p. 444 G)

REPRESENTATION

Dr. S.S.G. Enemeri for the Plaintiff/Appellant

The Defendant/Respondent was absent and not represented by Counsel

CASES REFERRED TO

Airlines v. U.B.A Ltd (1986) 5 S.C. 217 at 222

Nigerian Maritime Services Ltd. v. Afolabi (1978) 2 S.C. 76 at 84

Arase v. Arase (1981) 5 S.C. 33 at 51 - 52

Kodilinye v. Odu 2 W.A.C.A 336 at 337

Amakor v. Obiefuna (1974) 3 S.C. 67 at 75

Aigbe v. Edokpolor (1977) 2 SC 1 at 13

B Abrath v. N.E. Railway Co. 11 Q.B.D. 440 at 456

Wakelin v. London and South West RY (1896) 1 Q.B. 189

Kponugbo . v. Kodadja 2 W.A.C.A. 24

Awoyegbe v. Ogbeide (1988) 1 NSCC 491 at 508.

Abrath v. N.E. Railway Co. 11 Q.B.D. 440 at 456

C Ayoola v. Adebayo (1969) ALL N.L.R. 154

Automatic Woodturning Co. Ltd v. Stringer 1 ALL E.R. 90

Okup v. Ifemembi (1974) 3 SC. 97; (1974) ALL NLR 153 at 157.

D STATUTE REFERRED TO

Evidence Act, Cap 112, Laws of the Federation of Nigeria Sections 135, 136, 137, 138 and 139

E LEAD JUDGMENT BY OGWUEGBU JSC

The plaintiff instituted an action against the defendant in the Benin Judicial Division of the High Court of the then Bendel State of Nigeria claiming the following reliefs:-

F *"(i) N50,000.00 being general damages for trespass committed by the defendant in or around 27th February, 1980, this year, on that piece or parcel of land verged pink which with that parcel of land verged green and encompassing it in the survey plan number MWC/815/80 filed herewith, is in the lawful and exclusive possession of the plaintiff.*

G *(ii) An order of perpetual injunction to restrain the defendant, her servants, or agents or howsoever from committing trespass or further acts of trespass on the said land."*

H The case was heard on the pleadings filed and exchanged by the parties. The learned trial judge Akenzua, J. found the defendant liable, awarded damages against her and granted an order of injunction restraining the defendant and her agents from further acts of trespass on the land in dispute. The defendant was dissatisfied with the decision of the

learned trial judge and appealed to the Court of Appeal, Benin Division. Her appeal was successful and the plaintiff's claim was dismissed. The latter has appealed to this court against the judgment of the Court of Appeal.

From the grounds of appeal filed, the plaintiff who is the appellant B in this court identified the following issues for determination:

"1. Whether having regard to the state of the pleadings, the Court of Appeal rightly defined the onus of proof in this case as an onus on the plaintiff/appellant to prove his title under Bini Customary Law and if so, C

2. Whether the respondent having averred by specific facts, the lack of jurisdiction by Ward 33E Plot Allotment Committee to allocate or recommend the land in dispute for the Oba's approval the Court of Appeal was right in reversing the decision of the learned trial judge that the onus to prove such lack of jurisdiction was cast on the Respondent vide D Section 138 of the Evidence Act Cap. 62.

3. Whether the said misdirection as to the onus of proof in this case which is not conceded entailed a dismissal rather than a retrial.

4. Whether a Defendant in an action for trespass who relied on E justification by title which was not proved is nonetheless entitled to a judgment of dismissal where the plaintiff proved antecedent adverse possession but not title. In other words, is it proper to dismiss an action in trespass where neither party proved title and the claim rested on adverse F conflicting possession merely because the issue of title but not possession was ill resolved in favour of the plaintiff.

5. Whether the vacant nature of the land in dispute is the only factor for determining the quantum of damages, in trespass where other G facts or circumstances are also present."

The defendant who is the respondent in this court identified the following issues for determination by the court:-

"1. Whether on the settled pleadings and the specific findings of the learned trial Judge of the Benin High Court and consideration of H same by the Court of Appeal, the plaintiff/appellant had in law and infact discharged the onus of proof cast upon him to entitle him to judgment?

2. *Whether on the totality of the evidence adduced by the parties and in particular by the plaintiff/appellant in the Benin High Court for an award of N10,000.00 for trespass to vacant land, and the principle of assessment of damages, the award of N500.00 by the Court of Appeal was not justified?"*

The facts of the case are that the defendant obtained a grant from the Oba of Benin (See Exhibit "F") to a parcel of land situate at Okanaruovia Village in Ward 33A, Benin City. Her application dated 22-2-76 was recommended to the Oba for approval by the Plot Allotment Committee, Ward 33A Okanaruovia Village, Benin City after the parcel of land was inspected. The Oba gave approval to the application on 25-3-77. By an application dated 16-3-77 (Exhibit "C"), the plaintiff applied to the Oba of Benin for a grant in respect of a parcel of land situate in Oka through the Plot Allotment Committee for Oka Area Unit Ward 33E, Benin City. The Oba gave approval to this application on 2-11-77. Both parties claimed to have gone into possession after their respective grants. Some-time in 1980, the defendant commenced building on the land and the plaintiff brought the action leading to this appeal.

At the conclusion of the trial Akenzua, J. found as follows:

"In the case before me the affirmative asserted by the Plaintiff is that Ward 33E Plot Allotment Committee is the one with power to give out the plot of Land in question. This assertion is met by the negative assertion that only Ward 33A Plot Allotment Committee that has power to allocate the land in question. What is therefore crucial in this case is that it must be established that it is not Ward 33E that has power to allocate land in question. If Ward 33E has no authority to allocate this land it is on the defendant to prove. The plaintiff's case before me is that Ward 33E Plot Allotment Committee gave him the land through their recommendation to the Oba of Benin for approval (Exhibit "C"). The Defendant's case is that Ward 33E Plot Allotment Committee has no power to allocate the land but Ward 33A Allotment committee. The question that has arisen is why did the Oba of Benin also approve the recommendation of Ward 33E over the said plot? Was the Oba of Benin misled by Ward 33E Plot Allotment Committee to approve their recommenda-

tion, Exhibit "C"? This allegation is very essential to the Defendant's case. The burden of proof is on the Defendant that it is only Ward 33A and not Ward 33E Plot Allotment Committee that has power to allocate land in the area where the land in question is situated. The nature of evidence in proof varies according to the facts to be proved. If Ward 33E Plot Allotment Committee does not exist over the area where the land in dispute is or that Ward 33E Plot Allotment has no power to allocate land in the said area, it is the evidence of the person who constituted the two Plot Allotment Committee (sic) that can establish it. In this connection the Defendant should have subpoenaed the Secretary to the Oba of Benin to give this evidence. She should also have applied to move the Court, to the Palace if she felt strongly about the issue. She should have also called either Agbondehenhen Eweka, Aghajowa Igiebor or Mrs. Boyo, persons shown by her in her Survey Plan Exhibit "E" to be adjoining owners of land, to give this evidence. Instead she called the very members of the said Ward 33A Plot Allotment Committee to give evidence very well knowing that the Oba of Benin approved the application of Ward 33E Plot Allotment Committee also. The Court is unable to know whether Ward 33A Plot Allotment Committee also allocated their lands to those persons shown in Exhibit "E". It was also possible for the Defendant to move Court to the Palace of the Oba of Benin to ascertain the position of authority between the two Plot Allotment Committees within the area the land in dispute is situated. Thus there is no evidence in proof of the averments contained in paragraphs 4,5, and 6 of the statement of defence. The particular assertion that Ward 33E had no power to allocate land in the area in which the land in dispute is situated is a particular fact which the defendant alleged she knows, and which is material to her defence. The burden is on her under Section 138 Evidence Act the legal or the true ownership of the land in dispute now is in the plaintiff and the plaintiff has title to the land in dispute." (Underlining is for emphasis)

On the first and second issues for determination, the learned appellant's counsel submitted in the brief that by the rules of pleadings he who asserts must prove whether that assertion is in the negative or in the

affirmative and since the defendant averred in her pleadings the lack of authority in Ward 33E Plot Allotment Committee to allocate the land to the plaintiff and that Ward 33A Allotment Committee is the competent authority, she assumed the burden of proof of the particular fact that Ward 33E Plot Allotment Committee is not the competent authority. The court was referred to section 137(1) and 139 Cap 112, Laws of the Federation of Nigeria, 1990 and Aeroflot Soviet Airlines v. U.B.A Ltd. (1986) 5 S.C. 217 at 222, Nigerian Maritime Services Ltd. v. Afolabi (1978) 2 S.C. 76 at 84 and Arase v. Arase (1981) 5 S.C. 33 at 51 - 52.

It was submitted in the respondent's brief that the failure of the plaintiff to show that the land in dispute was within the jurisdiction of Ward 33E Plot Allotment Committee and therefore the competent Committee to recommend the application to the Oba of Benin meant that he had not proved his title to the land in dispute. We were referred to sections 136 and 137 of the Evidence Act, Cap 112, Laws of the Federation of Nigeria, 1990. It was further submitted on behalf of the respondent that the plaintiff must succeed on the strength of his own case and not on the weakness of the defendant's case. The cases of Kodilinye v. Odu 2 W.A.C.A. 336 at 337 and Jules v. Ajani (1980) 5 S.C. 96 were cited and relied upon.

The court below identified and determined the straight issue arising for determination namely, who of the parties had the burden to prove which Plot Allotment Committee had jurisdiction in respect of the land in dispute to recommend to the Oba of Benin application for approval of a grant. I too agree that this is the main issue. Both parties claimed title to the land in dispute and a claim for trespass and injunction as in this case postulates that the plaintiff is the owner of the land in dispute or has had prior to the trespass complained of, exclusive possession of it. **The plaintiff who alleged that the defendant is a trespasser has the onus of showing that he has a better title. See Kponugbo & Ors. v. Kodadja 2 W.A.C.A. 24, Amakor v. Obiefuna (1974) 3 S.C. 67 at 75 and Ogunleye v. Oni (1990) 2 N.W.L.R. (Pt. 135) 745.**

In the instant case, the party who had the onus was the plaintiff since he claimed that the defendant trespassed on his land. As

he relied on a grant (Exhibit "C"), he must prove the validity of it in order to succeed. It is an essential requirement of Bini Customary Law for a person to acquire a legal estate in any given Bini communal land, he must show that his application was recommended to the Oba for approval by the appropriate Ward Plot Allotment Committee having jurisdiction over the area in which the land is situate and such acquisition or transfer is effected on the endorsement by the Oba, of his approval on the purchaser's application duly recommended by the appropriate Plot Allotment Committee. See Aigbe v. Edokpolor (1977) 2 SC 1 at 13 and Awoyegbe and v. Ogbeide (1988) 1 NSCC 491 at 508. The defendant in paragraphs 4, 5, and 6 of her statement of defence in reply to paragraph 4 of the statement of claim challenged the right of Ward 33E Plot Allotment Committee to recommend approval to the Oba. It was therefore not enough for the plaintiff who had the burden to prove his title to tender the Oba's approval and to say that Ward 33E Plot Allotment Committee recommended his application. He must go further to prove that it was the said Ward 33E Plot Allotment Committee that had jurisdiction over the land granted to him. The said paragraphs of the statements of claim and defence read:

Statement of Claim

"5. The land aforesaid which is enclosed on three sides by vacant plots of land was prior to the coming into force of the Land Use Decree, 1978 allotted to the plaintiff with the approval of the Oba of Benin by the now defunct Oka Area Unit Ward 33E Plot Allotment Committee through whom the plaintiff had applied to His Highness, Akenzua II, the then Oba of Benin for the said land. The Oba of Benin aforesaid approved the allotment of the land measuring 300ft by 300ft to the plaintiff on 2nd November, 1977 and signified his said approval on an application for such approval dated 16th March, 1977 and made to him by the plaintiff through the Oka Area Unit Ward 33E Plot Allotment Committee aforesaid, which also certified the land as free from dispute after due inspection."

Statement of Defence

"4. In further answer to paragraphs 5,6,7,8,9, and 10 of the State-

ment of Claim, the Defendant contends and will show at the trial that such purported approval and acts were not meant or directed to the land in dispute which was at no time within the jurisdiction of Ward 33E Plot Allotment Committee for the purpose of land allocation or recommendation for Customary grant.

5. The Defendant categorically avers and maintains that the land in dispute which was properly made subject of customary grant to the Defendant was never within the jurisdiction of Ward 33E Plot Allotment Committee at any time or the material time.

6. The Defendant avers and will establish at trial that the land in dispute now, contained in Survey Plan OA/1188/BD 80 of 17/10/80 is situate at all times in Ward 33A Plot Allotment Committee Okanuruovia Village, Via Benin City. It was and is at all material time within the jurisdiction of Ward 33A Plot Allotment Committee Okanuruovia Quarters, Okanuruovia Village, Via Benin City for the purpose of land recommendation and approval by the Oba of Benin."

The learned trial Judge as could be gathered from the excerpts of his judgment reproduced earlier in this judgment, placed the burden on the defendant to prove that it was the Ward 33E Plot Allotment Committee which was the appropriate Allotment Committee having jurisdiction over the land in dispute. The court below found that he was in error to have done so and **I agree that the learned trial Judge wrongly placed the onus on the defendant.**

By the state of the pleadings, it was the duty of the plaintiff to establish the validity of his grant and not for the defendant to do so. It was the plaintiff who would fail if no evidence at all, or if no more evidence, as the case might be were given on either side. This burden rested before evidence was gone into on the plaintiff and he failed to establish that Ward 33E Plot Allotment Committee had authority within the area the land in dispute was situated. See Abrath v. N.E. Railway Co. 11 Q.B.D. 440 at 456 and Wakelin v. London and South West RY (1896) 1 Q.B. 189. Section 137(1) of the Evidence Act, Cap 112, Laws of the Federation of Nigeria applied and not section 139. Section 137(1) provides:

"137(1) In civil cases the burden of first proving the existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings."

The learned trial Judge found that the land covered by Exhibit "F" and shown in Exhibit "E" is part of the land claimed by the plaintiff by virtue of Exhibit "C". It was therefore the duty of the plaintiff to call the Oba of Benin or his Secretary to testify and not the defendant. There was the unchallenged evidence from D.W. 2 that Ward 33A Plot Allotment Committee had a layout plan approved by Bendel State Town Planning authority and that all persons shown on the defendant's plan Exhibit "E" were allocated their land by Ward 33A Plot Allotment Committee.

In the circumstances of this case, the plaintiff failed to prove on the balance of probabilities an essential requirement of a valid grant under Bini Customary Law namely, that Ward 33E Plot Allotment Committee had jurisdiction over the land in dispute. His claim ought to have been dismissed by the learned trial Judge and the Court of Appeal was right in dismissing the claim. The misplacement of the onus of proof occasioned a grave miscarriage of justice and I also agree with the court below that the plaintiff woefully failed to prove his case.

An order of retrial is not appropriate in this case where it is manifest that the plaintiff's case failed in toto and no irregularity is apparent on the records or shown to the court to warrant such order. The court below made a proper order of dismissal of the plaintiff's case. See Ayoola v. Adebayo (1969) ALL N.L.R. 154, Automatic Woodturning Co. Ltd v. Stringer 1 ALL E.R. 90 Bakare v. Apena (1968) 1 NSCC 935 and Ezeoke and others v. Nwagbo and others (1988) 1 NSCC 414, (1988) 1 N.W.L.R. (Pt. 72) 616 at 629 - 630. Having regard to my conclusions in respect of the appellant's first four issues for determination, it is unnecessary to discuss the fifth issue relating to damages.

I will therefore dismiss the appeal and affirm the judgment of the Court of Appeal delivered on 16-3-90. The defendant is awarded the

costs of this appeal which I fix at N10,000 against the plaintiff. Before I end this judgment, I must say that the quality of the respondent's brief is far below standard. In a fourteen page brief, ten pages were devoted to the reproduction of the grounds of appeal leaving only three and half pages for sketchy argument.

WALI JSC

I have read in advance the lead judgment of my learned brother Ogwuegbu JSC and I agree with the reasoning and conclusion for dismissing the Appeal. Having nothing more useful to add I adopt the reasons in the lead judgment as mine and also dismiss the appeal with N10,000 costs to the respondent.

KUTIGI JSC

The plaintiff's claims against the defendant are as contained in paragraph 15 of his Statement of Claim thus:-

"(i) N50,000.00 being general damages for trespass committed by the defendant in or around 27th February, 1980, this year, on that piece or parcel of land verged pink which with that parcel of land verged green and encompassing it in the survey plan number MWC/815/80 filed herewith, is in the lawful and exclusive possession of the plaintiff.

(ii) An order of perpetual injunction to restrain the defendant, her servants, or agents or whosoever from committing trespass or further acts of trespass on the said land."

He had before then pleaded in paragraphs 2, 3, 4, 5 and 6 (ibid) as follows:-

"2. The plaintiff is the possessory owner under Bini customary law, the lex situs and occupier of the piece or parcel of land in dispute in this case.

3. The said piece or parcel of land which is verged pink in the survey plan number MWC/815/80 made and drawn by licensed surveyor M. N. Chukwurah and filed herewith is but an intergral part of the larger

piece or parcel of land verged green in the said survey plan which land, including the portion verged pink and in dispute is in the exclusive possession of the plaintiff.

4. The said piece or parcel of land verged green which encompasses the portion thereof in dispute verged pink, lies and situate at Oka, Ward 33E along Benin-Abraka Road, Off Upper Sakpoba Road, Benin City in the Oredo Local Government Area and within the Benin Judicial Division. B

5. The land aforesaid which is enclosed on three sides by vacant plots of land was prior to the coming into force of the Land Use Decree, 1978 allotted to the plaintiff with the approval of the Oba of Benin by the new defunct Oka Area Unit Ward 33E Plot Allotment Committee through whom the plaintiff had applied to His Highness, Akenzua II, the then Oba of Benin for the said land. The Oba of Benin aforesaid approved the allotment of the land measuring 300ft by 300ft to the plaintiff on 22nd November, 1977 and signified his said approval on an application for such approval dated 16th March, 1977 and made to him by the plaintiff through the Oka Area Unit Ward 33E Plot Allotment Committee aforesaid, which also certified the land as free from dispute after due inspection. C D E

6. The plaintiff will at the hearing of this action found on the said application and the Oba's approval thereof endorsed on it." F

The defendant on the other hand in her Statement of Defence pleaded in paragraphs 3, 4, 5, 6 and 7 that:-

"3. The defendant denies paragraphs 2, 3, 4, 5, 8, 9, 10, 12 and 13 of the statement of claim and will at the trial put the plaintiff to the strictest proof of same. G

4. In further answer to paragraphs 5, 6, 7, 8, 9 and 10 of the statement of claim, the defendant contends and will show at the trial that such purported approval and acts were not meant or directed to the land in dispute which was at no time within the jurisdiction of Ward 33E Plot Allotment Committee for the purpose of land allocation or recommendation for Customary grant. H

5. The defendant categorically avers and maintains that the land

in dispute which was properly made subject of customary grant to the defendant was never within the jurisdiction of Ward 33E Plot Allotment Committee at any time or the material time.

6. The defendant avers and will establish at trial that the land in dispute now, contained in Survey Plan GA/1188/BD 80 of 17/10/80 is situate at all times in Ward 33/A Plot Allotment Committee Okaruruovia Village, Via Benin City. It was and is at all material time within the jurisdiction of Ward 33/A Plot Allotment Committee Okaruruovia Quarters, Okaruruovia Village, via Benin City for the purpose of land recommendation and approval by the Oba of Benin.

7. The defendant avers that she acquired the said parcel of land measuring 200ft by 200ft lying and situate in Okaruruovia Village area vide - Building Plot application dated 22nd February, 1976 and approved by His Highness Akenzua II, C.M.G. Oba of Benin, the traditional Trustee of Bini Communal land in Benin Division on 25th March, 1977. The said approval of Customary grant will be produced and relied upon at trial.

The single most important issue emerging from the averments above is whether it was Ward 33/E Plot Allotment Committee or Ward 33/A Plot Allotment Committee that had the power to allocate the land in dispute. In this connection the learned trial judge after a painstaking review of the evidence said:-

"Trespass is based on possessory title and the act of possession required to be proved depends on the particular facts of the case. But the law is, where two persons claim to be in possession of land, the law ascribes possession to that one who proves title. In this case, the plaintiff tendered as his root of title:-

"Exhibit "C" the Oba of Benin's approval through the Plot Allotment Committee, Oka Area Unit Ward 33E."

The defendant tendered, as her root of her title to the land:-

"Exhibit "F" Oba of Benin's approval through the Plot Allotment Committee Ward 33A, Okanaruovia Village."

The two documents bear the names of two different Ward Plot Allotment Committees. The plaintiff's is Ward 33E and the defendant's is Ward

33A. ----- As the situs of the land in question is not in dispute, the only vital question for court is now to decide which of the wards is empowered to recommend land to the Oba of Benin over the area."

I think so far so good. In his attempt to resolve the issue, the learned trial judge had this to say latter in the judgment:-

"If Ward 33E Plot Allotment Committee does not exist over the area where the land in dispute is or that Ward 33E Plot Allotment Committee has no power to allocate land in the said area, it is the evidence of the person who constituted the two Plot Allotment Committees that can establish it. In this connection the defendant should have subpoenaed the Secretary to the Oba of Benin to give evidence. She should also have applied to move the court to the Palace if she felt strongly about the issue..... It was also possible for the defendant to move court to the Palace of the Oba of Benin to ascertain the position of authority between the two Plot Allotment Committees within the area the land in dispute is situated." (underlining supplied by me)

It follows from the extract of the judgment above that the learned trial judge was clearly not satisfied as to which of the two Plot Allotment Committees (Ward 33E and Ward 33A) had the power and competence to recommend to the Oba of Benin for approval the area of land in dispute. It is implicit in the judgment also that the learned trial judge would require the evidence of the person who constituted the two Plot Allotment Committees, in the person of either the Oba of Benin or his Secretary in order to ascertain which of the two Committees had authority over the land in dispute. I think he was right. But it was wrong as stated by the Court of Appeal for the learned trial judge to have placed the burden of satisfying that requirement on the defendant. There is no doubt that the evidence of the Oba or his Secretary could go either way, depending on which of the two Committees actually had authority over the land in dispute. But once a defendant claims to be the owner of the land in dispute, as in this case, title to it is put in issue and in order to succeed the plaintiff must show a better title than that of the defendant even though in a claim for trespass, as in this case too, all a plaintiff

needs to prove is exclusive possession or a right to such possession of the land in dispute. This the plaintiff herein failed to do. (See AMAKOR v. OBIEFUNA (1974) 1 ALL NLR. 119; AROMIRE v. AWOYEMI (1972) 2 SC. 1. OGUNDE v. OJOMU (1972) 4 SC. 105).

B On this ground alone the appeal fails and it is hereby dismissed with costs of N10,000.00 in favour of the defendant/respondent. The judgment of the Court of Appeal is confirmed.

C **MOHAMMED JSC**

I have had a preview of the judgment just read by my learned brother, Ogwuegbu, J.S.C., in draft and I agree with him that this appeal has failed. My learned brother has considered all the issues raised in this
D appeal and has expressed his learned opinion over them. I have nothing to add to that opinion and adopt same as mine. The appeal is dismissed. I also award N10,000.00 in favour of the respondent.

E **ONU JSC**

I had a preview of the judgment of my learned brother Ogwuegbu, JSC just read. I agree with him that this appeal lacks merit and
F ought therefore to fail.

I wish to say a few words in expatiation to the leading judgment as follows:-

In my consideration of issue No. 1, I take the view that neither in law nor in fact had the appellant discharged the onus of proof cast on
G him to entitle him to judgment. In meeting the Appellant's forceful argument on this point, the learned Justices of the Court of Appeal (hereinafter referred to as the court below) observed as follows:-

*"Whether the plaintiff has established that Ward 33/E Plot Allotment Committee to the exclusion of Ward 33/A had power or jurisdiction
H to recommend him for grant of land to the Oba" the learned trial Judge of the High Court said:-*

"If Ward 33/E Plot Allotment Committee does not exist over the

area where the land in dispute is as that Ward 33/E Plot Allotment Committee has no power to allocate land in the said area, it is the evidence of the person constituting the two plot allotment Committees that can establish it." (Underlining is mine).

In spite of the above findings, the learned trial Judge went ahead in utter disregard of the provisions of Sections 135 and 136 of the Evidence Act (Cap. 112 Laws of the Federation of Nigeria, 1990) to put the burden of proof on the Respondent who was neither the plaintiff nor a person who counterclaimed in the action. The two sections state:

"135(1) *Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*"

(2) *When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*

136. *The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.*"

See also the unreported case of this Court No. SC.204/68 Elemo & ors. v. Molade & Anor of 17/11/70. It follows therefore that in the instant case the learned trial Judge was not satisfied as to which of the two Plots Allotment Committees (33/E or 33/A) had the power and competence to recommend to the Oba of Benin for approval of the application of the Appellant and clearly but erroneously placed the burden of proof on the Respondent. Be it noted that, the Respondent's claim as endorsed on his Writ of Summons in the trial Court was for:-

"N50,000.00 (Fifty thousand naira being general damages for trespass committed by the defendant some time last year and repeatedly on a portion of a piece or parcel of land lying and situate at Oka Ward 33E of Oredo Local Government Area, Benin City belonging to and in the exclusive possession, use and occupation of the Plaintiff. The said piece or parcel of land or the disputed portion thereof which is within the jurisdiction of this Honourable Court will be shown and more particularly delineated in Survey Plan to be filed in this action by the Plaintiff. Perpetual injunction to restrain the Defendant, her agents or servants or howsoever from committing trespass or further acts of trespass on the

said piece of land."

In Okeaya Inneh v. Aguebor (1976) 1 ALL NLR 1 and Omorieg v. Idugiemwanye (1985) 2 NWLR (Part 5) 4, this court held that under Bini Native Law and Custom, title to land is proved if a party claiming such title can establish that his predecessor in title acquired such land through the Oba of Benin.

Applying the principle stated above, the learned trial Judge in the instant case has held *inter alia* thus:-

"..... and which relevant procedural steps of acquiring land in Benin under Native Law of both parties, what is the consequent effect of such a grant of one piece of land to the person by the Grant? Learned Counsel for Defendant has priority over the Plaintiff. Learned Counsel supported this submission with a Supreme Court case Atiti Gold v. Beatrice Osareren (1970) 1 ALL NLR page 125. I agree with learned Counsel on this submission as the true position of the law 'Prior Est Tempore portior est jure.' "

The learned trial Judge having so found, the onus of proof, in my view, rested on the Appellant upon whom the burden to show that he had a good or better title lay, to establish that Ward 33/E Allotment Committee to the exclusion of Ward 33/A had power/competence or jurisdiction to recommend him for grant of the land to the Oba of Benin. Such title under Bini Customary law includes inspection of the land and recommendation to the Oba of Benin by the appropriate or competent Plot Allotment Committee. See Atiti Gold v. Beatrice osareren (supra); Mrs. Aigbe v. Bishop Edokopolor (1977) 2 SC. 1; Arase v. Arase (1981) 5 SC. 1; Bello v. Eweka (1981) 1 SC. 101 and Awoyegbe v. Ogbeide (1988) 1 NWLR (Part 73) 695. The Appellant's failure or inability to show that the land in dispute is within the territory assigned to Ward 33/E Plot Allotment Committee and therefore the competent committee to recommend to the Oba of Benin in respect of the land simply means that the Appellant has in the two courts below not proved his title to the land in dispute. Surely, the mere production of documents on which the Oba's purported approval was signified is not sufficient in law. The court below was therefore justified, in my opinion, to have allowed the Respondent's ap-

peal and in consequence set aside the trial court's judgment. It is trite law that a plaintiff must succeed on the strength of his case and not on the weakness of the defendant's case. See Kodilinye v. Mbanefo Odu 2 WACA 336 at 337; Jules v. Ajani (1980) 5 SC. 96 and Umesie v. Onuaguluchi (1995) 9 NWLR (Part 421) 515. Where there is a claim for trespass and an injunction, as in the instant case, title to the land involved is put in issue and this makes it incumbent on the trial Judge to consider the issue of title to the land or exclusive possession to it. See Okorie v. Udom (1960) 5 FSC 62 at 65; Amakor v. Obiefuna (1974) 3 SC 67 at 75-76; (1974) 1 ALL NLR (PART 1) 119 AT 128; Ogungbemi v. Asamu (1986) 3 NWLR (Part 26) 63 and Ayinla v. Sijuwola (1984) 5 SC. 44. As in the case in hand, both parties claim to be in possession of the plot in dispute and each is armed with the Oba of Benin's approval thereto (the disparity between Appellant's plot measuring 300' x 300' and Respondent's measuring 200' x 200' notwithstanding,) the law ascribes possession to the one with better title. See Ogungbemi v. Asamu (supra); Da Costa v. Ikomi & ors. (1968) 1 ALL NLR 394 at 398 and Joseph Ekwere & ors. v. Nakmakosi Iyiegbu & ors. (1972) 6 SC. 116 at 130. This is because in law, there is no such thing as concurrent possession of land by two persons claiming adversely to one another. See Odi v. Osafire (1987) 2 NWLR 510 AT 512; Amakor v. Obiefuna (1974) 3 SC. 67; Balogun v. Labiran (1988) 3 NWLR (Part 80) 66. For the learned trial Judge in the case in hand therefore to have held in his judgment inter alia that -

"If ward 33E Plot Allotment Committee does not exist over the area where the land in dispute is or that Ward 33E Plot Allotment Committee has no power to allocate land in the said area, it is the evidence of the person who constituted the two Plot Committees that can establish it. In this connection, the defendant should have subpoenaed the Secretary to the Oba of Benin to give evidence. She should also have applied to move the court to the palace if she felt strongly about it It was also possible for the defendant to move court to the palace of the Oba of Benin to ascertain the position of authority between the two plot Allotment Committees within the area the land in dispute is situated."

this amounts, in my view, to placing the burden of proof on the Respon-

dent who had done all she could by denying Appellant's case in both her pleadings and evidence she led thereon in court; indeed, the Respondent having gone further to claim title although not counterclaiming, title to the land in dispute is put in issue and in order to succeed, the Appellant must show a better title. This, Appellant in the instant case has failed to do. See Aromire v. Awoyemi (1972) 2 SC.1; Akpauna v. Obi Nzeka II (1983) 7 SC.1; (1983) 2 SCNLR 1 and Piara v. Tenalo (1976) 12 SC. 31. In any case, it should always be borne in mind that this court has held in a number of cases in land matters that the onus of proving title is on the plaintiff but it is when evidence has been led to show title that the onus shifts to the Defendant to show the contrary. See Oronsaye v. Osula (1976) 6 SC. 21; Imana v. Robinson (1979) 3 3-4 SC. 1 and Lewis & Peat (NRI) Ltd. v. Akhimien (1976) 7 SC. 157 at 168; (1976) 1 ALL NLR (Part 1) 460. All that I have said above would, in my view, not warrant a rehearing but an outright dismissal of the Appellant's action for the sheer reason that the evidence relied on by the Appellant in the trial court but which the court below re-appraised and rejected, could not in any way have sustained the claim. See Chief P. U. Ejowhomu v. Edok-Eter Mandilas Ltd (1986) 5 NWLR (Part 39) 1 at 17-18, per Karibi-Whyte, JSC, I am therefore of the firm view that the burden cast upon the Appellant was not discharged by a mere denial of the existence of the other Committee, because the non-existence of the rival committee does not necessarily constitute Plot Allotment Committee of Ward 33/E into the opposing one.

The above, in my view, disposes of the first issue to which my answer is in the negative.

The second issue which queries whether on the evidence adduced by the parties and in particular by the Appellant for an award of N10,000.00 for trespass to vacant land and the principle of assessment of damages, the award of N500.00 by the court below was not justified, is in my view, a non-issue as the Appellant neither pleaded nor established special damages he suffered. Moreover, with mere bald averments of entitlement, the reduction in the damages was clearly justified as the high award was not supported by evidence. See Okup v. Ifemembi (1974) 3 SC. 97;

(1974) ALL NLR 153 at 157.

For the reasons given by me and the more elaborate ones contained in the leading judgment of my learned brother Ogwuegbu, JSC I too, dismiss the appeal. I make the same consequential orders inclusive of those as to costs contained in the said judgment.

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