

SUPREME COURT OF NIGERIA

5TH JUNE, 1998. SC 273/1991

**CORAM:- S. M. A. BELGORE, I. L. KUTIGI, M. E. OGUNDARE,
S. U. ONU, A. I. IGUH, JJSC.**

PAUL NWAZUAH NKWO & 3 ORS PLAINTIFFS/
(For themselves and on behalf of Umuagu APPELLANTS
people or family of Illah)

AND

IBOE (DIOKPA EKPECHOR EBU) & 3 ORS DEFENDANTS/
(For themselves and on behalf of Ekpechor RESPONDENTS
or family of Ebu)

***APPEALS** - Concurrent findings of fact - Which are supported by sufficient evidence would not be disturbed - Unless there is some miscarriage of justice.*

***LAND LAW** - Declaratory action - Onus of proof - Is on the plaintiff and he must succeed on the strength of his own case - And not on the weakness of the defence except where the case for the defence supports plaintiff's case.*

FACTS

By a Writ of Summons issued in the Asaba High Court the plaintiffs/appellants representing themselves and the people or family of Umuagu in Illah sued the defendants/respondents also in a representative capacity for and on behalf of the people or family of Ekpechor in Ebu. Pleadings were ordered filed and exchanged and subsequently amended. The claims of the plaintiffs as per their amended statement of claim are for a declaration of title to the land in dispute, special and general damages for trespass on the said land; and perpetual injunction. The ancestor of the defendants called Irakpe and his brother Onyimoji, centuries ago migrated from Benin and settled in the area of the land now in dispute. Each settled on his own portion of the land and founded settlements. Irakpe's

settlement is now known as Ebu while Onyimoji's settlement is now known as Illah. The boundary between the two brothers was Iyi-Ukwu stream. Sometime later, the plaintiffs' ancestors came to the area, drove away Onyimoji's descendants from their land and occupied same. They have since been on that land. The descendants of Onyimoji moved to another part in the area to settle. The descendants of Irakpe continued to occupy the land of Irakpe to this day, this includes the land in dispute. They farm the land and put a number of tenants on it. However, what was in contention at the trial is the boundary between the two communities of Illah (of the plaintiffs) and Ebu (of the defendants). The plaintiffs contended that the boundary was Iyi-Oliakwukwo stream while the defendants contended that it was Iyi-Ukwu stream.

At the conclusion of trial, the learned trial judge in a well considered judgment accepted the traditional evidence as given by the defendants and rejected that of the plaintiffs. In the end, he found that the plaintiffs failed to establish their case and dismissed all their claims. Dissatisfied, the plaintiffs appealed to the Court of Appeal, Benin Division. That court dismissed the appeal and affirmed the judgment of the trial court. The plaintiffs have further appealed against that decision to the Supreme Court raising three issues which was narrowed down to a single issue.

ISSUE FOR DETERMINATION

Applying the correct principle as to the burden of proof in a declaratory action, is the Court below right in affirming the judgment of the trial High Court?

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

Declaratory action - Onus of proof

1. I must say I find no merit whatsoever in the arguments advanced by plaintiffs' counsel in this appeal. A long line of cases beginning with KODILINYE V. ODU (supra) has laid it down that in a declaratory action the onus of proof lies on the plaintiff and he must succeed on the strength of his own case and not on the weakness of the defence except where

the case for the defence supports plaintiff's case. The learned trial Judge was fully conscious of this principle of law and applied it, correctly in my respectful view, in this case. Learned counsel for the plaintiffs submitted before us that the case for the defence supported plaintiffs' case. When asked by us however, to show where the defence supported the plaintiffs' case he could not do so. For the plaintiffs to succeed, they should have pleaded and led evidence as to the extent of the land of the people they claimed they conquered and took over the land. They did not do that. There is ample evidence to support the findings made by the learned trial Judge and affirmed by the Court below. Paragraph 8 of Plaintiffs' amended statement of claim would appear to support Defendants' case that Iyi-Ukwu was the boundary between them (descendants of Irakpe) and the Ukala Okpunor people (descendants of Onyimoji). (p. 1396 F)

Concurrent findings of fact

2. In a situation such as this, where there are concurring findings of the two Courts below, the burden on an Appellant in this Court is great indeed. This Court has consistently held that it would not disturb concurring findings of facts by lower Courts which are supported by sufficient evidence. See for instance Njoku v. Eme (1973) 5 SC. 293; Chinwendu v. Mbamali (1980) 3-4 SC. 31 at page 75 where Obaseki JSC observed:

"It is necessary to emphasize that in such a case where there are two concurrent findings of fact, these findings cannot be disturbed without any substantial error apparent on the record of proceedings."

See also Enang v. Adu (1981) 11-12 SC. 25. To succeed in this appeal plaintiffs must show that the findings of fact made by the trial Judge and affirmed by the Court below are not supported by sufficient evidence or that there is some miscarriage of justice or violation of some principles of law or procedure. Neither of these have the plaintiffs shown in this case. On the main issue of boundary the learned trial Judge made specific finding of fact based on the evidence before him. The Court below rightly affirmed that finding. I am not satisfied that the plaintiffs have shown any good reason why this Court must disturb that finding. (p. 1397 B)

REPRESENTATION

C. J. Chukura for the appellants

O. M. Ayeni (Mrs.) for the respondent

B CASES REFERRED TO

Njoku v. Eme (1973) 5 SC. 293

Chinwendu v. Mbamali (1980) 3-4 SC. 31 at page 75

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

C Kodlinye vs. Mbanefo Odu II WACA 336

Ebba v. Ogodo (1984) 4 SC. 84

Elufisoye v. Alabetutu (1968) NMLR 298, 302.

Sobatin v. The State (1981) 5 SC. 75

Dawodu v. Danmole (1962) 1 ALL NLR 702

D

LEAD JUDGMENT BY OGUNDARE JSC

By a writ of summons issued in the High Court of the former Bendel State of Nigeria in the Asaba Judicial Division, the plaintiffs representing themselves and the people or family of Umuagu of Illah used the defendants in respect of a piece or parcel of land situate between the two streams of Iyi-Oliakwukwo to the North and Iyi-Ukwu to the South of the land. The defendants were sued in a representative capacity for and on behalf of the people or family of Ekpechor of Ebu. Pleadings were ordered, filed and exchanged and subsequently amended. The plaintiffs also filed a Reply. In the course of the action in the trial High Court, the original 1st and 2nd plaintiffs died and were substituted by Paul N. Nkwo and Vincent Oliduh. By order of the Court the 4th plaintiff Onyekagba **G** Ogogba was added. The claims of the plaintiffs as per their amended Statement of Claim are as follows:

"(i) A Declaration of the plaintiffs' title to the land in dispute excluding the areas verged GREEN and VIOLET (i.e a declaration of their right of occupancy under the Land Use Act, 1978 No. 6 and all laws relating thereto to the land in dispute).

(ii) N5,000.00 (Five thousand Naira) being special and general damages for trespass on the said land.

(iii) *A Perpetual Injunction restraining the Defendants, their servants and agents from henceforth entering the land in dispute and from committing any further or future acts of trespass whatsoever thereon.*

PARTICULARS OF DAMAGES

<u>Special:</u> (a) 20 Kolanut trees destroyed at N5.00	N1000.00	B
(b) 50 palm tress felled at N10.00	N500.00	
(c) 10 Iroko trees felled at N200.00	<u>N2,000.00</u>	
	N2,600.00	
General Damages	<u>N2,400.00</u>	C
	<u>N5,000.00"</u>	

At the trial plaintiffs called 10 witnesses whilst the defendants called 3 witnesses. At the close of trial and after addresses by learned counsel for the parties, the learned trial Judge, in a well considered judgment, reviewed the case for both sides and after evaluating same found that the boundary between the parties is the Iyi-Ukwu stream, as contended by the defendants and not the Iyi-Oliakwukwo stream, as contended by the plaintiffs. He accepted the traditional evidence as given by the defendants and rejected that of the plaintiffs. In the end, he found that the plaintiffs failed to establish their case and dismissed all their claims.

Being dissatisfied with that judgment the plaintiffs appealed to the Court of Appeal. The latter court, however dismissed the appeal and affirmed the findings and judgment of the trial Court. It is against that judgment that the plaintiffs, with leave of this Court given on 26th January 1994, have further appealed to this Court upon 7 grounds of appeal.

The parties filed and exchanged their respective Briefs of arguments. The defendants also filed a Notice of preliminary objection to the competence of the appeal on the ground that leave was not sought and obtained before the plaintiffs appealed on grounds of mixed law and fact. On learned counsel, Mrs. Ayeni being informed that, infact, the plaintiffs obtained leave of this Court on 26th January 1994, she withdrew the Notice of preliminary objection. She obviously was not aware that leave was granted by this Court when the Notice was prepared and filed. The Notice was accordingly struck out.

In the plaintiffs' Brief the following questions are formulated for

consideration by this Court:

"(i) Was the Court of Appeal not obliged to consider and decide the issue of relative strength of the parties' title to the land in dispute which was properly canvassed before it - and is failure to consider the issue not fatal to the ultimate decision?"

(ii) Is it not correct as argued before the Court of Appeal that the High Court required of the Appellants a higher degree of proof when:-

(a) the respondents did not dislodge the prima facie evidence of Appellants' boundary with Ebu town;

(b) all the evidence relied upon by the Respondents to challenge the title proved by the Appellants was rejected by the High Court;

(c) in spite of the Respondents' admission that the Appellants used and farmed on the land in dispute the High Court held that the Appellants did not know nor did they farm on the land;

(d) it did not consider the different standards of proof required to establish title based on traditional evidence; and title founded on acts of ownership?

(iii) Is the failure of the Court of Appeal to advert to and consider the evidence and pleadings in respect of the Appellants' boundary with Ekpechor (respondents) not fatal to its decision?"

All the questions raised above come to one and that is: applying the correct principle as to the burden of proof in a declaratory action, is the Court below right in affirming the judgment of the trial High Court?

The facts as gleaned from the pleadings and the evidence appear to be these: the ancestor of the defendants called Irakpe and his brother Onyimoji, centuries ago, migrated from Benin and settled in the area of the land now in dispute. Each settled on his own portion of the land and founded settlements. Irakpe's settlement is now known as Ebu whilst Onyimoji's settlement is now known as Illah. The boundary between the two brothers was Iyi-Ukwu stream. Sometime later, the plaintiffs' ancestors came to the area, drove away onyimoji's descendants from their land and occupied same. They have since been on that land. The descendants of Onyimoji moved to another part in the area to settle. The descendants of Irakpe continue to occupy the land of Irakpe to this day,

this includes the land in dispute. They farm the land and put a number of Ibo tenants on it.

It would appear from the pleadings and evidence that what was actually in dispute between the parties at the trial was the boundary between the 2 communities of Illah (of the plaintiffs) and Ebu (of the defendants). It was the contention of the plaintiff that the boundary was Iyi-Oliakwukwo stream. The defendants on the other hand contended that it was Iyi-Ukwu stream. The learned trial Judge on the evidence before him found as follows:

(1) *"I do not accept the traditional evidence of the plaintiffs in this case rather I am satisfied with the traditional evidence of the defendants which I prefer to that of the plaintiffs. The onus of proving his case rest squarely on the plaintiffs. See KODILINYE v. ODU 2 WACA 336; ELUFISOYE V. ALABETUTU (1968) NMLR 298 at 302. The plaintiffs have, however, failed to discharge this onus."*

(2) *"I believe the evidence of the defendants, including that of Ukala man, DW5, that the boundary between the plaintiffs and the Defendants is Iyi-ukwu stream and not Iyi-Oliakwukwo."*

The traditional history pleaded by the plaintiff runs as follows:

"8. An Illah hunter, one Obi Isaba chanced on Ukala-Okpunor during one of his hunting expeditions and persuaded the Illah people to invade it, it being a small town to the north of the Iyiukwu river.

9. The Illah people invaded Ukala-Okpunor and drove the people away from the entire land in dispute and they fled to their present site about 3 1/2 miles to Onicha Olona.

10. The Illah invaders took possession of the land in dispute and the descendants of one Agu, one of the leaders of the invasion settled on the whole area previously occupied by the Ukala Okpunor community, and thereon established the Umuagu Village of Illah. The remaining villages of Illah Community occupied the surrounding land (not in dispute) near Ukala-Okpunor (i.e. to the south and West of the land in dispute.)

11. The Obi (or Eze) of Illah and the Obi or Eze of Ebu decided to fix a boundary between their respective territories and agreed that they

should simultaneously set out from some given location in their respective territories at an agreed time and that the point at which they met would be the boundary between them.

12. *On the given date the Obi of Illah and the Obi of Ebu set out and their meeting point was the Oliakwukwo Iyi Ogo Stream which has since that time (beyond human memory) been the boundary between Illah and Ebu and which boundary has been respected by both communities.*

13. *The Defendants, the people of Ekpechor, had then not appeared on the scene and did not exist as a community or place in that area or at all at that time.*

14. *Much later, the people or Ekpechor arrived and stayed with the Ebu community which allowed them to occupy the southern reaches of Ebu land between the built-up area of Ebu and the Oliakwukwo Iyi Ogo stream to the south.*

15. *The Oliakwukwo Iyi Ogo Steam (otherwise called Egbeabu Stream by the defendants) remained then (as at present) the boundary between the Ebu and the Illah communities, respected by Illah, Ebu and Ekpecho alike - neither the Ebuses and Ekpechors on the one hand to the North of the stream nor the Illahs to the south daring to cross the stream.*

16. *Many years later when the Defendants' people fell foul of their hosts (the Ebuses) they crossed the Oliakwukwo Iyi Ogo steam and approached the Umuagu people begging for land to live in. The plaintiffs' ancestors granted the defendants' ancestors the parcel of land verged GREEN in the plaintiffs' plan on which the defendants established a village.*

17. *The defendants' ancestors who approached the plaintiffs' ancestors for the parcel of land hereinbefore referred to were led by one Emina and the plaintiffs' ancestors who made the grant were Obi Emefie Ezenwa; Obi Gbemudu; Obi Enwuzor and there were also present, one Omeazu who was the caretaker of all the forests.*

18. *Later, the defendants' ancestors again approached the plaintiffs' ancestors begging for a grant of land for farming. The defendants were received by the plaintiffs under the leadership of one Obi Enwezor, father of Ezenwa and grandfather of Enezue and others.*

The plaintiffs had compassion on the defendants and acceded to their request granting them the area verged VIOLET in the plaintiffs' Plan (which included the original grant) for farming purposes on the following terms, that is to say:

(a) Rendering of an annual tribute of 60 yams, 6 gallons of palmwine and 20 kolanuts before the farming season;

(b) after the farming season the defendants should again render identical tribute of 60 yams, 6 gallons of palmwine and 20 kolanuts.

19. The land thus granted is roughly triangular and is bounded on the West by the Iyiocha steam; on the North by the Oliakwukwo Iyi Ogo stream; on the East for some distance by the Yagagbe steam; and the apex of the triangle in the South was marked by an Igba tree (now a stump) where also stands a Tamakpa tree as depicted in the Plaintiffs' Plan.

20. The Ekpechor people dutifully and faithfully rendered these tributes until about 1912 when the leader of the plaintiffs, one Chief Enueze, reputed to be the most powerful Chief at that time ordered that no more tributes should be required of the Defendants because there had been intermarriage between the two communities. The plaintiffs' community agreed to this relaxation, and from that time did not require the defendants to render the tribute by which they hold the land.

21. After a long period of intermarriage (whist the two communities remained distinct and retaining their separate identities) it became a practice which later matured into a custom that on the death of an Umuagu woman married by an Ekpechor man, her body would be taken to the boundary of the land granted to the Defendants for farming at the point of the Tamakpa tree, from which place the people of Umuagu would receive the body and take it home for burial.

22. The point (Tamakpa) was accepted and respected by both communities as the boundary between them."

(underlining in paragraphs 8 & 10 are mine for emphasis)

It is this traditional history that the learned trial Judge rejected.

The defendants for their part pleaded as follows:

"6. The defendants deny paragraphs 7, 8, 9, 10, 11 and 12 of

the Amended statement of Claim. In a further answer to the said paragraphs the defendants aver that the present Ebu Town which includes the land in dispute was never invaded and that Iyi-Ukwu River (part of which is called Adugbene Stream) remains the boundary between Ebu and Illah peoples. Furthermore the boundaries and features of the land in dispute are shown in the defendants' plan heretofore mentioned.

8. In a further answer to the foregoing paragraphs the defendants say that their ancestor IRAKPE otherwise known as Ubueni migrated from Benin with his brother Onyimoji centuries ago. IRAKPE settled on a different area then known as Ukala but now known as Illah (sic). Irakpe or Ubueni had two children namely: Okomeje and Iyiekpechi. Okomeje (Iyiekpechi elder brother had three sons namely: Ogo, Ekpechor and Iyiagoshimili, while Iyiekpechi had six children viz:- Aganike, Usebe, Oke, Okudulu, Ugbolo and Amomagele. These nine children form the nucleus of the nine quarters of Abu."

It is the contention of the plaintiffs in this appeal that the learned trial Judge and the Court below failed to consider the relative strength of the parties' title to the land in dispute and that if the 2 Courts had applied the principle in MOGAJI V. ODOFIN (1978) 4 SC. 91 they would have found for the plaintiffs. It is contended that the 2 Courts below placed a heavier burden on the plaintiffs and that this occasioned a miscarriage of justice.

I must say I find no merit whatsoever in the arguments advanced by plaintiffs' counsel in this appeal. A long line of cases beginning with KODILINYE V. ODU (supra) has laid it down that in a declaratory action the onus of proof lies on the plaintiff and he must succeed on the strength of his own case and not on the weakness of the defence except where the case for the defence supports plaintiff's case. The learned trial Judge was fully conscious of this principle of law and applied it, correctly in my respectful view, in this case. Learned counsel for the plaintiffs submitted before us that the case for the defence supported plaintiffs' case. When asked by us however, to show where the defence supported the plaintiffs' case he could not do so. For the plaintiffs to succeed, they should

have pleaded and led evidence as to the extent of the land of the people they claimed they conquered and took over the land. They did not do that. There is ample evidence to support the findings made by the learned trial Judge and affirmed by the Court below. Paragraph 8 of Plaintiffs' amended statement of claim would appear to support Defendants' case that Iyi-Ukwu was the boundary between them (descendants of Irakpe) and the Ukala Okpunor people (descendants of Onyimoji). B

In a situation such as this, where there are concurring findings of the two Courts below, the burden on an Appellant in this Court is great indeed. This Court has consistently held that it would not disturb concurring findings of facts by lower Courts which are supported by sufficient evidence. See for instance Njoku v. Eme (1973) 5 SC. 293; Chinwendu v. Mbamali (1980) 3-4 SC. 31 at page 75 where Obaseki JSC observed: C

"It is necessary to emphasize that in such a case where there are two concurrent findings of fact, these findings cannot be disturbed without any substantial error apparent on the record of proceedings." E
 See also Enang v. Adu (1981) 11-12 SC. 25. To succeed in this appeal plaintiffs must show that the findings of fact made by the trial Judge and affirmed by the Court below are not supported by sufficient evidence or that there is some miscarriage of justice or violation of some principles of law or procedure. Neither of these have the plaintiffs shown in this case. On the main issue of boundary the learned trial Judge made specific finding of fact based on the evidence before him. The Court below rightly affirmed that finding. I am not satisfied that the plaintiffs have shown any good reason why this Court must disturb that finding. F
 The Plaintiffs averred in paragraph 10 of their pleadings that their ancestors who drove away the Ukala Okpunor people from the latter's land occupied "the whole area previously occupied by the Ukala Okpuno community". The Plaintiffs G
 have not shown how and at what time the land they conquered and occupied extended beyond that stream to Iyi-Oliakwukwo stream. H

The conclusion I reach after a consideration of the record of

appeal and submissions, both in the Briefs and in oral arguments of learned counsel for the parties, is that this appeal is completely devoid of any merit. I have no hesitation in dismissing it with costs assessed at N10,000.00 in favour of the Defendants/Respondents.

B _____

BELGORE JSC

In every civil case the primary duty lies on the plaintiff to prove his claim and unless he does this he cannot succeed. Kodlinye vs. Mbanefo Odu II WACA 336; Elufisoye vs Alabetutu (1968) NMLR 298, 302. There may be weaknesses in the case for defence, this will not derogate from the principle of the burden on plaintiff to prove his case first. Despite the amendments to their statement of claim the plaintiffs could not marshal enough evidence to support their claim and in my view trial judge concluded their case remained unproved. The Court of Appeal upheld this conclusion. The appeal now before us is against concurrent findings of facts in the Courts Below; however well couched the grounds of appeal there are now reasons advanced for this Court to interfere with those conclusions. I find this appeal is totally devoid of merit and I dismiss it with N10,000.00 costs to the respondents.

F _____

KUTIGI JSC

I read before now the judgment just delivered by my learned brother, Ogundare, JSC. I agree that being a case of concurrent findings of fact, the plaintiffs/appellants have failed to show as required of them, that the findings were perverse to warrant our intervention. (See NJOKU V. ENE (1973) 5 SC. 293; EBBA V. OGODO (1984) 4 SC. 84). I will also dismiss the appeal and affirm the judgment of the court below with costs as assessed.

H _____

ONU JSC

I have had the privilege of a preview of the judgment just delivered by my learned brother Ogundare, JSC and I agree with his reasoning and conclusions that this appeal does not succeed.

I only wish to add by way of expatiation the following contribution of mine. B

The appellants, the accredited representatives of Umuagu people of Illah through their pleading and evidence sought to show that the piece of land they laid claim to through conquest extended up to Iyi-Oliakwukwo stream in the North as exemplified on their survey plan (Exhibit 'A'). The respondents of Ekpechor in Ebu defending the appellants' action, also acting in representative capacity pleaded and testified to show that while they agree to sharing a common boundary with the appellants, put the limit of such land at Iyi-Ukwu in the South as exemplified on their survey plan (Exhibit 'B'). The trial court accepted the respondents' own account and so dismissed the appellants' claims in their entirety. This is part of what the trial court said in its judgment while dismissing their (appellants') action: D

"Historically, the land in dispute, apart from other lands, was first occupied by Irakpe, the defendants' ancestor. Irakpe was also called Ubuchi. Irakpe migrated from Benin with a relation called Onyimoji. Irakpe settled at the present site of Ebu, whilst Onyimoji settled at the present place now settled by Illah people. Before Onyimoji was displaced by Illah people he, Onyimoji, had Iyi-Uku or Adugbene and not Oliakwukwo stream as boundary with Ebu people. Irakpe and his people occupied the Northern part of Iyi-Uku also (spelt Iyi-Ukwu) and Onyimoji was founder of Ukala. The land between Ega-Ebu and Iyi-Uku as per Exhibit B belonged from time immemorial to Irakpe. Irakpe had 2 sons the 1st was called Okomeje and the 2nd Iyiekpechi. In his life time, Irakpe shared his lands into two. A part including the land in dispute, was given to Okomeje, whilst the other portion to Iyiekpechi. Okomeje shared his lands, inter vivos, amongst his 3 children namely Ogo, Ekpechor and Iyiagoshimili. The land in dispute was part of the land given to Ekpechor. Ekpechor never shared his land amongst his children, hence it E F G H

became a communal property to the Ekpechor people."

Continuing, the learned trial Judge observed:

"Having regard to the evidence before me the questions which I have to answer are:

B *(1) What is the boundary between the Illah and Ebu people. Is it Iyi Oliakwukwo or Iyi-Uku?*

(2) What is the boundary between Umuagu people of Illah and Ekpechor people of Ebu. Is it Tamakpa tree and Igba tree or Iyi-Ukwu stream?

C *(3) Which town among the parties is in effective control/occupation of the land in dispute?*

In other words if I find that Oliakwukwo stream (or Egaebu Stream) is the boundary between Illah and Ebu, the plaintiffs will succeed in their

D *action. On the other hand if I find that Iyi-Uku is the boundary between Illah and Ebu people, including Ekpechor people, then the plaintiffs action is bound to fail. Looking at both plans of the parties Exhibit A -*

E *(for the plaintiffs), Exhibit B - (for the defendants), the broad outline of the land in dispute is to a large extent identical, but knowledge of what is contained therein, is another matter."*

As regards acts of ownership and the traditional history on the land in dispute by the contending parties, the learned trial Judge commented as follows:-

F *"I shall first of all now deal with acts of ownership, numerous and positive enough as to lead to the conclusion as to the true owners before dealing lastly with traditional history. I have already partially considered the acts of ownership above and my views stated about them.*

G *Each side claimed that his people farmed extensively on the land from time beyond human memory, without let or hindrance; Each side claimed that his people gave out portions of the land to Eastern Ibo tenants, before and after the Civil War; Each side claimed giving out the old*
H *Leper Settlement and Agricultural Cotton Farm indicated in the parties plans to Government but none of them was able to establish this last assertion by credible evidence."*

Later down in the judgment, the learned trial Judge said:

"The Defendants on their part said that they and their tenants farmed extensively on the space between Egaebu (otherwise called Iyi-Oliakwukwo by the Plaintiffs) and Iyi-Uku streams I have noted the submission of Chief Chukwura SAN as to the conflicting dates when Oranyelu D.W. 6 was admitted as tenant on the land. The defendants variously pleaded 1927, 1947 smf 1935. The above is one of the reasons why I do not attach weight to this particular averment/defence. On the whole the evidence on each side of the parties as regards acts of ownership numerous and positive enough to warrant inference of true ownership is unsatisfactory and consequently inconclusive."

Then came the consideration of traditional history by the learned trial Judge who said:

"Over then to proof by traditional history. According to history, the plaintiff migrated from Omoka to where Ukala people were living, conquered Ukala, drove them out from the place then the plaintiffs' people lived and occupied it up till now. The defendants did not disagree with the fact that the Illah people drove out the Ukala people from their original home and then occupied same but contended that the area involved is South of Iyi-Uku stream as can be seen in Exhibit B..... After a critical look at the two plans and after a careful consideration of the evidence of the parties, I am satisfied that Ebu and Illah are now having common boundary. There is evidence which I believe that Ukala people and Ebu people were brothers. I also believe that Ebu and Ukala occupied their respective positions ever before Illah people came to drive away Ukala people from their place and occupied same. The conquest of Ukala people by Illah gave the latter the right to have common boundary with Ebu people. Logically, if ever it is true that the Obis of Ebu and Illah ever decided to forge a boundary, the Ebu people had been in their location ever before Illah acquired their land by conquest. I believe the evidence of the defendants, including that of Ukala man, D.W.5, that the boundary between the plaintiffs and the defendants is Iyi-Uku stream and not Iyi-Oliakwukwo."

In conclusion, the learned trial Judge said:

"It is noteworthy to emphasize that in coming to this decision, I

am not unmindful of the fact that Ukala people are related to the defendants. I am equally aware that the three towns - Illah, Ebu and Ukala intermarry and there exists a common link between them. I do not believe the story of the plaintiffs that Ebu and Illah exchanged corpses at Iyi-Oliakwukwo stream and Illah and Ekpechor at Tamakpa/Igba trees. It is my belief that such exchange of corpses took place at Iyi-Uku. The contention of the plaintiffs that the defendants arrived later in time and sojourned with their kith and Kin in the north of Oliakwukwo stream in Ebu and later still fell foul of their host (other Ebu Villages) and then sought refuge in the plaintiffs' land across Oliakwukwo stream, is not believed by me. Rather, I accept the evidence of the defendants that they inherited the land from Irakpe through Okomeje who begat Ekpechor It is settled law that a declaration of title to land can be granted on the basis of traditional evidence alone. See AKURU V. OLUBADAN-IN-COUNCIL 14 WACA 523; and the case of ABINABINA v. ENYINMADU (1953) 2 WLR 261 or in 12 WACA 171 at 172. But such traditional evidence must be cogent and conclusive vide ALADE V. AWO (1975) 4 SC. 215 at 224 - 229. I do not accept the traditional evidence of the plaintiffs in this case rather I am satisfied with the traditional evidence of the defendants which I prefer to that of the plaintiffs. The onus of proving his (sic) case rest squarely on the plaintiffs. See KODILINYE v. ODU 2 WACA 336; ELUFISOYE V. ALABETUTU (1968) NMLR 298 at 302. The plaintiffs have, however, failed to discharge this onus."

In the appeal the appellants lodged from this decision to the Court of Appeal, Benin Division (Coram: Omo, J.C.A as he then was, Salami and Ejwunmi, JJ.C.A) affirmed in its wholesomeness the well considered trial court's decision.

In their further appeal to this court, the main complaint by the appellants which falls within a narrow compass is, whether the principle relating to the burden of proof (as I perceive it), the court below was right in affirming the decision of the trial court.

At the hearing of this appeal on 9th March, 1998 the learned counsel for the appellants contended that a case for declaration of title

such as the one in hand is proved on the relative strength of evidence adduced by the parties; that in the instant appeal the respondents' case supported the appellants'. It is pertinent to say that while I find some truth in learned counsel for appellants' submission, that the appellants pleaded title by conquest of the land involved (land of Udala), the truth, B however, is that the trial court was right in upholding the argument proffered by learned counsel for the respondents, to the effect that the appellants had not made out a case; nor had they shown that the decision arrived at by that court based on traditional evidence and later affirmed C by the court below - both of which culminated in concurrent findings of fact are perverse. Since no miscarriage of justice or an error of law, substantive or procedural has been shown to have been perpetrated, I will be slow, indeed decline, to interfere therewith. See Adimora v. Ajufo (1988) 1 NSCC 1005 at 1016; Kodilinye v. Anatogu (1953) 1 WLR 231; D Sobatin v. The State (1981) 5 SC. 75 and Dawodu v. Danmole (1962) 1 ALL NLR 702, to mention but a few.

For the above reasons and the elaborate ones set out in the leading judgment of my learned brother Ogundare, JSC I too, dismiss this E appeal and award similar costs as contained therein.

IGUHJSC

I have had the privilege of reading in draft the leading judgment F just delivered by my learned brother, Ogundare, J.S.C. and I am in full agreement with him that there is no merit whatever in this appeal.

I have nothing more to add.

For the same reasons as are contained in the said judgment, I, G too, dismiss this appeal. I abide by the order for costs therein made.

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