

SUPREME COURT OF NIGERIA
12TH JUNE, 1998. SC. 280/1991
CORAM:- S. M. A. BELGORE, A. B. WALI, I. L. KUTIGI,
M. E. OGUNDARE, A. I. IGUH, JJSC.

NNANYELUGO C. ODUKWE	APPELLANT
AND	
ETHEL N. OGUNBIYI	RESPONDENT

APPEALS - Judgments - Error - Which has not occasioned any injustice
- Must be treated by the appellate court as immaterial.

APPEALS - Findings - Supported by the evidence before the court -
And are not perverse or reached as a result of a violation of any principle
of law - Will not be faulted.

EVIDENCE - Burden of proof - Is on the party who substantially asserts
the affirmative of the issue.

EVIDENCE - Burden of proof - In civil cases - Has two distinct meanings - Legal burden and evidential burden - While the former is always stable the latter may shift constantly .

EVIDENCE - Onus - Lies on the plaintiff to establish his claim - And he must succeed on the strength of his own case - But he is entitled to reply on the defendant's case where it support his case.

LAND LAW - Sale of family land - Sale of land in dispute to the defendant's vendor by the family - After the land has been partitioned and granted to the plaintiff's Vendor - Is irregular and invalid.

LAND LAW - Certificate of occupancy - Procured during the pendency of the action - Pronouncement by the trial judge that it was obtained by fraud - Is justified.

LAND LAW - *Lis pendens doctrine* - Operates to prevent the effective transfer of any real property in dispute - During the pendency of the litigation.

LAND LAW - *Acquisition of rights* - Doctrine of *lis pendens* - Does not disallow acquisition of rights over a property in dispute by a party to the litigation - So long as any of the other parties to the litigation is not prejudiced.

LAND LAW - *Sale of land* - Caught by the doctrine of *lis pendens* - The further transfer of the same land to the appellant was also null and void.

LAND LAW - *Statutory right of occupancy* - Awarded by the trial court - Is erroneous as there was no such claim - But no miscarriage of justice was occasioned.

STATUTES - *Granting what was not claimed* - High Court Rules of Eastern Nigeria - Order 54 Rule 2 - The provision does not empower a court to enter judgment in favour of a party - In respect of what he has not claimed.

TRESPASS - *Claim for trespass to land* - Coupled with a claim for an injunction - Automatically puts the title of the parties to such land in issue.

FACTS

In the High Court of former Anambra State of Nigeria, the Plaintiff/respondent instituted an action against the defendant/appellant claiming as follows: N500.00 (five hundred Naira) for trespass committed by the defendant and or his servants on the plaintiffs land which is situate at Omagba Layout Onitsha, and an injunction restraining the defendant, his servants and or his agents from further trespass on the said land. Pleadings were ordered in the suit and were duly settled filed and exchanged. The case went to trial and the parties testified on their own behalf and

called witnesses. Both parties traced their root of title to the land in dispute to the Isagba family of Ogbolieke Village Onitsha. The family was the undisputed original owners of an extensive parcel of land which includes the land in dispute. The plaintiff purchased the land in dispute from P.W.1 Charles Ogbuli in 1959 but completed full payment in 1965. A deed of conveyance was subsequently executed and duly registered as 20/20/456 in the lands registry at Enugu. The said Charles Ogbuli had claimed that the land he sold to the plaintiff belonged to him personally being his share of their family land at Omagba, Onitsha. The Isagba family in 1954 partitioned its family land amongst its members. The head and some members of Isagba family in three consolidated suits before Kaine, J. In 1960 unsuccessfully challenged the said partitioning of the Isagba family land at the Onitsha High Court. The defendant, for his own part claimed to have bought the land in dispute from one Philomena Ejoh to whom the land was allegedly granted by the Isagba family in 1962. The defendant did not make a survey of the land in dispute following the alleged purchase until he was obliged to do so in 1982 after he had been sued to court. In the course of the trial, he subsequently obtained a certificate of occupancy, Exhibit H, in respect of the land in 1983 under the Land Use Act, 1978.

At the conclusion of hearing, the learned trial judge found for the plaintiff and entered judgment in her favour. Dissatisfied, the defendant appealed to the Court of Appeal, Enugu Division, which unanimously affirmed the judgment of the trial court. Aggrieved by this decision of the Court of Appeal, the defendant has further appealed to the Supreme Court raising five issues but the court formulated one main issue so as to bring out the real issue in controversy.

ISSUE FOR DETERMINATION

"Whether or not the land sold to the respondent was at the time of such sale a family land which could only be validly alienated or sold by the head of the family with the concurrence of the principal members or one that was individually owned and therefore subject to alienation by the individual owner without the consent of any other person."

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

Appeals - Judgments

1. In this regard, it ought to be borne in mind that it is not each and every mistake or error in a judgment that necessarily determines an appeal in favour of an appellant or automatically results in the appeal being allowed. It is only when the error is so substantial that it has occasioned a miscarriage of Justice that the appellate court is bound to interfere. ¹ See Onajobi v. Olanipekun (1985) 4 S.C (part 2) 156 at 163, Oje v. Babalola (1991) 4 N.W.L.R. (Part 185) 267 at 282, Azuetonma Ike v. Ugboaja (1993) 6 N.W.L.R. (part 301) 539 at 556, Anyanwu V. Mbara (1992) 5 N.W.L.R (PART 242.) 386 at 400. In the same vein, What an appeal court has to decide is whether the decision of the court below was right and not whether his reasons were. Accordingly an established error or misdirection which has not occasioned any injustice must be treated by the appellate court as immaterial and going to no point of substance. See Ukejianya v. Uchendu (1950) 13 W.A.C.A. 45 at 46 Emmanuel Ayeni and others v. William Sowemimo (1982) 5 S.C. 60 at 73 - 75. etc. (p. 1536 H)

Appeals - Findings

2. The foregoing issues of facts were affirmed by the Court of Appeal. These findings are fully supported by the evidence before the court, nor are they perverse or reached as a result of a violation of or a wrong approach to the evidence or any principle of substantive law or procedure. In these circumstances, I have no reason, and am not prepared, to fault

¹ See some other recent Supreme Court authorities on this point - Spasco Ltd v. Alrairie Ltd (1995) 9 KLR 1912; Nwankpu v. Ewulu (1995) 7 KLR 1570; Oseni v. Dawodu (1994) 7 KLR 51; CF: Union Bank v. Ozigi (1994) 5 KLR 1 where it was told that the error of law in that case occasioned a substantial miscarriage of justice.

them.² See Woluchem v. Gudi (1981) 5 S.C. 291 at 326, Chikwendu v. Mbamali (1980) 3 -4 S.C. 31, Igwegu v. Ezengo (1992) 6 N.W.L.R. (Part 249) 561 at 585 etc. (p. 1539 H)

Evidence - Burden of proof

3. There can be no doubt that the burden of proving a particular fact lies on the party who substantially asserts affirmative of the issue.³ See Robins v. National Trust Co. (1927) A.C. 515 at 520, Huytonwith-Roby U.D.C. v. Hunter (1955) 1 W.L.R. 603. In this case, therefore, the onus was on the respondent who had asserted affirmatively that the land in dispute had been partitioned, shared or otherwise granted to her vendor, P.W.1, and that it was part of the land in dispute in the 1960 litigation to establish these facts. Besides, the law is long settled that where a plaintiff leads evidence that land is communal, the onus is on the defendant who asserts the contrary to establish that the land belongs to him personally or exclusively. See Udeakpu Eze v. Igiliegebe 14 W.A.C.A 61, Atuanya v. Mbajekwe (1975) 3 S.C. 161 at 167. (p. 1540 C)

Burden of proof - In civil cases

4. I think I need to point out that the phrase, "burden of proof" in civil cases has two distinct and frequently confused meanings. This comprises firstly, of the burden of proof as a matter of law and the pleadings, usually referred to as the legal burden or the burden of establishing a case, and, secondly, the burden of proof in the sense of adducing evidence, usually described as the evidential burden. While the burden of proof in the first sense is always stable, the burden of proof in the second sense may shift constantly, according as one scale of evidence or the

² See Nwoke v. Okeke (1994) 9 KLR 25; Hausa v. The State (1994) 11 KLR 164; Ezeanya v. Okeke (1995) 4 KLR 847 also Nwobosi v. A.C.B Ltd (1995) 7 KLR 1410; Agoma v. Guinness Ltd (1995) 2 KLR 404

³ See Umesie v. Onuagluchi (1995) 12 KLR 2166; Tsokwa & Co. Ltd v. Union Bank (1996) 12 KLR (Pt 46) 2254; Adeshoye v. Olowolayba (1996) 12 KLR (Pt 46) 1953

other preponderates. The respondent, having discharged the legal burden of establishing that the land in dispute, which was originally Isagba family land, was a part or portion of her Vendor's share of the family land following the 1954 partition, the evidential burden shifted on the appellant of introducing evidence which, if believed or accepted, would defeat the respondent's claim.⁴ This burden, the appellant was unable to discharge. (p. 1541 D/1542 F)

Evidence - Onus - Lies on the Plaintiff

5. Without doubt, the law is settled that in establishing his claim, the onus lies on the plaintiff to satisfy the court that he is entitled on the evidence brought by him to the relief claimed. To this end, the plaintiff must succeed on the strength of his own case and not on the weakness of the defendant's case and if this onus is not discharged, the weakness of the defendant's case will not help him.⁵ See Kodilinye v. Mbanefo Odu 2 W.A.C.A. 336 at 337, Frempong v. Brempong 14 W.A.C.A. 13 etc. This age long principle of law does not however apply where the defendant's case itself supports that of the plaintiff and contains evidence on which the plaintiff is entitled to rely. See Nwagbogu v. Chief Onoli Ibeziako (1972) 1 ALL N.L.R. (Part 2) 200, Josiah Akinola v. Oluwi (1962) 1 ALL N.L.R. 224 at 225, Oduaran v. Asarah (1972) 1 ALL N.L.R. (Part 2) 137. In the present case, it is clear that the evidence of D.W. 1 under cross-examination substantially supported the case for the respondent. I think that the respondent was perfectly entitled to rely on it. (p. 1543 C)

Land Law - Sale of family land

6. On the accepted facts of this case, it cannot be disputed that the purported sale or grant of the land in dispute by the Isagba family to

⁴ See other Supreme Court authorities Gbafé v. Gbafé (1996) 6 KLR (Pt 42) 1144; Obijaku v. Offiah (1995) 7 KLR 1554

⁵ See Oko v. Ntukidem (1993) 3 KLR 114; Kano v. Oyelakin (1993) 1 KLR 42

Philomena Ejoh in 1962, after the same family had in 1954 partitioned or shared their land at Omagba and granted the piece or parcel of which the land in dispute formed a portion to P.W.1, is to say the least grossly irregular, invalid and bordered on fraud. This is because nemo dat quod non habet, that is to say, no one can give that which he does not have. B Similarly the said Philomena Ejoh's purported transfer of the land to the appellant was again, pursuant to the same principle of law, a nudum Pactum and unquestionably irregular and invalid. (p. 1545 A)

C

Certificate of Occupancy

7. On the issue of Exhibit H, the learned trial judge found that the appellant procured the same in 1983 during the pendency of the action before him. He then proceeded exhaustively to examine the circumstances under which D it was procured and concluded thus:

"It is clear to me that Exhibit H was obtained by fraud and was intended to defeat the course of justice. It is as if the defendant deliberately removed the original beacons of the plaintiff by the use of a caterpillar and then proceeded to re-survey the land as in Exhibit C and to insert new beacons to deceive the Authorities into granting him the certificate of Occupancy in Exhibit H. A certificate, such as Exhibit H, is not meant to be used as an engine of fraud." E

F

The Court of Appeal reviewing the above findings of the trial court described the same as the learned trial judge's perception of Exhibit H. I need only add that having fully considered the circumstances surrounding the procurement of Exhibit H, as the trial court did, he was entitled to make whatever pronouncements he found justified, having G regard to the facts before him. The court of Appeal would appear to agree with the trial court's conclusion on the Exhibit and I confess I am in complete agreement with both courts below on their observations in connection with Exhibit H. (p. 1545 D) H

Lis pendens doctrine

8. The doctrine of Lis pendens⁶ affects a purchaser who buys real property, the subject matter of litigation, during the pendency of such litigation because the law does not allow to litigants, rights in a property in dispute which prejudice the opposite side. In other words, the doctrine of lis pendens operates to prevent the effective transfer of any real property in dispute during the pendency of the litigation in respect of such property. See Barclays Bank of Nigeria Ltd v. Alhaji Ashiru and others (1978) 6 and 7 S.C. 99 at 123-125, 128 and 129, Osagie v. Oyeyinka (1987) 2 N.W.L.R. (Part 59) 156, Ogundiani v. Araba and Another (1978) 6 and 7 S.C. 55 at 78. (p. 1546 E)

Land Law - Acquisition of rights

9. "It is not in dispute that Exhibit C was the instrument with which Exhibit "H" was procured, and that this was done during the pendency of the consolidated suits. In law, without a doubt, any party to the suit will be precluded from acquiring any fresh or new rights over the land in dispute, under the doctrine of lis pendens."

I entertain no doubt that the Court of Appeal's second sentence in the above passage of its judgment would appear, with respect, to be a wrong application of the doctrine of lis pendens. This is because the doctrine of lis pendens operates not to disallow acquisition of rights in or over a property in dispute by a party to a litigation during the pendency of such litigation, so long as such an acquisition is not prejudicial to any of the other parties to the litigation. It does operate to prevent the transfer of any property in dispute or any rights therein to another person or to a purchaser during the pendency of the dispute, thus prejudicing any of the other litigating parties. (p.1547 B)

Sale of land - Caught by the doctrine of Lis pendens

10. It is however clear that what both courts below were attacking was

⁶ On the doctrine of Lis Pendens: see also Bangboye v. Olusoga (1996) 4 KLR (pt 40) 655; Ajuwon v. Akanni (1994) 1 KLR 129

the purported sale of the property in dispute by the head of the Isagba family or the 1st plaintiff in the consolidated suits to Philomena Ejoh in 1862 when those suits were still pending in court and the ratification of the subsequent transfer of the land in 1964 to the appellant on the 13th June, 1964, barely 6 months before judgment was delivered in the suits B dismissing the claim that Omagba land was still Umuisagba family land. There can be no doubt that the purported sale of the land in dispute to Philomena Ejoh in 1962 by a party to the consolidated suits during the pendency of those actions were caught by the doctrine of lis pendens C and was consequently irregular and ineffective. That being so, it stands to reason that the further purported transfer of the same land by the said Philomena Ejoh to the appellant in 1964 was also null and void. This is because, as I have already stated, nemo dat quod non habet. D Philomena Ejoh having received nothing in respect of the purported sale of the land to her in 1962 had nothing to transfer to the appellant in 1964 in respect of the same land. (p. 1547 F)

Claim for trespass to land

11. Without doubt, whenever a claim for trespass to land is coupled with a claim for an injunction, as in the present case, the title of the parties to such land in dispute is automatically put in issue.⁷ See Akinola v. Lasupo (1991) 3 N.W.L.R (part 180) 508 at 515. (p. 1549 A)

Statutory right of occupancy - Award of

12. The learned trial Judge was in the circumstances of the present case entitled to consider the issue of title to the land in dispute, as he rightly did, and to make a finding or pronouncement on the issue, again as he did G in the case. He was however not entitled to make an award of title to the land in dispute to the respondent without a claim on the issue having been made by her in the writ of summons and/or her Statement of Claim. It sufficed that he made a finding, which is amply supported by the evi- H dence, to the effect that the respondent had a better title to the land in

⁷ see Adesanya v. Otuewu (1993) 1 KLR 142; Ojo v. Ighodalo (1996) 5 KLR (pt 41) 874

dispute. He was therefore wrong to decree or award to the respondent, a Statutory Right of Occupancy in respect of the said land as there was no such claim before the court. I think, as the law stands, both courts below are, with respect, in error in this regard. The award was however a mere surplusage in the circumstances of the case and did not in any way occasion any miscarriage of justice or vitiate the judgment. This is because both courts below, on the evidence before the court, had rightly found the respondent's assertion of title to the land in dispute established as against the appellant. In the circumstance, a resolution of issue 5 in favour of the appellant cannot, in my view, be any matter of consequence in this appeal. (p. 1549 F)

Statutes - Granting what was not claimed

D 13. I have given a most careful consideration to this submission of learned counsel but find it difficult to accept that the scope of the provisions of Order 54 Rule 2 of the High Court Rules of Eastern Nigeria would empower a court to enter judgment in favour of a party over and above what he has claimed or in respect of what he has not claimed at all. The respondent neither filed a declaratory claim for title to a statutory Right of Occupancy in respect of the land in dispute nor for the cancellation of the appellant's discredited Certificate of Occupancy, Exhibit H. I cannot accept that the two reliefs now in issue by way of grant of a Statutory Right of Occupancy and cancellation of Exhibit H made in favour of the respondent by the learned trial Judge and affirmed by the Court of Appeal can, in law, be justified in any way as they were not claimed by the respondent. They may also not be described in any way as consequential orders as known to law. Accordingly I am left with no other option than to set aside the two orders and they are hereby set aside by me. It must however be stated that they did not in any way occasion any miscarriage of justice or vitiate the judgments in question. (p. 1551 B)

H

REPRESENTATION

Parties absent and unrepresented

CASES REFERRED TO

- Onajobi v. Olanipekun (1985) 4 S.C (part 2)156 163.
Oje v. Babalola (1991) 4 N.W.L.R. (Part 195) 267 282
Ukejianya v. Uchendu (1950) 13 W.A.C.A. 45 at 46.
Woluchem v. Gudi (1981) 5 S.C. 291 at 326 B
Chikwendu v. Mbamali (1980) 3 -4 S.C. 31
Robins v. National Trust Co. (1927) A.C. 515 at 520.
Atuanya v. Mbajekwe (1975) 3 S.C. 161 at 167.
Kodilinye v. Mbanefo Odu 2 W.A.C.A. 336 at 337.
Frempong v. Brempong 14 W.A.C.A. 13 C
Akinola v. Oluwi (1962) 1 All N.L.R. 224 at 225.
Oduaran v. Asarah (1972) 1 All N.L.R. (part 2) 137
Osagie v. Oyeyinka (1987)2 N.W.L.R. (Part 59) 156
Akinola v. Lasupo (1991) 3 N.W.L.R (part 180) 508 at 515 D
Awoonor Renner v. Daboh 2 W.A.C.A. 258 at 259 & 263
Union Beverages v. Owolabi (1988) 2 N.W.L.R. (part 68) 128 at 133

RULES REFERRED TO

Supreme Court Rules, 1985; Order 6 Rule 2, Order 6 Rule 8(7).

LEAD JUDGMENT BY IGUH JSC

In the High Court of former Anambra State of Nigeria, the plaintiff, who is now the respondent, instituted an action against the appellant, who therein was the defendant, claiming as follows- F

"1. N500.00 (Five Hundred Naira) for trespass committed by the defendant and / or his servants on the Plaintiff's land which is situate and lying at Omagba Layout in Onitsha and which piece of land is correctly described as No. 28 Water Works Road Onitsha. The annual value of the said land is worth N20.00. G

2. An injunction restraining the defendant, his servants and / or his agents from further trespass upon the said plaintiff's piece of land." H
Pleadings were ordered in the suit and were duly settled, filed and exchanged.

The case accordingly proceeded to trial and the parties testified

on their own behalf and called witnesses.

Both parties traced their root of title to the land in dispute to the Isagba family of Ogbolieke village Onitsha. It was not in dispute that members of this family were the original owners of an extensive piece or
B parcel of land of which the land in dispute formed a part. The plaintiff's case was that she purchased the land in dispute from P.W.1, Charles Ogbuli, in 1959 but completed full payments thereof in 1965. Exhibits D - D3 were tendered in support of these payments. Following this, a deed
C of conveyance, Exhibit E, dated the 5th day of December, 1966 was executed and duly registered as 20/20/456 in the Lands Registry at Enugu. The said Charles Ogbuli had claimed that the land in dispute which he sold to the plaintiff belonged to him personally as his share of their Isagba family land at Omagba, Onitsha. It was in 1954 that the Isagba family
D partitioned its family land amongst its members. The plaintiff's case is that the land in dispute, following the partition of 1954, ceased to be family property and that P.W.1, Charles Igweze Ogbuli, to whom the family granted it as a result of the partition validly sold it to the plaintiff in
E 1959. The head and some members of the Isagba family in three consolidated suit before kaine, J. in 1960 unsuccessfully challenged the said partitioning of the Isagba family land. This was by Exhibit A at the Onitsha High Court. Charles Ogbuli not only sold the land in dispute to
F the plaintiff, he also sold adjoining plots of land to several other persons, all of whom he put in possession of the land, including the plaintiff. The plaintiff was in such possession of the land in dispute before the defendant came to disturb her possession of the land hence this action.

The defendant, for his own part, claimed to have bought the
G land in dispute from one Philomena Ejoh to whom the land was allegedly granted by the Isagba family in 1962. Her grantor was one Simon Ogbuli, the then head of the said Isagba family of Ogbolieke village, Onitsha . Two years later, the said Philomena Ejoh transferred her interest in the
H land to the defendant in 1964. Exhibit F and G were tendered in support of the defendant's title to the land in dispute. The defendant contended that the land in dispute at the time it was sold to the plaintiff was Isagba family land which could only be validly sold by the head and the principal

members of the family. The defendant made no survey of the land in dispute following his alleged purchase nor was it demarcated with boundary pillars. It was also not registered in the Lands Registry at Enugu. He was obliged to make a plan, Exhibit C. Only after the said defendant had been sued to court in 1982. He admitted that his bulldozer might have damaged existing beacons on the land, although he was not aware that this infact happened. The defendant in the course of the trial subsequently obtained a Certificate of Occupancy, Exhibit H, in respect of the land in 1983 under the Land Use Act, 1978.

At the conclusion of hearing, the learned trial Judge, Awogu, J, as he then was, after a careful review of the evidence found for the plaintiff on the 4th day of April, 1985. N500.00 general damages for trespass and perpetual injunction were awarded to the plaintiff against the defendant.

Being dissatisfied with the said judgment, the defendant lodge an appeal against the same to the Court of Appeal, Enugu Divisions, which in a unanimous decision affirmed the judgment of the trial court on the 28th day of March, 1988. Aggrieved by this decision of the court of Appeal, the defendant has further appealed to this court. I shall hereinafter refer to the plaintiff and the defendant in this judgment as the respondent and the appellatant respectively.

Pursuant to the Rules of this court, the appellatant, through his learned counsel, settled and filed his brief of argument on the 2nd day of January, 1992. The same was duly served on the respondent whose time for filing her brief of argument expired on the 10th day of March, 1993. She filed no brief and has since made no effort to apply for an extension of time within to file the respondent's brief of argument.

The five issues identified on behalf of the appellatant for the determination of this appeal are as follows-

"1. *Whether the court of Appeal was right in holding, per Macaulay, JCA, that issues Nos. 1 and 2 in the appeal before it raised synthetic issues and were not germane to the issues properly arising out of the judgment of the High court in this case.*

2. *Whether the court of Appeal was right in affirming the High*

court's decision which placed on the Appellant, the onus of proving non-partition of the Isagba family land, claimed to have been partitioned by the Respondent's Vendor, and the onus of proving that the land in dispute did not form part of the land litigated upon in 1960.

B 3. *Whether the court of Appeal was right when it affirmed the High Court's decision that the Appellant's certificate of Occupancy, Exhibit "H" was obtained by fraud, whereas the issue of fraud was neither specifically pleaded nor led in evidence by the Respondent in the High Court.*

C 4. *Whether the court of Appeal was right in applying the doctrine of lis pendens as it did in this case.*

D 5. *Whether the court of Appeal was right when it affirmed the High Court's grant of a right of statutory right of occupancy to the respondent and its orders that the Appellant's certificate of Occupancy be cancelled and instead, that a certificate of Occupancy be granted to the Respondent, whereas these were not among the reliefs claimed by the Respondent in the action before the court."*

E As I have already indicated, the respondent up to the date this appeal was heard did not, in compliance with the provisions of order 6 Rule 2 of the Supreme Court Rules, 1985, as amended, file any brief of argument. Consequently, the appeal was heard on the appellant's brief only.

F On the date of the hearing of this appeal, both parties and their counsel were absent in court although served with hearing notices in respect of the hearing of the appeal. Accordingly the appeal was regarded as having been argued on the appellant's brief pursuant to the provisions of order 6 Rule 8 (7) of the Rules of this court.

G I have closely examined the five issues identified on behalf of the appellant in his brief of argument which we are called upon to resolve in this appeal but cannot, with respect, agree that they address the main issue that arises for determination in this appeal. Similar issue were raised H by the appellant in the court below. The court of Appeal, quite rightly in my view, was of the same opinion that those issues did not conclusively address the central issue in controversy between the parties in the appeal.

In this regard, it ought to be borne in mind that it is not

each and every mistake or error in a judgment that necessarily determines an appeal in favour of an appellant or automatically results in the appeal being allowed. It is only when the error is so substantial that it has occasioned a miscarriage of Justice that the appellate court is bound to interfere. See Onajobi v. Olanipekun (1985) 4 S.C (part 2) 156 at 163, Oje v. Babalola (1991) 4 N.W.L.R. (Part 185) 267 at 282, Azuetonma Ike v. Ugboaja (1993) 6 N.W.L.R. (part 301) 539 at 556, Anyanwu V. Mbara (1992) 5 N.W.L.R (PART 242.) 386 at 400. In the same vein, what an appeal court has to decide is whether the decision of the court below was right and not whether his reasons were. Accordingly an established error or misdirection which has not occasioned any injustice must be treated by the appellate court as immaterial and going to no point of substance. See Ukejianya v. Uchendu (1950) 13 W.A.C.A 45 at 46 Emmanuel Ayeni and others v. William Sowemimo (1982) 5 S.C. 60 at 73 - 75. etc. I will in the course of this judgment and, as and when this becomes necessary, deal with these five issues raised by the appellant for the determination of this appeal.

Having regard to the pleadings of the parties and the evidence before the court, it seems to me that the main and central issue that arises for the determination of this appeal is as follows-

"Whether or not the land sold to the respondent was at the time of such sale a family land which could only be validly alienated or sold by the head of the family with the concurrence of the principal members or one that was individually owned and therefore subject to alienation by the individual owner without the consent of any other person."

This was the issue formulated in the judgment of Oguntade, J.C.A in the court below which, with respect, I fully endorse.

It was common ground at the hearing before the trial court that the head of the Isagba family at all material times was one Simon Adieme Ogbuli, now deceased. It was also not in dispute that the respondent's vendor, Charles Igweze Ogbuli, who was P.W.1 in this case, was not the head of the family. In this regard, it is settled law that a sale of family land by a member of the family without the consent of the head and the

principal members of the family is void ab initio. See Ekipendu v. Erika (1959) 4 F.S.C. 79 at 81, Oyebanji v. Okuwela (1968) 1 N.M.L.R. 221, Akerele v. Atunrase (1968) 1 All N.L.R. 201, Lucan v. Ogunsusi (1972) 1 All N.L.R. (PART 2) 41. The head of a family must join in a conveyance or alienation of family land and principal members must consent thereto otherwise such a conveyance will be void ab initio. See Agbloee v. Sapper 12 W.A.C.A. 187. Where, however, the head of a family alone sells family land without the consent of the principal members of such family, the sale is not void but Prima facie voidable and the family can set aside such a sale if the non-consenting members act timeously. See Manko v. Bonso 3 W.A.C.A 62, Ekipendu v. Erika, (supra) at 81, Esan v. Faro 12 W.A.C.A 135, Mogaji v. Nuga (1960) 5 F.S.C. 107 etc. But this latter position only applies where such head of a family executes the conveyance for and on behalf of the family and not if he purports to sell the property as the beneficial owner thereof. In that event, such a purported sale will be void ab initio as the principle, nemo dat quod non habet will apply, See Akerele v. Atunrase (1969) 1 All N.L.R 201 at 208. It will now become necessary to determine whether or not the land in dispute was at all material times the Umuigagba family land, as claimed by the appellant, or personal to the respondent's grantor, following the partition of the said Umuigagba family land at Omagba, as contended by the respondent.

In this regard, it ought to be noted that although the respondent in her statement of Claim expressly pleaded the partition of the Igagba family land in 1954 and led evidence in support of such partition, the appellant in his Statement, of Defence did not admit this. In his evidence before the trial court, however, D.W.1 Benedict Chukwuma Ogbuli, a member of the Igagba family, under cross- examination, admitted thus-

"In 1954, the Igagba family decided to partition the family land. As a result, all pending suits were withdrawn. N1,600.00 was paid to the family in 1945 by E.C.N. (now N.E.P.A.) There was no dispute over the sharing. All members were present when the sharing was done As a result of the said sharing, the Enwezor branch got their share from Omagba land. P.W1 also got portions of Omagba land."

It is obvious from the totality of the evidence of D.W.1 that the said admission of the partition of their family land in 1954 was not an unqualified admission. This is because D.W.1 had testified that the land in dispute was not part of the land granted to the respondent's vendor, P.W.1, under the 1954 partition. The trial court was thus obliged to B resolve the issues of whether or not there was a 1954 partition of the Isagba family land at Omagba and, whether or not, the land in dispute was a portion of that granted to the said P.W.1 under the 1954 partition. The trial Judge, who had been and heard the witnesses, after a thorough C consideration of the pleadings and the evidence, resolved the issues in favour of the respondent. Said the learned trial judge-

"I am satisfied from the evidence before me that the land in dispute is part of the Omagba land of Umuigbagba family which was the share of P.W.1. The evidence further shows that it was not only the land D in dispute but all the lands adjacent to it that formed part of the share of P.W.1. Also, P.W.2, P.W.3 and P.W.4 bought from P.W.1 and P.W.1 in his testimony said that the lands he sold to them formed portion of his share of Umuigbagba land at Omagba." E

A little later in his judgment, the learned trial judge further observed-

"Even on this score, the fact that the Okpala went to court in Exhibit A for a declaration that Omagba land was Umuigbagba family F land but failed to obtain the declaration was conclusive evidence against him that the lands in issue were Umuigbagba land."

He concluded thus-

"I am satisfied from the evidence before me that the land now in G dispute was a cause of action in the 1960 suit for, as D.W.1 put it, it was the indiscriminate sale by P.W. 1 and others that led to the action. The evidence before me shows that the land in dispute was sold to the plaintiff in 1959 and the final payment for it was made in 1965. It is clear. Therefore, that it must be part of the indiscriminate sale of Omagba land H which D.W.1 and the Okpala were challenging."

The foregoing issues of facts were affirmed by the Court of Appeal. These findings are fully supported by the evidence before

the court, nor are they perverse or reached as a result of a violation of or a wrong approach to the evidence or any principle of substantive law or procedure. In these circumstances, I have no reason, and am not prepared, to fault them. See Woluchem v. Gudi (1981) 5 S.C. 291 at 326, Chikwendu v. Mbamali (1980) 3 -4 S.C. 31, Igwego v. Ezengo (1992) 6 N.M.L.R. (Part 249) 561 at 585 etc.

Under issues 1 and 2, however, the appellant in his brief of argument has questioned whether the court below was right in affirming the high court's decision which placed on the appellant the onus of proving, firstly, that the land in dispute was not, that did not partitioned and, secondly, that it did not form part of the land litigated upon by the father in 1960. There can be no doubt that the burden of proving a particular fact lies on the party who substantially asserts the affirmative of the issue. See Robins v. National Trust Co. (1927) A.C. 515 at 520, Huytonwith-Roby U.D.C. v. Hunter (1955) 1 W.L.R. 603. In this case, therefore, the onus was on the respondent who had asserted affirmatively that the land in dispute had been partitioned, shared or otherwise granted to her vendor, P.W.1, and that it was part of the land in dispute in the 1960 litigation to establish these facts. Besides, the law is long settled that where a plaintiff leads evidence that land is communal, the onus is on the defendant who asserts the contrary to establish that the land belongs to him personally or exclusively. See Udeakpu Eze v. Igiliege 14 W.A.C.A. 61, Atuanya v. Mbajekwe (1975) 3 S.C. 161 at 167.

It was argued on behalf of the appellant that the learned trial judge was in error when he stated that the appellant, on the strength of the evidence before the court, assumed the burden of proving that the land in dispute was never partitioned. Said learned trial judge-

"He also said under cross-examination that the land in dispute was not included in the Omagba land in the 1960 suit but admitted that portions of Omagba (not included in 1960 suit) had in fact been partitioned to members of the Isagba family. Here, the defence assumed a burden, namely, the burden to proving that the land in dispute was never

partitioned to P.W. 1 but failed to discharge the burdens."

In this regard, it ought to be borne in mind that apart from the copious evidence called by the respondent at the trial on the issues that the Isagba family land at Omagba had been shared or partitioned by members of the family in 1954, that the land in dispute formed of her vendor's share of the family land, and that the land in dispute was part and parcel of the land litigated upon by members of the family in 1960, D.W.1, the sole witness called by the appellant, admitted under cross-examination that Isagba family land was in fact partitioned or shared in the said 1954. It was further admitted by him that P.W.1, the respondent's vendor, was granted portions of Omagba land in the partition exercise. It was on this state of the evidence that the learned trial judge made the comment, now under attack, although it was never seriously suggested that there was no evidence in support of the trial court's findings of fact on these issues or that the respondent failed to establish those issues of fact which she clearly pleaded and called copious evidence in proof of.

In this connection, **I think I need to point out that the phrase, "burden of proof" in civil cases has two distinct and frequently confused meanings. This comprises , firstly, of the burden of proof as a matter of law and the pleadings, usually referred to as the legal burden or the burden of establishing a case, and , secondly, the burden of proof in the sense of adducing evidence, usually described as the evidential burden. While the burden of proof in the first sense is always stable, the burden of proof in the second sense may shift constantly, according as one scale of scale of evidence or the other preponderates.** As Aniagolu, J.S.C. explained the issue in Felix O. Osawaru V. Simon Ezeiruka (1978) 6 and 7 S.C. 135 at 145,

"In civil cases while the burden of proof in the sense of establishing the case, initially lies on the plaintiff (Constantine Line Versus Imperial Swelting Corporation (1942) A.C. 154, 174) the proof or rebuttal of issues which arises in the course of proceedings may shift from the plaintiff to the defendant and vice versa as the case progresses. The general rule which is enshrined in the maxim Ei qui affirmat non ei qui negat incumbit probatio has been provided for in Sections 134 to 136 of

1542 Odukwe v. Ogunbiyi (1998) 6 KLR Iguh JSC
the Evidence Act Cap. 62. In particular, subsection 2 section 136 has
provided that:

"If such party adduces evidence which ought reasonably to satisfy a jury that the fact sought to be proved is established, the burden lies
B on the party against whom judgment would be given if no more evidence
were adduced; and so on successively until all the facts in the pleadings
have been dealt with."

See too Bafunke Johnson and Another v. Akinola Maja and others (1951)
C 13 W.A.C.A. 290.

In the present case, the respondent led cogent evidence to establish that the land in dispute was a part or portion of her vendor's share of their Isagba family land situate at Omagba Onitsha. She also established that Isagba family land was shared by members of the family in accordance with customary law in the year 1954. It seems to me plain that in the face of these facts which the trial court found satisfactorily proved, the evidential burden of proof shifted to the appellant to show that the land in dispute was not apportioned by the family to the respondent's
D vendor. This, the appellant failed to do. I am satisfied that the learned trial Judge after pointing at various admissions on the part of D.W.1, the appellant's only witness at the trial, which clearly strengthened the case of the respondent, would appear to be making reference to the evidential
E burden of proof when he observed thus -
F

"Here, the defence assumed a burden namely, the burden of proving that the land in dispute was never partitioned to P.W. 1 but failed to discharge this burden."

**The respondent, having discharged the legal burden of establishing
G that the land in dispute, which was originally Isagba family land, was a part or portion of her Vendor's share of the family land following the 1954 partition, the evidential burden shifted on the appellant of introducing evidence which, if believed or accepted, would
H defeat the respondent's claim. This burden, the appellant was unable to discharge.**

The evidence of D.W. 1, the only witness of the appellant and a member of the Isagba family in his cross-examination appears to me

illuminating. This witness admitted that in 1954 the family shared their land, that there was no dispute over the matter, that all concerned were present in the partition exercise and that a portion of land allocated to a member of the family could be sold by him to any one else. He further admitted that P.W. 1, the respondent's vendor, got portions of Omagba B land as a result of this 1954 partition and that in 1960, Simon Ogbuli and himself in Exhibit A sued P.W. 1 and others in respect of Omagba land for declaration that the land was their Isagba family land and to set aside sales by the defendants. These consolidated suits were dismissed. The C significance and effect of the judgment in Exhibit A is the fact that the case against P.W. 1, that he had been selling Omagba land not granted to him was dismissed as not made out.

Without doubt, the law is settled that in establishing his D claim, the onus lies on the plaintiff to satisfy the court that he is entitled on the evidence brought by him to the relief claimed. To this end, the plaintiff must succeed on the strength of his own case and not on the weakness of the defendant's case and if this onus is not discharged, the weakness of the defendant's case will not help E him. See Kodilinye v. Mbanefo Odu 2 W.A.C.A. 336 at 337, Frempong v. Brempong 14 W.A.C.A. 13 ETC. This age long principle of law does not however apply where the defendant's case itself supports that of the plaintiff and contains evidence on which F the plaintiff is entitled to rely. See Nwagbogu v. Chief Onoli Ibeziako (1972) 1 ALL N.L.R. (Part 2) 200, Josiah Akinola v. Oluwi (1962) 1 ALL N.L.R. 224 at 225, Oduaran v. Asarah (1972) 1 ALL N.L.R. (Part 2) 137. In the present case, it is clear that the evidence of D.W. 1 under cross-examination substantially supported the case G for the respondent. I think that the respondent was perfectly entitled to rely on it.

Before the trial court there was ample and cogent evidence which H was accepted by the learned trial Judge to the effect that there was a partition of the Isagba family land in 1954. The land in dispute was found to be part and parcel of the Omagba land of the Isagba family which was granted to P.W. 1 in 1954 as a result of the 1954 partition.

P.W. 1 in 1959 sold the land in dispute to the respondent. Following the completion of the purchase price by the respondent in 1965, a Deed of Conveyance in respect of the land dated the 5th December, 1966 was executed between P.W. 1. and the respondent. This is Exhibit E and it
B was duly registered in 1966 as 20/20/450 in the Lands Registry at Enugu.

As against the foregoing are the findings of the trial court that one Philomena Ejoh, to whom the land was purportedly granted by the Isagba family in 1962 sold the same to the appellant two years later. However, the appellant's alleged purchase was never registered. There
C was even no plan made in respect of the land purportedly sold. The same was also not demarcated. It was only in 1983 that the respondent procured the certificate of Occupancy, Exhibit H, in respect of the land in dispute. This was obtained in the course of the trial of this action for the
D purpose of the case.

It was in the face of the above facts that the learned trial judge found as follows-

*"from the evidence at the trial and the Exhibits in question, it
E appears that the sale to the plaintiff was prior in time to that of the defendant. This is, in fact, not disputed. In addition, the plaintiff registered that land at Enugu as per Exhibit E. Both facts make the case of the plaintiff stronger than that of the defendant."*

F *Later in his judgment, he declared-*

*"I am satisfied from Exhibit E and the plan attached to it (which is also Exhibit B1) that the plaintiff had proved a better title in respect of the portion of land shown as EK. 17029 - EK. 17032 which is within the area now in dispute. The references made by Asemota for the defence to
G plan Nos. MEC/36/59 and MEC/63/59 and MEC/6/58 do not really detract from the fact that the plaintiff knew what she got in 1966 and it is shown as in Exhibits E and B1."*

The above findings and observations of the learned trial judge
H were fully endorsed by the court of Appeal and I can find no reason whatsoever to fault them.

Learned counsel for the appellant under issue 3 of his brief of argument posed the question whether the court of Appeal was right in

affirming the trial court's decision that the appellant's certificate of Occupancy, Exhibit H, was obtained by fraud when fraud was neither specifically pleaded nor led in evidence. **On the accepted facts of this case, it cannot be disputed that the purported sale or grant of the land in dispute by the Isagba family to Philomena Ejoh in 1962, after the same family had in 1954 partitioned or shared their land at Omagba and granted the piece or parcel of which the land in dispute formed a portion to P.W.1, is to say the least grossly irregular, invalid and bordered on fraud. This is because nemo dat quod non habet, that is to say, no one can give that which he does not have. Similarly the said Philomena Ejoh's purported transfer of the land to the appellant was again, pursuant to the same principle of law, a nudum Pactum and unquestionably irregular and invalid.**

On the issue of Exhibit H, the learned trial judge found that the appellant procured the same in 1983 during the pendency of the action before him. He then proceeded exhaustively to examine the circumstances under which it was procured and concluded thus:

"It is clear to me that Exhibit H was obtained by fraud and was intended to defeat the course of justice. It is as if the defendant deliberately removed the original beacons of the plaintiff by the use of a caterpillar and then proceeded to re-survey the land as in Exhibit C and to insert new beacons to deceive the Authorities into granting him the certificate of Occupancy in Exhibit H. A certificate, such as Exhibit H, is not meant to be used as an engine of fraud."

The Court of Appeal reviewing the above findings of the trial court described the same as the learned trial judge's perception of Exhibit H which -

"When read against the background of Exhibit C, as the learned trial judge, in my view did, rightly entitled him to come to that conclusion."

I need only add that having fully considered the circumstances surrounding the procurement of Exhibit H, as the trial court did, he was entitled to make whatever pronouncements he found

justified, having regard to the facts before him. The court of Appeal would appear to agree with the trial court's conclusion on the Exhibit and I confess I am in complete agreement with both courts below on their observations in connection with Exhibit H. But even
 B if the court of Appeal was for any reason in error in upholding the trial court's observation on Exhibit H, and I do not so hold, I cannot see how such an error occasioned any miscarriage of justice in this case. It is precisely for this reason that I indicated earlier on in this judgment that
 C the issues raised for the determination of this appeal by the appellant did not appear to address the central issue that arises for determination in the case.

There is next the issue of the doctrine of lis pendens which the appellant raised in his brief of argument. The question posed is whether
 D the court below was right in applying this doctrine in the present case. The submission is that what the appellant did by procuring Exhibit H was to formalize his interest in the land and not to transfer the property in dispute to any third party.

E The doctrine of Lis pendens affects a purchaser who buys real property, the subject matter of litigation, during the pendency of such litigation because the law does not allow to litigants, rights in a property in dispute which prejudice the apposite side. In other
 F words, the doctrine of lis pendens operates to prevent the effective transfer of any real property in dispute during the pendency of the litigation in respect of such property. See Barclays Bank of Nigeria Ltd v. Alhaji Ashiru and others (1978) 6 and 7 S.C. 99 at 123-125, 128 and 129, Osagie v. Oyeyinka (1987) 2 N.W.L.R. (Part 56,
 G Ogundiani v. Araba and Another (1978) 6 and 7 S.C. 55 at 78. The trial court in dealing with the doctrine of lis pendens as it applied to this case observed-

*"Despite the absence of proof, the Okpala proceeded to convey
 H the land in dispute to Philomena Ejoh in 1962 when his 1960 suit was still pending in court and also ratified in 1964 the latter transfer of the land in dispute to the present defendant. This was on 13/6/64, barely six months before judgment was delivered on 14/12/64, dismissing his claim*

that Omagba land was still Umuisagba land. Although DW1 contends that the land now in dispute was not included in the 1960 suit, the defence tendered no plan showing the land in dispute in the 1960 suit, PW1 on the other hand, who was among the defendants, claimed that it was among the lands with respect to which he and the others were sued in 1960, and Exhibit A appear to support him."

The Court of Appeal, for its own part, stated as follows-

"It is not in dispute that Exhibit C was the instrument with which Exhibit "H" was procured, and that this was done during the pendency of the consolidated suits. In law, without a doubt, any party to the suit will be precluded from acquiring any fresh or new rights over the land in dispute, under the doctrine of lis pendens."

I entertain no doubt that the Court of Appeal's second sentence in the above passage of its judgment would appear, with respect, to be a wrong application of the doctrine of lis pendens. This is because the doctrine of lis pendens operates not to disallow acquisition of rights in or over a property in dispute by a party to a litigation during the pendency of such litigation, so long as such an acquisition is not prejudicial to any of the other parties to the litigation. It does operate to prevent the transfer of any property in dispute or any rights therein to another person or to a purchaser during the pendency of the dispute, thus prejudicing any of the other litigating parties. It is however clear that what both courts below were attacking was the purported sale of the property in dispute by the head of the Isagba family or the 1st plaintiff in the consolidated suits to Philomena Ejoh in 1962 when those suits were still pending in court and the ratification of the subsequent transfer of the land in 1964 to the appellant on the 13th June, 1964, barely 6 months before judgment was delivered in the suits dismissing the claim that Omagba land was still Umuisagba family land. There can be no doubt that the purported sale of the land in dispute to Philomena Ejoh in 1962 by a party to the consolidated suits during the pendency of those actions were caught by the doctrine of lis pendens and was consequently irregular and ineffec-

B
C
 tive. That being so, it stands to reason that the further purported transfer of the same land by the said Philomena Ejoh to the appellant in 1964 was also null and void. This is because, as I have already stated, nemo dat quod non habet. Philomena Ejoh having received nothing in respect of the purported sale of the land to her in 1962 had nothing to transfer to the appellant in 1964 in respect of the same land. It is however clear that whatever misdescription the court below attributed to the doctrine of lis pendens did not conceivably lead to any miscarriage of justice in the case as, apart of the application of the doctrine of lis pendens, there are various other reasons from which both courts below upheld the respondent's better title to the land in dispute than the appellant. Accordingly this issue cannot be a matter of concern in this appeal.

D
E
 Issue 5 raised in the appellant's brief of argument questions whether the court of Appeal was right when it affirmed the trial court's grant of a statutory right of occupancy in respect of the land in dispute to the respondent and its order that Exhibit H be cancelled whereas these orders were not claimed by the respondent in the action before the court. The trial court had in its judgment stated thus-

F
"I hereby grant the Plaintiff a Statutory Right of Occupancy in respect of the land shown in Exhibits "E and "E1"... The Authorities are hereby ordered to cancel the Certificate of Occupancy Exhibit "H" granted to the Defendant and instead to grant a Certificate of Occupancy to he plaintiff."

G
 The Court of Appeal, in affirming the said directives of the trial court, commented as follows-

H
"The learned S.A.N. has also complained that he erred in law in granting to the plaintiff a relief the latter didn't claim. He took further umbrage at the consequential orders cancelling Exhibit "H", the certificate of Occupancy in respect of the land in dispute after he had concluded that the plaintiff was entitled to judgment. I will be surprised if he did anything beyond the requirement of section 40 of the Land Use Act, 1978."

I have earlier on in this judgment set out the respondent's claims

against the appellant which comprised of N500.00 damages for trespass and perpetual injunction restraining the appellant, his servants and/or agents from committing any further acts of trespass on the land in dispute. **Without doubt, whenever a claim for trespass to land is coupled with a claim for an injunction, as in the present case, the title of the parties to such land in dispute is automatically put in issue.** See Akinola v. Lasupo (1991) 3 N.W.L.R (part 180) 508 at 515. So, too, where two parties are on a piece or parcel of land claiming possession, the possession being disputed, trespass will be at the suit of that one who can show that title to such land is in him. See Awoonor Renner v. Daboh 2 W.A.C.A 258 at 259 and 263, Umeabi v. Otukaya (1978) 4 S.C. 33 etc. The above notwithstanding, it is settled law that a court is without power to award to a party that which he has not claimed or which is more than he has claimed. See Etim Ekpenyong and others v. Inyang Nyong (1975) 2 S.C. 71 at 80-82, Union Beverages v. Owolabi (1988) 2 N.W.L.R. (Part 68) 128 at 133, Makanjuola v. Balogun (1989) 3 N.W.L.R. (Part 108) 192 at 206, Olarotimi v. Ige (1993) 8 N.W.L.R. (Part 311) 257 at 271 etc. In the present case, title to the land in dispute was clearly in issue. A declaration thereto was, however, not claimed or asked for by the respondent in her writ of summons or Statement of Claim.

Similarly if in a trespass action, the issue is one of title, as in the present case, title must be established. See Samuel Nelson v. Ammah 6 W.A.C.A. 134, Alhaji Aromire and others v. J.J. Awoyemi (1972) 1 All N.L.R. (Part 1) 105, Vincent Okorie and others v. Philip Udom and others 5 F.S.C.. 162. **The learned trial Judge was in the circumstances of the present case entitled to consider the issue of title to the land in dispute, as he rightly did, and to make a finding or pronouncement on the issue, again as he did in the case. He was however not entitled to make an award of title to the land in dispute to the respondent without a claim on the issue having been made by her in the writ of summons and/or her Statement of Claim. It sufficed that he made a finding, which is amply supported by the evidence, to the effect that the respondent had a better title to the**

land in dispute. He was therefore wrong to decree or award to the respondent, a Statutory Right of Occupancy in respect of the said land as there was no such claim before the court. I think, as the law stands, both courts below are, with respect, in error in this regard.

The award was however a mere surplusage in the circumstances of the case and did not in any way occasion any miscarriage of justice or vitiate the judgment. This is because both courts below, on the evidence before the court, had rightly found the respondent's assertion of title to the land in dispute established as against the appellant. In the circumstance, a resolution of issue 5 in favour of the appellant cannot, in my view, be any matter of consequence in this appeal.

With regard to the trial court's order cancelling Exhibit H, I need only state that the learned trial Judge, after he had overruled the strong objection of respondent's learned counsel on the admissibility in evidence of the document, stated in the course of his judgment as follows-

"In the course of the trial, the defendant tendered Exhibit H, a certificate of Occupancy granted to him in respect of the land in dispute. It was dated January 1, 1983, I admitted the document in evidence but stated that the weight to be attached to it would be considered in this judgment. I now proceed to do so."

The document was exhaustively considered by the learned trial Judge after which, as he was entitled to do, he came to the conclusion, on the evidence before him, that the same was procured by fraud. The court of Appeal affirmed this observation as well founded and I confess that I am in total agreement with both courts below on the issue.

Learned counsel for the respondent drew the attention of the court to the provisions of order 54 Rule 2 of the High Court Rules of Eastern Nigeria, 1963, Cap. 61 applicable to Anambra State of Nigeria which provide as follows-

"Subject to particular Rules, the court may in all causes and matters make any order which it considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the

benefit of the order or not."

It was his submission that the trial court, having thoroughly discredited the Certificate of Occupancy, Exhibit H on justifiable grounds, was entitled, in the interest of justice, to order the cancellation of the Certificate under the provisions of the said Order 54 Rule 2 of the High Court Rules of Eastern Nigeria. He contended that the order was merely consequential to his findings in respect of Exhibit H.

I have given a most careful consideration to this submission of learned counsel but find it difficult to accept that the scope of the provisions of Order 54 Rule 2 of the High Court Rules of Eastern Nigeria would empower a court to enter judgment in favour of a party over and above what he has claimed or in respect of what he has not claimed at all. The respondent neither filed a declaratory claim for title to a statutory Right of Occupancy in respect of the land in dispute nor for the cancellation of the appellant's discredited Certificate of Occupancy, Exhibit H. I cannot accept that the two reliefs now in issue by way of grant of a Statutory Right of Occupancy and cancellation of Exhibit H made in favour of the respondent by the learned trial Judge and affirmed by the Court of Appeal can, in law, be justified in any way as they were not claimed by the respondent. They may also not be described in any way as consequential orders as known to law. Accordingly I am left with no other option than to set aside the two orders and they are hereby set aside by me. It must however be stated that they did not in any way occasion any miscarriage of justice or vitiate the judgments in question.

In the final result, it seems to me that there is ample evidence in support of the findings of both courts below to the effect that the respondent has a better title to the land in dispute than the appellant. This appeal accordingly fails and the same is hereby dismissed. In view of the fact that the respondent filed no brief of argument, was not represented at the hearing and took no part whatever in the appeal, there will be no order as to costs.

BELGORE JSC

I am in full agreement with the judgment of my learned brother, Iguh, J.S.C. that this appeal has no merit whatsoever. The appellant, in view of his statement of defence as defendant at the trial Court, failed to
 B prove any of his assertions in denial. The respondent not only pleaded specific facts but led direct evidence to support them. The trial Court believe the plaintiff's facts supported by evidence and could not believe the defendant, now appellant. The Court of Appeal found no reason to
 C interfere with the decision on findings of facts of the trial Court. Against these concurrent findings of facts, I find no substance to justify any interference by this court. I also dismiss the appeal as it has no merit.

D

WALI JSC

I have the privilege of reading in advance a copy of the lead judgment of my learned brother, Iguh JSC and I entirely agree with his reasoning and conclusion that the appeal should be dismissed.

E The issues raised and canvassed in this case are supported by the evidence adduced in the trial court. Both the trial court and the Court of Appeal found that on the evidence adduced, the imaginary scale of justice titled in favour of the plaintiff/Respondent.

F For the same reasons ably stated in the lead judgment, I also hereby dismiss the appeal and affirm the decisions of the court below and the lower court. I make no order as to costs.

G

KUTIGI JSC

I read in advance the judgment just delivered by my learned brother, Iguh, JSC. I agree with it. The main issue before us is whether
 H land which could only be validly sold or alienated by the head of the family with the concurrence of the principal members or one that was individually or personally owned. There was no doubt evidence of partition before the trial High Court and the court further found that the land

in dispute was to the respondent by PW.1 after the 1954 partition. The trial court had therefore no alternative but to give judgment for the respondent as it did. The Court of Appeal was therefore right to have affirmed that decision.

The appeal is devoid of merit. I also dismiss it with no order as to costs, the respondent having played no part in the appeal since its inception.

OGUNDARE JSC

I have had the privilege of a preview of the judgment of my learned brother Iguh JSC just delivered. I agree entirely with him. For the reasons given by him in the said judgment I too dismiss this appeal and affirm the judgments of the two courts below except as regard the two orders made by the trial court and affirmed by the Court of Appeal to the effect:

"I declare Exh. H as null and void and as of no effect.

I hereby grant the plaintiff a statutory right of occupancy in respect of the land shown in Exhs. E and B1 and marked by beacon pillars EK. 17029, to EK.17032. The authorities are hereby ordered to cancel the certificate of Occupancy, Exh. H, granted to the Defendant and instead to grant a certificate of Occupancy to the plaintiff."

As these orders were never asked for by the plaintiff who sued only in damages for trespass and injunction, there was no justification for making those orders- See: Ekpenyong & Ors. v. Nyong (1975) 2 SC. 71 at 80-82; Olarotimi v. Ige (1993) 8 NWLR 257 at 271. It is sufficient for the purpose of this appeal that the plaintiff is found to have a better title to the land than the Defendant/Appellant who had no title at all, and that the Defendant obtained his Certificate of Occupancy (Exh. H) surreptitiously and in a most objectionable way. I set aside the said orders.

I abide by the order for costs made in the lead judgment of Iguh JSC.

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