

SUPREME COURT OF NIGERIA

3RD JULY, 1998. SC. 312/1991

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

BISIRIYU AGBOMEJI PLAINTIFF/APPELLANT
(For himself and on behalf of members
of Ogeye Longe Branch of Ogebule Family)

AND

LIADI BAKARE & 4 ORS. DEFENDANTS/RESPONDENTS
(For Otubose Branch)

COURTS - Findings of trial court - Inconsistent and erroneous findings
- Affirmed by the Court of Appeal - Cannot be allowed to stand.

LAND LAW - Family land - Allocation of the land in dispute was made
to appellant - And allocation of family land is equivalent to a grant.

LAND LAW - Family land - Absolute grant thereof - Need not be proved
by appellant - Mere allocation to him as a family member - Coupled with
exclusive possession would be sufficient.

LAND LAW - Partition of family land - A case for partition was made
out by appellant - As he established lack of peace and disharmony -
Among the four branches of the family.

FACTS

The plaintiff/appellant filed an action against the defendants/ respondents claiming that the entire property situate at 42/44 Aiyetoro Road, Epe Lagos State is the property of all the descendants of late Ogebule, partition of the said land among the four branches of the family and N6,000.00 special and general damages for trespass to the plaintiff's building on the land in dispute. Various amendments were made in respect of the statement of claim and statement of defence before the

case eventually went to trial.

The trial court held that the case succeeded in part. The appellant's claims for partition of the family land and for N6,000.00 special and general damages were dismissed. Appellant's appeal to the Court of Appeal was dismissed. He has further appealed to the Supreme Court raising 4 issues but issue 2 was withdrawn and struck out at the hearing.

ISSUES FOR DETERMINATION

"1. Whether the learned Justices of the Court of Appeal were right in affirming the finding of the learned trial Judge that the plaintiff /Appellant did not prove any allocation of land to him by the Head and principal members of the family.

2. Whether the learned Justices of the Court of Appeal were right in dismissing the Appellant's claims for damages for trespass.

3. Whether the learned Justices of the Court of Appeal were right in holding that the Appellant did not make out a case for partition of the family land.

4. Whether, having regard to all the circumstances of this case, particularly issues of fact not resolved at the trial, a retrial ought to be ordered."

HELD (Unanimously allowing the appeal per lead Judgment of **ONU JSC**)
Findings of trial court

1. I find at a glance the complaint of the Appellant to be well grounded. For the learned trial Judge who earlier found that Appellant had a bungalow on the allocated land in dispute to now turn round to say that the Appellant had no land allocated him there on the land where his house stood, constitutes an inconsistent finding that must not be allowed to stand. See Olale v. Ekweledu(1989)4 NWLR (part 115)326; Missr v. Ibrahim(1974)5 SC. 55; in the case in hand, I am of the view that the learned trial Judge was in error to have held that the Appellant has failed to substantiate the allegation regarding allocation to him (Appellant) of family land vide his pleading in paragraph 10 of the Amended Statement of Claim. The court below, with due respect, was also in error in affirming that finding. (p. 1694 B)

Allocation of the land in dispute

2. Having held elsewhere in this judgment that the decision of the trial court was therefore perverse the very act of its perversity will enable me to interfere with the supposed concurrent findings of fact of the two courts below by holding that the portion of land upon which the bungalow was built was allocated to the Appellant. See Onwuka v. Ediala (1989)1 NWLR (Part 96)182; Atanda v. Ajani (1989)2 NWLR (part 101)23. The learned trial Judge had in fact misconceived the Appellant's case ab initio. The court below accordingly, in my view, was also wrong to have affirmed the erroneous conclusion arrived at by the trial court. Allocation of family land, I hold, is the equivalent of a grant. (p. 1695 G)

Family land - Absolute grant thereof

3. It was not incumbent on the Appellant in this case to prove absolute grant of that portion of land said to have been granted or allocated to him. Mere allocation of it as a family member, coupled with its exclusive possession would be sufficient. After having held that a bungalow was in fact built on a portion of the family land by the Appellant, what the learned trial Judge ought to have resolved was whether the trespass that he (Appellant) alleged, took place after the riot. This he did not do and so he failed to adjudicate in the case brought before him while the court below misconceived that its role was to set aside the decision thus arrived at. (p. 1697 B)

Partition of family land

4. In sum, the learned Justices of the court below were clearly in error in affirming the findings of the learned trial Judge that the appellant did not prove any allocation of land to him by the Head and principal members of the family. Also, the learned Justices of the court below were wrong in holding that the Appellant did not make out a case for partition of the family land whereas he was able to establish that the four branches of the family could no longer live together as one unit in peace and harmony on the land and to that extent issue 3 is resolved against the Respondents. (p. 1698 C)

NOTABLE POINTS OF INTEREST

OGUNDARE.JSC

1. Allottee of family land - Has ownership of whatever he superimposes on the land

- B It is the law that family land remains family land, irrespective of allotment - See: Olanguno v. Ogunsanya(1970) 1 All NLR 223; (1970) ANLR 227. The Plaintiff, however, has occupational right to occupy and use the land but cannot alienate it without the consent of the family- see Shelle v. Asajon(1957)2 FSC 65; Adagun v. Fagbola11 NLR 110, 111.
- C The right of occupation acquired is transmissible to his successors - Tongi v. Kalil 14 WACA 331, 332 where the West African Court of Appeal, per Foster-Sutton, P held:

- "..... once land has been allocated to a member of the Tribe by the Tribal Authorities such member acquires a right to occupy the land which is transmissible to his successors."

- Plaintiff, as an allottee in possession of family land, has a right to institute an action for damages for trespass in respect of such land. If an allottee has occupational rights over family land allocated to him, as decided by the authorities, with which I am in full agreement, it cannot be right, therefore, to say that whatever he has on the land either a building thereon or crops belongs to the family. Although the land does not belong to him the allottee, in my respectful view, has ownership of whatever he superimposes on the land by his own personal efforts. (p. 1711 C)

2. When a plaintiff can demand partition of family land

- The plaintiff has an undoubted right to demand partitioning of the family land but this will only be granted if it is shown that there are disputes as to occupation right which cannot be amicably settled among the family members themselves See Lewis v. Bankole(1909)1 NLR 81. (p. 1715 G)

H REPRESENTATION

O. A. R. Ogunde, Esq., for the Appellant
Respondents absent. Not represented.

CASES REFERRED TO

Onwuka v. Ediala (1989)1 NWLR (Part 96)182	
Atanda v. Ajani (1989)2 NWLR (part 101) 23	
Olanguno v. Ogunsanya (1970) 1 All NLR 223	
Shelle v. Asajon (1957)2 FSC 65	B
Adagun v. Fagbola 11 NLR 110, 111	
Incar Nig Ltd v. Adegboye (1985)2 NWLR 455	
Ramonu Atolagbe v. Shorun (1985)4 SC. (part 1) 250 at 285	
Tongi v. Kalil 14 WACA 331, 332	
Lewis v. Bankole (1909)1 NLR 81.	C
Kale v. Coker (1982)12 SC 252	
Lokoyi v. Olojo (1983)2 SCNLR 127	
Ojomu v. Ajoa (1983)2 SCNLR 156	
Ibrahim v. Shagari (1983) 2 SCNLR 176	D

LEAD JUDGMENT BY ONU JSC

The claims of the plaintiff who is the Appellant in this court against the Defendants (herein Respondents) as endorsed on his Amended Writ of Summons filed on 12th October, 1977 are as follows:-

- "1. Declaration that all the entire property situate lying and being at 42/44 Aiyetoro Road, Epe in Lagos State is the property of all the descendants of late OGEBULE owned under native law and custom.*
- 2. Partition of the said land into four parts amongst the fore branches of the family namely: OGEYE LONGE (ii) OTUBOSE (iii) OTUBERU and (iv) OTUBONI*
- 3 N6,000.00 being both special and general damages for trespass to the plaintiff's building on the land in dispute."*

PARTICULARS

<i>Special Damages</i>		
<i>Cost of Structure destroyed by the Defendant</i>		
.....	N5,000.00	H
<i>General Damages</i>	<u>N1,000.00</u>	
	<u>N6,000.00"</u>	

A Statement of claim was filed on behalf of the Appellant on

14th June, 1976 and to it a composite plan was attached. After the learned trial Judge had fixed the case for trial on 27th and 28th September, 1977, the Appellant sought and obtained leave to amend the Statement of Claim. The Amended Statement of Claim was further amended by court order
 B dated 12th February, 1979. The Respondents on the other hand, made several applications filed on their behalf to amend the Statement of Defence. The final Amended statement of Defence was filed on 12th June, 1981. The Appellant in response thereto, filed a Reply on 3rd July, 1981. The facts of the case are not in dispute and I do not propose to set them
 C out here.

The case went to trial after the exchange of pleadings and following the addresses of counsel, the learned trial Judge, Agoro, J. held that the case succeeded in part. For his claims for partition of family land
 D and also for N6,000.00 special and general damages, these were dismissed. The learned trial Judge, however, ruled that the Appellant was entitled to a declaration that the entire landed property situate lying and being at 42/44 Aiyetoro Road, Epe in Lagos State is the property of all the
 E descendants of late OGE BULE owned under native law and custom.

Aggrieved by this decision, the Appellant appealed to the Court of Appeal, Lagos Division (Coram: Nnaemeka-Agu and Kutigi JJ. CA as they were then as well as Kolawole, J.C.A who wrote the leading judgment) and dismissed the appeal with costs to the Respondents.
 F

The further appeal to this court is against the judgment of the Court of Appeal (hereinafter referred to as the court below) premised on the five grounds of appeal contained in a Notice of Appeal dated 10th November, 1992. The parties subsequently filed and exchanged briefs of
 G arguments in accordance with the rules of this court. The Appellant identified four issues which in path and substance are identical to the four the Respondents formulated for our determination. For the disposal of this appeal, I deem it necessary to stick to the four issues argued in the
 H Appellant's brief (the four issues proffered by the Respondents though differently worded are subsumed therein) . They state:

"I . Whether the learned Justices of the Court of Appeal were right in affirming the finding of the learned trial Judge that the plaintiff

/Appellant did not prove any allocation of land to him by the Head and principal members of the family.

2. *Whether the learned Justices of the Court of Appeal were right in dismissing the Appellant's claims for damages for trespass.*

3. *Whether the learned Justices of the Court of Appeal were right in holding that the Appellant did not make out a case for partition of the family land.*

4. *Whether, having regard to all the circumstances of this case, particularly issues of fact not resolved at the trial, a retrial ought to be ordered."*

At the hearing of the appeal on 14th April, 1998, learned counsel for the Appellant relied on the issues he formulated in his brief dated 28th January, 1993 and made oral expatiation thereon. Arguing first issue 1 (having abandoned issue 2 which was accordingly struck out), the learned counsel for the Appellant submitted as follows:-

Firstly, he contended that in order to demonstrate proof of allocation of the family property to the Appellant the learned trial Judge found unequivocally thus:

"There was evidence before the court by the plaintiff, and supported by Mr. T.A Sule (pw2), to the effect that a bungalow building with two bedrooms, sitting room, kitchen, bathroom and toilets, was completed for the plaintiff in 1961 on a portion of the land in dispute. The evidence before the court also showed that as a result of the riot or disturbance at Epe in 1975, many buildings and other properties, including the plaintiff's bungalow and wooden shed, were destroyed by fire"

Reference was then made to another passage in the trial court's findings where the learned trial Judge turned round (a stance which the learned counsel for the Appellant rightly, in my view, described as most intriguing) when he observed as follows:-

"I find it difficult to accept the story put forward by the plaintiff regarding the destruction or demolition of the bungalow building. His version of the story is at variance with the evidence of the carpenter (pw3). It seems to me from the totality of the evidence before the court, and I hold as a fact that the bungalow building was destroyed during the

army riot at Epe in 1975. There is no credible evidence before the court to substantiate the allegation that the first four Defendants were the persons who pulled down the walls of the bungalow building. "(Underlining is mine)

I find at a glance the complaint of the Appellant to be well grounded. For the learned trial Judge who earlier found that Appellant had a bungalow on the allocated land in dispute to now turn round to say that the Appellant had no land allocated him there on the land where his house stood, constitutes an inconsistent finding that must not be allowed to stand. See Olale v. Ekweledu(1989)4 NWLR (part 115)326; Missr v. Ibrahim(1974)5 SC. 55; Incar Nig Ltd v. Adegbeye (1985)2 NWLR 455 and Ramonu Atolagbe v. Shorun(1985)4 SC. (part 1) 250 at 285; (1985)1 NWLR 360 at 375, the latter in which a perverse decision has been held as one which ignores the facts or evidence and when considered as a whole, amounts to a miscarriage of Justice. See also Adimora v. Ajufo (1988) 3 NWLR (part 80)16.

In the case in hand, I am of the view that the learned trial Judge was in error to have held that the Appellant has failed to substantiate the allegation regarding allocation to him (Appellant) of family land vide his pleading in paragraph 10 of the Amended Statement of Claim. The court below, with due respect, was also in error in affirming that finding. The Appellant had in paragraphs 10,11, and 12 (ibid) pleaded thus:

"10. The Plaintiff avers that in or about 1960 one Garba Bakare (now deceased) as the Head of Ogebule Family granted or allocated to the plaintiff a portion of the land now in dispute for the purpose of putting up a building in accordance with native law and custom.

11. That in or about 1961 the said Garba Bakare with the principal members of OGEBULE family came to the aforesaid portion of land and blessed (it) in accordance with the native law and custom of Epe before the plaintiff commenced the building of a bungalow.

12. The Plaintiff states further that the bungalow was built of cement blocks, plastered and painted and was in occupation with the plaintiff's mother and family up to 1975."

The Respondents denied paragraphs 9, 10 and 11 but curiously failed to say anything about paragraph 12. Where, one may enquire, was the Appellant residing between 1961 and 1975 when the Army riot led to the demolition of his bungalow? Indeed, one may further ask, was a bungalow built at all by the Appellant or not? On this, the Appellant testified as follows:-

"In 1960, the Head of the Family Garuba Bakare and other principal members of OGEBUGE Family allocated a vacant plot of land now in dispute in this case to me in order to erect a building. I cleared the land and erected a block on the land in 1961..... I moved into the building sometime in November, 1961 with my family. Nobody objected to my living in the house nor did anybody obstruct me during the period of construction."

The Respondents as pointed out earlier, denied there was any bungalow built by the Appellant. As a matter of facts, not only did DW1 deny that Appellant ever lived in the family house at 42/44 aiyetoro Road, Epe but added that Appellant "and his mother lived at Okeposun."

As I pointed out hereinbefore, since the learned trial Judge in his judgment equivocated between saying (i) that there was no allocation of land to the Appellant but (ii) turned round to say "Plaintiff's bungalow and wooden shed were destroyed by fire" and (iii) held that "as a fact that the bungalow building was destroyed during the Army Riot of 1975," he by implication believed the Appellant's story that he (Appellant) erected a bungalow on family land at 42/44 Aiyetoro Road, Epe. If there was no allocation how could the Appellant have been on the land from 1961-1975, 14 clear years without protest until the Army Riot?

Having held elsewhere in this judgment that the decision of the trial court was therefore perverse the very act of its perversity will enable me to interfere with the supposed concurrent findings of fact of the two courts below by holding that the portion of land upon which the bungalow was built was allocated to the Appellant. See Onwuka v. Ediala(1989)1 NWLR (Part 96)182; Atanda v. Ajani(1989)2 NWLR (part 101)23. The learned trial Judge had in fact misconceived the Appellant's case ab initio. The court below

accordingly, in my view, was also wrong to have affirmed the erroneous conclusion arrived at by the trial court. Allocation of family land, 1 hold, is the equivalent of a grant. See the evidence of DW2 who was present at the allocation of the land by the family Head and principal members to Appellant. See also the evidence of PW5, Saratu Ogeye - Appellant's mother which was not discredited under cross-examination.

My answer to issue No.1 is accordingly rendered in the negative.

Ever before the oral argument of the appellant's four issues contained in his brief was embarked upon, learned counsel for him submitted as follows:-

"The Appellant abandons ground 2 of the appeal after having read the case of BANKOLE v. PELU(1991)8 (part 211) PAGE 523."

In consequence, the argument proffered on the issue emanating from it (issue 2) is also deemed as abandoned and it is accordingly struck out.

Turning to issue 3 which inquires whether the learned Justices of the Court of Appeal were right in holding that the Appellant did not make out a case for partition of the family land, argument was proffered on appellant's behalf to the following effect:

That the learned trial Judge refused to make an order for partition on the ground that "it is clear to me from the composite survey plan marked Exhibit D that the Ogebule Family land verged "Red" have (sic) been fully utilised by various branches of the family." This, it is submitted, was a most unsatisfactory finding. For instance, it was further contended, no answers were provided to the following questions, to wit:

- (a) How many branches does the family have?
- (b) Was Sangodemuren a child of Ogebule?
- (c) Was there any family arrangement dividing the family property into two?

In the absence of a finding on the number of the branches, how, it is submitted, could the learned trial Judge have determined that the family land "have been fully utilized by the various branches of the family?" The learned trial Judge, it is further contended, ignored the evidence that the

appellant had been prevented from rebuilding his bungalow and that his mother even testified to that facts, adding that the case of Balogun v. Balogun and all the other cases cited are, with respect, totally irrelevant. The court below, it was further maintained, merely affirmed the finding of the trial court on the ground that "it was amply supported by the evidence adduced before him."

I See the force in the Appellant's argument. In the first place, it was not incumbent on the Appellant in this case to prove absolute grant of that portion of land said to have been granted or allocated to him. Mere allocation of it as a family member, coupled with its exclusive possession would be sufficient. After having held that a bungalow was in fact built on a portion of the family land by the Appellant, what the learned trial Judge ought to have resolved was whether the trespass that he (Appellant) alleged, took place after the riot. This he did not do and so he failed to adjudicate in the case brought before him while the court below misconceived that its role was to set aside the decision thus arrived at. See Lengbe v. Imale (1959) SCNLR 640 and Ojibah v. Ojibah (1991) 5 NWLR (part 191) 296. The learned trial Judge himself realised that he failed to make findings of fact on various issues raised in the pleadings when he held:-

"In view of the findings of facts which I have made and decisions reached upon the evidence before the court, it is hardly necessary for me to advert to other matters raised on the pleadings which I consider to be ancillary to the main points already dealt with in this judgment."

On appeal, the court below, in my view, wrongly held after correctly station the law by holding among other things as follows:-

"It seems to me that in order to invoke the jurisdiction of the High Court, the plaintiff in this action must show not only that some members of the Ogebule Family want the family property to be broken up, but rather that it has become impossible to continue to use the land in dispute as family property. See Ajibabi v. Jure (1948) 19 NLR 27 and contrast the case of Bajulaiye v. Akapo (1938) 14 NLR 10

I should point out that the jurisdiction of the High Court to order partition in an appropriate case is exercised on the grounds of eq-

uity, and, therefore, the order of partition of family property is at the discretion of the court. In the case in hand, the plaintiff has failed to establish grounds upon which this court should exercise its discretionary power in his favour. Nor do I consider that it would be in the best interest of the branches or members of Ogebule Family to order partition of the Family property now in dispute in the present action. See Lewis v. Bankole (1909)1 NLR 81 at 103."

In view of the above, coupled with my findings in issue 1, I am of the opinion, that the learned trial Judge equivocated when he stated that there was no allocation of land to the Appellant.

In sum, the learned Justices of the court below were clearly in error in affirming the findings of the learned trial Judge that the appellant did not prove any allocation of land to him by the Head and principal members of the family. Also, the learned Justices of the court below were wrong in holding that the Appellant did not make out a case for partition of the family land whereas he was able to establish that the four branches of the family could no longer live together as one unit in peace and harmony on the land and to that extent issue 3 is resolved against the Respondents.

In the light of answers to issues 1 and 3, issue 4 no longer arises for consideration. The appeal therefore wholly succeeds and it is allowed by me. The decisions of the two courts below are accordingly set aside and I shall proceed to make the following orders:-

1. Declaration that all the entire property situate lying and being at 42/44 Aiyetoro Road, Epe in Lagos State is the property of all the descendants of late OGEBUGE owned under native law and custom.

2. That in the best interest of the branches or members of the Ogebule family, partition of the said family property be made and carried into effect amongst the four branches of the family namely (i) OGEYE LONGE, (ii) OTUBOSE, (iii) OTUBERU and (iv) OTUBONI by the trial court i.e. the Lagos State High Court at the behest of the Chief Judge thereof.

Costs are assessed in Appellant's favour in the sum of N10,000.00 only.

BELGORE JSC

The learned trial Judge clearly found on the evidence before him that the appellant had an allocation of the land in dispute and it does not matter whether it was for a shop or a house. It is however clear that the appellant erected bungalow on the land and lived there up to the time some civil disturbance led to its destruction. Once this evidence is believed the appellant was clearly in lawful possession and could maintain an action in trespass.

I therefore agree with Onu, J.S.C. that the decisions of the Courts below were at variance with the evidence and this Court will set aside such a decision. I also allow the appeal on the reasons adumbrated in the judgment of Onu, J.S.C. and make the same consequential orders.

WALI JSC

I have read in advance the leading judgment of my learned brother Onu, JSC and I agree with his reasoning and conclusion for allowing the appeal in part.

For these same reasons in the lead judgment, I also allow the appeal in part and endorse all the consequential orders made therein.

OGUNDARE JSC

The plaintiff (who is now appellant before us) and the Defendants (respondents in this appeal) are members of the Ogebule family. The Plaintiff is from the Ogeye Longe branch of the family. The Defendants are from the other three branches that constitute the Ogebule family. The land in dispute situate and lying at 42/44 Aiyetoro Road, Epe in Lagos State belongs to the family and is jointly owned by the four branches. The land was settled upon several years ago by the common ancestor of the parties, one Ogebule who migrated from Ijebu Ode to settle at Epe. On the death of Ogebule, the land and the house he built on part of it devolved on his present descendants by a series of succession. The Plaintiff claimed that sometime in 1960 Garuba Bakare, the head of the family and

other principal members of the family allocated a part of the land to him and in 1961 he built a bungalow on the part allocated to him and lived therein with his mother. The Defendants denied these claims. On 22nd March 1975 there was a violent clash in Epe between civilians, on the one hand and some soldiers on the other, as a result of which a number of residential houses in Epe, including plaintiff's bungalow, were burnt by the soldiers. The doors, windows and roof of plaintiff's bungalow were burnt by the rioters. Later that year plaintiff engaged the services of a contractor to repair the damages done to his house and bought some building materials for this purpose. When repair work commenced to the roof, the 1st -4th defendants came to the site, pulled down the roof that had just been repaired and disturb plaintiff's workers. Plaintiff reported the Defendants, first to the head of the family, and later to the Oba of Epe but Defendants refused the invitations for a settlement. Rather, later in October 1975 the 1st-4th Defendants went back to the land and pulled down the walls of plaintiff's bungalow and commenced erection of a building on the site.

Plaintiff commenced in the High Court the action leading to this appeal after a similar action commenced by him in the Customary Court had been withdrawn. By his amended writ of summons, plaintiff claimed as hereunder:

"(1) Declaration that all the entire landed property situate lying and being at 42/44 Aiyetoro Road Epe in Lagos state is the property of all the descendants of late Ogebule owned under native law and custom.

(2) Partition of the said land into four parts amongst the four branches of the family namely (i) OGEYE LONGE; (ii) OTUBONI; (iii) OTUBOSE and (iv) OTUBERU.

(3) N6,000.00 being both special and general damages for trespass to the plaintiffs' building on the land in dispute."

Paragraph 21 of his amended statement of claim, the plaintiff gave particulars of damages he was claiming paragraph 21 reads:

"21. The plaintiff shall further contend and prove at the trial that he is entitled to punitive damages against the Defendants jointly and severally and that by the destruction of the plaintiff's structure as afore-

said, the Defendants have caused the plaintiff losses as stated hereunder:

A. SPECIAL DAMAGES

(i) Costs of existing walls pulled down by the 1st-4th Defendants..... N3,004.00

(ii) Cost of re-roofing before destruction by the 1st-4th Defendants N700.00

(iii) Iron sheets, hooks, hinges, bolts and locks-unburnt but used and/or carried away by the 1st-4th Defendants N734.00

(iv) Costs of planks for doors, windows, shutters and frames for doors and windows N440.00

(v) Labour N122.00

B. GENERAL DAMAGES N1,000.00
N6,000.00

Pleadings having been filed and exchanged and, with leave of D court, amended, the action proceeded to trial at which evidence was led on both sides. After addresses by learned counsel for the parties, the learned trial Judge, in a reserved judgment, found:

1. "The present Plaintiff and the Defendants are the great grand- E children of Ogebule who was the founder of the family. Thus, the land in dispute became family land under customary law."

2. "I hold as a fact that the plaintiff has failed to substantiate the allegation regarding allocation of family land to him as contained in F paragraph 10 of the Amended Statement of Claim."

3. "The evidence before the Court also showed that as a result of the riot or disturbance at Epe in 1975, many buildings and other properties, including the plaintiff's bungalow and wooden shed, were destroyed by fire. There was also evidence by Mr. Lasisi Alabi (PW3) a G carpenter, that while he was replacing the roofing rafters on the bungalow building damaged by fire, the 1st Defendant stopped him from working."

4. "I find it difficult to accept the story put forward by the plain- H tiff regarding the destruction or demolition of the bungalow building. His version of the story is at variance with the evidence of the carpenter (PW2). It seems to me from the totality of the evidence before the court,

and I hold as a fact that the bungalow building was destroyed during the Army riot at Epe in 1975."

5. "There is no credible evidence before the court to substantiate the allegation that the first four Defendants were the persons who pulled
B down the walls of the bungalow building."

6. "..... the plaintiff has failed to establish grounds upon which this court should exercise its discretionary power in his favour. Nor do I consider that it would be in the best interest of the branches or
C members of Ogebule Family to order partition of the family property now in dispute in the present action."

He concluded his judgment in these words:

"In the result of this case the plaintiff's claim succeeds in part. But his claims for partition of family land and also for N6,000.00 being
D special and general damages will be dismissed. I am, however, satisfied that the plaintiff is entitled to a declaration which I hereby make that all the entire landed property situate lying and being at 42/44, Aiyetoro Road, Epe in Lagos State is the property of all the descendants of late OGE BULE
E owned under native law and custom.

The special circumstances of the parties to this action who are members of the same family has encouraged me to order that the parties should bear their own costs."

F Being dissatisfied with that part of the judgment refusing some of his claims, the plaintiff appealed to the Court of Appeal Lagos Division. The appeal was dismissed. Plaintiff has now further appealed to this Court upon 5 Grounds of appeal contained in a Notice of Appeal
G filed, with leave of this court, on 20/11/92. Pursuant to the rules of this Court the parties filed and exchanged their respective written briefs of argument.

At the oral hearing of the appeal, Mr. Ogunde learned counsel for the plaintiff proffered oral arguments in elucidation of some issues raised in
H plaintiff's brief. He withdrew Issue 2 in the Appellant's brief and this was struck out. The Defendants were absent and were not represented by counsel at the oral hearing.

Plaintiff relies on the remaining three issues raised in his brief.

These are:

1. *"Whether the learned Justices of the Court of Appeal were right in affirming the finding of the learned trial judge that the plaintiff/Appellant did not prove any allocation of land to him by the Head and principal members of the family in 1960."* B
2. *"Whether the learned Justices of the Court of Appeal were right in holding that the Appellant did not make out a case for partition of the family land."*
3. *"Whether, having regard to all the circumstances of this case, particularly issues of fact not resolved at the trial, a retrial ought to be ordered."* C

The issues formulated in Defendants' brief are substantially the same as the above issues. I need not set them out.

Issues 1

The Plaintiff pleaded, inter alia, as follows:

- "9. *The Plaintiff avers that the land in dispute is owned by all the descendants of Ogebule aforesaid and devolved on them under native law and customs operating in Epe.*" E
10. *The Plaintiff avers that in or about 1960, one Garuba Bakare (now Deceased), as the Head of OGEBULE FAMILY and with the consent and authority of the principal members of the Ogebule family granted or allocated to the plaintiff a portion of the land now in dispute for the purpose of putting on a building.* F
11. *That in or about 1961, the said Garuba Bakare with the principal members of the OGEBULE Family came to the aforesaid portion of the land and blessed it in accordance with the native law and custom of Epe before the plaintiff commenced the building of a bungalow.* G
12. *The plaintiff states, further that the bungalow was built of cement blocks, plastered and painted and was in occupation with the plaintiff's mother and family up to March 1975.* H
13. *That on or about the 22nd March 1975 when there was riot between the soldiers and the civilians, both the doors, windows and roof of the plaintiff's bungalow were burnt by the rioters."*

The Defendants, for their part, in answer, pleaded thus:

"8. *The defendants deny paragraphs 9 and 10 of the amended Statement of Claim and stated further that by a further family arrangement between the OTUBERUS and the SANGODIMURENS the space between the two portions of No. 44 was given to the OTUBERUS while the remaining unbuilt portion by the end of the (sic)*

9. *The Defendants in answer to paragraph 11 of the Amended Statement of Claim state that the plaintiff by a written document dated the 19th July 1969 took a lease of the unbuilt portion added to the portion of the Sangodimurens from Badiru Sule now dead and Ganiyu Karimu now very ill (Sangodimuren's descendants) but the original document was burnt during the riot at Epe.*

10. *The defendant aver that the said structure was completely destroyed during the Epe riot, together with the buildings on No. 42 and 44.*

11. *The Defendants state that the plaintiff put up a structure on the leased land where he sold petty wares."*

In his reply to the amended statement of defence, plaintiff pleaded:

"8. *The plaintiff states that he took a temporary lock-up shed from Badaru Sule and Ganiyu Kamiru at a rent of N1.00 per month where the plaintiff's wife carried on petty trading and the plaintiff states further that the shed was a separate and distinct property from the one in dispute."*

Plaintiff led evidence in support of his averments. He testified thus:

"In 1960 the Head of Family Garuba Bakare and other principal members of Ogebule Family allocated a vacant plot of land now in dispute in this case, to me in order to erect my own building. I cleared the land and erected a block building on the land in 1961. The Head of family and other principal members of the family were present when I laid the foundation of the building, His Highness the former Oloja of Epe Oba Ajayi was also present. One Mr. Tirimisiu who carries on business as 'Moonshine Builder and General Civil Engineering Contractor erected the building at a cost of N3,004.00. It was a bungalow with two

rooms, sitting room and other conveniences.

I moved into the building sometime in November 1961 with my family. Nobody objected to my living in the house, nor did anybody obstruct me during period of construction. On March, 1975 there was a disturbance at Epe between the Army and civilians during which all important buildings at Epe were burnt. My building at Epe was burnt during the Army /Civilian disturbance. All my receipts and other documents were damaged by fire. The roof and ceiling of the house were damaged as well as doors, windows and their frames were also burnt to ashes."

PW2, Tirimisiu Adisa Sule, deposed as follows:

"I know the plaintiff in this case. I also know the houses at No. 42 and 44 Aiyetoro Road, Epe. In February 1961 the plaintiff engaged me to erect a building for him at No. 44 Aiyetoro Road / Olugbase Street, Epe. I carry on my contracting business under the name of 'Moonshine & General Contractor.' I erected for the plaintiff a building containing two bedrooms one sitting room, kitchen, bathroom and toilet. The plaintiff supplied wooden frames for windows and doors. I was responsible for other building materials including the roof. The contract price was 1,502 pounds now N3,004.00. I completed the building to the satisfaction of the plaintiff. The plaintiff paid me N3,004.00 for the work and I gave him receipts. He paid me in four instalments and I issued him four receipts."

PW5, Saratu Ogeye, the mother of the plaintiff, in her testimony deposed thus:

"I know the plaintiff; he is my son. I also know the defendants. One Ogebule was my grandfather, and also the grandfather of the defendants."

I know the land in dispute in this case which originally belonged to my grandfather. Both the plaintiff and the defendants are entitled to the land in dispute.

The plaintiff erected a building on the land about 20 years ago. It was bungalow made of blocks. The children of Ogebule at a family meeting gave my son (the plaintiff) the land upon which he erected the bungalow. One Garuba Bakare was the Head of Family at that time.

The bungalow was duly completed and I moved into it with the plaintiff. The house was burnt down during a riot by certain soldiers in 1975."

When recalled to testify following amendments to the statement of defence, the plaintiff admitted renting a temporary shed from Badaru Sule and Ganiyu Kamiru at a rent of N1.00 per month sometime in 1969. He however, added that the shed was about 30 yards away from the land in dispute. The shed was burnt down during the 1975 disturbance. Cross-examined, plaintiff said:

"*Apart from the temporary shed hired by me, I also erected a building on the plot of land allocated to me by the family in 1961 at No.2A, Olugbasa Street, Epe.*

The case for the defence was put forward by the 2nd Defendant Abdul Ramonu Bakare who testified as DW1. He deposed:

"I know the plaintiff in this case. Ogeye Longe beget the mother of the plaintiff. She is called Saratu Mabun.

The plaintiff approached Oseni Sule, Badaru Sule, Ganiyu Karimu(deceased) and asked for permission to use the small portion of land as a shed. The plaintiff erected a shed on the small portion of land. I was aware that there was an agreement (document) with the plaintiff. The plaintiff lived at Okeposun.

As far as I am aware my father Garuba Bakare did not give the land in dispute or any other land to the plaintiff."

DW2, Liadi Bakare who is the 1st Defendant also testified. He deposed:

"It is not true as alleged by the plaintiff that my father, Garuba Bakare and other principal members of the family granted land to him (the plaintiff). The true position was that the children of Sangodemuren Badiru Sule, Oseni Sule, Sailu Sule and Ganiyu Kamiru (deceased) granted permission to the plaintiff to remain on the small portion of land near No.44, Aiyetoro Road, Epe. The children of Sangodemuren entered into a written agreement with the plaintiff. The plaintiff said that he would be selling various articles on the said land. The plaintiff erected on the land a wooden shed with corrugated iron sheets on the roof.

It is not correct as alleged by the plaintiff that my father and

other principal members of the family blessed the land before erecting the wooden shed.

On the 3rd of March about six years ago, there was disturbance by the Army during which the house at No. 44, Aiyetoro Road, Epe was completely burnt down as well as the wooden shed erected by the plaintiff. The house at No. 42 Aiyetoro Road, Epe was party burnt down. "(Underlining is mine for emphasis)

Later in his evidence he said, under cross-examination:

"Apart from the wooden shed on part of the land in dispute, the plaintiff did not erect any building on the said land."

DW3, Oseni Sule in his evidence deposed thus:

"The land in dispute in this action is situate at 44, Itaopo, Aiyetoro Road, Epe, Lagos State. There is a small portion of land adjoining the house at No. 44, which was let to the plaintiff. The house at No. 44, Itaopo, Aiyetoro Road was built by Shangodemuren and Otuberu.

Shangodemuren was my grandfather. Ogebule begat Shangodemuren.

We leased the portion of land to the plaintiff vide Exhibit E. We were prepared to renew the lease, But unfortunately there was a riot and the whole place was set on fire. We later rebuilt our own house. We also used the portion originally leased to the plaintiff.

The land in dispute in this action originally belonged to Shangodemuren. The land in dispute now belongs to the plaintiffs as descendants of Shangodemuren."

Cross-examined, he testified thus:

"The land in dispute was a small portion of land upon which the house at No. 44 was erected many years ago. Shangodemuren would have built that small portion of land, but he did not have sufficient fund at that time.

The portion of land was leased to the plaintiff by Badiru Sule and Ganiyu Kamiru on behalf of themselves and other defendants in this action. The plaintiff used the land as a shop built with planks. I returned to Epe after a period of seven months to find the plaintiff's shed on the land in dispute.

The plaintiff's shed was destroyed by fire during the Army riot.

I know the mother of the plaintiff very well. She never lived at No. 44, Itaopo Aiyetoro Road, epe; nor did she own any room in the said house. The mother of the plaintiff used to reside at No. 42, Itaopo, Aiyetoro Road, Epe.

The plaintiff did not erect any bungalow house at No. 44 Itaopo, Aiyetoro Road, Epe, or at all."

In summary, the plaintiff contended that the piece of land in dispute was allocated to him by the Head and other members of the Family in 1960 and he built a bungalow on it and lived therein with his mother and family from 1961 until soldiers burnt part of it in the disturbance of 1975. The Defendants, on the other hand, denied that plaintiff ever built a bungalow on the land. They deposed that he had a wooden shed on a small portion of land leased to him by the children of Shagodemuren and that the shed was burnt down in 1975 by soldiers. The plaintiff admitted the existence of the shed but said it was not on the land in dispute but some 10 meters away from it.

The learned trial Judge found that the plaintiff had a bungalow on the land and a wooden shed which were both burnt by soldiers in the 1975 disturbance, He, however, found also that the land on which the bungalow stood was not allocated to the plaintiff by the family. There has been no appeal against the first finding of fact but plaintiff appealed against the second finding. And that is the main issue in this appeal. I must mention that the Court of Appeal affirmed the two findings of fact.

It is submitted on behalf of the plaintiff both in the brief and in oral submissions of his counsel Mr. Ogunde that the second finding is perverse having regard to the state of the pleadings, the evidence and the first finding of fact. It is also submitted that the finding that there was no allocation of the land to the plaintiff by the family was based on an improper evaluation of the evidence and this court is urged to set the finding aside and to hold instead that the land was allocated to the plaintiff, as claimed by him. It is submitted in the plaintiff's brief thus:

"It is important for your Lordships to observe that apart from the fact that the reasons given for disbelieving the Appellant are uncon-

vincing, the learned trial judge sought to rely on his impression of the Appellant in the witness box on 28th April, 1980 as the reason for reaching his judgment in June 1984 more than four years after having seen and heard' the witness. In the circumstances demeanour is little guide to truth and the Court of Appeal was in error in merely affirming the finding on the basis of having been made by the trial court who 'saw and heard' the witnesses."

Mr. Ogunde in his oral submissions, submitted that having found there was a bungalow built by the plaintiff on the land, it was inconsistent of the learned trial Judge to find that plaintiff failed later to prove allocation. He further submitted that by the finding that plaintiff had a bungalow on the land, the learned Judge accepted plaintiff's case as against the defence which denied that plaintiff built on the land.

For the Defendants, it is argued in their brief thus:

"It is my submission that apart from the mere assertion of the plaintiff that the land in issue was allocated to him by Garuba Bakare (the Head of the Family) and other principal members, there was no evidence to show that the said Garuba Bakare was the Head of the Family at that time, or that such allocation was made."

In fact the evidence of the Appellant's mother at page 95 is inconsistent with his evidence, when she said

'The children of Ogebule at a Family meeting gave my son (the plaintiff) the land

In addition to the contradiction by the evidence of the Appellant's mother, the 1st and 2nd Defendants (sons of Garuba Bakare) denied the evidence at page 117, lines 21-23, and page 119 lines 27-29. The Appellant failed also to call any of the principal members."

In the absence of such evidence before the trial court, the Court of Appeal was right in confirming the High Court judgment that the Appellant failed to prove that Garuba Bakare with the approval of the principal members of the family allocated the land in issue to him."

It is true that the learned trial Judge stated that the bungalow building was destroyed during the Army riot at Epe in 1975, but this was a mere error that can not effect the need for the Appellant calling neces-

sary evidence to establish a grant. The court is not expected to base its judgment on assumption, which appears to be the argument of the Appellant.

It has been held that it is not every error of the lower court that will lead to a reversal of its decision as in this case. See

(i) Bankole v. Pelu(1991)8 NWLR (pt.211) page 545.

(ii) Olubode v. Salami (1985)2 NWLR (pt. 1) page 282.

It is therefore my submission that the judgment is right and the Supreme Court should confirm it."

I think there is some force in the submissions of learned counsel for the plaintiff. Surely, if DW1 and DW2, on whom the learned trial Judge relied in finding that the land on which the plaintiff's bungalow building stood was not allocated to the plaintiff, lied on the existence of the building on the land - a matter that was obvious to the naked eye - how could they be believed on what their father (who is now dead and could not be called as a witness) did. Would Garuba Bakare and other members of the family stand by and allow, without complaint, plaintiff to build on the land in dispute and alive therein for 14 years? It does not appear the learned Judge properly evaluated the evidence before him on this principal issue. Had he done so he would have accepted plaintiff's story that the land was allocated to him by the Head and principal members of the family prior to his building thereon. And had the court below properly directed itself it would not have affirmed the finding of the trial court on the issue of allocation of the land to the plaintiff.

True enough, this Court does not readily interfere with concurrent findings of the courts below - See: Kale v. Coker (1982)12 SC 252; Lokoyi v. Olojo (1983)2 SCNLR 127; Ojomu v. Ajoa (1983)2 SCNLR 156; Ibrahim v. Shagari (1983) 2 SCNLR 176. As the concurrent finding of fact under consideration appears not to flow logically from the other findings made by the trial Judge, I must hold that finding is perverse and I must consequently set it aside. In my respectful view, the finding that the land was not allocated to the plaintiff by the family is unreasonable given the fact that the land is situate in a family compound surrounded by houses in which members of the family lived, and still live. Plaintiff could

not, without the family's permission, build on it and live therein with his mother and family for 14 years without protest from the family. The Defendants could not be speaking the truth that it was only a small piece of land on which plaintiff erected a wooden shed that was leased to him by the children of Shangodemuren. I say this because the learned trial Judge found that it was both the bungalow building and the shed that were burnt in the 1975 disturbance. The plaintiff admitted he had a shed but said it was not on the land in dispute but about 10 meters away from it. In the light of his other findings of fact, the learned Judge should have accepted this evidence. I answer Question 1 in the negative.

Question 2:

This leads me to the question: what are plaintiff's rights on the land in dispute allotted to him by the family? It is the law that family land remains family land, irrespective of allotment - See: Olanguno v. Ogunsanya(1970) 1 All NLR 223; (1970) ANLR 227. The Plaintiff, however, has occupational right to occupy and use the land but cannot alienate it without the consent of the family- see Shelle v. Asajon(1957)2 FSC 65; Adagun v. Fagbola11 NLR 110, 111. The right of occupation acquired is transmissible to his successors -Tongi v. Kalil 14 WACA 331, 332 where the West African Court of Appeal, per Foster-Sutton, P held:

"..... once land has been allocated to a member of the Tribe by the Tribal Authorities such member acquires a right to occupy the land which is transmissible to his successors."

Plaintiff, as an allottee in possession of family land, has a right to institute an action for damages for trespass in respect of such land. So held the Federal Supreme Court in Lengbe v. Imade(1959) WNLR 325. With respect to their Lordships of the Court below, that court could not be right when, per Kolawole JCA, it said

"Assuming that the plaintiff built a bungalow on the land, as a member of ogebule family, he is entitled so to build but such building is not exclusively his but that of the family."

If an allottee has occupational rights over family land allocated to him, as decided by the authorities, with which I am in full agreement, it cannot be right, therefore, to say that whatever he has on the land either a build-

ing thereon or crops belongs to the family. Although the land does not belong to him the allottee, in my respectful view, has ownership of whatever he superimposes on the land by his own personal efforts. I agree with the following passage in Elias: Nigerian Land Law, 4th edition at page 125.

"The other matter to be noted is the distinction made between the individual's inalienable right in the family land as such and his alienable one in any structure such as a building which he may superimpose on the family land (with, of course, the consent of the family) by his own personal exertions. This seems to go on the analogy of the right given to the individual by customary law to formerly unappropriated land first cultivated by him or to crops planted by him on existing family land. There would seem to have been no direct Supreme (or higher) Court decision on the point, but in a case at Iperu in the Ijebu Province of Yoruba-land, one Desalu owned a debt to one Coker and the Supreme Court issued a writ of fi-fa to attach the judgment debtor's interest. A successful interpleader summons was allowed to other members of the family who claimed that the land, but not the house erected by Desalu thereon, was their family property. The Court, therefore, held that only the house could be attached, as it was the only thing which Desalu could claim as his absolute property."

It is only where the family of the allottee fails and becomes extinct that the family has a right of reversion - see Oshodi v. Dakolo & Ors.(1930) AC 667 at p. 668.

It would appear that the Courts below, again, misconstrued the plaintiff's case in trespass. Plaintiff did not say that the Defendants were reasonable for the burning of his house but that after the riot of 1975, he accused repairs to be effected on the building but that the Defendants disturbed his workmen, pulled down the walls of the building and on the land a building of their own. The defence admitted as much that the land had been as much that the land had been rebuilt- See the evidence of DW2. I have examined the evidence of the plaintiff and that of PW3, the carpenter. I find no such discrepancy in their evidence as would affect adversely the credibility of the witnesses. I find no discrepancy in their

evidence as would affect adversely the credibility of the witnesses. In the light of the admission, by DW2, that the land had been rebuilt there was interference with plaintiff's possession of the land. This is trespass.

In view, however, that issue 2 in the Appellant's brief is not available for a decision as it was withdrawn at the hearing of the appeal, I say no more on the claim. B

Question 3:

This deals with the claim for partition. The learned trial Judge had this to say:

"I turn now to consider the partition of the land situate at 42/44 Aiyetoro Road, Epe into four parts amongst the four branches of Ogebule Family. As I understand it, the effect of partitioning family property among branches or several members of the family entitled to a portion, would be to split the family property into several individual properties, each portion vesting absolutely in a branch or member to whom it has been apportioned. See: Balogun v. Balogun (1943) 9 WACA 78. While it is conceded that the High Court has an inherent power to order a partition or sale of family property, the jurisdiction of the Court will be exercised with great restraint because of unwillingness to interfere with the management of family property by those entitled under customary law to manage the said family property. It seems to me that in order to invoke the jurisdiction of the High Court, the plaintiff in this action must show not only that some members of the Ogebule family want the family property to be broken up, but rather that it has become impossible to continue to use the land in dispute as family property. See Ajibabi v. Jura (1948) 19 NLR 27, and contrast the case of Bajulaiye v. Akapo (1938) 14 NLR 10 C D E F G

I should point out that the jurisdiction of the High Court to order partition in an appropriate case is exercised on the grounds of equity, and, therefore, the order of partition of family property at the discretion of the Court. In the case in hand, the plaintiff has failed to establish grounds upon which this court should exercise its discretionary power in his favour. Nor do I consider that it would be in the best interest of the branches or members of Ogebule Family to order partition of the family H

property now in dispute in the present action. See the case of Lewis v. Bankole (1909) 1 NLR 81 at 103. It is clear to me from the composite Survey plan marked Exhibit D that the Ogebule Family land verged 'Red' have been fully utilised by various branches of the family, I, for my part, would prefer to leave the management of the family land in the hands of the Head of Family and other principal members of Ogebule Family." The Court below, in affirming this conclusion, observed, per Kolawole JCA:

"The court refused (partition) because it found it has not become impossible for the parties to use the premises as family property even though some of the interested parties (as the plaintiff in this case) desire an absolute grant. I agree with the views expressed and I shall be guided by those views in the consideration of this case."

After deliberating on the issues of allocation and trespass alleged by the plaintiff the learned Justice of Appeal went on:

"I am in complete agreement with the learned judge on the principles which he enunciated governing the partitioning of the OGE BULE family property. Generally speaking family property under Yoruba customary law remains family property. The effect of partitioning of family property would be to split the family property into, several individual properties, each portion resting ABSOLUTELY in a branch or member to whom it has been apportioned. See Balogun v. Balogun (1943)9 WACA 78). The Court usually is slow in interfering in the management of property by those entitled under Yoruba customary law, because it causes a break up of that family unit. The individual can build a separate house of his own but the family compound remains sacred and intact. But where the plaintiff invokes the jurisdiction of the High Court, the plaintiff must show

(1) that some members of the family want the property to be broken up and

(2) that it has become impossible to continue to use the property in dispute as family property.

The learned trial judge found that the plaintiff has failed to order the partition of the OGE BULE property when he himself testified that the

four branches of OGEBULE are now using the property as family property."

Earlier in his judgment Kolawole JCA had observed:

"To my mind, the single issue for determination is whether, as put in the Respondents' brief there was evidence before the lower court upon which the trial judge could have ordered partitioning of the family property. In other words, did the plaintiff adduce credible evidence in proof of paragraph 10 of his amended statement of claim that:

(1) Garuba Bakare (now deceased) was Head of OGEBULE family in or about 1960.

(2) If he was, did he grant, with the concurrence of the principal members of Ogebule family the land, out of the family land, upon which the plaintiff claimed he built his bungalow in 1961."

It would appear that the court below was influenced in refusing the claim for partition by the failure, in its judgment, of the plaintiff to prove the allocation to him of part of the family land. That finding having now been set aside in this judgment, it is moot if the court below would still have arrived at the same conclusion, as it did, refusing the claim for partition.

Be that as it may, I need now examine the facts in this case to see whether that claim was rightly refused. The plaintiff seems to base his claim for partition on the fact that the other branches of the Ogebule family are oppressive to his own branch. He cited, as a glaring example of this attitude, the pulling down of his building on the land allocated to him by the family many years back and the re-development of that land by elements of the other branches. As it now turns out, his claim that he was allocated, by the family, the land on which his bungalow building stood, is upheld by me. His being disturbed on this land is obviously an act of trespass. The land has been re-developed by the defendants, who represent the other three branches of the family.

The plaintiff has an undoubted right to demand partitioning of the family land but this will only be granted if it is shown that there are disputes as to occupation right which cannot be amicably settled among the family members themselves See Lewis v. Bankole(1909)1 NLR 81.

The court below gave as the main reason for refusing partition

the fact that plaintiff was not allotted the land on which he built. Other reasons were also given for not ordering partition. First, that the whole land is fully built on and secondly, that the members of the family appear to alive happily together. The first reason, with respect, is not good enough.

B Apart from Exh. D showing that there are vacant spaces still within the family compound, where the property is incapable of partition, the court has power to order its sale. The second reason is untenable either. The evidence shows that the plaintiff's branch of the family enjoys a disproportionate right over the family property when compared with the other
C branches who seem to have pulled together to deprive plaintiff's branch a right to own their own individual building on the family compound. The facts in Ajibabi v. Jura 19 NLR and Bajulaiye v. Akapo, 14 NLR are not apposite to the facts.

D The decision to order, or not to order, partition is at the discretion of the court but, like all other discretions, it must be exercised judicially and judiciously. In the light of the observations made by me above and, more particularly, that I have found that the land on which the plaintiff built his bungalow was allotted to him by the family but was wrongly
E taken back from him by the Defendants, I think this is a proper case in which the court ought to order partition of the Ogebule family property situate at 42/44 Aiyetoro Street Epe. Consequently, I order that this case
F be remitted to the High Court of Lagos State for the partition to be carried out by a Judge of that Court designated by the Chief Judge of the State for that purpose.

In view of the conclusions I have reached on Questions 1&3, it is not necessary to consider Question 4.

G It is for the reasons given above that I agree with my learned brother Onu JSC that this appeal be allowed. I set aside the judgment of the courts below and enter judgment in favour of the plaintiff in terms of his claims (1) and (3). I subscribe to the order for costs as contained in
H the judgment of my learned brother Onu, JSC.

IGUH JSC

I have had the privilege of reading in advance the leading judgment just delivered by my learned brother, Onu, J.S.C. and I agree that there is substance in this appeal and that the same should be allowed.

For the same reasons as are contained in the said judgment, I B too, allow this appeal and set aside the judgments of the two courts below. I abide by the consequential orders including those as to costs therein made.

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