

**SUPREME COURT OF NIGERIA**

3RD JULY, 1998. SC. 110/1992

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

RAIMI AJAO OJOKOLOBO & ORS. ....

DEFENDANTS/  
APPELLANTS

AND

LAPADE ALAMU & ANOR. .... PLAINTIFFS/RESPONDENTS

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***EVIDENCE** - Evaluation of evidence - Conflict in the traditional evidence - Given by the Plaintiff's witnesses - The court did not pick and choose which of the witnesses it would believe - As there was no conflict in their evidence.*

***LAND LAW** - Conflicting traditional histories - The court was right to have discarded the conflicting histories of both sides - And applied the principle enunciated in **KOJO II V. BONISIE**.*

***LAND LAW** - Boundary men - Rejection of their evidence - Boundary men should be treated like any other witness - And the trial court is free to accept or reject the evidence of any witness - Provided there are sufficient reasons for doing so.*

**FACTS**

At the High Court, holden at Ibadan, the plaintiffs/respondents claimed against the defendants/appellants for a declaration that their entire family are entitled to a statutory Right of Occupancy in respect of the area in dispute, damages for trespass and perpetual injunction. The defendants/appellants counter-claimed. The plaintiffs' case is that the land in dispute formed part of a large parcel of land granted by Orowusi to their ancestor Labudana. Labudana used the land for farming purposes. Labudana begat Popoola and Omilana who also succeeded to the land in dispute. Popoola died childless while Omilana got married to Aiyenibu

and had Eyinosun for him. Eyinosun begat Aromona who also succeeded to the land in dispute and built a house on it, which she named after herself. Aiyenubu's second wife begat Ojokolobo, the ancestor of the defendants. Eyinosun during her lifetime used to take Ojokolobo to the land in dispute, and when he grew up a portion was allotted to him for farming purposes only. When Ojokolobo attempted to plant permanent economic trees thereon, he was sent parking. Busuvi Eruola a descendant of Ojokolobo who attempted to claim the land had his claim rejected by the head of Orawusi family and the Olubdan of Ibadan. The defendants have now again trespassed on the land in dispute, hence this action. The defendants on the other hand said that their ancestor, Ojokolobo first settled on the land in dispute. He was succeeded by Eruola and Lamikoro who built houses on the land. Avomona used to sell "akara" balls at a junction near the land in dispute and used to pass the night in Ojokolobo's village. When Aromona claimed the land she was reported to Akinsola, head of Orawusi family who ordered the removal of Aromona's from the land in dispute. They had since enjoyed peace until the plaintiffs instituted this action.

At the conclusion of hearing, the learned trial judge found for the plaintiffs and entered judgment for them. The defendants counter-claim was dismissed in its entirety. Dissatisfied the defendants appealed to the Court of Appeal, Ibadan Division. That court unanimously dismissed the appeal. Aggrieved by the decision of the Court of Appeal, the defendants have further appealed to the Supreme Court, raising three issues.

#### **ISSUES FOR DETERMINATION**

*"(1) Was the Court of Appeal right in confirming the decision of the trial court to apply the principle laid down by the Privy Council in KOJO V. BONISIE when on the court's own finding there was conflict in the traditional evidence as given by the plaintiffs' witnesses quite apart from the conflict in that evidence with the traditional history as given by the defendants?"*

*(2) Can the trial judge pick and choose which of the plaintiffs' witnesses he would believe or disbelieve if there is a conflict in the traditional evidence given by these witnesses?"*

(3) *Was the Court of Appeal right in approving of the decision of the trial court to reject the evidence of the boundary men called by the defendants to establish its ownership of the land in dispute?"*

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

***Evaluation of evidence***

1. Therefore as to the conflict in the evidence of PW.4 with that of the other witnesses of the plaintiffs as well as the pleadings, I think the learned trial judge was right in resolving that the evidence of PW.4 was not completely at variance with the pleadings where PW.4 said that Aromona (her grandmother) was the first to settle on the land in dispute. The above paragraphs I believe can only mean that Orowusi granted the land to Labudanu and from the evidence of PW.4, Aromona being the first to settle on the land can only mean the first person to build the first house or settlement on the land in dispute as correctly interpreted by the learned trial judge above. The Court of Appeal was therefore right when it said in the lead judgment:-

*"I agree with the learned trial judge that the plaintiffs did not put forward two conflicting traditional evidence of their root of title."*

I also agree. Clearly the trial Court did not pick and choose as demonstrated above which of the plaintiffs' witnesses it would believe or not as alleged in issue (2). Issues (1) and (2) therefore ought to fail. (p. 1726 F)

***Conflicting traditional histories***

2. The learned trial judge was therefore right when he discarded the conflicting traditional histories of both sides and applied the principle enunciated in KOJO II V. BONSIE & ORS.<sup>1</sup> (supra) and found in favour of the plaintiffs. The Court of Appeal rightly upheld the findings of the learned trial judge. (p. 1727 E)

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<sup>1</sup> The Supreme Court also considered a similar issue in the following cases: Ige v. Akoju (1994) 7 KLR 37; Emodi v. Kwentoh (1996) 2 KLR (pt 38) 232; Akpan v. Otong (1996) 12 KLR (pt 46) 1986 and Adeyeri v. Okobi (1997) 6 KLR (pt 52) 1188

***Land law - Boundary men***

3. I think we should bear in mind that boundary men should just be treated like any other witness called by a party in a case. A trial court is usually free either to accept or reject the evidence of any witness provided there are sufficient reasons or good grounds for doing so. The learned trial judge has given ample reasons why he disbelieved the testimonies of the boundarymen. I think he was right. The Court of Appeal was equally right to have affirmed that decision. We cannot interfere now since we were not privileged like the trial court to have seen, heard or watched them testify individually in person in court. (p. 1727 G)

**REPRESENTATION**

Miss O. M. Lewis for defendants/appellants  
D R. O. Ogunwole for plaintiffs/respondents

**CASES REFERRED TO**

Mogaji v. Cadbury Nigeria Ltd. (1985) 2 NWLR (Pt. 7) 393 at 430  
E Kojo Bonsie (1957) 1 WLR 1223  
Oko v. The State (1988) 2 SC. (Pt. 1) 140 at 172  
Odofin v. Ayoola (1984) 11 SC. 72 at 106.

F **LEAD JUDGMENT BY KUTIGI JSC**

At the High Court, holden at Ibadan, the plaintiffs' claim as formulated in paragraph 32 of their Amended Statement of Claim is for:-

"(1) Declaration that their entire family are entitled to a Statutory Right of Occupancy in respect of the area in dispute.  
G (2) N400.00 (Four hundred naira) damages for trespass committed by the defendants on the land in dispute.  
(3) Perpetual injunction restraining the defendants, their servants and or their agents or anybody claiming through them from any  
H further acts of trespass."

By paragraph 35 of their Further Amended Statement of Defence and Counter-Claim, the defendants counter-claimed when they averred thus:-

"35. The defendants will at the trial of this action counter-claim for themselves and on behalf of other members of Ojokolobo family as follows:-

(a) Declaration to a Statutory right of Occupancy over that area of land VERGED RED on plan No. AK 2443/OY attached to this Amended Statement of Defence and Counter-Claim. B

(b) The sum of four hundred naira (N400.00) being general damages for trespass committed by the plaintiffs, their servants, agents and privies on the said parcel of land sometime in June, 1980. C

(c) An order of injunction restraining the plaintiffs, their servants, agents, privies or anybody claiming through them from committing any further acts of trespass on the said land."

At the close of pleadings the case proceeded to trial. The plaintiffs called seven witnesses while a total of nine witnesses testified for the defendants. In a reserved judgment the learned trial judge found for the plaintiffs and entered judgment for them. The defendants' counter-claim was dismissed in its entirety. The judgment concluded thus:- D

"In the result, I make the following orders:- E

(1) Declaration that the plaintiffs' family are entitled to statutory right of occupancy to the land in dispute.

(2) N200 general damages for trespass committed by the defendants on the land in dispute. F

(3) Perpetual injunction restraining the defendants, their servants and or agents or anybody claiming through them from committing further acts of trespass.

The Counter-Claim is hereby dismissed in its entirety."

Briefly put the plaintiffs' case is that the land in dispute formed part of a large parcel of land granted by Orowusi to their ancestor Labudana. Labudana used the land for farming purposes. Labudana begat Popoola and Omilana who also succeeded to the land in dispute. Popoola died childless while Omilana got married to Aiyenibu and had Eyinosun for him. Eyinosun begat Aromona who also succeeded to the land in dispute and built a house on it, which she named after herself. That Aiyenubu's second wife begat Ojokolobo, the ancestor of the de G H

pendants. Eyinosun during her life time used to take Ojokolobo to the land in dispute, and when he grew up, a portion was allotted to him for farming purposes only. When Ojokolobo attempted to plant permanent economic trees thereon, he was sent packing. Busuvi Eruola descendant  
B of Ojokolobo who attempted to claim the land had his claim rejected by the head of Orowusi family and the Olubadan of Ibadan. The defendants have now again trespassed on the land in dispute, hence this action.

The defendants on the other hand said that their ancestor,  
C Ojokolobo first settled on the land in dispute. He was succeeded by Eruola and Lamikoro who built houses on the land. Aromona used to sell "akara" balls at a junction near the land in dispute and used to pass the night in Ojokolobo's Village. When Aromona claimed the land she was reported to Akinsola, head of Orowusi family who ordered the removal  
D of Aromona's shed from the land in dispute. They had since enjoyed peace until the plaintiffs instituted this action.

Dissatisfied with the judgment of the High Court, the defendants appealed to the Court of Appeal, holden at Ibadan. Five issues were  
E submitted for determination in that court. The Court of Appeal thoroughly examined all the issues and resolved each and everyone of them against the defendants. Consequently the appeal was unanimously dismissed with costs in favour of the plaintiffs.

Aggrieved by the decision of the Court of Appeal, the defendants have now further appealed to this Court. Counsel on both sides filed and exchanged their briefs of argument in the appeal. These were adopted at the hearing and additional oral submissions were made. The three issues arising for determination which the defendants identified on  
F  
G page 3 of their brief read:-

*"(1) Was the Court of Appeal right in confirming the decision of the trial court to apply the principle laid down by the Privy Council in KOJO V. BONISIE when on the court's own finding there was conflict in  
H the traditional evidence as given by the plaintiffs' witnesses quite apart from the conflict in that evidence with the traditional history as given by the defendants?*

*(2) Can the trial judge pick and choose which of the plaintiffs'*

witnesses he would believe or disbelieve if there is a conflict in the traditional evidence given by these witnesses?

(3) Was the Court of Appeal right in approving of the decision of the trial court to reject the evidence of the boundary men called by the defendants to establish its ownership of the land in dispute?"

Issues (1) and (2) were argued together. The gist of the complaint here is simply that the learned trial judge having found that there was conflict in the traditional evidence led by the plaintiffs ought to have dismissed the plaintiffs' case as laid down in MOGAJI V. CADBURY NIGERIA LTD. (1985) 2 NWLR (Pt. 7) 393 at 430 and that resort cannot be made to the decision in KOJO V. BONSIÉ (1957) 1 WLR 1223 to start looking for acts of possession and ownership exercised by the parties to the dispute in order to test the veracity of the conflicting evidence of tradition given by the plaintiffs' witnesses. That the rule in KOJO V. BONSIÉ (supra) only applies when there is a conflict between the traditional evidence led by a plaintiff on one side, and the traditional evidence led by a defendant on the other side. I entirely agree that the law is as stated above. But the question to ask now is - Did the learned trial judge find any conflict in the plaintiffs' traditional history? The record shows that this problem arose from the comments made by the learned trial judge on only one aspect of the testimony of PW.4. She was one of the seven witnesses called by the plaintiffs in support of their case. The learned trial judge said on page 56 of the record thus:-

*"From the evidence and the pleadings it is clear to me that both parties are relying on:-*

*(1) traditional evidence, and*

*(2) numerous and positive acts of ownership of the land spread- ing over a long period of time. I will consider first the former. The plaintiffs by their pleading traced their title to Orowusi whom they claimed settled their ancestor Labudanu on the land after the cessation of hostilities brought about by the inter-tribal war. See paragraphs 4 & 5 of the Amended Statement of Claim. The story goes on to show that the land passed from Labudanu to Popoola, Omilana, Eyinosun and Aromona who in succession made use of it. The plaintiffs led evidence in support*

*of those pleadings, the only discordant note in respect of these averments was sounded by PW.4 who said in her evidence:-*

*"Aromona was the first settler on the land in dispute."*

B *I shall have more to say about this woman's evidence later in this judgement .....*".

Later on in the judgment, the learned trial judge said:-

C *"While it is true that the latter witness' (meaning PW.4) historical account diverged from that given by other plaintiffs' witnesses, it must be pointed out that it is also at variance with the pleading. The pleading of the plaintiffs is that Labudanu who first settled on the land was put there by Orowusi ..... I would wish to state that on the facts of this case, this particular piece of evidence may not be absolutely at variance with the rest of the story told by the plaintiffs and their*  
D *witnesses as it appears on the surface. She (meaning PW.4) stated that Aromona was the first to build on the land. This in effect may mean that she was the first to live there and as the first to live thereon, she was the first to settle on it. If this view is taken of the evidence, then there is no*  
E *conflict in the evidence given by this witness (meaning PW.4) and the other witnesses for the plaintiffs and the case of MOGAJI V. CADBURY NIGERIA LTD. (1985) 2 NWLR 395 relied upon by Mr. Arasi in support of his submission that the plaintiffs having put forward two historical*  
F *versions in support of their root of title is not entitled to judgment, will not apply."*

**Therefore as to the conflict in the evidence of PW.4 with that of the other witnesses of the plaintiffs as well as the pleadings, I think the learned trial judge was right in resolving that the evi-**  
G **dence of PW.4 was not completely at variance with the pleadings where PW.4 said that Aromona (her grandmother) was the first to settle on the land in dispute. Paragraphs 4, 5 & 22 of the Amended Statement of Claim read:-**

H *"4. The whole area edged Red in plan No. OB4678A originally belong to one Labudanu by settlement during the reign of Orowusi as the Baale of Ibadan 150 years ago.*

*5. Baale Orowusi was one of the great Ibadan warriors who*



settled Labudanu on the land in dispute together with the area edged Red, Labudanu being one of his war-boys.

22. Aromona was in active and effective possession of the land in dispute farming, reaping palm fruits and making palm oil therefrom with her children and a granddaughter i.e. Bolanle Awele, and she also planted more economic trees, founded a village-Aromona village named after her and the whole area including the one edged "Red" is known and called Aromona farmland."

The above paragraphs I believe can only mean that Orowusi granted the land to Labudanu and from the evidence of PW.4, Aromona being the first to settle on the land can only mean the first person to build the first house or settlement on the land in dispute as correctly interpreted by the learned trial judge above. The Court of Appeal was therefore right when it said in the lead judgment:-

*"I agree with the learned trial judge that the plaintiffs did not put forward two conflicting traditional evidence of their root of title."*

I also agree.

The learned trial judge was therefore right when he discarded the conflicting traditional histories of both sides and applied the principle enunciated in KOJO II V. BONSIE & ORS. (supra) and found in favour of the plaintiffs. The Court of Appeal rightly upheld the findings of the learned trial judge. Clearly the trial Court did not pick and choose as demonstrated above which of the plaintiffs' witnesses it would believe or not as alleged in issue (2). Issues (1) and (2) therefore ought to fail.

Issue (3) deals with the rejection of the evidence of boundary men by the learned trial judge and which was confirmed by the Court of Appeal. **I think we should bear in mind that boundary men should just be treated like any other witness called by a party in a case. A trial court is usually free either to accept or reject the evidence of any witness provided there are sufficient reasons or good grounds for doing so.**

The learned trial judge in his judgment said:-

*"The defendants also called the boundarymen to testify in their*

support. One or two of them told the court that when the first plaintiff attempted to serve them with write of subpoena duces tecum they did not accept them because they believed that his family was not the owner of the land. I wish to point out that this is not a good reason for their behaviour because once a witness is served with a process to attend court, he is under a duty to accept it. It does not mean that he is under an obligation to support the case of whosoever subpoenaes him. His duty is to speak the truth in court. In this particular case I believe that they did not accept the process because, come what may, they had made up their minds to support the defendant and not to speak the truth. I do not believe the testimonies of the boundary men that the land in dispute belonged to the defendants."

Confirming the decision of the trial court above, the Court of Appeal said:-

"I agree with the learned trial judge that a witness who is served with a subpoena duces tecum is not under a duty to support the case of the party at whose instance he is summoned. The 3rd and 5th DWs. in their evidence stated that they refused to accept the witness summonses. I also agree with the learned trial judge that this is not a proper thing to do.

But whether the refusal is because they had made up their minds to support the case of the other party is another matter. Since plaintiffs inserted their names in their survey plan as their boundarymen and proceeded to issue witness summons for their attendance, the respondents would not have taken that risk if they had the least doubt that they would come to give evidence which would turn out to be against them.

The learned trial judge who saw and heard the boundarymen as they testified must have formed his impressions about them after appraising their evidence before coming to the conclusion that they did not speak the truth. This court is therefore reluctant to interfere with the finding of the learned trial judge in respect of the evidence of the boundarymen. See OKO & ORS. VS. THE STATE (1988) 2 SC. (Pt. 1) 140 at 172 and ODOFIN VS. AYOOLA (1984) 11 SC. 72 at 106.

Furthermore, it is not only the evidence of the boundarymen

*which a trial court has to consider when dealing with a case of declaration of title to land. The evidence of boundarymen is not conclusive. The Court has to consider it along with other pieces of oral evidence and ascribe probative values to each piece of evidence before coming to its conclusion. In this case, there were other pieces of evidence which the court considered and found in favour of the respondents before granting their reliefs.*

*The evidence of the boundarymen was not decisive of the issues before the court. The location of the land in dispute was not in issue nor were the boundaries. The boundaries or other features of the land were also not in issue."*

**I agree. The learned trial judge has given ample reasons why he disbelieved the testimonies of the boundarymen. I think he was right. The Court of Appeal was equally right to have affirmed that decision. We cannot interfere now since we were not privileged like the trial court to have seen, heard or watched them testify individually in person in court. Issue (3) also fails.**

Having resolved all the three issues against the defendants the appeal fails. It is accordingly dismissed with Ten thousand naira (N10,000.00) costs in favour of the plaintiffs/respondents.

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### BELGORE JSC

This case is entirely based on findings of fact. The evidence of P.W.4 which sounded like a contradiction has been admirably resolved by the trial judge as after all not contradictory. The concurrent findings of fact of the two lower court cannot be assailed having regard to the pleadings and evidence in support. This Court has therefore no reason to interfere with the findings. I also dismiss this appeal as totally lacking in merit. I make the same consequential orders as in the judgment of my learned brother, Kutigi, J.S.C

**OGUNDARE JSC**

I agree entirely with the judgment of my learned brother Kutigi JSC delivered. This being an appeal against a decision based on concurrent findings of fact of the two Courts below the Appellants have an uphill task to satisfy this Court that those findings are perverse. And they having failed to discharge that burden I am left with no alternative but to dismiss the appeal.

I, too, dismiss it with costs assessed at N10,000.00 (ten thousand naira) against the Defendants/Appellants and in favour of the Plaintiffs/Respondents.

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**ONU JSC**

Having had the advantage of a preview of the judgment of my learned brother Kutigi, JSC just delivered, I am in entire agreement therewith that the appeal lacks substance and it therefore fails.

I adopt the same as mine and have nothing further to add thereto except to make the same consequential orders inclusive of costs as contained in the leading judgment.

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**IGUH JSC**

I have had the privilege of reading in advance the leading judgment just delivered by my learned brother Kutigi, J.S.C. and I agree that this appeal is without substance and ought to be dismissed.

The learned trial Judge considered the traditional evidence as well as the other evidence of numerous and positive acts of ownership exercised on the land in dispute and found for the plaintiffs/respondents. His findings were affirmed by the court below. This is a case of concurrent findings of fact by both the trial court and the Court of Appeal. The appellants have been quite unable to establish why the decisions of both courts below should be interfered with. I find that this appeal is without substance and the same is hereby dismissed by me. I abide by the order for costs made in the leading judgment.