

SUPREME COURT OF NIGERIA
18TH SEPTEMBER, 1998. SC.77/1992.
CORAM:- S. M. A. BELGORE, A. B. WALI, I. L. KUTIGI,
M. E. OGUNDARE, E. O. OGWUEGBU, JJSC

OBASI IBENYE & ORS. DEFENDANTS/APPELLANTS
AND
ABRAHAMAGWU & ANOR. PLAINTIFFS/RESPONDENTS

***APPEALS** - Preliminary objection - Alleged error that arose in the court below - Can only be considered before the Supreme Court and not the lower Court.*

***APPEALS** - Preliminary objection - Submission that a ground of appeal is incompetent - Because it complains against concurrent findings - Is not a matter for preliminary objection.*

***APPEALS** - Procedural error - Contention that the lower Court should have considered the appeal first - Because it raised the plea of resjudicata - Is irrelevant.*

***APPEALS** - Retrial - Traditional history in land matter - Where not considered no resolved - Retrial will be ordered.*

***LAND LAW** - Traditional history - Of each side - Where not considered no resolved by the trial court - Retrial ought to have been ordered by the court below.*

***LAND LAW** - Traditional history - Resolving the issue of the parties' rival traditional history - Can only be done by the trial court and not the Court of Appeal.*

***RES JUDICATA** - Subject matter - Identify of the land in dispute - Failure to establish same subject matter - Plea of res judicata was rightly*

rejected.

FACTS

Before the Umuahia High Court, the plaintiff/respondents filed an action in suit No. HU/7/74 against the defendants/appellants claiming declaration of title to the land in dispute, N1,000.00 special and general damages and permanent injunction. Defendants instituted a similar action vide suit No. HU/8/74 against the plaintiffs. The two suits were consolidated. Both sides gave evidence of traditional history. Plaintiffs claimed that the land was founded by their ancestor while the defendants contended that portion of the land was granted to the plaintiffs to build their houses by the defendants' ancestors. The defendants also raised the issue of *res judicata* relying on a native court proceedings in suit JB1/29, Exh. E.

The trial court, without considering or resolving the issue of the parties' conflicting traditional history found in favour of the defendants but dismissed their plea of *res judicata*. Plaintiffs' appeal to the Court of Appeal was allowed while the defendants' cross appeal on the issue of *res judicata* was dismissed. The defendants have now appealed to the Supreme Court raising 3 issues.

ISSUES FOR DETERMINATION

"(a) whether it was proper for the Court of Appeal to have considered and decided on the merits of the appeal, before dismissing the issue of res judicata;

(b) whether the Court of Appeal ought not to have upheld the plea of res judicata;

(c) whether in the absence of a specific finding by the trial Court on the parties' conflicting traditional history, the Court of Appeal erred in not ordering a retrial of the case."

HELD (Unanimously allowing the appeal in part by ordering a retrial per lead judgment of **OGUNDARE JSC**)

Alleged error that arose in the court below

1. The Defendants complain in the appeal before us that the Court below was wrong to decide the main appeal before the cross-appeal as res judicata ought first to be resolved before the merits of the case. It is this complaint the Plaintiffs now say ought to have been raised first in the Court below and not in this Court for the first time. I think this objection is completely misconceived. How could an alleged error that arose in the course of the judgment of the Court below be taken first in that Court? Is it that the said error could have been anticipated? I think it is a matter of common sense that the complaint could only arise in this court. The objection is lacking in substance and it is refused. (p. 2200 B)

Submission that a ground of appeal is incompetent

2. I find no substance also in the objection to ground (ii) of the grounds of appeal. That a ground of appeal complains against concurrent findings of the two Courts below is no reason for saying that such a ground is incompetent. The success or otherwise of such a ground of appeal is a matter to be decided on the merit after the issue formulated on the ground has been argued. It is not a matter for a preliminary objection, moreso that the Defendants were granted leave by this court to argue the ground of appeal. (p. 2200 E)

Appeals - Procedural error

3. Two appeals came before the Court below in this matter. That Court, not being the final Court, had to pronounce on each appeal. I don't think it matters which appeal it pronounced on first. The success of the cross-appeal would not have deprived the court below of the duty to pronounce on the main appeal. See- Balogun v. Labiran (1988) 1 NSCC 1056, 1065. In any event I can see no miscarriage of justice resulting from the court below pronouncing on the merit of the main appeal before determining the cross appeal. I, therefore, resolve issue (a) against the Defendants. (p. 2201 D)

Res judicata - Subject matter

4. The Defendants having failed to establish the identity of the land in dispute in the 1929 case cannot be said to have discharged the burden on them to prove that the subject matter in that action was the same as the land now in dispute. Consequently, their plea of res judicata was rightly rejected by the Courts below. I have no reason to disturb their concurrent finding of fact which I hereby affirm. (p. 2205 H)

Traditional history - Where not considered

5. The learned Justice of the Court of Appeal, in my respectful view, correctly identified the burden on each party to prove its case. Having reached the conclusion that the evidence of traditional history of each side was not considered, let alone resolved, the court below ought to know that the only course open to it was to order a retrial. Omosun J.C.A. specifically found that the trial court -

"Did not consider the case of the respondents (plaintiffs in HU/8?74) and thereby came to a wrong conclusion."

With this finding, how could the court below then properly dismiss the plaintiffs' case in HU/8/74? With profound respect to their Lordships of that Court, they were clearly in error in so doing. This is not just a case where a trial judge failed to make a finding of fact on an important issue but one where the case of one party or the other was not considered at all. (p. 2221 G)

Traditional history - Resolving the issue

6. With respect, it is clearly wrong of the court below to hold, per Omosun JCA, that-

"In short, the traditional evidence of the respondents was unsatisfactory."

What the court below did was to resolve the issue of the rival traditional histories of the parties. It rejected that of the Defendants and accepted that of the Plaintiffs. I cannot see how it could do this when it had not the opportunity which the trial court had, of seeing and hearing the witnesses give evidence. (p. 2222 F)

Appeals - Retrial

7. From all I have been saying above, I must resolve Issue (c) in favour of the Defendants. The issue of the traditional history pleaded by either side is so vital to the resolution of the dispute between them that a failure to consider, let alone resolve, this all-important issue cannot make any adjudication of either suit worth its salt. The proper course is to order a retrial of the consolidated suits. (p. 2223 A)

NOTABLE POINTS OF INTEREST

OGWUEGBU JSC

1. Res judicata- Absence of survey plan in previous suit is not fatal

The defendants failed to relate the land previously in dispute with the land being litigated upon in the present suit. Absence of a survey plan in the previous proceedings is not fatal to the application of the plea of estoppel per rem judicatam but there is absolute need for the identity of the land to be established by clear evidence. See Jack V. Harry (1978) 6-7 SC 159. There is no clear evidence to show that the lands in the two cases were the same. There was therefore no basis for the courts below to treat them as the same and apply the doctrine of estoppel per rem judicatam. I agree with the courts below that the plea failed. (p. 2228 C)

REPRESENTATION

G.U. Peter-Okoye (Mrs) for the Defendants
The plaintiffs are absent and not represented.

CASES REFERRED TO

Balogun v. Labiran (1988) 1 NSCC 1056, 1065.
Nwaneri v. Oriwa (1959) 4 FSC 132;
Alashe v. Ilu (1964) 1 All NLR 390, (1964) ANLR 383;
Esi v. Chief Secretary (1973) 11 SC 189.
Kwadzo v. Adjei 10 WACA 274.
Fasoro v. Beyioku (1988) 2 NWLR (part 76)
Kono 11 v. Bonsie (1957) 1 NWLR 1223
Fadiora v. Gbadebo (1978) 3 S.C. 219

Nwosu v. Udejaja (1990) 1N.W.L.R. (part 125) 188 and
Ikpong and others v. Edoho and other (1978) 2 LRN 29.

STATUTES & RULES REFERRED TO

- B Supreme Court Rules 0. 6 r. 8(6)
Evidence Act ss. 46 & 146

LEAD JUDGMENT BY OGUNDARE JSC

C In suit No. HU/7/74, Abraham Agwu and Onyebuchi Amaechi,
for themselves and as representing Umuohu-Azueke Community of
Ndume-Ebeku sued Onyemakfe Nwakwurube, Odum Awomukwu and
Nmesirionye Obike in the Umuahia Judicial Division of the High Court of
former East Central State, claiming-

D *"(a) Declaration of title to all that lot piece or parcel of land
known as and called 'Okpula Umuohu' situate at Umuohu, Azueke,
Ndume, Ibeku within the Umuahia, Judicial Division - annual rental
value N10.00.*

E *(b) N1,000.00 being special and general damages for trespass
upon the said land.*

*(c) Injunction permanently restraining the defendants, their ser-
vants, agents and/or workmen from further entry upon or interference
with the said land."*

F The defendants were, with leave of court, allowed to defend as repre-
sentatives of the Ihie Community of Ndume-Ibeku. In another action,
HU/8/74 instituted in the same court and about the same time, that is
February 1974, Obasi Ibenye and Nwazue Agbara, as plaintiff, sued Josiah
G Nzeako, Rufus Nwankire, Michael Maduka and Osu Nwagwu, as defen-
dants, claiming-

H *"(a) a declaration of title to the piece or parcel of land known
as and called 'UGWUTE' situate at Ndume Ibeku in the Umuahia Judi-
cial Division with annual rental value of N20.00.*

(b) N1,000.00 damages for trespass to the said 'UGWUTE' land.

*(c) an injunction permanently to restrain the Defendants, their
agents, servants and or workmen from in any way interfering with the*

said land."

Both sides sought and obtained leave of court to sue and defend as representatives of their respective communities, that is, Ihie and Umuohu.

Pleadings were ordered in each case, filed and exchanged. The parties, subject matters and claims being the same, the two actions on B the application and with the consent of counsel for the parties, were by order of court, consolidated with the parties in suit No. HU/7/74 being plaintiffs and defendants respectively in the consolidated suits.

Before trial commenced, learned counsel formulated issues which C the trial court admitted as Exhibit 1. Seven witnesses testified for the plaintiffs and nine witnesses testified for the defence. At the conclusion of evidence the trial court inspected the land in dispute. Learned counsel for the parties addressed the court. In a reserved judgment, the learned trial Judge rejected the plea of re judicata raised by the defendants. He, D however, found the case of the Umuohu-Azueke Community not proved and dismissed their claims in HU/7/74. He found the case of the Ihie Community proved and entered judgment in their favour on their claims as modified by the learned Judge, in these terms: E

"Clearly there is a preponderance of evidence in support of the finding that the ancestors of the plaintiffs in suit No. HU/8/74 i.e. the Ihie people granted parts of their Ugwuete land to the ancestors of Umuohu people to make their homes. This was how the settlement of Umuohu F people in the land in dispute was established. There is no evidence that the Umuohu people extended beyond where they have lived or exercised any acts of ownership beyond that area. Indeed roughly South East of their settlement is a vast area of empty farmland which remains part of G Ugwuete land of Ihie people not granted to the Umuohu people. It includes the area verged pink in defendants' plan Exhibit D. The plaintiffs in suit No. HU/8/74 are entitled to a declaration of title in their favour over all that parcel of vacant land adjacent the houses of Umuohu people and roughly South East of the Umuohu Azueke village settlement. They H will not however for the reasons I have already stated be entitled to a declaration of title to the area where the Umuohu people have their houses in all that area roughly North-West of the vacant portion.

As for damages, nobody from the Ihie side has come forward to say that his crops were damaged. I am not satisfied that the Umuohu people caused any damages. However in view of the posture by the Umuohu people that the land is theirs, I will make an order for permanent injunction restraining the defendants in suit No. HU/8/74 their relations, servants and/or agents from committing any acts of trespass in that vacant part of the land verged pink in their plan roughly South of where they live and which the court has found to be part of Ugwute land of the Ihie people.

In the final result the case of the plaintiffs in suit No. HU/7/74 is dismissed and judgment is hereby entered for plaintiffs in HU/8/74 for declaration of title and permanent injunction as declared above."

The Umuohu community (hereinafter of referred to as the plaintiffs) appealed against the judgment. The Ihie community (hereinafter referred to as the Defendants) also cross-appealed against the dismissal of their plea of res judicata. The Court of Appeal, after hearing learned counsel on the two appeals, dismissed the Defendants' cross-appeal and allowed the Plaintiffs' main appeal. The Court, per Omosun, J.C.A.

"Set aside the judgment for NJIRIBEAKO J. Dated 27th February, 1987 sitting at the Umuahia High Court. In its place, I enter judgment for the appellants as follows:

(i) Customary right of occupancy to that piece or parcel of land known as and called 'Okpula Umuohu' situate at Umuohu Azueke verged pink in Exhibit 'A'

(ii) N1,000.00 special and general damages for trespass.

(iii) Perpetual injunction restraining respondents, their servants or agents from committing further acts of trespass on the said land.

I award costs of N750.00 to the appellants in the Court below and in this Court N1,200.00"

Being dissatisfied with the decision of the court below, the Defendants appealed to this court, after obtaining the leave of this Court to appeal on grounds other than law.

In accordance with the rules of this court, the parties filed and exchanged their respective written briefs of argument.

At the oral hearing of this appeal the Plaintiffs were not represented by counsel. Being satisfied that hearing notice was sent to their counsel several months ago, we proceeded pursuant to Order 6 rule 8(6) of the Rules of this Court, to hear the appeal on the briefs filed by the parties and heard oral submissions from Mrs. Peter-Okoye, learned counsel for the Defendants in expatiation of the points raised in the brief of the Defendants. B

The Plaintiffs, in their Respondents' Brief raised preliminary objections to two of the grounds of appeal dealing with the issues of res judicata. The Defendants filed a Reply Brief in which they responded to the submissions raised in support of the preliminary objections. C

I need set out here the grounds of appeal to which specific objections have been raised by the Plaintiffs. They, without their particulars, read: D

"(i) The Court of Appeal erred in law and made a grave procedural error to the prejudice of the appellants in failing to take the cross-appeal in limine and /or as a threshold question (Res judicata) but rather disposed of the main appeal purportedly on the merits and in effect allowed the main appeal before considering the cross-appeal relating to res judicata. E

(ii) In view of the fact that the Court of Appeal clearly stated that 'The only issue that arose for determination on the plea of res judicata was the identity of the land in dispute in 1929 and the one now in dispute, the finding of the Court of Appeal that the land in the 1929 Native Court cases cannot be identified was manifestly unreasonable having regard to the materials before the Court.' F

On ground (1), it is, contended that as the error in law and procedure alleged, is in effect, that since the cross-appeal related to res judicata, it should have been taken in limine or as a threshold question before dealing with the main appeal. Such issue, it is contended, should have been raised in the Court below and not in this Court for the first time. Plaintiffs cited in their brief a number of authorities. For the Defendants, it is contended in their Reply Brief, that as the error complained of in ground (i) arose in the course of the judgment of the Court of Appeal, the place G H

to complain is in this Court.

I think the Defendants are right. Two appeals came before the Court below, that is, Plaintiffs' appeal on the merits of the case and the Defendants' cross-appeal on res judicata. The two appeals were argued together. The Court below considered in its judgment first the main appeal and pronounced on it and next the cross appeal which it dismissed. **The Defendants complain in the appeal before us that the Court below was wrong to decide the main appeal before the cross-appeal as res judicata ought first to be resolved before the merits of the case. It is this complaint the Plaintiffs now say ought to have been raised first in the Court below and not in this Court for the first time.**

I think this objection is completely misconceived. How could an alleged error that arose in the course of the judgment of the Court below be taken first in that Court? Is it that the said error could have been anticipated? I think it is a matter of common sense that the complaint could only arise in this court. The objection is lacking in substance and it is refused.

I find no substance also in the objection to ground (ii) of the grounds of appeal. That a ground of appeal complains against concurrent findings of the two Courts below is no reason for saying that such a ground is incompetent. The success or otherwise of such a ground of appeal is a matter to be decided on the merit after the issue formulated on the ground has been argued. It is not a matter for a preliminary objection, moreso that the Defendants were granted leave by this court to argue the ground of appeal.

I find the authorities cited by the Plaintiffs in support of their preliminary objections just not apposite. The objections to the two grounds of appeal are hereby dismissed.

Three issues are set out in the Defendants' brief as arising for determination in this appeal. They are:

"(a) whether it was proper for the Court of Appeal to have considered and decided on the merits of the appeal, before dismissing the issue of res judicata;

(b) whether the Court of Appeal ought not to have upheld the plea of res judicata:

(c) whether in the absence of a specific finding by the trial Court on the parties conflicting traditional history, the Court of Appeal erred in not ordering a retrial of the case."

The questions raised in the Plaintiffs' brief raise, in effect the same issues. I shall adopt the issues as set out in the Defendants' brief.

ISSUES (a)

Under issue (a) the Defendants complain that the Court below was procedurally in error to have considered the question of res judicata raised in the cross-appeal before that of the merit of the case raised in the main appeal. It is contended that by the procedure adopted by the Court below it failed to give full consideration to the plea of res judicata relied on by the Defendants. It is further contended that by considering and upholding the merits of the main appeal before it, the court below rendered the consideration of the plea superfluous and its dismissal inevitable.

I see no merit in all these arguments. **Two appeals came before the Court below in this matter. That Court, not being the final Court, had to pronounce on each appeal. I don't think it matters which appeal it pronounced on first. The success of the cross-appeal would not have deprived the court below of the duty to pronounce on the main appeal. See- Balogun v. Labiran (1988) 1 NSCC 1056, 1065. In any event I can see no miscarriage of justice resulting from the court below pronouncing on the merit of the main appeal before determining the cross appeal. I, therefore, resolve issue (a) against the Defendants.**

ISSUE (b)

In paragraph 6(a) of their rather prolix statement of defence in suit NO. HU/7/74, the Defendants pleaded thus:

"6(a). In answer to paragraph 7 of the plaintiffs' Statement of Claim the defendants say that neither the plaintiffs nor their ancestors before them have ever been owners in possession of the land in dispute at any material time, neither from time immemorial nor within living memory.

It is also false that their rights hitherto had never been disputed. In 1925, the predecessors of the plaintiffs laid claim to the land in dispute wherein they committed various acts of trespass including harvesting palm fruits growing on the land in dispute. Chief Nnochiri Agbara the head
 B *Chief of the defendants on behalf of the defendants' people of IHIE sued the plaintiffs' ancestors to the Olokoru Native court in suits Nos. 874 to 877/29, JB 1/29. The Native court declared title to the land in dispute to be in the defendants and awarded damages for trespass against the Plaintiffs' predecessors of UMUOHU. The Defendants shall raise as an issue*
 C *for determination upon the trial of this action that the doctrine of res judicata operates to stop the Plaintiffs bringing this action in respect of the land in dispute. Although no plans were made in that suit in 1929 and although and Plaintiffs' chose to call the land in dispute the false*
 D *name of 'OKPULA UMUOHU' yet the defendants shall show at the trial that the two pieces or parcels of land are one and the same land known as and called 'UGWUTE' the subject matter of the 1929 cases."*

The Plaintiffs' version of the Olokoru Native Court case was
 E pleaded in paragraph 9 of their statement of claim in suit No. HU/7/74. Paragraph 9 reads:

9. The Plaintiffs aver that sometime ago one Nwosu Udo a member of the plaintiffs' village had no money with which to pay the cost of
 F *initiating him into the Okonko Society of Umuohu Azueke and in order to raise the necessary funds he pledged the land verged yellow in the plan filed with this statement of claim to the said Okonko Society Umuohu Azueke in lieu of cash payment and he was so initiated into the said society and he became entitled to all the rights and obligations of the*
 G *said Okonko Society. As time went on the said Okonko Society denied the said Nwosu Udo the rights and obligations which he was hitherto entitled as such member because he had violated one of the rules of the said Okonko Society namely, that a member must have a wife within 5*
 H *years of initiation which he failed to have. As a result of his ban from further participation in the Okonko Society and as a reprisal thereto the said Nwosu Udo went to his mother's brother called Isigwe Mmaju a member of the defendants village of Ihie and handed over the said land*

verged yellow in the plan to him, Isigwe Mmaju and told him to harvest the oil palm trees and other economic trees thereon. The said Nwosu Udo took this step in order to prevent the Okoko Society from entering on the said land and harvesting the oil palm fruits which hitherto the said Okonko Society had been harvesting as a result of the pledge. The plaintiffs B further aver that when Isigwe Mmaju entered upon the land verged yellow and harvest the oil palm fruits thereon the plaintiffs as a reprisal went into the defendants' neighbouring land called 'Ugwute' land on the north-west of the plan outside the area verged green on the said plan and C harvested the defendants' oil palm fruits for which the defendants brought an action against the plaintiffs in the native court, Olokoro in or about 1927 claiming title to the said 'Ugwute' land and obtained judgment. There has never been any court action between the plaintiffs and the D defendants in respect of the portion of the land verged yellow in the plan."

It is clear from the pleadings of the parties that they were not agreed on the identity of the land in dispute in the Olokoro Native Court case. To succeed on the plea raised by the Defendants they must prove that- E

1. The parties in the two cases are the same .
2. That the issues in the two cases are the same.
3. That the subject matter is the same, and
4. That the Court that decided the earlier dispute must be one of competent F jurisdiction.

See. Nwaneri v. Oriuwa (1959) 4 FSC 132; Alashe v. Olori Ilu (1964) 1 All NLR 390, (1964) ANLR 383; Esi v. Chief Secretary (1973) 11 SC 189.

The Olokoro Native court proceedings in suit JB1/29 was tendered in evidence in support of the plea of res judicata raised by the Defendants. After a perusal of the record and the evidence before him, the learned trial Judge found: G

"At the end of the trial the Court found for Ihie people and H declared title to land called 'Ugwute' in their favour. But I have tried to identify from Exhibit E the precise area in question and I must confess that it is impossible to do so. Evidence of the boundaries was imprecise,

true the land in question was 'Ugwute'. The Umuohu people were alleged to have harvested palm fruit in a part of the land. From Exhibit E that part cannot be identified. In the circumstance estoppel per rem judicatam cannot be upheld."

B On appeal, the court below affirmed the above finding. The Defendants have further appealed to this Court.

C Surely, unless the land in the 1929 case was the same as the land now in dispute, the plea cannot succeed. There was no evidence at the trial of the identity of the land in dispute in the 1929 case, other than Exhibit E, the proceedings in that case. As long ago as 1944 the West African Court of Appeal laid down the test to be applied where there is no plan, as in the Olokoro Native Court case, of the land in dispute. In Ate Kwadzo v. Robert Kwasi Adjei, 10 WACA 274. The Court said:

D *"The acid test is whether a surveyor taking the record could produce a plan showing accurately the land to which title has been given."* I am in no doubt that Exhibit E cannot pass that test. The Defendants admitted as much. In their brief it is written:

E *"In their Statement of Claim in suit HU/8/74, the Appellants pleaded boundaries of Ugwute land; see para. 5 p.69 Record. These boundaries are as shown on Exh. C, Plan No. E/GA80/75. The vital question is whether these boundaries tally with those proved in the 1929 case. In 1929, the Plaintiffs' evidence was simply that:*

F *'We have boundary on the land with the people of Umuana Ndume quarter. There is Udo trees on the boundary between our people and Umuana Quarter. We also have boundary with people of Umuezeala and Ohokobe Quarter. There is old road on the boundary between we and them.'*

G Taken by itself, this may not be the epitome of a precise description."

(Underlining is mine for emphasis)

It is, however, argued in the brief that -

H *"..... but when it is noted that the court had found that the parties were disputing over the same area of land; that the Appellants plan showed the existence of these same people on their boundaries; that certain features of the Respondents' plan, Exhibit A (for instance the old*

road on the eastern boundary and the Land of Umuana Udume on the South) tallied with features shown on Exhibit C (the Appellants' plan); it would then be seen that the converse of what the Court of Appeal held is more correct, i.e, that there is nothing to show that the Ugwute land subject of dispute in 1929 is different from that presently claimed by the Appellants. Indeed, the balance of probabilities tilts towards the fact that the area roughly described by the witness, Nnochiri, in 1929 and that shown on the plan No. E/GA80/75 are the same. B

It must be noted that on the pleadings and the evidence the respondents' contention was as follows: conceding that the 1929 case ended in Appellants' favour (see p. 116, lines 17-20). that (1929) case was in respect of 'Ugwute' which land is distinct from 'Okpulo Umuohu.' Therefore, once the Appellants had discharged on balance of probabilities the Onus of showing that "Ugwute' land described by Nnochiri in 1929 is the same as 'Ugwute' land now in dispute, then the onus shifted to the Respondents to show that 'Ugwute' and 'Okpulo Umuohu' are not the same plot. However, in order to do this successfully, the respondents must appeal and argue convincingly against the trial court's findings that 'Ugwute' and 'Okpulo Umuohu' are one and the same plot. Neither of these were advanced before the Court of Appeal." C D E

I think the Defendants completely misconceived the findings of fact made by the learned trial Judge. The Judge found: F

"It becomes very important therefore to keep the correct area in dispute firmly in view. Let me stress that the area in dispute as shown in plaintiffs plan Exhibit A is same area as verged violet in the defendants' plan Exhibit C. The Plaintiffs call it 'Okpulo Omuohu.' The defendants call it 'Ugwute.' It is one and the same parcel of land." G

What the Judge found as being the same was the land marked on Plaintiffs' plan as being in dispute in these proceedings and that shown on Defendants' plan as being in dispute. On Defendants' pleading and plan (Exhibit D) the land they call 'Ugwute' is a much larger area than the land H in dispute in the present proceedings, part of which the Plaintiffs conceded to the Defendants.

The Defendants having failed to establish the identity of

the land in dispute in the 1929 case cannot be said to have discharged the burden on them to prove that the subject matter in that action was the same as the land now in dispute. Consequently, their plea of res judicata was rightly rejected by the Courts below. I have no reason to disturb their concurrent finding of fact which I hereby affirm.

Issue (b) is also resolved against the Defendants.

ISSUE (c)

For their root of title to the land in dispute the Plaintiffs pleaded thus in their statement of claim in HU/7/74:

"4. The Plaintiffs aver that Ohu, one of the, sons of Ndume was the founder of the plaintiffs' village called Umuohu Azueke of which the land in dispute forms part. Ohu had 3 male issues called Okorie, Ndu and Oligho. These 3 sons constituted 3 large families of Umuohu Azueke called Umuowasi, Umuokpo and Amaokwe respectively. The 1st plaintiff belongs to the large family of Umuokpo and the 2nd plaintiff belongs to the large family of Umuowasi. Each and every other member of the community of Umuohu Azueke belongs to one of these 3 large families. When Ohu founded this village of Umuohu Azueke he sent his said 3 sons to live there as will be shown hereinafter. It was the said 3 sons who cleared the virgin forest of Umuohu Azueke and built their dwelling houses and farmed thereon.

5. The plaintiffs aver that apart from Ohu, Ndume who himself was the son of Otuka had other sons namely:- Ana, Lodu, Afia, Ihie, Ohokobe, Ezeala. The villages in which these sons of Ndume lived were named after them, namely - Umuana the capital village of Ndume, Lodu, Umuafai, Ihie, Ohokobe, Umuhute, Ofeke, Umuaroko, Umuezeala, Umuohu also known as Umuohu Okpula to distinguish it from Umuohu Azueke. The plaintiffs village of Umuohu Azueke was an off-shoot of Umuohu Okpula but now a distinct village therefrom.

6. The plaintiffs further aver that many many years ago when other clans of Ibo land used to wage wars against Ndume it became necessary that certain parts of Ndume should be reinforced by posting people there. Ohu contributed his 3 sons named in paragraph 4 of this

statement of claim and quartered them at the place now known as Umuohu Azueke of which the land in dispute forms part. Ana from Umuana village contributed his own people and quartered them at the place now known as Umuhute. Afia from Umuafai village quartered his people at Umuaroko and Ohokobe from Ohokobe village and Ezeala from Umuezeala village quartered their own people at Ofeke. These villages of Umuohu Azueke, Umuhute, Umuaroko and Ofeke are collectively called 'Azueke'. The 4 villages have stretches of lands far beyond their said villages and the plaintiffs' village of Umuohu Azueke has its own communal lands on both sides of the Umuahia-Ikot Ekpene road shown on the plan and particularly on the left hand side of the said road up to and beyond the Fisher High School (formerly called the Government College) down to the stream which crosses this main road. These 4 villages of Azueke including the plaintiffs' village of Umuohu Azueke are distinct villages of Ndume and are entitled to share equally in all things and all rights due to the sons and villages of Ndume and are exclusive owners of the communal lands which they now own, possess and occupy as of right.

7. *The plaintiffs aver that the plaintiffs and their predecessors have been the owners in possession of the land in dispute from time immemorial and that the defendants and the defendants' ancestors have hitherto never disputed the plaintiffs' rights of ownership and possession thereof. As acts of ownership and possession of the land in dispute the plaintiffs live on it, built their houses on it, as shown on the plan filed with this statement of claim. The plaintiffs have been farming on the land in dispute as long as human memory can go and have been harvesting economic trees such as Kolanut, Oil palm, raffia palm, cocoa, pear, Ukwu, Oil bean, plantain, banana trees which they planted thereon or which grew wild without any interruption by the defendants or their forefathers. Here in the land in dispute are found the plaintiffs' shrines, such as 'Iyite shrine' Alaezi Umuowasi shrine' 'Alaezi Umuokpukwu shrine', Ihukamalu shrine' of Umuohu, 'Thuekpe shrine' of Umuohu, 'Thuokonko shrine' of Umuohu, 'Thu Mboko shrine' of Umuohu, 'Ama' Umuohu Azueke."*

The Defendants, for their part, pleaded in their statement of claim in HU/

8/74 as hereunder:

"6. (i) *The plaintiffs who are owners in possession of the land in dispute are the descendants of Ndume. Ndume had four sons namely: Ana the ancestor of Umuana Ndume village, Ohokobe the ancestor of Ohokobe Ndume village, Ihie the ancestor of Ihie Ndume village (the Plaintiffs) and Afai the ancestor of Umuafai Ndume village. Ana, Ihie and Afia were of the same mother while Ohokobe was from a different mother.*

(ii) (a) *The sub villages of Ofeke Ndume, Umuhute Ndume, Lodu Ndume and Umuaroko Ndume came into being during a certain war when for strategic reasons Ndume people decided to station some of their men to guard the gateways leading to Ndume against external warriors.*

(b) *Some Umuana people occupied and settled at a place near Ndume's border with Bende called Umuhu and they later became known as Umuhute Ndume.*

(c) *Some Umuafai people were settled at a place called 'Aroko' and they later became known as Umuaroko Ndume.*

(d) *Some Umuana people were settled at a place called 'Lodu' and are referred to as the people of Lodu Ndume.*

(e) *Some Ohokobe people (which includes Umuezeala Ohokobe, a compound of Ohokobe) and some Umuafai people were settled in a place called 'EFE EKE' and later became known as Ofeke Ndume. The people at Efe Eke were specially to protect a neighbouring village known as Ogbagu which was nearly extinguished by the war and which for the same reason became annexed as a part of Ndume. The lands of Ndume were shared among the children of his two wives with Ana and his two brothers taking one share while Ohokobe took other. The portions belonging to Ana's mother's section was subsequently re-shared among his sons with Ana having the lion share.*

(f) *Ana, Ihie and Afai had common boundaries between them and all share common boundaries with Ohokobe.*

(g) *The land in dispute was Ihie's share of the land at Ugwute with Ana having the remaining portion.*

7. (a) *By Ibeku custom a person could purchase a slave, eman-*

cipate him and make him to belong to his family. This was also the case with respect to war captives who could be re-settled in the home of the captors. The owner of the slave during his life time made grants of land and other property to the emancipated slave since upon his death the slave could not share in his property with his male children, although if he died without an heir, the emancipated slave could inherit his property. B

(b) One of the sons of Ohokobe called Okoro Anyim bought a handsome slave called Akpu from the Area. He emancipated him and settled him on a portion of his land at Ohokobe. He also bought two brothers who were natives of Ahaba near Uzuakoli. One was light and the other was dark in complexion. He called them 'AHABA OCHA' and 'AHABA OJI' to distinguish them and also emancipated and settled them in the same area as Akpu was settled. They all became known as Umuohu Okoro Anyim and existed as part of Umuokoro Anyim of Ohokobe, Ndume. C D

(c) (i) Akpu became the ancestor of Umuakpu Compound of Umuohu

(ii) Ahaba Ocha became the ancestor of the Compound known as Ahaba Ocha in Umuohu; and E

(iii) Ahaba Oji became the ancestor of the Compound known as Ahaba Oji in Umuohu.

8. (a) In the life time of Okoro Anyim, he granted the people of Umuohu other portions of land apart from their place of habitation for example, he granted them a portion of his land at Uzo Eke Ndume, another portion at Efe Eke Ndume and some portion near Eghem land in Ohokobe for farming purposes. F

(b) Some years later, a violent disagreement over ownership of Okeife's 'Okpuaja land' existed among the sons of Okeife Akpu who was one of Akpu's three sons. One of the wives of Okeife (who was the mother of Okpo, Owasi and Okwe Okeife) was accused of using witchcraft and attempting to kill the other sons of Okeife Akpu of different mothers. G H

As this disagreement became very serious and even threatened the lives of Okpo, Owasi and Okwe Okeife and their mother who was to be tried by the Okonko Society for practising witchcraft, they took their

mother and left their old home at Umuohu to found a new home on the land in dispute) granted to their ancestor Akpu at EFE EKE by the late Okoro Anyim of Ohokobe Ndume. This was how the defendants of Umuohu came to live at Efe Eke Ndume near Ofeke. They then became known as Umuohu Ofeke. The defendants referred to their old home at Umuohu Ohokobe as 'Umuohu Okpula' which name it is known even today. It was only a few years ago that the defendants renamed themselves Umuohu Azueke. No Ndume town in the area called Azueke (a nickname for the villages behind the Eke market) attaches Azueke to its name as the defendants have now done. These three sons of Okeife Akpu by the same mother to wit: Okpo, Owasi and Okwe were the founders of the three compounds and families of the defendants namely, Umuokpo, Umuowasi and Amaokwe.

9. As years went by, the population of the Umuohu Ofeke people of the defendants grew by leaps and bounds and there was need for land to build their houses. They approached some Ohokobe people and the Plaintiffs for more lands to build their houses. Some Ohokobe people gave some portions of lands to individual members of the defendants' people of Umuohu to erect their living houses. Those of the Plaintiffs' led by their paramount head one Agbara and later his son Nnochiri Agbara also gave lands to Defendants' people of Umuohu to build their houses. Whenever the defendants' people of Umuohu needed land for farming, the plaintiffs when approached allowed them portions of the land in dispute to farm for the particular farming season. Some of Defendants predecessors who benefited then from the plaintiffs generosity included one Uwaga, Nwankwo, Ukocha, Ogbuji, Nwagwu, Otatu the father of Uwaga, Mbe, Nwammuo, Ikele, Amaechi and Nwosu Udo all of the Defendants' people of Umuohu, Living at Ugwute."

Traditional history is clearly the main basis of the claim of each side to the land in dispute. Evidence was led by each side in support of its traditional history.

In his judgment the learned trial Judge after a review of the evidence led on both sides observed:

"Having disposed of the issue of res judicata I will now proceed

to identify the major issues that emerged from the pleadings. The first is the traditional history of the land. The plaintiffs have asserted that their forebearers moved into the land in dispute in the olden days of tribal or village wars before the advent of the colonial Government. Briefly put, they claim to be part of Ndume stock and that the need arose of Ndume people to strengthen themselves against invaders. B

A strategy was adopted whereby each village of Ndume including theirs- Umuohu sent some of her brave sons to live in their land away from their traditional homes to from the first line of defence as it were in case of invasion. These sons formed the nuclei of villages which later developed from the settlements. This was how their homes were established in the land in dispute the plaintiffs claimed. C

The defendants agree that each village of Ndume, (four in all according to them) sent some of her brave sons to start new settlements to strengthen their flanks as the plaintiffs say but they contend that Umuohu Azueke did not at all have its origins in that way. They alleged that the ancestors of Umuohu Azueke people were emancipated slaves and had not come to Ndume when the sub-villages were established. D E

The second major issue of fact was the assertion by the plaintiffs but denied by the defendants that the Umuohu people have been exercising maximum rights of ownership over the land in dispute including farming on it from time immemorial unmolested and unchallenged." F After recognising on whom the burden of proof lay to prove these two major issues, he observed:

"On the issue of traditional history let it be noted that inspite of the attendant difficulties which may result from facts embedded in the distant past, if accepted, it provides sufficient basis for declaration of title under our law." G

He asked how a court should decide which of two conflicting traditional histories is more probable and therefore ought to be accepted and answered: H

"Happily there is a rule of very sound common sense which provides the proper approach to the assessment and evaluation of traditional evidence. The rule is simply this, where there is a conflict in the

traditional history in a land case, and evidence of traditional history on either side is in conclusive, a trial court should be guided by evidence of acts of ownership in recent times - i.e moving from the known to the unknown - See Lord Denning in the Privy Council case. Kojo v Bonsie

B (1957) 1 WLR 1223 at 1226-7"

The learned Judge quoted the dictum of Lord Denning but rather than apply the test suggested therein to the evidence before him and resolve which traditional history was probable, he, curiously, observed;

C "A lot of heat was generated during the trial of this case over the posterity of Ndume. The controversy was most unnecessary. Indeed it is very irrelevant in this case. Whether the great ancestor of the plaintiffs was Ohu a son of Ndume (as plaintiffs claim) or whether the plaintiffs ancestors were emancipated slaves and so called Umuohu (as defendants say) the fact of the establishment of the plaintiffs' settlement by the plaintiffs' forbearers which became the nucleus for their present village had nothing to do with their status. So, I make no finding whatever on that issue which is not at all a major one in this case." (Underlinings are

E mine)

In effect, he avoided resolving what, in my respectful view, is the most important issue between the parties. That the Plaintiffs are on part of the land in dispute was not the question but how they got there. Did they get there in the manner narrated in their traditional history, that is, as of right?

F Or did they get there as claimed by the Defendants in their traditional history, that is, by permission of the Defendants?

G The learned judge after relieving himself of the duty of resolving the conflict in the evidence of traditional history proffered by the parties, asked:

"So, what is the evidence on how the plaintiffs' settlement was founded?"

H He proceeded to answer this question by reviewing once again the evidence in support of the Plaintiffs' case and concluded:

"I have had to go through the evidence of the witnesses for the defendants very carefully to see if there were elements which support the history pleaded by the plaintiffs as to the origin of their settlement in the

land in dispute. This is so because the plaintiffs will be entitled to draw for support from such evidence. Oduaran & Ors. v. Chief John Asarah & Ors. (1972) 1 AN NLR (pt.2) 137; Akwanta Nwagbogu v. Chief M.O. Ibeziako (1972) vo.2 (pt.5) ECSLR 335 at 338. There was however no support from the defendants'

B

As if making a u-turn, the learned Judge said:

"Before the assessment and evaluation of the evidence of traditional history given by the plaintiffs, it becomes necessary to have another close look at the case which occurred nearly sixty years ago between the Umuohu and Ihie people."

C

At the end of this exercise, the learned Judge concluded:

"The story of Nwosu Udo and the Okonko Society did not at all feature in the 1929 case. Indeed the plaintiffs i.e. Umuohu people have not at all produced any evidence to support paragraph 9 of their statement of claim in suit HU/7.74."

D

Following this conclusion, the learned Judge made a brief assessment and evaluation of the evidence given by the plaintiffs and made a crucial finding without a similar treatment of the case for the Defendants. He said:

"I noticed that when plaintiffs gave evidence as to the origins of their homes in the land in dispute the witnesses PW 1 and PW2 did not in fact link the founding of their village to the strategy of war adopted by Ndume people. They did not in fact give evidence in support of the allegations in their pleadings. I am inclined to accept the evidence of the defendants that where the plaintiffs live was part of Ugwute land which their ancestors granted the plaintiffs' ancestors for dwelling."

G

By this finding, the learned Judge appeared to have tacitly accepted the traditional history of the Defendants without saying so and without applying the test in Kojo v. Bonsie (supra) to which test he had adverted his mind earlier in his judgment.

After findings that plaintiffs were on the Defendants' land by virtue of a grant from Defendants' ancestors, the learned Judge next considered what the plaintiffs did on the land. In the course of this exercise he considered the evidence of PW2, Josiah Nzeako and remarked:

H

"PW2 Josiah Nzeako was concerned to show that Umuohu people are of Ndume stock. As I said earlier the controversy about the posterity of Ndume was not necessary at all. The point is that PW2 did not claim to have farmed in the land neither did he give any evidence of farming activities in the land." (Underlining is mine for emphasis)

This is another indication by the Judge that he was not at all concerned with the Plaintiffs traditional history which he considered unnecessary for his determination of the case. Concluding on Plaintiffs case, the learned Judge found that they did not farm on the land. He said:

"My findings on the two broad themes on which the plaintiffs have fought their case in suit No. HU/7/74 are adverse to the plaintiffs. They cannot therefore, succeed in their quest for declaration of title. Their title remains intact over all that area where they inhabit and which is clearly shown in their plan Exhibit A dotted with their houses. When I inspected the land during the trial I saw the houses of the plaintiffs and their people. They have really been there for generations. It would appear that the grant to them of that area by the ancestors of the defendants was outright and it will be wrong for the leaders of the present generation of Ihie people to pretend otherwise without evidence."

And without any evaluation of the evidence for the Defendants, the learned trial Judge found that they were the original owners of the land in dispute and that their ancestors granted portions of it to plaintiffs ancestor to build. He granted them a declaration in respect of the land less the areas where the plaintiffs "have their homes"

This was the position when the case went on appeal to the Court of Appeal. And the issues to be determined by that Court were:

"(a) Was the Court below right in dismissing the appellants' suit No. HU/7/74?

(b) Did the respondents prove title to the land they claimed in suit No. HU/8/74?

(c) If the answer to issue (b) is in the affirmative was the judgment of the court below awarding the respondents title to land the boundaries of which are unascertainable from the judgment sustainable in law?

The Defendants, in their brief on their cross-appeal, added the following

issues:

"(ii) Was the learned trial Judge justified in holding that the area of land on which the Respondents erected their houses was an outright granted by the appellants to the respondents having regard to the pleadings and the case put forward by the respondents in the consolidated suits? B

(iii) Having regard to the fact that the status of the individuals of the respondents' community of UMUOHU who have buildings on the land in dispute, on the evidence before the learned trial Judge, was that of customary tenants and not land owners whether the learned trial Judge was justified in awarding title to the respondents to the area where those buildings were located. C

(iv) Whether the learned trial Judge was justified in making use of the evidence of the witnesses in EXHIBIT E (Native court cases) in making his finding of fact that the alleged grant to Respondents by the appellants was an outright grant." D

The Court below, per Omosun J.C.A., observed:

"It is plain that at the hearing of the consolidated suits it was not an issue whether the plaintiff farmed and cultivated the said farmland. I share the view of Mr. Anyamene SAN, learned counsel for the appellants that by the rules of pleadings, the issue joined by the parties was whether the appellants and their predecessors cultivated the farmland adjacent to the habitation as of right or by permission of the respondents." E F

After a consideration of the evidence, Omosun JCA observed:

"The learned Judge found the land in dispute to be one parcel of land made up of two portions - the inhabited ones which now is Umuohu village and what he sometimes referred to as the vacant land. In his judgment he granted declaration of title to the respondents except the one inhabited by the appellants. There is evidence UZO OCHIE an ancient foot path separates the two portions of the land in dispute. A look at the plans confirms that the inhabited portion and vacant one are so connected or situated that what is true of the village is likely to be true of the land in dispute which is their farmland. Section 45 has been applied to G H

confirm the claim of a plaintiff where the land in dispute is in the midst and entirely surrounded by other lands belonging to the plaintiff: OKECHUKWU v. OKAFOR (1961) 1 ALL NLR 685, 691. It was also applied to confirm the claim of a plaintiff where the plaintiff owned the land on one side of the road, and there was evidence that plaintiffs' family farmed on both sides of the road: KASALI v. LAWAL (1986) 3 NWLR (part 28) 306, 315. Section 45 is one of the methods of proving title to land: D.O. IDUNDUN & ANR. v. D.E. OKUMAGBA & ORS. (1976) 1 NMLR 200; 210-211. In my view, Section 45 avails them in proof of title to the adjoining farmland - SUNDAY PIARO V. CHIEF TENALO & ANR (1976) 12 SC 31 at pages 43-44." (Underlinings are mine)

The application of section 45 (now Section 46 of the Act and subsequently of section 145 (now Section 146) of the Act in favour of the plaintiffs lost sight of the fact that the plaintiffs must first be proved to be owners of the land on which they have their buildings. That could only be done by resolving the traditional history in their favour. The trial court did not do this. The court below, per Omosun J.C.A. made specific reference to this. He said:

"The respondents pleaded that the plaintiffs were descendants of three (free) emancipated slaves and did not inherit and could not have inherited any land of Ndume who was the founder and original owner of the land in dispute. They testified along these lines page 134 of the printed records. As against this, the appellants pleaded that they are descended from one of the sons of Ndume.

In his judgment at page 185 lines 23-33 and page 186 line 1-4 the learned Judge said:

'A lot of heat was generated during the trial of this case over the posterity of Ndume. The controversy was most unnecessary. Indeed it is very irrelevant in this case. Whether the great ancestor of the plaintiffs was Ohu a son of Ndume (as plaintiffs claim) or whether the plaintiffs' ancestor were emancipated slaves and so called (Umuohu (as defendants say) the fact of the establishment of the plaintiffs' settlement by the plaintiffs forebears which became the nucleus for their present village had

nothing to do with their status. So I make no finding whatever on that issue which is not at all a major one in this case.

At page 197 lines 9-15, the learned Judge held that:

"Clearly there is a preponderance of evidence in support of the finding that the ancestors of the plaintiffs in suit No. HU/8/74 i.e. the Ihie people granted parts of their Ugwute land to the ancestors of Umuohu people to make their homes. This was (how) the settlement of Umuohu people in the land in dispute was established." B

The question that arises is on what basis were the plaintiffs' ancestors granted parts of Ugwute land to build their settlement. By the pleadings and evidence, the appellants as I understand were granted part of the land as emancipated slaves. The court in civil case does not make for a party a case which the party had not made itself: OLANIYAN V. UNIVERSITY OF LAGOS (1985) 2 NWLR (part 9) 599. In my judgment the learned Judge was wrong in not making any finding of fact on the rival conflicting traditional evidence adduced before him. The issue was not the status of the plaintiffs. The issue was, did the ancestors of appellants inherit the land as the sons of Ndume who according to them founded the land or as the respondents say they were allowed to settle on the disputed land as children of emancipated slaves. We are dealing with hard facts and the learned Judge should have made findings, accepted or rejected one of the rival histories about the finding (sic) of the land. With all due respect to the learned Judge, he could not shy away from that duty. C D E F

(underlinings are mine)

Later in his judgment Omosun JCA observed::

"As was said in KOJO 11 V. BONISIE (1957) 1 WLR 1223 per Lord Denning at page 1226 'the best way is to treat traditional history by reference to the facts in recent years as established by evidence of acts and by seeing which of the two conflicting histories is the most probable.' He ignored the traditional history. Where, therefore, did the learned Judge base his finding that subsequent ancestors of the respondents granted parts of their Ugwute land to the ancestors of the appellants to make their homes and that was how the settlement of appellants' people in the G H

land in dispute was established. The learned Judge should not have given judgment on the strength of the traditional evidence alone. It seems to me that in giving judgment for the respondents he should have done that on the basis of evidence of facts of ownership which for many years they alleged they have exercised on the land without protests from the appellant. That would be in accordance with the law as stated in KOJO 11 V. BONISIE above." (Underlinings are mine)

I agree with the observations above on the failure of the learned trial Judge to make a finding on the rival traditional histories set up by the parties. The question to be resolved in this appeal is the effect of such failure. The Defendants contend in this appeal that the Court below, having come to that conclusion, should have ordered a retrial of the case. It is argued by the Defendants in their brief thus:

"..... the Court of Appeal then fell into the same error as the trial court and failed to make a finding on which traditional history to believe. The decision of the case before the trial court depended on which of the parties traditional history to believe. If the trial Court's decision was set aside by the Court of Appeal for failure to decide these conflicting histories, the Court of Appeal could not itself ultimately give judgment in favour of the Respondents herein without first holding as a matter of fact that the said Respondents are descendants of Ndume."

"..... In view of the Court of appeal's understandable reluctance to make a specific finding on the traditional history of the respective parties root of title (which, except for the issue of res judicata, was the most crucial issue at the trial,) the only option left to the Court of Appeal was to order a retrial. Since a decision on the point involved viewing the demeanour of witnesses and judging the impressions which they would make on a court, the making of findings of fact lay pre-eminently within the province of the trial court. In the absence of such findings, the Court of Appeal ought to have ordered a retrial, and erred in failing to do so; See Idika v. Erisi (1988) 2 NWLR (pt. 78) 563, at 572 (1) and 575 (G)."

The Plaintiffs, for their part, argue in their brief as follows:

"The main contention of the appellants on this issue is that

since each of the two lower courts failed to resolve the conflict in the evidence of traditional histories of the two parties, the Court of Appeal should have remitted the case to the High Court for retrial.

Some of the principles relating to resolution of conflict in evidence generally and ordering of retrial due to failure to resolve such conflict may be re-stated for the purpose of dealing with this issue. First, as stated in Atanda v. Ajani (1989) 3 NWLR 511 at 536, see also Solomon v. Mogaji (1982) 11 Sc 1 at 24), if the resolution of conflict in evidence is essential to the just determination of the case, then the proper order is a retrial unless the circumstances do not warrant such an order. Such an order would be warranted where the resolution of the conflict can only be based on the view of the trial judge on the credibility of the witnesses whom he saw and heard for the court of appeal cannot itself make any finding in such a situation (see Okeye v. Kpajie (1972) 6SC 126). It is also trite that demeanour of a witness is no guide to his credibility in evidence of traditional history (Adenie v. Oyegbade (1967) NMLR 136), Kojo v. Bonsie (1957) 1 WLR 1223) contrary to the appellants assertion (See Appellants' Brief of Argument Para. 5.03 lines 5-8, page 6). Rather it is the principles laid down in Kojo v. Bonsie (1957) 1 WLR. 1223) which is to resort to acts of possession and ownership by the parties in more recent time as established by evidence and see which render the corresponding version of traditional history more probable."

I agree with the statement of law in this passage. The Plaintiffs, however, further argue thus:

"The parties in these consolidated suits hoisted their respective cases on traditional history and acts of possession and ownership. The trial judge, not only failed to make important findings from the evidence of the traditional histories, which the Court of Appeal adverted to in the passage cited by the appellants in Grounds 2 page 3 of their Notice of Appeal, but also wrongly, copiously used the evidence of some witnesses in the Olokoro Native Court case of 1929 to discredit part of the traditional history of the respondents (See pp 189-193 of the record). In the circumstance, the rival claims of the parties could not be correctly decided on traditional history. But as these claims could equally be de-

cided on acts of possession and ownership also relied upon by the appellants and the respondents, it was not necessary for the Court of Appeal to resolve the conflict in the evidence of traditional histories or to remit the case for retrial by the High Court so that the said conflicts should be resolved. Evidence of traditional histories being inconclusive, the Court of Appeal was therefore right in considering the other leg of the claim to see in whose favour the presumptions in sections 46, 146, (formerly sections 45, 145 respectively) of the Evidence Act, CAP 112 Laws of the Federation of Nigeria 1990 lie. (See Balogun & Others v. Akanji and Others (1988) 1 NSCC 180 at 196)."

I must correct a statement in the last argument. It is not correct to say that evidence of traditional histories was inconclusive. The correct position is that evidence of traditional histories was not considered at all. And that makes all the difference in this case.

The root of title pleaded by each side is of paramount importance in this case. Both the Courts below recognised this fact. The respective claim to possession of the land in dispute was dependent on each party's traditional history. Each party is a plaintiff who has the burden to prove its case relying on the strength of that case rather than on the weakness of the case of the opposing party. The Court below recognised this fact. For Omosun J.C.A. in his lead judgment, said:

"On the traditional history, I have stated earlier in this judgment what the correct approach ought to be. Both parties are agreed that their ancestors moved into the land in dispute and its environs to provide a first line of defence against invaders. I have also stated that what was in issue and needed to be resolved was that the respondents gave the land to appellants' ancestors as emancipated slaves and that at the time of the movement they had not been bought as slaves and could not have taken part in the movement. The learned Judge held that it was not a major issue in this case and he made no finding whatever on the issue. He found no evidence from the respondents to support appellants' case. He examined next the traditional evidence of the appellants by considering the evidence in the OLOKORO Native Court suits of 1929. I have said this is wrong. The learned Judge in conclusion said:

'I have not bothered myself with the evidence of Ihie people (defendants people). It is not necessary.'

(page 193 lines 1-2)

This clearly means that he did not consider the traditional evidence of the respondents, yet he reached the following conclusion at page 193 lines 15-18:

'I am inclined to accept the evidence of the defendants that where the plaintiffs live was part of Ugwute land which their ancestors granted the plaintiffs' ancestors for dwelling.

On the issue of acts of ownership, the learned Judge said at page 196 lines 23-25:

'Nobody from the plaintiffs' side has come forward to say that he has ever farmed in the vacant portion of the land in dispute.'

It seems to me that the learned Judge did not advert his mind to the fact that this was a representative suit and also that the appellants and their ancestors farming on the vacant portion was not an issue before him. The issue in my view was whether they farmed as of right or by the permission of the respondents. It was for the respondents to prove that appellants farmed on the vacant portion by their permission.

It ought to be pointed out that the respondents were not just defendants in suit No. HU/7/74 but plaintiffs in the cross-action in suit No. HU/8/74. It follows therefore that the respondents had the onus to prove their case and succeed on the strength of its own case not relying on the weakness of the appellants (defendants) case in suit No. HU/8/74. It is apparent that in giving judgment to the respondents, the learned Judge did not evaluate the evidence in support of their case. Consolidation is for purposes of convenience of hearing only and each case has to be considered on its own merit."

The learned Justice of the Court of Appeal, in my respectful view, correctly identified the burden on each party to prove its case. Having reached the conclusion that the evidence of traditional history of each side was not considered, let alone resolved, the court below ought to know that the only course open to it was to order a retrial. Omosun J.C.A. specifically found that the trial

court -

"Did not consider the case of the respondents (plaintiffs in HU/8?74) and thereby came to a wrong conclusion."

With this finding, how could the court below then properly dismiss the plaintiffs' case in HU/8/74? With profound respect to their Lordships of that Court, they were clearly in error in so doing. This is not just a case where a trial judge failed to make a finding of fact on an important issue but one where the case of one party or the other was not considered at all.

I do not understand the dictum of Lord Denning in Kojo v. Bonsie (supra) to mean that demeanour of witnesses is irrelevant in the resolution of conflicts in the evidence of traditional history. What I understand the noble and learned Lord to be saying is that where witnesses Honestly testify as to what has been handed down to them by word of mouth, acts in recent times should be called in aid to resolve the conflict in the evidence of traditional history so given. But a witness may not be honestly telling what he heard from his ancestors. A trial court that seems and hears him must be in a position to determine whether or not he is honest about what he is narrating. This cannot be in the province of an appellate court. Where there is a conflict of evidence which the trial court failed to resolve, as in the case on hand, an appellate court cannot make any findings in such a situation - see: Okoye v. Kpajie (1972) 6SC_176, 187. The proper course is to order a retrial before another judge.

With respect, it is clearly wrong of the court below to hold, per Omosun JCA, that -

"In short, the traditional evidence of the respondents was unsatisfactory."

What the court below did was to resolve the issue of the rival traditional histories of the parties. It rejected that of the Defendants and accepted that of the Plaintiffs. I cannot see how it could do this when it had not the opportunity which the trial court had, of seeing and hearing the witnesses give evidence. In the process it misdirected itself when, per Omosun JCA, it said:

"It is common ground that the ancestors of both moved into the

land and its environs to provide a first line defence against invaders."

There is no such common ground. The case of the Defendants is that the villages had been established before the ancestors of the plaintiffs came onto the scene.

From all I have been saying above, I must resolve Issue (c) B in favour of the Defendants. The issue of the traditional history pleaded by either side is so vital to the resolution of the dispute between them that a failure to consider, let alone resolve, this all-important issue cannot make any adjudication of either suit worth its salt. The proper course is to order a retrial of the consolidated suits. C

Consequently, I allow this appeal and set aside the judgment of the court below. I remit the consolidated suits to the court of trial to be retired by another Judge of that court. D For the avoidance of doubt, the plea of res judicata is no longer available to the Defendants as their appeal on that issue is hereby dismissed.

I award to the Defendants N10,000.00 (ten thousand Naira) costs of this appeal. The costs awarded to the plaintiffs as costs of the appeal E in the court below shall stand but the costs of the trial shall abide the result of the retrial herein ordered.

BELGORE JSC

The learned trial judge considered all the evidence before him except the traditional evidence. He thus arrived at his conclusion without advertng to this all-important aspect of the case before him. This thus puts to question how could he justly arrive at the judgment he delivered without advertng and making definite findings on the traditional evidence. G Whatever the merit of the other findings in the case, the omission on traditional evidence is fatal and the Court of Appeal erred to have overlooked it. The appeal succeeds and for the reasons fully adumbrated by H my learned brother, Ogundare, JSC, I allow it. I also make order for retrial of the consolidated suits before another judge of Umuahia Judicial Division of Abia State High Court. I make the same consequential orders

as in the judgment of Ogundare, J.S.C.

WALI JSC

I have read before now the lead judgment of my learned brother
 B Ogundare JSC and I agree with the reasons for allowing the appeal save
 on the issue of res judicata which is dismissed. I also adopt the conse-
 quential order of retrial of the consolidated cases before another judge,
 that of costs inclusive.

C _____

KUTIGI JSC

I had the privilege of reading in advance the judgment just deliv-
 ered by my learned brother, Ogundare, JSC. I agree with his reasoning
 D and conclusions. It is settled that where a party's root of title is pleaded,
 that root has to be established first before any consequential acts flowing
 therefrom can properly qualify as acts of ownership. (see for example
FASORO & ANOR. V. BEYIOKU & ORS. (1988) 2 NWLR (part 76)
 E 263). Therefore when the plaintiffs/respondents pleaded traditional evi-
 dence as their root of title, they either succeed in proving the traditional
 history or fail. Both the trial High Court and the Court of Appeal having
 failed to make a finding on the rival traditional histories set up by the
 F parties, it was wrong for the Court of Appeal to have turned round to find
 for the plaintiff relying on acts of ownership or acts of possession which
 are acts derivable only from and rooted in the traditional history pleaded
 as the radical title. (See BALOGUN V. AKANJI (1988) 1 NWLR (part
 70) 301).

G A finding the rival traditional histories of the parties is not one that can be
 made by this court. Of course if the rival traditional histories are found
 to be inconclusive, then the test or rule in KONO 11 V. BONSIÉ (1957) 1
 NWLR 1223 will apply.

H I would therefore also in the circumstances allow this appeal
 and remit the consolidated suits to the High Court for retrial by another
 Judge. I endorse the consequential orders made in the said lead judg-
 ment.

OGWUEGBU JSC

The judgment just read by my learned brother, Ogundare, J.S.C. was made available to me in draft. I agree with the reasoning and conclusions arrived at therein. He has set out very clearly the facts of this appeal as well as the submissions made before us. It is only by way of B emphasis that I am making these few points.

On whether the court below should have upheld the plea of res judicata, it is necessary to examine the pleadings of the parties, the evidence and the findings of the courts below on the issue. In paragraph C 6(a) of their statement of defence in Suit No. HU/7/74, the defendants averred as follows:

"6(a) In answer to paragraph 7 of the plaintiffs' Statement of Claim the defendants say that neither the plaintiffs nor their ancestors before them have ever been owners in possession of the land in dispute at any material time, neither from time immemorial nor within living memory. It is also false that their rights hitherto had never been disputed. In 1925, the predecessors of the plaintiffs laid claim to the land in dispute wherein they committed various acts of trespass including harvesting palm fruits growing on the land in dispute. Chief Nnochiri Agbara the head Chief of the defendants on behalf of the defendants' people of IHIE sued the plaintiffs' ancestors to the Olokoro Native Court in suits Nos. 874 to 877/29, JB 1/29. The Native Court declared title to the land in dispute to be in the defendants and awarded damages for trespass against the plaintiffs' predecessors of UMUOHU. The defendants shall raise as an issue for determination upon the trial of this action that the doctrine of 'res judicata' operates to stop the plaintiffs bringing this action in respect of the land in dispute. Although no plans were made in that suit in 1929 and although the plaintiffs' chose to call the land in dispute the false name of 'OKPULA UMUOHU' yet the defendants shall show at the trial that the two pieces or parcel of land are one and the same land known as and called 'UGWUTE' the subject matter of the 1929 cases." H

The Plaintiffs' response to the Olokoro Native Court case is contained in paragraph 9 of their statement of defence in Suit No. HU/8/74 and it reads:-

'9. The plaintiffs aver that sometime ago one Nwosu Udo a member of the plaintiffs' village had no money with which to pay the cost of initiating him into the Okonko Society of Umuohu Azueke and in order to raise the necessary funds he pledged the land filed with this statement of claim to the said Okonko Society Umuohu Azueke in lieu of cash payment and he was so initiated into the said Society and he became entitled to all the rights and obligations of the said Okonko Society. As time went on the said Okonko Society denied the said Nwosu Udo the rights and obligations which he was hitherto entitled as such member because he had violated one of the rules of the said Okonko Society namely, that a member must have a wife within 5 years of initiation which he failed to have. As a result of his ban from further participation in the Okonko Society and as a reprimand thereto the said Nwosu Udo went to his mother's brother called Isigwe Mmaju a member of the defendants' village of Ihie and handed over the said land verged yellow in the plan to him, Isigwe Mmaju and told him to harvest the oil palm trees and other economic trees thereon. The said Nwosu Udo took this step in order to prevent the Okonko Society from entering on the said land and harvesting the oil palm fruits which hitherto the said Okonko Society had been harvesting as a result of the pledge. The plaintiffs further aver that when Isigwe Mmaju entered upon the land verged yellow and harvesting the oil palm fruits thereon the plaintiffs as a reprimand went into the defendants' neighbouring land called 'Ugwute' land on the north-west of the plan outside the area verged green on the said plan and harvested the defendants' oil palm fruits for which the defendants brought an action against the plaintiffs in the native court, Olokoru in or about 1929 claiming title to the said 'Ugwute' land and obtained judgment. There has never been any court action between the plaintiffs and the defendants in respect of the portion of the land verged yellow in the plan." (Underlining is for emphasis).

H From the above pleadings, the identity of the land the subject matter of the 1929 Olokoru Native Court case is in issue and the onus is on the defendants to prove that the UGWUTE land the subject matter of the present proceedings is the same parcel of land litigated upon by the

parties and/or their privies in the 1929 native court cases (Exhibit "E"). To succeed on a plea of res judicata the party relying on it must prove that the parties, the issue, the subject matter in the previous litigation were the same in the action in which the plea is raised, the court that decided the earlier case must be a tribunal of competent jurisdiction and B that the decision is final. See Alashe and others v. Ilu and others (1965) N.M.L.R. 66 and Fadiora V. Gbadebo (1978) 3 S.C. 219.

The defendants tendered the Olokoro Native Court proceedings in Suit No. JB1/1929 through D.W. 1 (Micheal Onyeukwu) as Exhibit C "E" without more. On the plea of res judicata the learned trial judge found as follows:-

"At the end of the trial the court found for Ihie people and declared title to land called "Ugwute" in their favour. But I have tried to identify from Exhibit E the precise area in question and I must confess D that it is impossible to do so. Evidence of boundaries was imprecise, true, the land in question was "Ugwute". The Umuohu people were alleged to have harvested palm fruit in a part of land. From Exhibit E that part cannot be identified. In the circumstance estoppel per rem E judicatam cannot be upheld."

The above finding was affirmed by the court below. The Court of Appeal held as follows :-

" The 1929 case was a Native Court Case not attached to any F plan that does not preclude from operating as res judicata but it must be certain the land it refers to. In my judgment, the learned Judge rightly from a careful examination of Exhibit "E" could not locate the precise area in question. The Onus lies on the respondents to establish the de- G fence of estoppel From the evidence part of the land is in possession of the appellants There is nothing to show that it covers the land in dispute in this case and that is sufficient reason for saying that the plea of res judicata cannot succeed..... I share the H opinion of the learned Judge that the 1927 cases cannot operate as es- toppel in this case."

These are concurrent findings by the courts below and before a declaration of title is given, the land in dispute must be ascertained with

certainty, the test being whether a surveyor can from the record produce an accurate plan of such land. See Kwadzo v. Adjei 10 WACA. 274. This test cannot succeed if applied to the land the subject matter of the 1929 Olokoro Native Court proceedings.

B In a native court proceedings such as this where there are no pleadings, it is trite that what will be material for the court to consider is the substance and not the form. The court looks at the claim, the evidence and the judgment to decide what the substance of the previous suit was. See Nwosu v. Udejaja (1990) 1 N.W.L.R. (part 125) 188 and
C Ikpang and others v. Edoho and others (1978) 2 LRN 29. As I stated earlier in this judgment, what is in issue in this case is the identity of the land in dispute in the Olokoro Native Court Case. The defendants failed to relate the land previously in dispute with the land being litigated upon in
D the present suit. Absence of a survey plan in the previous proceedings is not fatal to the application of the plea of estoppel per rem judicatam but there is absolute need for the identity of the land to be established by clear evidence. See Jack v. Harry (1978) 6-7 SC 159. There is no clear evi-
E dence to show that the lands in the two cases were the same. There was therefore no basis for the courts below to treat them as the same and apply the doctrine of estoppel per rem judicatam. I agree with the courts below that the plea failed.

F The next complaint of the appellants is the failure of the court below to make an order for a retrial of the suit once if found that the trial court failed to make a finding on the crucial issue of which evidence of traditional history to believe. Traditional history was copiously pleaded by both parties and it was the main plank on which their respective cases
G rested apart from the plea of res judicata raised by the defendants. See paragraphs' 4,5, and 7 of the plaintiffs' statement of claim in suit No. HU/7/74 and paragraphs 6, 7, 8 and 9 of the defendants' statement of claim in Suit No. HU/8/74.

H Both parties adduced enough evidence on their respective traditional histories. The plaintiffs' case is that they descended from one of the sons of Ndume. The defendants on the other hand testified that the plaintiffs were descendants of the three emancipated slaves and did not

inherit and could not have inherited the land of Ndume who was the original founder of the land. Both sides claimed that their ancestors moved into the land and its environs to provide a first line of defence against invaders. The learned trial Judge Njiribeako, J. made no findings on the conflicting traditional evidence.

B

On the traditional evidence the learned trial Judge said:

"One major allegation which was strenuously contested by the Umuohu people in the later suit by the Ihie people was the allegation that the Umuohu people are descendants of emancipated slaves. The Ihie people contended that there was no son of Ndume called Ohu, and that Umuohu was the description in Ibo of the emancipated slaves of one of the grandsons of Ndume called Okoro Anyim The case of the defendants is that the land in dispute is part of their land called "Ugwute" bounded as shown in Exhibit "C". The defendants recounted a totally different geneological history of the Umuohu people and denied that there was any sons of Ndume their great ancestor called Ohu. They alleged that Umuohu people are descendants of emancipated slaves, and that their forebears are collectively described in Ibo language as 'Umu-Ohu'....."

C

D

E

Having disposed of the issue of res judicata I will now proceed to identify the major issues that emerged from the pleadings. The first is the traditional history of the land. The plaintiffs have asserted that their forebears moved into the land in dispute in the olden days of tribal or village wars before the advent of the colonial government. Briefly put, they claim to be part of Ndume stock and that the need arose for Ndume people to strengthen themselves against invaders. A strategy was adopted whereby each village of Ndume including theirs- Umuohu sent some of her brave sons to live in their land away from their traditional homes to form the first line of defence as it were in case of invasion. These sons formed the nuclei of villages which later developed from the settlements. This was how their homes were established in the land in dispute the plaintiffs claimed.

F

G

H

The defendants agree that each village of Ndume, (four in all according to them) sent some of his brave sons to start new settlements to

strengthen their flanks as the plaintiffs say but they contend that Umuohu Azueke did not at all have its origin in that way. They alleged that the ancestors of Umuohu Azueke people were emancipated slaves and had not come to Ndume when the sub-villages were established. The second major issue of fact was the assertion by the plaintiffs but denied by the defendants that Umuohu people have been exercising maximum rights of ownership over the land in dispute including farming on it from time immemorial unmolested and unchallenge it is elementary, of course that the burden of proving these facts lies on the plaintiffs. They discharge it as in any civil case on the balance of probabilities based on preponderance of evidence. The question which has to be asked is this - how should a court decide which of two conflicting traditional histories is more probable and therefore ought to be accepted. Happily there is a rule of very sound common sense which provides the proper approach to the assessment and evaluation of traditional evidence. The rule is simply this"

The learned trial Judge correctly identified the two major issues calling for his determination and the onus of proof of the two issues. He equally recognised the rule laid down in Kojo v. Bonsie (1957) 1 W.L.R. 1223 where traditional histories told by the parties are found to be inconclusive or in conflict. He shied away from performing his sacred duty at that point in time and proceeded to hold as follows:

"A lot of heat was generated during the trial of this case over the posterity of Ndume. The controversy was most unnecessary. Indeed it is very irrelevant in this case. Whether the great ancestor of the plaintiffs was Ohu a son of Ndume (as the plaintiffs claim) or whether the plaintiffs ancestors were emancipated slaves and so called Umuohu (as the defendants say) the fact of the establishment of the plaintiffs' settlement by the plaintiffs' forbears which became the nucleus of their present village had nothing to do with their status. So I make no finding whatever on that issue which is not at all a major one in this case."

At this stage, the learned trial Judge failed to make a finding on the crucial issue on which the case was fought by the parties after they had joined issue in their pleadings in respect of it. Having declined to

resolve the issue of how the plaintiffs settled on the land in dispute which was part of their traditional history and which the defendants stoutly denied, he turned round to ask himself:

"So, what is the evidence on how the plaintiffs' settlement was found."

B

He came to the following conclusion:-

"My findings on the broad themes on which the plaintiffs have fought their case in Suit No. HU/7/74 are adverse to the plaintiffs. They cannot therefore succeed in their quest for declaration of title. Their title remains intact over all that area where they inhabit and which is clearly shown in their plan Exhibit A dotted with their houses Clearly there is a preponderance of evidence in support of the finding that the ancestors of the plaintiffs in suit No. HU/8/74 ie the Ihie people granted parts of their Ugwute land to the ancestors of Umuohu people to make their homes. This was how the settlement of Umuohu people in the land in dispute was established."

C

D

It is obvious that the learned trial Judge after recognising and failing to apply the rule in Kojo v. Bonsie (supra) went through the back door to accept the traditional history of the defendants without any evaluation of their evidence. He finally found as follows:

E

"The plaintiffs in Suit No. HU/8/74 are entitled to a declaration of title over all that parcel of vacant land adjacent the houses of Umuohu people and roughly South East of the Umuohu Azueke village settlement. They will not however for reasons I have already stated be entitled to the area where Umuohu people have their houses in all that area roughly Northwest of the vacant portion In the final result the case of the plaintiffs in Suit No. HU/7/74 for declaration of title is dismissed and judgment is hereby entered for plaintiffs in HU/8/74 for declaration of title and permanent injunction as declared above."

F

G

Both parties were dissatisfied with the judgment of the learned trial Judge. The plaintiffs appealed against the dismissal of their claim in Suit No. HU/7/74 and the declaration of title in favour of the defendants in Suit No. HU/8/74. The defendants cross- appealed against the rejection of their plea of res judicata.

H

On the traditional history, the court below stated:

"The question that arises is on what basis were the plaintiffs' ancestors granted parts of Ugwute land to build their settlement. By the pleadings and evidence, the appellants as I understand were granted part of the land as emancipated slaves. The court in civil case does not make for a party a case which the party had not make (sic) itself: Olaniya v. University of Lagos (1985) 2 N.W.L.R. (part 9) 599. In my judgment the learned Judge was wrong in not making any finding of fact on the rival conflicting traditional evidence adduced before him. The issue was not the status of the plaintiffs. The issue was, did the ancestors of the appellants inherit the land as sons of Ndume who according to them founded the land or as respondents say they were allowed to settle on the disputed land as children of emancipated slaves. We are dealing with hard facts and the learned Judge should have made findings accepted or rejected one of the rival histories about the finding (sic) of the land. With all respect to the learned Judge, he could not shy away from that duty."

The court below was quite correct in the above findings. The issue as rightly observed by the court below was not the status of the plaintiffs. The question that called for a determination was how the plaintiffs came by the land in dispute.

The decision of the case before the trial court depended on which of the parties' traditional history to believe. The court below should have proceeded to set aside the decision of the trial court. Instead, it gave judgment for the plaintiffs. It could not have done so. Since the trial court failed to resolve the conflict in the evidence of traditional histories of the parties, the court below should have remitted the case to the High Court for retrial. The lacuna created by the trial Judge can only be put right by a trial court. The learned trial Judge having failed to make a finding on the vital issue in the case, the duty to do so is that of the trial court which saw and heard the witnesses and observed their demeanour. As the resolution of that issue is essential for the just determination of the case, the proper course is to order a retrial. In the instant case, it is in the interest of justice to order a retrial. See Atanda v. Ajani (1989) 3 N.W.L.R. (Part 111) 511 and Solomon and others v. Mogaji (1982) 13 N.S.C.C.

For the reasons stated above and the fuller reasons contained in the judgment of my learned brother Ogundare, J.S.C., I allow the appeal and set aside the judgment of the court below. I also remit the consolidated suits to be retried in the High Court of Abia State. I also agree that B the plea of res judicata is no longer available to the defendants as they have lost their appeal on that issue in this court. I endorse the order as to costs proposed in the lead judgment.

C

D

E

F

G

H

B

C

D

E

F

G

H