

**SUPREME COURT OF NIGERIA**  
8TH JANUARY, 1999. SC. 13/1991  
**CORAM:- M. L. UWAIS CJN, S. M. A. BELGORE,**  
**I. L. KUTIGI, E. O. OGWUEGBU, A. I. IGUH, JJSC**

GBADAMOSI SANUSI OLORUNFEMI & ORS. .... APPELLANTS  
AND  
CHIEF RAFIU EYINLE ASHO & ORS. .... RESPONDENTS

---

***JUDGMENTS*** - Findings on trespass - By the trial court - Which is supported by the pleadings and evidence - Ought not to have been disturbed by the Court of Appeal.

***PRACTICE AND PROCEDURE*** - Pleadings - Parties are bound by their pleadings and the issues joined therein - And the Court must be on its guard not to deviate therefrom.

***TRESPASS*** - Findings on trespass - Consequent upon such findings there must be a verdict of perpetual injunction - And an award of damages

**FACTS**

The plaintiffs/respondents instituted an action in the High Court of Lagos State against the defendants/appellants claiming declaration of title, damages for trespass and an order of perpetual injunction in respect of the land in dispute. The defendants counter claimed. The plaintiffs claimed that they are people of Akesan in Alimo Local Government Area of Lagos State and by virtue of being the first to settle at Akesan their forefathers who came there from Oyo about 300 years ago, named the place Akesan as that was the name of the place in old Oyo they hailed from. They claimed exclusive possession of the land at Akesan. They averred that part of the land now in dispute was subject of a suit in 1918 in which the present defendants were plaintiffs and they the present plaintiffs were defendants. That since the decision in that 1918 suit the respondents\* had kept away from the disputed land until 1983 when they

broke into the land an act of trespass giving rise to the present suit. The defendants on the other hand contended that the ancestors of the plaintiffs were their customary tenants, paying customary rents by way of "Ishakole" regularly until their death. Several years ago. As against the averments of plaintiffs that "Akesan" was the name of the place of their Origin in Old Oyo, the defendants aver that their own direct ancestor was the person known and called "Alawe Akesan" and he it was that first "pitched tent" at a place now known and called Akesan village and being a centre of commerce it was popularly called "Oja Alawe Akesan" meaning "Alawe Akesan Market." As for the suit of 1918 the judgment never vested anything in the present plaintiffs as they never counter-claimed. The present defendants who were then the plaintiffs merely failed to prove their case and at any rate the land in 1918 suit is not the same as the one now in dispute.

At the conclusion of hearing, the learned trial judge, Onalaja J (as he then was) held that the plaintiffs never proved their case and dismissed it in its entirety. The defendants' counter claim for a declaration of customary right of occupancy and an order for perpetual injunction against the plaintiffs were granted. He dismissed the claim for damages for trespass because according to him the defendants predicated their case on the basis that the plaintiffs were their customary tenants. The parties appealed to the Court of Appeal; the plaintiffs against dismissal of their claim and against the award of the counter-claim of defendants; the defendants against refusal of award of damages for trespass. The Court of Appeal again confirmed the decision of the trial court except the order of injunction which was set aside. The defendants have now appealed against this decision to the Supreme Court raising three issues.

#### **ISSUES FOR DETERMINATION**

*"(1) Whether the court below did not misdirect itself in that basis for dismissal of defendants' cross-appeal was not an issue joined by the parties at the close of pleadings.*

*(2) Whether the defendants/appellants conceded from their testimony that the plaintiffs/respondents were their customary tenants in respect of the land in dispute.*

(3) *Whether the court below decided the case on an issue not pleaded by the defendants/appellants and an issue categorically denied by the plaintiffs/respondents."*

**HELD** (Unanimously allowing the appeal per lead judgment of **BELGORE JSC**

***Practice and Procedure - Pleadings***

1. Of importance also is that throughout the pleadings customary tenancy was not the main issue between the parties, rather it was who had better title to the disputed land, and that was the crux of the matter. Parties are bound by their pleadings and the issues joined therein (Oji v. Adejobi & ors.) (1978) 3 SC 65, 75; Aseimo & ors. v. Amos & ors. (1975) 2 SC 57,68; Otuaha Akpapuna & Ors. v. Obi Nzeka II & Ors. (1983) 7 SC I, 24). The Court must be on its guard so that it will not deviate from the case made by each party in the pleadings, otherwise it will unwittingly be making for parties an entirely new case <sup>1</sup> (Ibanga and Ors. v. Chief Edet Usanga (1982) 5 SC 103, 124, 130. (p. 34 D)

***Judgments - Finding on trespass***

2. There is clear evidence upon the pleadings that the plaintiffs trespassed into the disputed land, which the trial judge rightly found. Unless the finding of the trial Court on fact is not supported by pleadings and or evidence, the appellate court should not interfere (Ogbu v. Ani (1994) 7 NWLR. (Pt. 355) 128; Nwoke v. Okere (1994) 5 NWLR (Pt. 343) 159). If the findings of trial court are not perverse or against the evidence or supported by pleadings the appellate court must not substitute its views on those facts as found by the trial court (Ogbuokwelu v. Umeanafunkwa (1994) 4 NWLR. (Pt. 341) 676). There is no reason why the findings on trespass by the trial court should be disturbed by the court of Appeal as the pleadings of the defendants and their evidence in support, rightly believed by trial court, support the findings. (p. 34 G)

---

<sup>1</sup> The Supreme Court reached the same decision in the following cases: Okoya v. Santili (1994) 6 KLR 1 and Umokoro v. NPA (1997) 5 KLR (pt. 51) 959

***Trespass - Findings on trespass***

3. Both the trial court and the Court of Appeal recognized from historical evidence that the appellants had always been the overlord and the plaintiffs/respondents broke into the land in dispute. There ought to be a finding in trespass which the trial court did. Consequent upon findings in trespass there must be a verdict of perpetual injunction asked for. Similarly for the trespass there must be an award of damages. (p. 35 B)

**NOTABLE POINT OF INTEREST**  
**OGWUEGBU JSC**

*1. It is not open to the court to make out a case different from that before it*

Having predicated their case on res judicata and issue estoppel and having categorically denied that they were customary tenants of the defendants, it was not open to the courts below to make out for the plaintiffs a case which is different from that which they had put forward before the court. See Adeniji & Ors. v. Adeniji & Ors. (1972) 4 S.C. 10 at 17 and Adebanjo v. Brown (1990)3 N.W.L.R. (Pt.141) 661. The court below with respect was in gross error when it vacated the order of injunction made by the learned trial judge and upheld the order of the learned trial judge dismissing the claim for damages for trespass when the plaintiffs did not deny the act of trespass complained of by the defendants. (p. 38 A)

**REPRESENTATION**

O. Ayanlaja SAN with Miss B. O. Ajayi for the Appellants  
Tani A Molajo Esq. for the Respondents

**CASES REFERRED TO**

Ogbu v. Ani (1994) 7 NWLR. (Pt. 355) 128  
Nwoke v. Okere (1994) 5 NWLR (Pt. 343) 159  
Oji v. Adejobi (1978) 3 SC 65, 75  
Aseimo v. Amos (1975) 2 SC 57,68  
Akpauna v. Nzeka (1983) 7 SC I, 24)

Ibanga v. Usanga (1982) 5 SC 103, 124, 130  
 Okpala v. Dereke - Solar (1986) 4 SC 141, 189,193  
 Olatunji v. Adisa (1995) 2 NWLR (Pt. 367) 167  
 Lipede v. Sonekan (1995) 1 NWLR. (Pt. 374) 668.  
 Adeniji v. Adeniji (1972) 4 S.C. 10 at 17  
 Adebanjo v. Brown (1990)3 N.W.L.R. (Pt.141) 661

B

### **LEAD.JUDGMENT BY BELGORE JSC**

The land in dispute in this case is clearly defined in the two plans tendered at trial Court by each party. The plaintiffs (now respondents in this Court) tendered Exhibit 1, (Plan No. JOD/70/85) and the area in dispute on it is verged blue as pleaded in their statement of claim. The defendants (now appellants) pleaded the plan which was admitted at trial as Exhibit 5 and the areas in dispute on it are verged in blue and red. Plaintiffs claimed damages for trespass and an order of perpetual injunction in respect of the land in dispute,. At the conclusion of hearing learned trial judge, Onalaja, J. (as he then was) found as a fact that the land in dispute in Exhibit 1, of the plaintiffs' plan, is the same as that shown in Exhibit 5 - the defendants ' plan, thus the identity of the land in dispute is clear. The plaintiffs claimed title to the land. It is pertinent for better appreciation of the positions of the parties at the trial to set out the historical background relied upon by each party.

C

D

F

The plaintiffs claimed they are people of Akesan in Alimoso Local Government Area of Lagos State and by virtue of their earlier settlement at Akesan by their forefathers who came there from Oyo about 300 Years ago, they named the place Akesan as that was the name of the place in old oyo they called from. They claimed exclusive possession of the land at Akesan which "they used partly for building their houses and largely for hunting, farming and occupational uses." They claimed part of the land now in dispute was subject of a suit in 1918 in which the appellants were plaintiffs and present respondents were plaintiffs and present respondents were defendants. In that suit Olorunfemi Oje and Eyinle Asho represented Akesan people, but they lost the suit. That since the decision in that 1918 suit the defendants had kept away from the

G

H

disputed land until 1983 when they broke into the land, an act of trespass giving rise to the present suit resulting in this appeal.

The appellants, as defendants, counter-claimed after traversing all the claims of the plaintiffs. In their statement of defence they pleaded that the ancestors of the plaintiffs were customary tenants of the defendants, paying customary rents by way of "Ishakole" regularly" until their deaths several years ago". As against the averments of plaintiffs that "Akesan" was the name of the place of their origin in old Oyo, the defendants aver that their own direct ancestor was the person known and called "Alawe Akesan" and he it was that first "pitched tent" at a place now known and called Akesan Village and being centre of commerce for neighbouring villages or settlements, it was popularly called "Oja Alawe Akesan" meaning "Alawe Akesan market." As for the suit of 1918 the present defendants were the plaintiffs with the present plaintiffs as defendants but they never counter-claimed and the judgment never vested anything in the present plaintiffs.

They (present defendants) merely failed then to prove their case and at any rate the land in 1918 suit is not the same as the one now in dispute. The defendants (now appellant) then proceeded extensively in their counter-claim to plead their traditional history - genealogy, family branches, tenants, acts of possession over several years from last century, and indicated who their boundary men on the land were. They finally asked for declaration of right of occupancy over the land now in dispute, damages for trespass and order of perpetual injunction.

After exhaustive consideration of the evidence and the pleadings before him, learned trial judge, Onalaja J (as he then was) came to the conclusion that the plaintiffs never proved their case and dismissed it in its entirety. He held that there was no dispute as to the identity of the land in issue between the parties and that the land litigated upon in 1918 was not the parcel of land now in dispute. On preponderance of probability he believed the defendants and held their case in their counter-claim proved believing their clearly set out traditional history, acts of possession including farming, occupation, and authority on the land very convincing. He therefore granted their counter -claim as right to customary right of

occupancy, and perpetual injunction, though he declined award of damages for trespass because, according to him, Defendants postulated their case on the basis that plaintiffs were their customary tenants.

The parties appealed to Court of Appeal; the plaintiffs against dismissal of their claim and against the award of the counter-claim of B defendant; the defendants against refusal of award of damages for trespass. Each party filed a brief of argument. The plaintiffs main issue was:

*"Can the defendants obtain a perpetual injunction against the C plaintiffs who have been found to be customary tenants of the defendants against whom a claim for damages for trespass has been dismissed?"*

The defendants on their own formulated the following issues for determination:-

*"1. Whether or not the learned trial judge was right in holding D the view that the Defendants/ counter-claimants have (sic) predicated their case on the fact that the plaintiffs are (sic) their customary tenants in respect of the area verge RED on the plan Exhibit 5.*

*2. Whether or not the Defendants/Counter-claimants have (sic) E proved their averment that the plaintiffs/Appellants are (sic) trespassers on the area verged RED in the plan tendered as Exhibits 5,*

*3. Whether or not the learned trial judge was right in refusing to award damages in favour of the Defendants/Counter-claimants in the F above matter."*

The issues as formulated, I must say, clearly narrowed down the areas of dispute and dissatisfaction with the trial court's decision. Court of Appeal dismissed the appeal of the plaintiffs except the order for injunction which was set aside following the dismissal of the cross-appeal on damages for trespass. The court concluded as follows:- G

*"(i) The appeal of the appellants against the judgment of Onalaja, J, in respect of the appellants' claim in suit No. ID/505/85 at the Ikeja High Court of Lagos State is hereby dismissed, H*

*(ii) The appeal of the appellants against the order for injunction in respect of the counter - claim restraining the appellants from 'committing further acts of trespass' is hereby allowed.*

(iii) *The order of injunction made by the lower court is hereby set aside.*

(iv) *The cross-appeal of the respondents in respect of damages for trespass is also hereby dismissed". (Pages 489-490 of the Records).*

B Against this decision the defendants have appealed and plaintiffs respondents also cross-appealed. Both appeals were struck out on 16th January 1995 - the appellants' for incompetence because leave was needed to the appeal and no leave was obtained; the cross-appeal for want of prosecution. On 29th March 1995 this court on application granted extension of time and leave to appeal to defendants, and the Notice of Appeal was duly filed on 18th April 1995, Both parties filed their briefs of argument. It is pertinent for better appreciation to set out the issues formulated by each side.

D For Defendants/Appellants.

"(1) *Whether the court below did not misdirect itself in that basis for dismissal of defendants' cross-appeal was not an issue joined by the parties at the close of pleadings.*

E (2) *Whether the defendants/appellants conceded from their testimony that the plaintiffs/respondents were their customary tenants in respect of the land in dispute.*

F (3) *Whether the court below decided the case on an issue not pleaded by the defendants/ appellants and an issue categorically denied by the plaintiffs / respondents."*

For Plaintiffs/Respondents

"1. *Whether the appellants proved their averment that the respondents are (sic) trespassers on the land in dispute.*

G 2. *Whether the appellant can obtain damages for trespass and, in consequence thereof, a perpetual injunction against the respondents whom the appellants allege to be their customary tenants.*

H 3. *Whether the Appellants' counterclaim was competent as it was brought in a representative capacity in spite of the averment that the land in dispute has been partitioned.*

4. *If the answer to issue No. 3 above is in the negative, whether the court of trial had jurisdiction to try the Appellants' counter-*



claim."

It must be stated clearly that the Plaintiffs/Respondents right from trial court to court Appeal predicated their claim on title, outright title, and res judicata based on 1918 suit which present defendants lost. Trial court dismissed this claim of the plaintiffs and court of Appeal B found no reason to interfere with this decision when it held:-

*"Suffice to say that on the fact before the lower court in this case and the law of estoppel per rem judicatem the finding of the lower court that the appellants cannot avail themselves of the plea of res judi- C cata cannot be disturbed"*

Having dismissed the case of the plaintiffs in its entirety by holding that they had no title and that title was in the defendants, and as title was plaintiffs main claim, one would not think learned trial judge would be under any difficulty finding in trespass and to award damages. His D reason for refraining from finding in trespass was because defendants alleged plaintiffs were their customary tenants. But the same court granted perpetual injunction, according to him, "to protect the defendant/counter-claimants and save them from future litigations as the land in dispute is E clearly identifiable in Exhibit 5".

The plaintiffs, since 1918 litigation when they were defendants, never did anything on the land not until 1981. According to Defendants, since time immemorial they never lost title or possession of the land in F dispute as pleaded by them at paragraphs 48 and 49 of their amended statement of defence and also gave evidence. The paragraph reads:-

*"48 The family of the counter-claimants were farming on the respective land partitioned to them until sometime in December 1981 G after the promulgation of the land use Decree when the plaintiffs started to boast to the hearing of the defendants that they would drive the counter-claimants away from the land in dispute to which the counter -claimants inherited from their ancestors and which land had been in physical pos- H session of the counter-claimant and their ancestors from time immemo- rial".*

*"49 In furtherance of this boast, the plaintiffs attempted to extend their farming activities beyond the area conceded to the plaintiffs*

34 Olorunfemi v. Asho (1999) 1 KLR Belgore JSC  
by trespassing on the land in dispute. The defendants resisted their acts  
of trespass and resistance had resulted in frequent fighting."

B It is true that land use Act caused a lot of confusion and apprehension in its early years. Many tenants held the belief that they had become owners since they were in possession. They have been proved wrong in their assumptions as the Act as more of management legislation than devolution on tenants. However, it must be pointed out that nowhere in their pleadings did the defendants ever that plaintiffs were their tenants on the land in dispute, they might be on other parts of the large  
C land outside the one in dispute, The plaintiffs were tenants in area verged green (not in dispute) as tenants of defendants in Exhibit 5:, they however encroached on the area in dispute which has always been in exclusive possession of appellant / defendants. That is area verged red.

D **Of importance also is that throughout the pleadings customary tenancy was not the main issue between the parties, rather it was who had better title to the disputed land, and that was the crux of the matter. Parties are bound by their pleadings and the**  
E **issues joined therein (Oji v. Adejobi & ors. ) (1978) 3 SC 65, 75; Aseimo & ors. v. Amos & ors. (1975) 2 SC 57,68; Otuaha Akpapuna & Ors. v. Obi Nzeka II & Ors. (1983) 7 SC I, 24). The Court must be on its guard so that it will not deviate from the case made by each party in the pleadings, otherwise it will unwittingly be making**  
F **for parties an entirely new case (Ibanga and Ors. v. Chief Edet Usanga (1982) 5 SC 103, 124, 130; Okpala & Anor. v. Dereke - Solar (1986) 4 SC 141, 189,193, Olatunji v. Adisa (1995) 2 NWLR (Pt. 367) 167: Lipede v. Sonekan (1995) 1 NWLR. (Pt. 374) 668.**

G **There is clear evidence upon the pleadings that the plaintiffs trespassed into the disputed land, which the trial judge rightly found. Unless the finding of the trial Court on fact is not supported by pleadings and or evidence, the appellate court should not interfere (Ogbu v. Ani (1994) 7 NWLR. (Pt. 355) 128; Nwoke v. Okere (1994) 5 NWLR (Pt. 343) 159). If the findings of trial court are not perverse or against the evidence or supported by pleadings the appellate court must not substitute its views on those facts as found**  
H

Olorunfemi v. Asho (1999) 1 KLR Belgore JSC 35  
by the trial court (Ogbuokwelu v. Umeanafunkwa (1994) 4 NWLR.  
(Pt. 341) 676).

There is no reason why the findings on trespass by the trial court should be disturbed by the court of Appeal as the pleadings of the defendants and their evidence in support, rightly believed by trial court, support the findings. Both the trial court and the Court of Appeal recognized from historical evidence that the appellants had always been the overlord and the plaintiffs/respondents broke into the land in dispute. There ought to be a finding in trespass which the trial court did. Consequent upon findings in trespass there must be a verdict of perpetual injunction asked for. Similarly for the trespass there must be an award of damages.

I therefore allowed this appeal and restore substantially the judgement of trial court set aside by Court of Appeal. I however award nominal damages of N3,000,00 to the appellant for the trespass.

I award the costs of N10,000,00 as against the respondents in this appeal.

---

#### UWAIS CJN

I have had the advantage of reading in draft the judgment read by my learned brother Belgore, JSC, I agree with him that this appeal has merit and that it should be allowed,

For the reasons contained in the said judgment I too hereby allow the appeal and adopt all the consequential orders therein.

---

#### KUTIGI JSC

The learned trial judge found as a fact that the land in dispute is the areas verged 'blue' in Exhibit I of the plaintiffs and the area verged 'red' in Exhibit 5 of the Defendants. He also found as a fact the land litigated upon in 1918 is not the same piece of land in dispute now.

The plaintiffs' claims were dismissed by the Court. This was confirmed by the Court of Appeal, The Defendants' counter-claim for a

declaration of customary right of occupancy and an other for perpetual injunction against the plaintiffs were granted. He dismissed the claim for damages for trespass because according to him the Defendants predicated their case on the basis that the plaintiffs were their customary tenants. The Court of Appeal again confirmed the decision except the other of injunction which was set aside.

The problem here as I see it is simply whether the Defendants from their pleadings could be said to have predicated their counter-claim in respect of the land in dispute that the plaintiffs were their customary tenants.

A close reading of the pleadings show that the Defendants stated that the plaintiffs' ancestors were the customary tenant's of the Defendants' ancestors in respect of the land verged "green" in Exhibit 5, and that the plaintiffs have now left the area verged "green" in Exhibit 5, and trespasses into the area verged "red" in Exhibit 5 now in dispute in this case. The plaintiffs on their own part pleaded as well as contended that they could never be Defendants' tenants on the land in dispute settled upon by their ancestors.

Both the trial High Court and the Court of Appeal were therefore wrong to have held that the Defendants predicated their counter-claim on the plaintiffs being their customary tenants.

It follows therefore that the learned trial judge having properly granted Defendants declaration of customary right of occupancy and an order of injunction, they must be entitled to their claim for damages for trespass as well. The Court of Appeal was therefore wrong to have set aside the order for injunction and to have affirmed the order of the High Court dismissing the claim for damages for trespass..

I observed on page 282 of the record where the learned trial judge had indicated that he would have awarded the Defendants nominal damages of N2,000.00 for trespass. I think that figure is adequate enough.

The appeal therefore succeeds, and it is hereby allowed.

The judgment of the Court of Appeal is set aside while that of the trial High Court is restored with the additional order that the Defendants are awarded N2,000.00 (two thousand Naira Only) being nominal

damages for trespass against the plaintiffs. The defendants are entitled to the costs of their appeal which are fixed at N10,000.00..

It is for the above reasons that I agree with the lead judgment of my learned brother Belgore, JSC which I read before now.

B

### OGWUEGBU JSC

I have had the opportunity of reading in draft the judgment which has just been delivered by my learned brother belgore, J.S.C and I find myself in complete agreement with it. C

The plaintiffs/respondents predicated their case on the plea of estoppel per rem judicatam and issue estoppel. The learned trial judge Onalaja, J. (as he then was) dismissed their claims. He also dismissed the defendants' counter-claim for damages for trespass but granted a declaration of customary right of occupancy and injunction in their favour. D

The learned trial judge found that the plea of estoppel per rem judicatam and issue estoppel did not avail the plaintiffs. The court below affirmed this finding of the learned trial judge that the plea of res judicata and issue estoppel raised by the plaintiffs failed. E

The reason given by the learned trial judge for dismissing the claim for damages for trespass was not borne out the pleadings and the evidence led by the defendants. It was not the case of the defendants that the plaintiffs were their customary tenants in respect of the area in dispute verged "Red" in their survey plan Exhibit "5". The defendants maintained that the plaintiffs were their customary tenants in the area verged "Green" in Exhibit "5". The plaintiffs did not claim to be customary tenants of the defendants in respect of the land in dispute. The made their position clear in paragraph 19 of the amended statement of claim which reads: F G

19. *The plaintiffs further deny paragraphs 20, 23, 24, 30, 32, 33, 36, 37, 38, and 40 of the statement of the counter-claim and avers that they can never be tenants on the land settled upon by them as owner and in respect of which the defendant (sic) and their ancestors have lost in the said suit No.23 of 1918."* H

Having predicated their case on res judicata and issue estoppel and having categorically denied that they were customary tenants of the defendants, it was not open to the courts below to make out for the plaintiffs a case which is different from that which they had put forward before the court. See Adeniji & Ors. v. Adeniji & Ors. (1972) 4 S.C. 10 at 17 and Adebanjo v. Brown (1990)3 N.W.L.R. (Pt.141) 661. The court below with respect was in gross error when it vacated the order of injunction made by the learned trial judge and upheld the order of the learned trial judge dismissing the claim for damages for trespass when the plaintiffs did not deny the act of trespass complained of by the defendants.

For the above reasons and the fuller reasons set out in the judgment of my learned brother, Belgore, J.S.C. I hereby allow the appeal and adopt all the consequential orders made in the lead judgment inclusive of the order as to costs.

---

### IGUH JSC

I have had the privilege of reading in draft the leading judgment just delivered by my learned brother, Belgore, J S.C, and I am in entire agreement that there is merit in this appeal.

For the same reasons as are contained in the said judgment, I, too, allow this appeal and abide by the same consequential orders, including those as to costs therein made.

G

H