

SUPREME COURT OF NIGERIA
29TH JANUARY, 1999. SC. 229/1992
CORAM:- M. L. UWAIIS CJN, I. L. KUTIGI, M. E. OGUNDARE,
E. O. OGWUEGBU, A. I. IGUH, JJSC

1. OBA JOSEPH O. OYEDELE FASIKUN II	DEFENDANTS
(The Olunisa of Inisa)	APPELLANTS
2. ADEGBOYE ABORISA	
3. GABRIEL ADEBIMPE	
4. CHIEF DAVID ADEYEMI (Ologa of Inisa	
For themselves and on behalf of Inisa Community)	
AND	
1. OBA SAMUEL M. O. OYELEYE OLURONKE II	
(The Olokuku of Okuku)	
2. CHIEF JACOB AKINPELU	PLAINTIFFS/
(Osolo of Akunyun, Okuku)	RESPONDENTS
3. BUSARI (head of Bandooyo family, Okuku)	
4. SAMUEL ABIOYE ODUOYE	
(For themselves and on behalf of Okuku Community)	

JUDGMENTS - Finding - Which is patently perverse - As it is not borne out by the evidence - Must not be allowed to stand.

JUDGMENTS - Order - To be made where plaintiffs fail to prove their case - Is to dismiss it - There is no jurisdiction to refer it to the Boundary Settlement Commission.

LAND LAW - Trespass and injunction - Where from the pleadings the issue of title to the land in dispute was involved - For plaintiff to succeed they had the burden to show a better title to the land.

LAND LAW - Survey Plans - Location of the land in dispute - The plans cannot over ride the evidence of the witnesses.

FACTS

The plaintiffs/respondents for themselves and on behalf of Okuku community sued the defendants/appellants for themselves and on behalf of Inisa Community claiming damages for trespass and perpetual injunction in respect of the pieces or parcels of land known as Kookin and Akunyun. The Defendants referred to the land simply as "Akunyun". The Plaintiffs pleaded their traditional history. Contrary to the traditional history the plaintiffs pleaded, the evidence given by their witnesses as well as defence witnesses established the fact that Kookin, Akunyun and Inisa existed as separate settlements before the Ijesha Arara war. As a result of this war, Kookin and Akunyun were destroyed. The people of Kookin who survived the war moved northwards and founded the present day Okuku. The people of Akunyun took refuge in Inisa where they formed various compounds and families and continued after cessation of hostilities to farm on their homestead till this day. The evidence for the plaintiffs on the location of the land in dispute as between the old settlements of Kookin and AKUNYUN was full of contradictions but the evidence of the 2nd plaintiff, the head of the Akunyun people asserted positively that the land in dispute was Akunyun. Defence witnesses claimed that the land in dispute was Akunyun. While the plaintiffs claimed to have exercised acts of ownership over the land in dispute, the defendants on the other hand maintained that the area is not a community land but owned by individual families which form part of Inisa community and need no grant from Okuku people before they farm there as it belongs to them absolutely. It was the various owners that gave the defendants consent to enter the land for the siting of Inisa Technical College, hence the present dispute.

At the conclusion of the trial the learned trial judge (Ige J., as she then was) found that the plaintiffs failed to establish the exact area of what constituted Akunyun, nor were they in exclusive possession. She also found that the plaintiff's failed to establish exclusive possession of the land in dispute since there were some occupiers of the land who had never paid tribute (Ishakole) to anyone and who had better claims to exclusive possession than the plaintiffs. Instead of dismissing the plain-

tiffs' claims, the learned trial judge non-suited the plaintiffs and referred the dispute to the Boundary Settlement Commission of Oyo State for determination. As both the defendants and the plaintiffs were dissatisfied with this decision they appealed and cross-appealed respectively to the Court of Appeal, Ibadan Division, which in a unanimous decision dismissed the defendants' appeal but allowed that of the plaintiffs. It proceeded to enter judgment for the plaintiffs in terms of their claims for damages for trespass and perpetual injunction. The defendants still dissatisfied, appealed to the Supreme Court raising a lone issue. The plaintiffs also raised a lone issue.

ISSUE FOR DETERMINATION

"Whether the court below was right not to have entered judgment of dismissal of the Respondents' (plaintiffs') claims in view of all the facts and circumstances of this case."

OR

"Did the Appellants in fact trespass upon the plaintiffs' land known as Kookin and Akunyun and was the court below not right in holding that the Respondents proved their case for trespass and injunction against the Defendants?"

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

Trespass and injunction

1. True enough the claims at the trial were for trespass and injunction but it is clear from the pleadings that the issue of title to the land in dispute was involved and the learned trial Judge, in my respectful view, was right in so holding. For plaintiffs to succeed, therefore, they had the burden to show better title to the land in dispute. (p. 147 H)

Judgments - Finding

2. It is clear that the evidence for the Plaintiffs on the location of the land in dispute as between the old settlements of KOOKIN and AKUNYUN was a bundle of contradictions and confusion. One piece of evidence that appeared straightforward was that of the 2nd Plaintiff who said that

the land in dispute was AKUNYUN. On the strength of the evidence, one cannot see how it could be said that -

"it seems quite clear from the evidence that the land in dispute is Kookin"

B Nor that "it is common ground that the land in dispute is Kookin". If this were Plaintiffs' case there would be no need to bring in 2nd plaintiff as a party. This finding of the Court below is patently perverse as it is not borne out by the evidence. And since the judgment of the Court below is based on this erroneous finding, I agree with Mr. Kehinde Sofola SAN that it must not be allowed to stand. (p. 153 D)

Land law - Survey plans

D 3. Chief Chukura SAN relied on the plans to show that the finding was correct. With respect, I cannot share this view. The plans cannot override the evidence of the witnesses. And there is nothing in the plans to show the locations of the two settlements of Kookin and Akunyun vis-a-vis the land in dispute. (p. 153 H)

E

Judgments - Order

F 4. In the light of such overwhelming evidence against Plaintiffs' case, I cannot see what is left of it. They have been found not to be in exclusive possession of the land. They have failed woefully to prove better title to it. The finding by the learned trial Judge that

"..... from the evidence before me (that) both the plaintiffs and the Defendants have genuine and concrete claims over the land in dispute"

G does not flow from the other findings of the learned Judge nor from the evidence on record. That finding was reached, in my respectful view, to justify the learned Judge's abdication of her duty to adjudicate in the matter. She shied away from dismissing Plaintiffs' case as the logical conclusion of her findings, and would rather want another body the Boundary Settlement Commission, to arbitrate between the parties. This attitude is wrong. There is no jurisdiction in the High Court to refer a case before it to the Boundary settlement Commission for adjudication.

The Plaintiffs, having failed to prove their case, the proper order for her to make was to dismiss it. By the position she took she ended up not satisfying either party. (p. 154 D)

NOTABLE POINTS OF INTEREST

B

IGUHJSC

1. Claim for trespass to land is rooted in exclusive possession

It is trite law that generally speaking, a claim for trespass to land is rooted in exclusive possession. All that a plaintiff needs, therefore, to establish to succeed in such a claim is that he has exclusive possession or the right to such possession of the land in dispute. However, once the defendant asserts ownership of such land in dispute, title thereto is automatically put in issue and the plaintiff, to succeed, must establish a better title than that of the defendant. See Pius Amakor v. Benedict Obiefuna (1974) 3 S.C 67. So, too, where an action in trespass to land is coupled with a claim for perpetual injunction, as in the present suit, the title of the parties to such land is automatically put in issue. See Alhaja Akintola v. Madam Lasupo (1991) 3 N.W.L.R (part 180) 508 515 Kponugbo v. Kodadja 2 W.A.C.A. 24. (p. 160 C)

2. Findings of fact amply supported by evidence

It cannot be disputed that the evaluation of evidence and the ascription of probative value to such evidence are the primary functions of a trial court which saw, heard and assessed the witnesses. Where, therefore, a trial court, as in the present case, clearly evaluated the evidence of the parties and justifiably appraised the facts, it is not any business of the Court of Appeal to substitute its own views of the facts for those of the trial court. See Akinloye and Another v. Eyiola and others (1968) N.M.L.R 92 at 95, etc. Once, as in the present case, there is sufficient evidence on record from which the trial court made its findings of fact, the appellate court cannot interfere. See Akpagbue v. Ogu (1976) S.C. 63, etc. In the case on hand, the findings of fact made by the learned trial judge were amply supported by the evidence before the court. With profound respect to the Court of Appeal, I am unable to find any justifi-

cation on its part for disturbing those findings as a result of which it was able to enter judgment for the respondents in the suit. It is clear to me that the court below was in error to have found for the respondents inspite of the aforementioned solid findings of fact made by the trial court against them. (p. 162 C)

3. *A court must not grant to a party a relief which he has not sought*

There is finally the issue of reference of the suit to the Boundary settlement Commission of Oyo State by the trial court. With due respect to the learned trial judge, I am unable to identify any reason for referring the suit to the Boundary Settlement Commission. Nobody applied for such an order. Besides, it is settled law that a court must not grant to a party a relief which he has not sought or which is more than he has sought. See Ekpenyong v. Nyong (1975) 2 S.C. 71 at 81 - 82, etc. I think that the trial court was in error when it referred the case to the Boundary Settlement Commission of Oyo State in the face of its findings to the effect that title to the lands known as kookin and Akunyun were in dispute in the action, that the respondents failed to establish the precise area of land they claimed, that the respondents were unable to establish exclusive possession of the lands in dispute and that the respondents' traditional evidence as to their ownership of the land in dispute was vague and inconclusive. (p. 163 B)

REPRESENTATION

Kehinde Sofola, SAN with H. Akpan (Miss) for the appellants
Chief O. Chukura, SAN with J. A. Oyegoke and chief O. A. Ogundeji for the Respondents

CASES REFERRED TO

Amakor v. Obiefuna (1974) 3 S.C 67
H Alhaja Akintola v. Madam Lasupo (1991) 3 N.W.L.R (part 180) 508 515
Kponugbo v. Kodadja 2 W.A.C.A. 24
Akinloye v. Eyiola (1968) N.M.L.R 92 at 95
Enang v. Adu (1981) 11-12 S.C. 25 at 39

Woluchem v. Gudi (1981) 5 S.C. 291 at 320

Akpagbue v. Ogu (1976) S.C. 63

Odofin v. Ayoola (1984) 11 S.C 72

Amadi v. Nwosu (1992) 5 N.W.L.R. (part 241) 273 at 280

Ekenyong v. Nyong (1975) 2 S.C. 71 at 81 - 82 B

Olurotimi v. Ige (1993) 8 N.W.L.R. (Part 311) 267 at 271

Makanjuola v. Balogun (1989) 3 N.W.L.R. 192 at 206

STATUTES REFERRED TO

Supreme Court Act, Cap. 424 s. 22 C

Local Government and Community Boundaries Settlement Law, Cap. 67,
Laws of Oyo State, 1978, s.5

LEAD JUDGMENT BY OGUNDARE JSC

By a writ of summons filed on 30th September 1982, the plaintiffs (now Respondents before us) sued the defendants (now Appellants) claiming-

"(1) N10,000.00 (Ten Thousand Naira) being damages for trespass in that the Defendants since April 1982 entered into the land owned beneficially and in possession of the plaintiffs' community of Okuku, parts of which are known as and called Kookin and Akunyun, within the jurisdiction of this Court, cut traces, destroyed crops therein took surveyors thereof and generally behaved in a manner which challenged the beneficial title and possession of the plaintiffs over the land.

(2) Perpetual injunction restraining the Defendants, their servants and or agents from henceforth entering into the said land or committing or continuing the acts of trespass complained of or any other acts of trespass." G

The writ was subsequently, by order of court, amended whereby the Defendants were sued "for themselves and on behalf of the Onisa community." Thus the action was between the two communities of Okuku H and Inisa.

Pleadings were filed and exchanged. Because of the issue raised in this appeal, I need to set out the penultimate paragraphs of the plead-

ings of the parties. In their statement of claim, the plaintiff pleaded the traditional history they relied on in paragraphs 3-14. They read:

"3. The land in dispute known as Kookin and Akunyun are shown in the plan No. FA 11, 580 dated 25th March, 1983 made by A.O. Adegbogun Esquire, Licensed Surveyor, attached to this statement of claim, is a portion of Okuku land and has been owned beneficially by the Okuku Community from time immemorial.

4. Kookin, the original settlement of the progenitors of the plaintiffs (founded by one Oladile) was a large town and in fact the only large town in the area, before the Ijesha Arara War (about 1760), during which war the plaintiffs' ancestors were dispersed.

5. After the War the Surveyors regrouped and they resettled at the northern end of Kookin under the leadership of Oba Jala Okin and farmed at Kooki and Akunyun. Remains of Kookin were for a long time visible on the land.

6. To the North-East boundary of Kookin, one Ijabe a younger relation of Oba Jaja Okin settled some others of the surveyors at Ijabe whilst Elende, another younger relation of the Olokuku, settled other surveyors at the Southern end of Kookin, called Eko-Ende.

7. The Okuku Community (of Ife Origin) in the area now known as Odo-Otin Central Local Government Area of Oyo State, have since these early days remained in uninterrupted possession of the land in dispute, exercising thereon unlimited rights of ownership and performing maximum acts of possession.

8. One Esa a senior chief of Olokuku was expelled from Okuku for some customary misbehaviour and was allowed to settle on the farmland of the Olokuku, which later became known as Inisa (Ohun in Esa: Esa's property). To date the Esa is still traditionally held to be one of the Chiefs of the Olokuku even though that vacancy has remained unfilled at Okuku.

9. After the said War, there was an influx of immigrant elements into Okuku mostly from the north: such as wood carvers from Oje under the leadership of Otebolaje; Apa, the founder of Aworo-Otin compound in Okuku; Tela Oloko, the founder of Oloko compound and Winyomi,

the founder of Oluode compound to mention a few. Each group was permitted to retain the chieftaincy title it enjoyed where it came.

10. Otebolaje of Oje who married Oladile's daughter called Lalubi was given the Chieftaincy title of Odofin.

11. The land that abutts Esa's land (i.e. Inisa) was the farm of an illustrious Okuku Chief, the Osholo, ancestor of the second plaintiff, of Akunyun family and to this day, the second plaintiff has maintained his abode both at Okuku and at Inisa town and farms on the land in dispute. The second plaintiff is a Chief of Okuku and receives his stipend from Okuku.

12. Apart from the Akunyun family other Okuku families also farm on portions of the land in dispute such as Alawe, Odogun, Osolu, Aro and Alao, to mention a few.

13. The Defendants acknowledge that the land in dispute known as Kookin and Akunyun by the plaintiffs and referred to simply as Akunyun by the Defendants is owned by the Okuku Community and the plaintiffs will found on;

(i) a part writing by the first Defendant dated 18th January, 1979;

(ii) Tradition and History;

(iii) Rendering of traditional tribute in cash and kind by Inisa Community to the Okuku Community during the annul Olokuku festival;

(iv) A paper writing dated 2nd July, 1929 by which the Olukuku Oba Oyekunle complained to the Assistant District Officer, Oshogbo that the Bale of Inisa had not rendered the requisite tribute;

(v) The duty of maintaining the footpath from Inisa to Okuku was borne by the Inisa Community, a burden which acknowledges the ownership of land through which the path passes as residing in Okuku. In proof of this acknowledgement;

14. Whereas, Okuku has had six Obas who reigned at Kookin (i.e. from Oba Oladile to Oba Ijala Okin who reigned both at Kookin and at Okuku) before 1760, the Inisa community did not appear on the scene until after the Ijesha Arara War. Thereafter eleven other Obas have reigned at Okuku up to and including the first plaintiff.

For their acts of ownership and possession, they pleaded thus ;

15. The Okuku Community in exercise of its rights of ownership has never ceased to farm on the entire land in dispute and has made grants of portions thereof as follows:

B *(a) To the C.M.S. Church Inisa for temporary use by LATE Oba Oyinlola Edun II, Olokuku of Okuku (1934-1960) on which the grantees have planted Cashier and palm-trees.*

C *(b) To the Inisa Muslim Community for temporary use as YIDI, praying ground, by the late Oba Oyekunle Oyekanbi II, the area of which was later extended by the late Oba Olaosebikan Oyewusi II (Olokuku of Okuku 1961 to 3rd March 1980).*

(c) To Imam Alao of Inisa by the late Oba Oyinlola Edun II.

D *(d) To Asuamu family of Inisa by the late Oba Oyekunle Oyekanbi II and another parcel by Oba Oyinlola Edun.*

(e) To Idi Otin family of Inisa by the late Oba Oyekunle Oyekanbi II.

E *(f) To Olode-Okuta family of Inisa by the late Oba Oyewusi I, following the marriage of Osolo's daughter to that family.*

(g) Bandoyo Camp, (now in ruins) and farmland granted to one Busari (Bandoyo) by the late Oba Oyinlola Edun II.

F *(h) Alagbede family through Osolo by late Oba Oyinlola Edun II.*

16. Several members of the plaintiffs' community farm on the land in dispute for food crops as well as economic crops such as palm-trees, Kolanut trees, cocoa, bananas, cocoyams."

They alleged in paragraphs 19 to 29 the acts of trespass complained of.

G The Defendants, for their part, pleaded in reply:-

H *"3. The Defendants deny paragraphs 3, 5, 6, 7, 8, 9, 10,11,12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30 of the plaintiffs' Statement of Claim and put the plaintiffs to the strictest proof thereof.*

4. With further reference to paragraph 3 of the plaintiffs' Statement of Claim the Defendants aver that those parcels of land described as Kookin are in fact owned by various families who with others form the

Inisa Community. Such families are Ajala, Ipe-Aronfesu, Olode Okuta, Idi-Otin, Olukotun, Seuramu, Ariwoola, Alogbo, Fanto, Gudugudu, Bunmikeji, Abede etc.

5. *These families inherited their various parcels of land from their ancestors who derived their titles from one Ooku the founder of Inisa.* B

9. *The Defendants further aver that since the grant by Ooku the founder of Inisa or his descendants to the ancestor of the families referred to in paragraph 4 above they including the present members of the family had been and are still in possession of their various parcels of land cultivating them and exercising acts of ownership over them without any disturbance.* C

10. *The Defendants aver that they were placed into possession of the area verged violet on Plan No. OG.675/83 by the various owners for the siting of Inisa Technical College.* D

11. *The Defendants aver that the descendants of Oyegbebi are now important members of Inisa Community who take active part in any development project undertaken by Inisa Community. They exercise various acts of ownership over their land.* E

12. *With further reference to paragraph 4 of the plaintiffs' Statement of claim the Defendants state that while Kookin was founded before the Ijesha Arara War, the area occupied by the founder one Oladile did not extend to the area indicated as Kookin on plan No. FA 11580 on 25th March, 1983 as Inisa Town and other settlements were already in existence before the founding of Okuku Town.* F

13. *The defendants aver in reply to paragraph 8 of the plaintiffs' statement of claim that one Esa expelled from Okuku never settled at Inisa or that Inisa was coined from 'Ohun Ini Esa' Inisa was in fact founded by Ooku and she has retained that name since Ooku founded it.* G

14. *The defendants aver that the children and followers of Oyegbebi partitioned their father's farm verged blue on plan. No. OG 675/83 into three, each of them became absolute owners of his share hence the 2nd plaintiff exercised absolute acts of ownership over his own share.* H

15. The defendants aver with reference to paragraph 13 of the statement of claim that Akunyun land is VERGED BLUE on plan No. OG/675/83 and it is owned by Akunyun people while the area described as Kookin land is owned by the founder of Kookin and it is outside the land in dispute.

16. With further reference to paragraph 14 of the plaintiffs' statement of claim the defendants aver that Kookin and Okuku are two separate settlements founded by distinct individuals. In fact Kookin was founded shortly before the Ijesha Arara War while Okuku was founded after the said war whereas the Inisa settlement had been in existence before any of these two towns was founded

17. With further reference to paragraph 15 of the plaintiffs' statement of claim the defendants say that the area is not a community land and Okuku Community could not have exercised acts of ownership over it. The area is owned by individual families which form part of Inisa Community and need no grant from Okuku people before they farm there as it belongs to them absolutely.

20. The Defendants deny maintaining any footpath from Inisa to Okuku but state that Inisa Community maintained the footpath from Inisa to the end of their boundary with Okuku people.

22. The Defendants state that the area verged RED on plan No. OG.675/83 belongs to them absolutely, their ancestor Ooku having acquired the area by settlement over 300 years ago while the area verged BLUE belongs absolutely to Akunyun people who now live at Inisa and are members of Inisa community.

23. With further reference to paragraph 19 of the Plaintiffs' Statement of Claim the Defendants state that they entered the land in dispute with the consent of the true owners but denied destroying any economic trees therein. In fact the various owners of the area verged violet were physically present at the site with the Defendants." (underlining are mine)

They further pleaded that the owners of the land in dispute granted the same to the Inisa Community for the siting of the proposed Technical College.

Plaintiffs filed a reply to the statement of defence which con-

tained denials of some averments in the defence.

The case proceeded to trial at which evidence was led on each side. At the conclusion of evidence and after addresses by learned counsel, the learned trial Judge, in a considered judgment, found -

1. That Okuku was an offspring of Kookin. B
2. That Inisa was founded as a separate town just as Okuku was founded.
3. That Akunyun was a different settlement from Kookin.
4. That Kookin was an older settlement than Okuku and it was the Arara Wars that scattered the people of Kookin to go up north and found Okuku. C
5. That the Plaintiffs have not been able to establish the exact area of what constitutes Akunyun.
6. That the Plaintiffs were not in exclusive possession of the land in dispute. D
7. That the traditional evidence of the plaintiffs as to ownership of Akunyun land was rather vague and inconclusive.
8. That the claims of Asuamu, Olode-Okuta, Suamu, etc. over Akunyun land are strong and genuine and they have better claims to exclusive possession than the Plaintiffs. E

Having made the above findings which are essentially against the Plaintiffs, the learned trial judge, in a turn around, found:

"Moreover most of the buildings marked Yellow in Exhibit 'A' are so near Inisa town and some of them had been in existence long before 1982, some 10 years, others 12 years, that the matter calls for a permanent boundary settlement.

Also those people who once farmed on Akunyun and Kookin lands and later went to settle in Okuku and Inisa should have the question of ownership of their previous farmlands permanently resolved.

The question of jurisdiction over an area is different from the issue of ownership of land.

The concept of land tenure a native law and custom is very clear. Community land belongs to all the members of the community or village where everyone has a right. The head of the Community or Oba holds all

the land in trust for the community (with due deference to the provisions of the land Used Decree) - See the case of Ajao v. Ikolaba (1972) 5 SC p. 58.

*I am satisfied from the evidence before me that both the plain-
B tiffs and the Defendants have genuine and concrete claims over the land in dispute but the extent of each side's claim can only be determined by a Boundary settlement Commission because the Claims are inter-woven.*

*In view of previous records of boundary issues between Okuku
C and Iba, Inisa and Ekoende, and in view of the fact that this action had been taken in the names of two Communities - Okuku and Inisa, I consider that this is a proper case to be referred to the Boundary settlement Commission of Oyo State.*

*Rather than dismiss the Plaintiffs' Claims, I shall non-suit them.
D Plaintiffs are therefore, non-suited. Case is referred to Bound-
ary Settlement Commission of Oyo State."*

*Both parties were dissatisfied with the trial Court's judgment and
appealed to the Court of Appeal. The Defendants appealed on three
E grounds of appeal, to wit:*

*"(i) The learned trial Judge erred in law when she ordered a
non-suit without calling for address of both counsel for the parties.*

*(ii) The learned trial Judge erred in law in making an order
F transferring the case to the Boundary Commission as part of her judg-
ment.*

*(iii) The learned trial Judge erred in law and on the fact when
she failed to award costs to the Defendants/Appellants."*

The particulars are omitted.

*G The plaintiffs also appealed upon the ten grounds of appeal which,
without their particulars, read:*

*"1. The learned trial Judge erred in law in entering a non-suit
without calling upon the parties or giving them an opportunity to address
H the Court on the propriety of entering a non-suit.*

*2. The learned trial Judge erred in law in referring the case to
the Boundary Settlement Commission of Oyo State when there was no
claim or request therefor and the parties were not given the opportunity*

of addressing the court thereon.

3. The learned trial Judge erred in law in abdicating its duty of deciding the case made before her on the writ, the pleadings and the evidence when she held.

'I am satisfied from the evidence before me that both plaintiffs B and the Defendants have genuine and concrete claims over the land in dispute but the extent of each side's claim can only be determined by a Boundary Settlement Commission because the claims are interwoven.'

4. The learned trial Judge erred in law in failing to grant the claims of the plaintiffs when the claims were proved by preponderance of C evidence.

5. The learned trial Judge misdirected herself in law and on the facts when she held:

'I am of the view that these families who had (been) in posses- D sion of the site for the proposed Technical College and the Yellow buildings in Exhibit 'A' ought to have been made parties to this suit specifically especially when 1st Defendant did not make secret of those he alleged had granted him land as Inisa people on Akunyun land.' E

6. The learned trial Judge misdirected herself in law when she held:

'If it is true that those people were granted land by the Olokuku for temporary use, then their landlord has a right to forfeit their tenancy F that is why an action for forfeiture ought to have been taken against them directly.'

7. The learned trial Judge misdirected herself in law and on the facts as follows:

'I agree with counsel for the plaintiffs that the Statement in Ex- G hibit 'D' by the 1st Defendant is no doubt a Statement against his interest but the claims of those families I have referred to above are so strong and I believe them to be genuine that 1st Defendant's acknowl- edgment of Olokuku's jurisdiction over Akunyun land cannot bind these H people This has made the traditional evidence of the plaintiffs as to ownership of Akunyun land rather vague and inconclusive.'

8. The learned trial Judge misdirected herself on the facts when

she held:-

'The plaintiffs have not been able to establish the exact area of what constitutes Akunyun 1st plaintiff said he knew the people farming on Akunyun land but he did not know the original area of the land granted to the first Akunyun. How then does he know what land constitute Akunyun in exhibit 'A' .

9. The learned trial Judge erred in law in falling to grant the reliefs of Trespass, Damages and perpetual injunction claimed by the plaintiffs when:

(i) The Defendants admitted the title of the plaintiffs by at first asking for land from the plaintiff, and the plaintiffs title to the land was otherwise proved;

(ii) the Defendants in their pleadings (paragraphs 10, 23, 24, 25, 26, 27, 28 and 29 of the Statement of Defence) and in their evidence admitted trespass and trespass was otherwise fully proved.

(iii) the Defendants who did not claim title still claim to have a right to go on to the land and still persist in remaining thereon.

10. The decision is against the weight of evidence."

In their Appellants' Brief before the Court of Appeal Defendants formulated the following four questions, to wit:

(i) Was the learned trial judge right in ordering a non-suit without calling for addresses from counsel appearing for both parties.

(ii) Was the learned trial Judge right in non-suiting the plaintiffs/respondents having found that they were not in exclusive possession of the land in dispute.

(iii) Was the learned trial judge right in non-suiting the plaintiffs/respondents having found that their traditional evidence in relation to title was vague and inconclusive.

(iv) Was the learned trial judge right in granting a relief which was not asked for by the plaintiffs/respondents either in their writ of summons or in their statement of claim."

In addition to the above four questions, the plaintiffs in their brief posed five questions arising from their own appeal.

These are:

"(i) (a) Was this a case in which a non -suit could or should be awarded?

(b) Even if it were, was the trial Judge right in entering a non-suit without calling upon the parties or giving them an opportunity to address the Court on the propriety of entering a non-suit?

(ii) Had the trial Judge any competence to refer the case to the Boundary Settlement Commission? Whether or not it had competence to do so, could the court make the order when there was no claim or request therefor and the parties were not given the opportunity of addressing the court thereon?

(iii) Whether the trial court was right in not granting the claims of the plaintiffs after holding on the preponderance of evidence that the plaintiffs had proved title to the land in dispute and that Exhibit D (pp 125-127) was a declaration by the first Defendant against his interest.

(iv) The claim being in trespass against named defendants in person and as representatives of the natives of Inisa (not against the Akunyun community who are the Kith and Kin of the plaintiffs), was the trial Judge right in requiring a joinder of Akunyun people - OR failing to join them suo motu if she thought it necessary to do so?

(v) Did the issue of forfeiture arise from the case as constituted and canvassed AND was it necessary for a just decision of the case for the plaintiffs to claim against their grantees (Kith and Kin) for forfeiture?

The Court of Appeal, in its judgment, agreed with the parties on the issue of non-suit, holding that the trial Judge was wrong to have entered an order of non-suit and to have referred the dispute between the parties to the Boundary Settlement Commission of Oyo State. It, however, agreed with the plaintiffs that the trial Judge ought to have entered judgment for them as the Defendants admitted plaintiffs' ownership of Kookin. The court allowed plaintiffs' appeal and entered judgment in their. Omololu-Thomas J.C.A. in his lead judgment with which Sulu-Gambari and Akpabio, JJCA agreed, concluded -

"Accordingly, the judgment of the learned trial judge will be and is hereby set aside, and in its place will be substituted judgment in

favour of the plaintiffs for damages for the acts of trespass in terms of the claim in respect of parts of the land known as Kookin and Akunyun, and for order for perpetual injunction restraining the defendants, their servants and or agents, henceforth from entering into the said land or committing or continuing the acts of trespass complained of or any other acts of trespass.

In further exercise of the powers of this court under section 16 of the Court of Appeal Act 1981 as amended I assess damages (in the absence of any assessment of damages by the trial Court) in the sum of 6,000.00 only in favour of the plaintiffs with N500.00 costs in respect of the High Court proceedings, and N350.00 costs, in this appeal and crossappeal respectively, against the defendants." (underlining is mine)

The appeal of the Defendants was dismissed.

The Defendants have further appealed to this Court, after obtaining leave so to do, upon 8 grounds of appeal and have, in their notice of appeal sought from this court a "reversal of the whole decision and an order dismissing the plaintiffs' claims and entering judgment in favour of the Defendants."

The parties, through their learned counsel, filed and exchanged their respective Briefs of argument. The only issue the defendants put before us is as to "whether the court below was right not to have entered judgment of dismissal of the Respondents' (plaintiffs') claims in view of all the facts and circumstances of this case." The plaintiffs formulated the question differently, that is,

"Did the Appellants in fact trespass upon the plaintiffs' land known as Kookin and Akunyun and was the court below not right in holding that the Respondents proved their case for trespass and injunction against the Defendants?"

Contrary to the traditional history the plaintiffs pleaded, the evidence given by their witnesses as well as defence witnesses established the fact that Kookin, Akunyun and Inisa existed as separate settlements before the Ijesa Arara War. As a result of this War, Kookin and Akunyun were destroyed. The people of Kookin who survived the War moved northwards and founded the present day Okuku. The people of Akunyun

took refuge in Inisa where they formed various compounds and families and continued, after cessation of hostilities, to farm on their old homestead till this day. It is not surprising that the learned trial Judge rejected the traditional history pleaded by the plaintiffs.

The main plank of the argument of learned counsel for the defendants is that on the findings made by the court below and the evidence led at the trial, the court below was clearly in error to have found that the land in dispute was Kookin and that Akunyun was outside it. Learned counsel went through the evidence of the witnesses and concluded that the land in dispute was in fact Akunyun and not Kookin. He drew attention to the judgment of the court below that found that the land was Kookin and yet that court gave judgment in respect of Kookin and Akunyun. Learned counsel drew attention also to plaintiffs' claim and submitted that the judgment of the court below was inconsistent with that claim and the evidence in support. On the order of non-suit entered by the trial Judge, learned counsel submitted that that order was wrong. He further submitted that on the findings made by the learned trial Judge which findings have not been set aside the proper order should be a dismissal of the plaintiffs' claims.

Learned counsel for the plaintiffs submitted that the finding of the court below to the effect that the land in dispute was Kookin was correct. He went through the plans tendered in evidence by the parties and concluded that the trial Judge was wrong in the final conclusion she finally reached. Learned counsel urged on this court that the decision of the court below was unimpeachable. He argued that the defendants based their claim on jus tertii which counsel said was untenable. He observed that the claim was for trespass and injunction and not for a declaration of title. He submitted that the standard of proof would not be the same were there to be a claim for declaration of title. He also observed that the claim for injunction was against the people of Inisa and not against the members of Akunyun community.

True enough the claims at the trial were for trespass and injunction but it is clear from the pleadings that the issue of title to the land in dispute was involved and the learned trial Judge, in my

respectful view, was right in so holding. For plaintiffs to succeed, therefore, they had the burden to show better title to the land in dispute. I have examined the plans tendered by both sides. Strangely enough not one of the farms of the witnesses called by the plaintiffs who
B claimed to farm on the land was shown on the plaintiffs' plan. Not only that, the houses shown on the plan as being cause of dispute were found, on the evidence, by the learned trial judge to have been built ten years and over before the immediate problem leading to the present dispute and by
C people living at Inisa.

The court below, per Omololu-Thomas, JCA, observed:

*"The claim was not against the grantees, but against the defendants for trespass and injunction; and it seems quite clear from the evidence that the land in dispute is Kookin, particularly, and as urged, since
D 'Akunyun land' according to the plans of the parties and evidence is outside the area in dispute. The learned trial judge ought not to have allowed the issues on Akunyun to becloud her vision, particularly as she had unequivocally found ownership of Kookin by traditional evidence
E conclusive when she said that Kookin was an offspring of Okuku.*

*It seems indeed quite clear to me from the evidence that it is common ground that the land in dispute is Kookin, and an order of non-suit in the circumstance seems to me to have clearly wronged the plaintiffs unjustly. The proper order which the learned trial judge ought to
F have made is one entering judgment for the plaintiffs.*

On this issue alone, this court ought to set aside the judgment of the lower court and enter judgment in favour of the plaintiffs."

With profound respect to their Lordships of the court below, this passage
G betrayed their complete misconception of the case before them. It is clear from the pleadings and the evidence that the land in dispute is part of land originally known as Akunyun. I refer first to the fact that the 2nd plaintiff is referred to as the head of the Akunyun people. Next is para-
H graph 13 of the statement of claim where plaintiffs pleaded -

"13. The Defendants acknowledge that the land in dispute known as Kookin and Akunyun by the plaintiffs and referred to simply as Akunyun by the Defendants is owned by the Okuku Community" (Underlings are

mine)

The Defendants in paragraph 15 of their defence pleaded-

"The defendants aver with reference to paragraph 13 of the statement of claim that Akunyun land is VERGED BLUE on plan No. OG/675/83 and it is owned by Akunyun people while the area described as Kookin land is owned by the founder of Kookin and it is outside the land in dispute." B

I now examine the evidence. PW3, Oba Oyedele, the traditional head of IBA, a boundary man testified thus:

"I know the land in dispute. The land is KOOKIN. It is also called AKUNYUN" C

PW4, Oba Raji Oladosu, Elende of Ekonde, testified and said:

"The land in dispute is called KOOKIN/AKUNYUN"

Cross-examined, he said:

"Kookin and Akunyun are in the same area." D

The two lands, Akunyun and Kookin are separate entities."

PW5, Amos Olawuyi in his evidence deposed:

"The land in dispute is called KOOKIN and AKUNYUN" E

Cross-examined, he testified:

"I know where KOOKIN is. Kookin is next door to Otin-Okuku. Kookin is a bit far from Inisa. I don't know how far. Kookin is nearer Inisa. I have been to Kookin about 4 Years ago. I went to visit my friend there. I didn't go to Kookin. I only went to Akunyun." F

Further cross-examine he said:

"Sons of Akunyun now live at Inisa but they are Okuku people"

PW6, Shittu Araoye testified thus:

"I know the land in dispute. The land is known as Kookin and Akunyun." G

Cross-examined, he deposed:

"Kookin and Akunyun are one and the same before Ijesha Arara War. After the war the people of Kookin and Akunyun scattered about. Some of them settled at Okuku. Some of them settled at Inisa." H

Further cross-examines, the witness said:

"The land in dispute spreads over Akunyun to Kookin"

Another plaintiffs' witness (8th) Michael Oyebola put yet another twist to the position of Kookin and Akunyun. He said:

"I know the land in dispute. It is called Kookin. Akunyun is within Kookin land."

B Cross-examines PW8 testified:

"I know the old Inisa-Okuku Road. I know the new Express-Road from Osogbo to Okuku. The land on the old road of Inisa-Okuku is known as Akunyun land. Kookin is the same land as Akunyun. The whole land is Kookin. Akunyun was given land out of Kookin land."

C PW9, Oyelade Odogun testified thus:

"I also know the land in dispute. I farm on the land in dispute. I am a Chief of Osolo. Osolo granted me land there to farm."

He further testified:

D *"The land over which Osolo had authority is called Akunyun."*

Cross-examined, the witness deposed:

"The land in dispute is at Akunyun."

He later added

E *"Kookin and Akunyun are one and the same land."*

To further questions under cross-examination, the witness testified:

"Before the Ijesha-Arara War the land in dispute was given to the Akunyun by the Olokuku. The Akunyuns are still farming on the land right now. After the Ijesha-Arara War the Akunyuns scattered about. Some are living in Okuku. Some are now living in Inisa. Some of those living in Inisa are now farming on the land in dispute."

F

PW10, Samuel Ajayi who put his age at 80 testified and said:

G *"I know the land in dispute. The land is known as KOOKIN/ AKUNYUN. I carry out my farming at KOOKIN on the land in dispute."*

Cross-examined, he said,

H *"I am about 80 years old. I grew up on the farm. My own farm is at KOOKIN. Kookin and Akunyun are the same. They are not distinct settlements. They are the same. The two places I know as one and the same."*

PW11, Tijani Oyelade in his own testimony, said:

"I know the land in dispute. The name of the land is KOOKIN."

Out of this KOOKIN land, part of it was given to Akunyun."

The 3rd plaintiff gave evidence and claimed to be a stranger in Okuku. He hails from Oyo and lives in Inisa. This is the man who is put forward as a representative of Okuku community!

The 2nd plaintiff, Jacob Akinpelu testified and said:

"I bear the Chieftaincy title of Osolo Akunyun. I live at Inisa - Osolo Compound. Before the Arara Wars my father lived in Akunyun. During the War he ran away to Ikirun. On leaving Ikirun after the War my father returned home to Inisa. The Olu Inisa then invited my father to let them live together. The two of them built houses at Inisa. That is how we got to Inisa. I am a farmer. I have my farm at Akunyun. My father met the Olokuku at Akunyun. My Osolo chieftaincy title belongs to Okuku. We live together in Inisa and do politics together. The Inisa people never gave me a land. Some people got to Akunyun through the Olokuku, others got there through my ancestors. Olokuku had nothing to do with those who got on the land through my ancestors. I know Alagbede family. Olokuku granted land to Alagbede family. Osolo James Lateju gave land to Toso. Osolo took people to the land just as Olokuku took people to the land. The two farm lands Akunyun and Olokuku's land are inter-woven. Olokuku put me on Akunyun land as head of the place. I know Kookin. Olokuku owns Kookin land. There is no boundary between Kookin and Akunyun. I know the land in dispute. It is called Akunyun land. (Underlining is mine)

Testifying further, he deposed;

"Olu Inisa called me to say the Government wanted to give him a School. He approached me for a piece of land for the school, which is quite big. He said his own land wasn't big enough and I should help him to find more land. I then called my family together to inform them about Olu Inisa request. I agreed with my people to give the land to Olu Inisa because the idea of a school was a good thing for our town. I was asked to grant the entire land for building the school to avoid future trouble. I later informed the Olokuku said I should ask Olu Inisa to see him. Olu Inisa said he wasn't asking for land from the Olokuku but from me. I told him I couldn't grant Akunyun land to him without the Olokuku's consent.

The next thing was that Olu Inisa went to survey the land. I didn't give him permission on survey. I don't know whether Olokuku gave him permission to survey. The people upon whose land the surveying passed through, reported to the Olokuku that I had sold their land."

B Cross-examined, the witness testified:

"Before Area War Akunyun was a separate town. Akunyun had its own Oba before the war. It also had its own chiefs. Olokuku was at Kookin when Akunyun had its own Oba. At that time Olokuku had its own chiefs at Kookin. Okuku was a town just as Akunyun was a town too. I don't know the history of Kookin. I know the history of Akunyun. My father's name is Akinliyi. During the Arara war the people of Akunyun were driven out and they went to Ikirun. I don't know where Kookin people ran to. I know where Kookin is. Kookin and Akunyun have
C *common boundaries. I don't know the bounaried of Kookin. I only know the boundary between me and the Olukuku. No one from Akunyun got land from Inisa people. The Inisa people got land from Akunyun people. Inisa existed before the Arara war. The Olu Inisa who went to*
D *war never returned. I cannot say if Osolo compound at Inisa belongs to Inisa. Akunyun land has boundaries with Inisa, Elekusa and Olokuku. Bando's farm-land is also next to mine. Osolo's compound where I now live is at Inisa."*

E *Concluding his evidence, 2nd plaintiff said:*

"My people take part in Inisa development programmes. All my people from Akunyun are members of the Inisa Descendants Union. We are now living peacefully at Inisa. It is not in my plan that I and my people should pack from Inisa to go and live in Okuku."

G The 1st plaintiff, Oba Oluronke 11 was also a witness for the plaintiffs. He said:

"I know the land in dispute. It is called KOOKIN and AKUNYUN."

H Testifying further, he said:

"I am claiming the land in dispute as Okuku land. The land had been Okuku land from time in memorial - from the time of our father Oladile. He was the first Oba of Kookin. Kookin was first settled by my

for-fathers - Oladile and Akunyun was part of Kookin- a continuous land. After the Ijesha/Arara War around 1760, the people of Kookin were scattered. They subsequently had to move a little bit Northward. The place where they moved to is now known as Okuku. Kookin still remained a farmland. Akunyun also remained a farmland.

Later in his evidence, the 1st plaintiff deposed::

"The land abutting Esa's land (Inisa) was the land given to Osolo one of Olukuku's chiefs. The land was called Akunyun. The 2nd plaintiff in this case is one of the decedents of Osolo. The family name of Osolo is Akunyun. The Osolo family are spread to Inisa and Okuku. They farm of Akunyun land which is part of the land in dispute."
(Underlining is mine)

He added:

"The Defendants simply refer to the land in dispute as AKUNYUN."

Defence witnesses claimed that the land in dispute was AKUNYUN.

It is clear that the evidence for the Plaintiffs on the location of the land in dispute as between the old settlements of KOOKIN and AKUNYUN was a bundle of contradictions and confusion. One piece of evidence that appeared straightforward was that of the 2nd Plaintiff who said that the land in dispute was AKUNYUN. On the strength of the evidence, one cannot see how it could be said that -

"it seems quite clear from the evidence that the land in dispute is Kookin"

Nor that "it is common ground that the land in dispute is Kookin". If this were Plaintiffs' case there would be no need to bring in 2nd plaintiff as a party. This finding of the Court below is patently perverse as it is not borne out by the evidence. And since the judgment of the Court below is based on this erroneous finding, I agree with Mr. Kehinde Sofola SAN that it must not be allowed to stand. Chief Chukura SAN relied on the plans to show that the finding was correct. With respect, I cannot share this view. The plans cannot override the evidence of the witnesses. And there is

nothing in the plans to show the locations of the two settlements of Kookin and Akunyun vis-a-vis the land in dispute.

The conclusion I reach is that the judgment of the Court below cannot stand and it is hereby set aside by me. The appeal of the plaintiffs to the Court below ought to have been dismissed.

On the findings of fact made by the learned trial Judge, particularly that Plaintiffs were not in exclusive possession of the land in dispute, it is difficult to see how their claims could succeed. The unchallenged evidence before the trial court was that the people of old Akunyun, including their head the Osolo, sought refuge in Inisa, the Defendants' town where they, and their descendants after them, lived up to this day. They continued and still continue to farm on the land of their homestead. Indeed they regard themselves to all intents and purposes as belonging to the Inisa community. The case of the Defendants is that the land in dispute is part of that old homestead of Akunyun. The evidence of the 2nd Plaintiff and that of some of Plaintiffs' other witnesses support Defendants' case. **In the light of such overwhelming evidence against Plaintiffs' case, I cannot see what is left of it. They have been found not to be in exclusive possession of the land. They have failed woefully to prove better title to it. The finding by the learned trial Judge that**

"..... from the evidence before me (that) both the plaintiffs and the Defendants have genuine and concrete claims over the land in dispute"

does not flow from the other findings of the learned Judge nor from the evidence on record. That finding was reached, in my respectful view, to justify the learned Judge's abdication of her duty to adjudicate in the matter. She shied away from dismissing Plaintiffs' case as the logical conclusion of her findings, and would rather want another body the Boundary Settlement Commission, to arbitrate between the parties. This attitude is wrong. There is no jurisdiction in the High Court to refer a case before it to the Boundary settlement Commission for adjudication. The Plaintiffs, having failed to prove their case, the proper order for her to make was to

dismiss it. By the position she took she ended up not satisfying either party.

The conclusion I finally reach is that this appeal succeeds and it is allowed by me. I set aside the judgment of the Court of Appeal and restore that of the trial High Court except as to the orders of non-suit and reference of the case to the Boundary Settlement Commission of Oyo State, which orders are hereby set aside. In their place, I order that Plaintiffs' claims are dismissed. I award to the Defendants N10,000.00 costs of this appeal and N500.00 and N350.00 costs of the trial and the appeal in the Court of Appeal respectively.

UWAIS CJN

I have had the opportunity of reading in draft the judgment read by my learned brother Ogundare, J.S.C I agree that the appeal be allowed.

The Respondents' (Plaintiffs) claims in the High Court were for trespass and perpetual injunction in respect of a piece of land known as "Okuku" and "Akunyun". The Appellants (Defendants) referred to the land in their pleadings simply as "Akunyun". At the conclusion of the trial the learned trial judge (Ige J., as she then was) found that the Plaintiffs failed to establish the exact area of what constituted Akunyun, nor were they in exclusive possession. She also found that the Plaintiffs failed to establish exclusive possession of the land in dispute since there were some occupiers of the land who had never paid tribute (ishakole) to anyone and who had better claims to exclusive possession than the plaintiffs.

Instead of dismissing the Plaintiffs' claims, the learned trial judge non-suited the Plaintiffs ad referred to dispute to the Boundary Settlement Commission of Oyo State for determination. These are her remarks -

"I am satisfied from the evidence before me that both the Plaintiffs and the Defendants have genuine and concrete claims over the land in dispute but the extent of each side's claim can only be determined by a Boundary Settlement Commission because the claims are interwoven,

In view of previous records of boundary issues between Okuku and Iba, Inisa and Ekoende, and in view of the fact that this action had been taken in the names of two Communities - Okuku and Inisa, I consider that this is a proper case to be referred to the Boundary Settlement Commission of Oyo State.

Rather than dismiss the Plaintiffs' claims, I shall non-suit them.

Plaintiffs are therefore, non-suited. Case is referred to Boundary Settlement Commission of Oyo State."

As both the Defendants and the Plaintiffs were dissatisfied with this decision they appealed and cross-appealed respectively to the Court of Appeal. The Court below, (Omololu-Thomas, Sulu-Gambari and Akpabio, JJ.C.A.) in its judgment, held that the trial court was in error to have entered an order of non-suit against the Plaintiffs and to have referred the dispute between the parties to the Boundary Settlement Commission. Instead, it held (per Omololu-Thomas, JCA who wrote the leading judgment):-

"The Plaintiffs have established and proved title to Kookin within which the land in dispute is situate, the learned trial judge ought to have held that the plaintiffs were in exclusive possession of the land in dispute or are entitled to the right to possession (vide) Amakor v. Obiefuna, (supra), (1974) 1 N.M.L.R. 331 at p. 335) with the result that any possession which the defendants claimed or had must be that of trespassers.

Ground 1 of the grounds of appeal (by the Defendants) succeeds but no consequential order can be made in the defendants' favour in view of the plaintiffs' cross-appeal." (Underlining and parenthesis mine).

With regard to the cross-appeal, the learned Justice found as follows:-

"I now turn to the cross-appeal. I uphold the submissions of the learned plaintiffs' counsel on the issues raised and his submissions - oral and in his brief. All the issues raised in the cross-appeal except the fifth on forfeiture specifically, had been discussed already. No such issue was raised in the plaintiffs' pleadings, and the learned trial Judge ought not to have considered it or made any finding on it.

The cross-appeal wholly succeeds, and is allowed.

Accordingly, the judgment of the learned trial Judge will be and is hereby set aside, and in its place will be substituted judgment in favour of the plaintiffs for damages for the acts of trespass in terms of the claim in respect of parts of the land known as Kookin and Akunyun, and for order for perpetual injunction restraining the defendants, their servants and agents, henceforth from entering into the said land or committing or continuing the acts of trespass complained of or any other acts of trespass."

The Defendants, still dissatisfied, appealed to this Court formulating the following issue, in their brief of argument, for us to determine

"Whether the Court below was right not to have entered judgment of dismissal of the Respondent's claims in view of all the facts and circumstances of this case."

For their part, the plaintiffs submitted the following, in their brief of argument, as the real issue for determination:-

"Did the Appellants in fact trespass upon the Plaintiffs' land known as Kookin and Akunyun and was the court below not right in holding that the Respondents proved their case for trespass and injunction against the Defendants?"

The case for the Defendants (Appellants) before us is that the court of Appeal was in error to have found that the land in dispute was outside Kookin. Learned Senior Advocate for the Appellants referred to the judgment of the Court below which found that the land in dispute was kookin, and submitted that despite this, the Court below gave judgment in respect of both kookin and Akunyun. Consequently, he argued that the decision of the Court of Appeal was inconsistent with the Plaintiffs' claims in the lower court and the evidence which was adduced by them in support of the claims. He finally submitted that on the findings made by the trial court, which were not set aside by the Court of Appeal, the proper order to have been made by the Court of Appeal was that dismissing the plaintiffs' claims.

In reply, learned Senior Advocate for the Respondents, contended that the finding by the Court of Appeal that the land in dispute was Kookin

was correct and that the learned trial judge was wrong in finding otherwise. He argued further that the Plaintiffs' claims were for trespass and injunction and therefore a declaration of title was not involved. Consequently the standard of proof applicable to a declaration of title would not B apply.

There is no doubt that the Court of Appeal did not come to the conclusion that the land in dispute was in Kookin by holding that the findings of fact by the trial court were perverse. The latter court found C that Okuku was an offspring of Kookin and that Akunyun was a different settlement from Kookin. The common ground established by the parties' pleadings was that the land in dispute was Akunyun. Since the Plaintiffs failed to prove that the land in dispute was kookin and the learned trial Judge so found, the Court of Appeal was wrong to reverse the decision D of the lower court because there was no reason for it to do so - See Akinloye & Anor. Eyiola & Ors., 1968 N.M.L.R. 92 at p. 95 and Woluchem v. Gudi. (1981) 5 S.C. 291 at p. 320. Consequently, the decision of the Court of Appeal was based on wrong premise and cannot E be allowed to stand since it is perverse.

The next question is can we uphold the decision of the lower court, then? There is no doubt that the order of learned trial judge to no-suit the plaintiffs and refer the dispute to the Boundary settlement Commission cannot be allowed. By its findings the Appellants failed to prove F the location of the land in dispute as between kookin and Akunyun. Nor were the Appellants in exclusive possession of the land in dispute. The proper order to have been made by the learned trial judge, and from which she reneged, was to dismiss the Appellants' claims. I will exercise G the general powers of the Supreme Court under section 22 of the Supreme Court Act, Cap. 424 to dismiss the Plaintiffs' claims.

As to the order referring the dispute to the Boundary settlement Commission of Oyo State, the learned trial judge had no jurisdiction to do H so. For by the provisions of section 5 of Local Government and Community Boundaries Settlement Law, Cap. 67, of the Laws of Oyo State, 1978, only the State Executive Council can refer the settlement of boundaries to the Commission. The section provides:-

"5. The Executive council may by order refer to a (Boundary Settlement) Commissioner for determination the boundaries or any part of the boundaries between the area of two or more Local Governments or Communities."

On the whole this appeal has merit and it hereby succeeds. I too B
allow it and I adopt the order as contained in the judgment of my learned
brother Ogundare, J.S.C.

KUTIGIJSC

I read before now the judgment just delivered by my learned C
brother Ogundare, J.S.C, I agree with his reasoning and conclusions. I
will also allow the appeal, set aside the judgment of the Court of Appeal
and enter an order of dismissal of the Plaintiffs/Respondents' claims. I D
endorse the order for costs

OGWUEGBUJSC

I have had the advantage of reading in draft the judgment just
delivered by my learned brother Ogundare, J.S.C. I am in full agreement E
with his reasoning and conclusion and will adopt the reasoning in the
judgment to allow the appeal. I abide by the order as to costs in the
judgment of my learned brother Ogundare, J.S.C.

IGUHJSC

I have had the privilege of reading in draft the leading judgment
just delivered by my learned brother, Ogundare, J.S.C and I am in com-
plete agreement with him that there is merit in this appeal.

The plaintiffs' claim before the trial court were for trespass and G
perpetual injunction in respect of the pieces or parcels of land known as
Kookin and Akunyun. The trial court at the conclusion of trial non-suited
the plaintiffs and purported to refer the dispute to the Boundary Settle-
ment Commission of Oyo State. H

On appeal by both parties, the Court of Appeal, Ibadan Division,
in a unanimous decision dismissed the defendants' appeal but allowed
that of the plaintiffs. It proceeded to enter judgment for the plaintiffs in

the sum of N6,000.00 being damages for trespass and granted the perpetual injunction claimed against the defendants. It is against this judgment of the Court of Appeal that the defendants have now appealed to this court. The plaintiffs and the defendants will hereinafter be referred to in this judgment as the respondents and the appellants respectively.

The sole issue formulated by the appellants for the determination of this appeal is whether the court below was right by failing to dismiss the respondents' claim, having regard to the facts and circumstances of the case.

It is trite law that generally speaking, a claim for trespass to land is rooted in exclusive possession. All that a plaintiff needs, therefore, to establish to succeed in such a claim is that he has exclusive possession or the right to such possession of the land in dispute. However, once the defendant asserts ownership of such land in dispute, title thereto is automatically put in issue and the plaintiff, to succeed, must establish a better title than that of the defendant. See Pius Amakor v. Benedict Obiefuna (1974) 3 S.C 67. So, too, where an action in trespass to land is coupled with a claim for perpetual injunction, as in the present suit, the title of the parties to such land is automatically put in issue. See Alhaja Akintola v. Madam Lasupo (1991) 3 N.W.L.R (part 180) 508 515 Kponugbo v. Kodadja 2 W.A.C.A. 24, Ogunfaolu v. Adegbite (1986) 5 N.W.L.R. (part 43) 549, Ajani v. Ladepo (1986) 3 N.W.L.R (part 28) 276, Okorie v. Udom (1960) 5 F.S.C 162 at 165 etc.

In the present case, it is clear from the claim before the court, the pleadings of the parties and the evidence before the trial court that the parties were each vehemently claiming title to and the right to possession of the land in dispute. In this regard, the learned trial Judge found thus -

"Certain facts have emerged in this case which showed that although there is no claim for title declaration, the issue of title is intricately involved."

A little later in her judgment, the learned trial Judge further observed -

"It is my view that these claims and counter claims have made title to the land an issue in this case."

I entertain no doubt that the trial court was perfectly right when it held

that title to the land in dispute was in issue between the parties in the case.

Having so held, the learned trial Judge proceeded carefully to evaluate the pleadings and the evidence before the court and made the following significant findings of fact against the respondents, namely - B

(a) That upon the evidence from both parties, title to the lands known as Kookin and Akunyun was in issue.

(b) That the Respondents failed to establish the exact area of what constituted Akunyun.

(c) That the Respondents were unable to establish exclusive C possession of the land in dispute.

(d) That the traditional evidence given for the respondents as to ownership of Akunyun land was rather vague and inconclusive.

(e) That there were some occupiers of the land other than the D respondents who had never paid ishakole to anyone and who had better claims to exclusive possession than the respondents.

In particular, the trial court found thus -

"With regard to exclusive possession of the land in dispute, 1st E plaintiff said he did not know those who were farming on the C.M.S land before the land was granted to them, neither did he know the people who were farming originally on the Moslem praying ground before the grant to them. He cannot be said to be in exclusive possession."

She continued - F

"I must say that there is some merit in the claims of those families that their contention cannot just be swept aside, especially when the Olukuku cannot identify the occupier of land in Akunyun before making G grants to people and establishments. This has made the traditional evidence of the plaintiffs as to ownership of Akunyun land rather vague and inconclusive."

If it is true that those families were granted land by the Olukuku for farming purposes only and for temporary use, the issue of payment of H Ishakole by them would definitely arise. But they have maintained persistently that no one had ever disturbed them on their land and, neither they, nor their ancestors have ever paid Ishakole to any one or the

Olukuku. In my view these people have better claims to exclusive possession than the plaintiffs."

The above are devastating findings of fact against the respondents and are fully supported by evidence on record.

B The principle is well settled that in a claim for declaration of title, the plaintiff must succeed on the strength of his case and not on the weakness of the defence, although any evidence adduced by the defence which is favourable to the plaintiff's case will necessarily strengthen the case of the plaintiff.. See Kodilinye V. Mbanefo Odu (1935) 2 W.A.C.A. 336 at 337, Josiah Akinola and Another v. Fatoyinbo Oluwo and others (1962) 1 All N.L.R. 224 at 225, Idundun and others v. Daniel Okumagba (1976) 10 S.C. 227, Egonu v. Egonu (1978) 11 - 12 S.C. 111 at 130.

D It cannot be disputed that the evaluation of evidence and the ascription of probative value to such evidence are the primary functions of a trial court which saw, heard and assessed the witnesses. Where, therefore, a trial court, as in the present case, clearly evaluated the evidence of the parties and justifiably appraised the facts, it is not any business of the Court of Appeal to substitute its own views of the facts for those of the trial court. See Akinloye and Another v. Eyiola and others (1968) N.M.L.R 92 at 95, Enang v. Adu (1981) 11-12 S.C. 25 at 39. Woluchem v. Gudi (1981) 5 S.C. 291 at 320 etc. Once, as in the present case, there is sufficient evidence on record from which the trial court made its findings of fact, the appellate court cannot interfere. See Akpagbue v. Ogu (1976) S.C. 63, Odofin v. Ayoola (1984) 11 S.C 72, Amadi v. Nwosu (1992) 5 N.W.L.R. (part 241) 273 at 280 etc.

G In the case on hand, the findings of fact made by the learned trial judge were amply supported by the evidence before the court. With profound respect to the Court of Appeal, I am unable to find any justification on its part for disturbing those findings as a result of which it was able to enter judgment for the respondents in the suit. It is clear to me H that the court below was in error to have found for the respondents inspite of the aforementioned solid findings of fact made by the trial court against them.

The trial court, on the other hand, entered a non-suit against the

respondents in the action. With the greatest respect to the trial court, I cannot accept that the findings of fact it arrived at justified an order of non-suit in the claim. In my view, the respondents, having failed to establish the case put forward by them in their pleadings as a result of contrary credible evidence, the only logical order that the justice of the case demanded was an outright dismissal of the claims. See Egonu v. Egonu, (supra) and Odum v. Chinwe (1978) 6 - 7 S.C. 251. B

There is finally the issue of reference of the suit to the Boundary settlement Commission of Oyo State by the trial court. With due respect to the learned trial judge, I am unable to identify any reason for referring the suit to the Boundary Settlement Commission. Nobody applied for such an order. Besides, it is settled law that a court must not grant to a party a relief which he has not sought or which is more than he has sought. See Ekpenyong v. Nyong (1975) 2 S.C. 71 at 81 - 82, Olurotimi v. Ige (1993) 8 N.W.L.R. (Part 311) 267 at 271, Makanjuola v. Balogun (1989) 3 N.W.L.R. 192 at 206 etc. I think that the trial court was in error when it referred the case to the Boundary Settlement Commission of Oyo State in the face of its findings to the effect that title to the lands known as kookin and Akunyun were in dispute in the action, that the respondents failed to establish the precise area of land they claimed, that the respondents were unable to establish exclusive possession of the lands in dispute and that the respondents' traditional evidence as to their ownership of the land in dispute was vague and inconclusive. D E F

The Court of Appeal, for its own part, was also in gross error when it entered judgment for the respondents inspite of the undisturbed solid findings of fact made by the trial court against the respondents.

It is for the above and the more detailed reasons contained in the judgment of my learned brother that I, too, allow this appeal and set aside the judgment and orders of the court below. I also set aside the order of transfer of the case to the Boundary Settlement Commission by the trial court and, in place thereof, the respondents' claims are dismissed in their entirety. I abide by the order for costs contained in the leading judgment. G H