

SUPREME COURT OF NIGERIA
10TH DECEMBER, 1999. SC. 97/1991
CORAM:- A. B. WALI, I. L. KUTIGI, U. MOHAMMED,
U. A. KALGO, S. O. UWAIFO, JJSC

1. AKIO ABEY 1ST DEFENDANT/APPELLANT
2. CHIEF J. A. IKROMA 2ND SET OF DEFENDANTS/
OWIYE & 4 ORS. APPELLANTS

(For themselves and as representing Tombia Town)

AND

CHIEF ALHAJI IBRAHIM FUBARA PLAINTIFFS/
ALEX & 2 ORS. RESPONDENTS

(For themselves and as representing Owuroboma
Compound/Buguma)

ACTIONS - Out of Court settlement - Breach of out of court settlement agreement - Cause of action would no longer be founded on any purported previous right of ownership - But on the alleged breach of the agreement.

COURTS - Findings of fact - Where dependent on documentary evidence - Trial judge is to test the reliability of the oral evidence - Against the documentary evidence.

JUDGMENTS - Out of court settlement - Previous unexecuted judgments - Shall be deemed compromised - As a result of a subsequent out of court settlement.

LAND LAW - Boundary - Trespass - Alleged by the plaintiffs - They would have to prove that the trespass did take place - In contravention of the new boundary.

LAND LAW - Trespass - Alleged against the appellants - Where not proved from the evidence - Appellants cannot be found liable.

PRACTICE & PROCEDURE - *Pleadings - Amendment suo motu by court - Was proper in the present case - As it did not entail injustice to the other party.*

FACTS

The plaintiffs/respondents commenced an action against the 1st defendant/appellant claiming N7,000.00 as special and general damages and perpetual injunction. On the application of the 2nd set of defendants/appellants, leave was granted them to join as co-defendants. Their ground was that they allotted the land in dispute as part of their land to the 1st defendant. The parties called the land different names and stated different places as the location of the land. The plaintiffs averred that their ancestors owned the land from time immemorial and that there are some court decisions in their favour against the defendants. That in spite of those decisions the defendants commenced another suit. But that one Chief Amachree VI intervened and had the matter settled out of Court. This settlement led to the fixing of a new boundary between the parties and that more land of the plaintiffs were given to the defendants. That the defendants respected plaintiffs right until sometime in 1973, when they noticed an encroachment upon the portion in dispute.

The trial court gave judgment for the plaintiffs. It found that the defendants committed trespass and awarded damages of N3,000.00 against them, and granted the injunction sought. Defendants' appeal to the Court of Appeal was dismissed. Being dissatisfied, the defendants have further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"Whether on the pleadings and evidence the plaintiffs/respondents made out their case of title and consequently trespass against the defendants as to entitle them to the judgment of the court."

"Whether having regard to the state of pleadings, the subsequent joinder of the second set of defendants/appellants and the evidence before the trial court, the court below was within its powers in amending the respondents' pleadings as it did."

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

Pleadings - Amendment suo motu by court

1. It is my view that in the circumstances of the case which was prosecuted and defended on the basis that all three parties were properly before the court (the 2nd set of appellants at their own instance), the amendment the lower court made was a necessary formality which any court would be entitled to effect faced with the same situation, without any application for it to do so, in the interest of justice, even on appeal: see Afolabi & Ors v Adekunle & Anor. (1983) 2 SCNLR 141; (1983) 14 NSCC 398 where an amendment done on appeal at the Court of Appeal to reflect the capacity in which an action was brought was held proper by this court. At page 149; 404, Aniagolu JSC, who read the leading judgment, observed:

"It is the duty of courts to aim at, and to do, substantial justice and to allow such formal amendments, in the course of the proceedings, as are necessary for the ultimate achievement of justice and the end of litigation."

Such an amendment, as in the present case, can be made if it will entail no injustice or any hardship to the other party, even without a formal written application in that behalf to the court, so long as that other party is given an opportunity of being heard on the point: see Kojo Atta v. Kwaku Apawu & Ors (1941) 7 WACA 75 at 76; Gbogbolulu v Hodo (1941) 7 WACA 164 at 165. I hold that there is no merit in that second issue for determination. (p. 3061 B)

Actions - Out of court settlement

2. The cause of action any of the parties to that agreement would have in regard to whoever would breach or has breached the boundary established thereby would not be founded on any purported previous right of ownership or possession through immemoriality or some earlier court judgment, but on the alleged breach of the agreement or out-of-court settlement in question. If this had been thoroughly appreciated, there would have been no need for any elaborate pleadings other than was

necessary to lead to a true and clear interpretation of what was settled as the boundary between the two parties, namely, Bukuma and Tombia, and the production of a survey plan to reflect that interpretation. (p. 3062 D)

B *Judgments - Previous unexecuted judgment*

3. I think the emphasis should be that if a judgment remains not executed but can still be by the proper procedure being taken, then it might be said to be a step taken at any stage of a pending proceeding. In that sense and with that status, a judgment may be compromised by the parties to it. I can see nothing unusual or unlawful about this. That was what in effect happened to the judgments in the consolidated Kalabari Native Court suits No.321/46 and No.352/46 when the parties entered a compromise as per exhibit B. (p. 3064 C)

Courts - Finding of fact

4. A trial judge will not be entitled to assume that it is within his exclusive province to make findings of fact when such findings depend much or entirely on documentary evidence. His findings must reasonably reflect the contents of the document or documents in question as a whole so as to be seen as a true understanding and interpretation of the terms thereof. Where any oral evidence on an issue in a case is given and there is cogent documentary evidence on the same issue, it is the duty of the trial judge to test the reliability of the oral evidence against the said documentary evidence. To put it in the now familiar expression, it helps the trial judge to reach a fair finding by using the relevant document as a hanger on which to assess the oral testimony: see Kimdey v Governor, Gongola State (1988) 2 NWLR (pt. 77) 445 at 473. (p. 3065 H)

Land law - Boundary

5. In order for the plaintiffs/respondents to succeed in the present suit, they would have to prove that the trespass alleged against the defendants/appellants did take place in contravention of the new boundary. In other words, they would have to show the new boundary to the satisfaction of the court as a prelude to establishing the act of trespass. That is based on

the principle that a plaintiff has the burden to prove the case he seeks to make, and can only succeed on the strength of his case: see Kodilinye v Mbanefo Odu (1935) 2 WACA 336 at 337. (p. 3070 B)

Land law - Trespass

6. It is therefore untenable from the demonstrable evidence to hold that the defendants/appellants committed trespass for which they can be found liable. I am satisfied that the plaintiffs/respondents failed to prove their claim on the balance of probabilities and therefore their action ought to have been dismissed. I will therefore answer the first issue for determination in the negative. I accordingly find merit in this appeal and allow it. The judgment of the lower court together with the order for costs is set aside. The plaintiffs/respondents' action is hereby dismissed. (p. 3073 G)

NOTABLE POINT OF INTEREST

UWAIFO.JSC

1. Settlement out of court - Is to be encouraged at any stage

It has been held - and I think that is in consonance with the right of parties to settle civil actions out of court and the established practice is that this should be encouraged by the courts whenever there is such a move - that at any stage of pending civil proceedings, save in specified cases or circumstances in which public interest or policy element is involved, the parties are entitled to settle or compromise all or any of the questions or disputes between them on any terms and conditions on which they agree even without the approval or sanction of the court, or prior reference to the court. Such an agreement or out-of-court settlement between the parties supersedes the original cause of action altogether and the court has no further jurisdiction in respect of the original cause of action which has been so superseded. If the terms of such new agreement or out-of-court settlement are breached or not complied with, the injured or aggrieved party must seek his remedy based on the agreement or out-of-court settlement. In other words, his cause of action is founded on that agreement or out-of-court settlement: see Halsbury's Laws of England, 4th edn, vol. 37, para. 383; Green v Rozen (1955) 2

ALL ER 797 at 801. (p. 3062 G)

REPRESENTATION

C. O. I. Joseph Esq. SAN, with Deji Oggunniyi Esq. for the defendants/

B appellants

F. O. Ofodile Esq. for the plaintiffs/respondents

CASES REFERRED TO

C Afolabi v. Adekunle (1983) 2 SCNLR 141; (1983) 14 NSCC 398

Atta v. Apawu (1941) 7 WACA 75 at 76

Gbogbolulu v Hodo (1941) 7 WACA 164 at 165

Kimdey v. Governor, Gongola State (1988) 2 NWLR (pt. 77) 445 at 473

Atolagbe v. Shorun (1985) 4 SC 250 at 285

D Narumal & Sons (Nig) Ltd v. Niger Benue Transport Co. Ltd (1989) 2
NWLR (pt.106) 730 at 742

Kodilinye v. Odu (1935) 2 WACA 336 at 337

Udegbe v. Nwokafor (1963) 1 ALL NLR 417 at 418

E Akinola v. Oluwo (1962) 1 ALL NLR 224 at 225

Piaro v. Tenalo (1976) 12 SC 31 at 37

BOOK REFERRED TO

F Halsbury's Laws of England, 4th edn, vol. 37, para. 383

LEAD JUDGMENT BY UWAIFO JSC

G This appeal deals essentially with the effect of an out-of-court
settlement of an action by the parties thereto. There is a peculiarity with
such a settlement - even when not made an order of court. In a subse-
quent litigation between the same parties (or their privies) over the same
subject-matter the focus should be on the settlement as a foundation of
the cause of action. When this is appreciated, the court should examine
H the terms of settlement in relation to the suit to ascertain what should be
the area of concern for its resolution. The appeal comes from a decision
of the Court of Appeal, Port Harcourt Division, given on 15 November,
1989.

The plaintiffs commenced action on 6 October, 1973 in a representative capacity of Owuroboma compound against the 1st defendant in his personal capacity in respect of a parcel of land, and claimed two reliefs, namely, (1) N7,000.00 as special and general damages and (2) perpetual injunction. On the application of the 2nd set of defendants, B leave was granted them on 17 February, 1975 to join as co-defendants in a representative capacity of Tombia Town. Their ground was that they allotted the land in dispute as part of their land to the 1st defendant. While the plaintiffs call their land Ahele of which they claim that the land C in dispute forms part, the 2nd set of defendants call their land Tombia Piri or Kule Kiri. While the plaintiffs claim that the land is situate in Degema Division, the defendants say it is in Kalabari Division.

The trial court (per Wai-Ogosu Ag. C.J.) gave judgment for the plaintiffs on 23rd April, 1982. He found that the defendants committed D trespass and awarded damages of N3,000.00 against them. He also granted the injunction sought. This decision was affirmed by the Court of Appeal.

I shall identify what the plaintiffs asserted as entitling them to E the reliefs they sought and make brief comments where necessary. From the statement of claim, it may be said that the plaintiffs averred the followings broad facts: (a) that their ancestors owned the land called Ahele from time immemorial and that the inherited it from their said an- F cestors. This is contained in para. 3 in these words and no more-

"3. *The plaintiffs are the owners in possession of the land, a portion whereof is the subject-matter of this action, having inherited same from their ancestors, the owners thereof from time immemorial.*" G
(b) That there were some court decisions in their favour against the defendants in respect of the land, viz, judgment in Kalabari Native Court suit No.321/46 and suit No.352/46 (consolidated) which on appeal to the Port Harcourt/Degema Magisterial District in case No. D/42A/43 and further to the Supreme Court (equivalent of High Court) of Aba Judicial H Division in case No.A/18A/47, was upheld: see paras. 5 and 6 of the statement of claim. (c) That in spite of those decisions, the defendants commenced another case in the said Supreme Court in suit No.A/4/48;

but that Chief Jacob Tom Princewill Amachree VII of Kalabari intervened to have the matter settled out of court, to which both parties agreed "for the sake of peace and good neighbourliness" and this led to the fixing of a new boundary between the plaintiffs and the 2nd set of defendants with pillars. It is averred that "the said boundary overlooked an earlier boundary fixed by Chief Kieni Amachree VI (sic: V) of Kalabari and gave more land of the said plaintiffs to the said defendants." As regards this settlement, it is pleaded as part of para. 8 and 9 that "A document evidencing the said settlement was duly executed by the said Chief J.T. Princewill Amachree VII and the other chiefs and persons who, together with him effected the settlement, as well as by the parties. The plaintiffs will rely on the said document. Since the aforesaid settlement the said defendants and their people respected the rights of the said plaintiffs and their people until about November, 1973, when it was noticed by the plaintiffs that some unknown person or persons had cleared the portion in dispute in this action and deposited sand, gravel and other materials thereon."

If I may remark at this stage, there is no evidence as to how the ancestors of the plaintiffs became owners of the land from time immemorial, nor is there evidence of acts of immemoriality that can be relied on except that in the judgment in the consolidated Native Court Suit No. 321/46 and No.352/46, admitted as exhibit F, 309-310 thereof, the court made findings that King Amachree I located the Bukuma people on the land in dispute and King Amachree IV located the Tombia people where they now are. It got to a point the boundary between the two was no longer valid owing to encroachment thereof which led King Amachree V alias Kieni to establish another boundary between the two. The relevant portion of the said findings shall be reproduced later in this judgment.

The claim in No.321/46 read: "The plaintiffs claim a declaration that as members of the Owerebo's family of Bukuma village they are entitled to a right of occupation, possession and use of the land or bush commonly known as Ahele situated within the Bukuma land or bush and that the defendants without the knowledge and permission of the plaintiffs allotted the said 'Ahele' land or bush to the Christ Army and Delta

Pastorate Missions for the purpose of erecting a Central School for Tombia." Injunction was also sought. In a similar vein, the Tombia people in suit No.352/46 claimed for a "declaration of right and title of occupation, possession and use of the land/bush known and called as 'Sababoro-Daha' alias 'Tombia-Piri' situated at and extended from Tombia, B being property originally occupied, possessed and used by the people of Tombia for about 62 years" as at that time in 1946. Injunction was also sought.

Although judgment was for the Bukuma people (i.e the present respondents), a close study of the entire proceedings does not quite clearly reveal where physically the said new boundary drawn between the Bukuma people and the Tombia people (i.e. the present appellants) by Kieni Amachree was established, except what the court said it found as the boundary lined with palm-tree planted by Tombia people. It is therefore D no wonder that another action in suit No.A/4/48 was instituted by Bukuma people against Tombia people at the Supreme Court, Aba Judicial Division claiming damages of \$300 (three hundred pounds) for trespass and an injunction. It was following this development that a peaceful settlement was arrived at and recorded in a document and signed by all necessary parties as per exhibit B. E

The appellants (as defendants) generally claimed in their statement of defence that they own the land in dispute. They admitted the previous judgments of the Kalabari Native Court but denied that the land F in dispute now forms part of the land that was the subject-matter of those Native Court suits. They further admitted that Chief Princewill Amachree VII intervened and made a settlement for the parties but that the boundary between the parties was established with Odum-dum trees G and not cement pillars. They also pleaded that the boundary established in the said agreement by Amachree VII added a distance of 1216 feet in favour of the appellants to the boundary earlier fixed by Kieni Amachree stretching from Tombia towards Bukuma. H

The appellants in their brief of argument set down two issues for determination by this court. So did the respondents. But only the first issue is of real moment. It was stated by the respondents as fol-

lows:-

" Whether on the pleadings and evidence the plaintiffs/respondents made out their case of title and consequently trespass against the defendants as to entitle them to the judgment of the court."

B The second issue was framed thus:-

"Whether having regard to the state of pleadings, the subsequent joinder of the second set of defendants/appellants and the evidence before the trial court, the court below was within its powers in amending the respondents' pleadings as it did."

C I intend to consider the second issue first. The 2nd set of appellants were joined to the action upon their own application to the trial court. The writ of summons and statement of claim ought to have been amended and served on them. That is the proper practice when there has
D been a joinder of parties: see Uchendu v Ogboni (1999) 5 NWLR (pt. 603) 337 at 352. It would appear they were merely served with the original writ of summons and statement of claim their unamended form. They did not contain the names of the 2nd set of appellants. Reference
E was only to the defendant who had in fact become the 1st defendant and all through the statement of claim the impression was that there was only one defendant. That was most untidy. But the 2nd set of appellants filed a separate statement of defence. They claimed in it to be the owners of the land in dispute wherein they referred to themselves as the 2nd set of
F defendants and that they granted the land to the original defendant to whom they referred as the 1st defendant. It was therefore clear to them that there were two defendants to the action, in which then reliefs sought
G were capable of being claimed jointly and severally against the said two defendants.

There was a rejoinder by the plaintiffs/respondents to the statement of defence filed by the 2nd set of defendants in which they were
H directly referred to by the plaintiffs, and allegations were made against them. The 2nd set of defendants filed a surrejoinder. They raised no objection at any stage of the proceedings at the trial court nor was any argument made in this regard in address that they were misled or could

not effectively defend the action. The appellants argue in this court that in their appeal to the lower court their case was that since the statement of claim was not amended there was no basis for the award of damages against the 2nd set of defendants/appellants. They say the lower court then amended the statement of claim accordingly and now submit that that was improper and that the lower court should simply have allowed the appeal on the basis that they were not parties against whom any relief was sought. I think the complaint and submission are rather technical. **It is my view that in the circumstances of the case which was prosecuted and defended on the basis that all three parties were properly before the court (the 2nd set of appellants at their own instance), the amendment the lower court made was a necessary formality which any court would be entitled to effect faced with the same situation, without any application for it to do so, in the interest of justice, even on appeal: see Afolabi & Ors v Adekunle & Anor, (1983) 2 SCNLR 141; (1983) 14 NSCC 398 where an amendment done on appeal at the Court of Appeal to reflect the capacity in which an action was brought was held proper by this court. At page 149; 404, Aniagolu JSC, who read the leading judgment, observed:**

"It is the duty of courts to aim at, and to do, substantial justice and to allow such formal amendments, in the course of the proceedings, as are necessary for the ultimate achievement of justice and the end of litigation."

Such an amendment, as in the present case, can be made if it will entail no injustice or any hardship to the other party, even without a formal written application in that behalf to the court, so long as that other party is given an opportunity of being heard on the point: see Kojo Atta v. Kwaku Apawu & Ors (1941) 7 WACA 75 at 76; Gbogbolulu v Hodo (1941) 7 WACA 164 at 165. I hold that there is no merit in that second issue for determination.

As regards the first issue, it must be recalled that the respondents and the 2nd set of appellants relied on the out-of-court settlement evidenced by exhibit B. The learned trial judge acknowledged this at the

close of pleadings and identified two issues which he said called for a determination in the case arising from that settlement, as recorded by him as follows:

"(a) Did King Amachree use concrete pillars as alleged by the plaintiffs or did he use 'Odumdum' tree as alleged by the defendants?
 (b) Where did King Amachree insert the concrete beacons if the plaintiffs are right or the Odumdum trees as alleged by the defendants? This will determine the boundary between Tombia and Bukuma no more no less."

I think it ought to be said that the recognition initially given to the out-of-court settlement contained in exhibit B by the learned trial judge, in my respectful view, portrayed the right focus in the circumstances of this case. Both parties accepted the settlement; it became their agreement binding on them, and upon that understanding and the state of affairs, the action in suit No.A/4/48 then pending in the Supreme Court of Aba Judicial Division was compromised. **The cause of action any of the parties to that agreement would have in regard to whoever would breach or has breached the boundary established thereby would not be founded on any purported previous right of ownership or possession through immemoriality or some earlier court judgment, but on the alleged breach of the agreement or out-of-court settlement in question. If this had been thoroughly appreciated, there would have been no need for any elaborate pleadings other than was necessary to lead to a true and clear interpretation of what was settled as the boundary between the two parties, namely, Bukuma and Tombia, and the production of a survey plan to reflect that interpretation.**

It has been held - and I think that is in consonance with the right of parties to settle civil actions out of court and the established practice is that this should be encouraged by the courts whenever there is such a move - that at any stage of pending civil proceedings, save in specified cases or circumstances in which public interest or policy element is involved, the parties are entitled to settle or compromise all or any of the questions or disputes between them on any terms and conditions on which they agree even without the approval or sanction of the court, or prior

reference to the court. Such an agreement or out-of-court settlement between the parties supersedes the original cause of action altogether and the court has no further jurisdiction in respect of the original cause of action which has been so superseded. If the terms of such new agreement or out-of-court settlement are breached or not complied with, the B injured or aggrieved party must seek his remedy based on the agreement or out-of-court settlement. In other words, his cause of action is founded on that agreement or out-of-court settlement: see Halsbury's Laws of England, 4th edn, vol. 37, para. 383; Green v Rozen (1955) 2 ALL ER 797 at 801. This was approved in McCallum v County Residences Ltd C (1965) 1 W.L.R. 657 at 660 where Lord Denning M.R. said:

" When an action is compromised by an agreement... it gives rise to a new cause of action. This arises since the writ in the first action, and must be the subject of a new action. The plaintiffs, in order D to get judgment, has to sue on the compromise. That is the only course which the plaintiffs can take in order to enforce the settlement..... "

The effect of settlement or compromise has also been recorded in Halsbury's Laws of England (supra), para. 391. There it is said that E where the parties settle or compromise pending proceedings, whether before, at or during the trial, the settlement or compromise constitutes a new and independent agreement between them made for good consideration on the authority of Re Hearn, de Bertodano v Hearn (1913) 108 F L.T.737 at 738 per Cozens-Hardy M.R. Its effects are (1) to put an end to the proceedings, for they are thereby spent and exhausted; (2) to preclude the parties from taking any further steps in the action, except where they have provided for liberty to apply to enforce the agreed terms; and G (3) to supersede the original cause of action altogether, that is to say, the terms of the settlement or compromise must henceforth regulate the relationship and entitlement of the parties in regard to the subject-matter.

It would appear that it can be argued that the power to settle or compromise "at any stage of pending proceedings" extends even to that H of compromising judgments in certain situations. This is so because under note 1 to para. 383 of Halsbury's Laws of England (supra), it is remarked that proceedings remain pending until satisfaction of the judg-

ment. For this opinion, the observation of Jessel M.R. in Re Clagett's Estate, Fordham v Clagett (1882) 20 Ch.D 637 at 653 is there relied on. There, he stated inter alia:

"A cause is said to be pending in a Court of Justice when any proceeding can be taken in it..... If you can take any proceeding it is pending. 'Pending' does not mean that it has not been tried. It may have been tried years ago. In fact, in the days of the old Court of Chancery, we were familiar with cases which had been tried fifty or even one hundred years before, and which were still pending. Sometimes, on doubt, they require a process which we call reviving..... but nevertheless they were pending suits".....

I think the emphasis should be that if a judgment remains not executed but can still be by the proper procedure being taken, then it might be said to be a step taken at any stage of a pending proceeding. In that sense and with that status, a judgment may be compromised by the parties to it. I can see nothing unusual or unlawful about this. That was what in effect happened to the judgments in the consolidated Kalabari Native Court suits No.321/46 and No.352/46 when the parties entered a compromise as per exhibit B.

It should not be forgotten that a judgment in a civil case (except possibly where it has a public policy element in it because of its subject-matter) confers a private right for the benefit of the successful party. Such a right can, where possible, be transferred by him to another person or surrendered to the party who lost in the judgment or even abandoned without the judgment being executed, or he could execute it partially. In that regard it can be fitted into the general and broad proposition stated by this court in Ariori v Elemo (1983) 1 SCNLR 1 at 13 per Eso JSC that:

"When a right is conferred solely for the benefit of an individual there should be no problem as to the extent to which he could waive such right. The right is for his benefit. He is sui juris. He is under no legal disability. He should be able to forgo the right or in other words waive it either completely or partially, depending on his free choice.

The extent to which he has forgone his right would be a matter of fact and each case will depend on its peculiar facts. A simple example could be seen in a right which has been conferred by contract. A person who is a beneficiary to a contract, whereby the benefit is principally for him, has full competence to waive that right. What obtains in the case of a contract should go for the benefits conferred by statute." B

It must therefore be clear beyond dispute that it was open to the successful party to the Kalabari Native Court judgment to enter into terms of settlement of the said judgment in any way it considered fit. That is in no measure unlawful or against public policy. C

Initially, as already observed earlier in this judgment, the learned trial judge appeared to appreciate the relevance of exhibit B at the close of pleadings, even before hearing commenced. In his judgment, he managed to keep fairly within that line of understanding when he said [except that the (c) aspect is only to a limited extent] that: D

"I think that for one to reach a just and balanced decision on this question (of trespass) I have to consider three important matters as follows (a) the pleadings (b) Exhibit 'B' i.e. the J.T. Princewill Amachree VII's agreement between the parties reduced into writing, and (c) Exhibit 'F' the native court judgment." E

He had penultimate said:

"I agree with learned counsel for the plaintiffs that if I should find as a fact that King Amachree VII's boundary as placed by the plaintiffs is where it had then any interference with the rights of the plaintiffs on any portion south of that boundary is a flagrant act of trespass." F

It must, of course, be cautioned that a finding of fact which is made, having regard to the existence of documentary evidence, cannot be seen to fly in the face of the accepted relevant document or documents by the court. If it is, it will be contradictory and perverse. The appeal court will have to intervene to set aside such finding and make its own finding as may be justified by the evidence: see Atolagbe v Shorun (1985) 4 SC 250 H at 285; Narumal & Sons (Nig) Ltd v Niger Benue Transport Co. Ltd (1989) 2 NWLR (pt.106) 730 at 742. **A trial judge will not be entitled to assume that it is within his exclusive province to make findings**

of fact when such findings depend much or entirely on documentary evidence. His findings must reasonably reflect the contents of the document or documents in question as a whole so as to be seen as a true understanding and interpretation of the terms thereof.

B Where any oral evidence on an issue in a case is given and there is cogent documentary evidence on the same issue, it is the duty of the trial judge to test the reliability of the oral evidence against the said documentary evidence. To put it in the now familiar expression, it helps the trial judge to reach a fair finding by using the relevant document as a hanger on which to assess the oral testimony: see Kimdey v Governor, Gongola State (1988) 2 NWLR (pt. 77) 445 at 473.

D Having regard to the clear view taken by the learned trial judge, I think quite rightly, of the central importance of the settlement agreement, exhibit B, his duty was to use its contents to test any claim by either of both parties to a particular boundary as having been established between them by that settlement. The learned trial judge in his judgment remarked
E in respect of exhibit B:

"Exhibit 'B' is the Chief J.T. Princewill Amachree VII's agreement reduced into writing and which I referred to above as the important consideration to guide me in arriving at some definite answer."

F Later in the judgment he made this further observation on exhibit B:

"Learned counsel for the 2nd set of defendants did refer only to paragraph 3 of this exhibit 'B'. But I am satisfied that, in the absence of any objection to any portion of it, the whole of Exhibit 'B' is taken as having been accepted in its entirety."

G There was no objection to any part of exhibit B by the parties. They accepted the purpose that agreement was to serve and also its terms.

H In their statement of claim, para.8, the respondents made the following relevant averment about the settlement effected by Chief Jacob Tom Princewill Amachree VII and others between them and the appellants in that agreement as evidenced by exhibit B:

"8. The said Chief Jacob Tom Princewill Amachree VII and the said others persuaded the said plaintiffs to permit the said defendants to

keep and use the schools and mission buildings already erected by them on the land and the said plaintiffs having consented for the sake of peace and good neighbourliness, the said Chief Jacob Tom Princewill Amachree VII and the said others fixed a new boundary known as the Princewill boundary with pillars bearing the initials J.T.P. The said boundary overlooked an earlier boundary fixed by Chief Kieni Amachree V. of Kalabari and gave away more land of the said plaintiffs to the said defendants. A document evidencing the said settlement was duly executed by the said chief J.T. Princewill Amachree VII and the other chiefs and persons who, together with him effected the settlement, as well as by the parties. The plaintiffs will rely on the said document." [Emphasis mine]

This averment shows that the boundary previously established between the parties by Amachree v alias Kieni was moved towards Bukuma (plaintiffs/respondents) by the settlement subsequently arrived at under the auspices of Amachree VII alias Princewill thereby giving more land to Tombia (defendants/appellants). Of course the document evidencing the said settlement as pleaded is exhibit B. It is important to note that it was the boundary made by Kieni, which the Tombia people disputed and appeared to have failed to respect, that was confirmed by the Kalabari Native Court in the consolidated suits No .321/46 and No.352/46 that followed that dispute. The findings made as a result of the inspection of the locus in quo carried out by that Court were recorded in exhibit F (record of proceedings). Those findings first dealt with the histories of the two parties as to how they came to be on their respective lands before drawing certain conclusions. The Bukuma people were located on their land by King Amachree I. It was much later that King Amachree IV located the Tombia people on their own land. This was around 1883 since the findings which were made in 1946 put the Tombia location 63 years earlier.

It will now be pertinent and convenient for the proper understanding of the genesis of the dispute which the Kalabari Native Court had to settle in 1946 to reproduce, inter alia, the findings of that Court as follows:

"It is a substantial proof before the Court that late King Amachree I located the people of Bukuma on the land in dispute for considerable number of years past. Both the Kalabari people as-well-as the people of Tombia were at the old shipping when Bukuma people were located on the land in dispute by late King Amachree I for habitation. The people of Bukuma people (sic) were then the only people making use of the whole enter (sic: entire) area of the land in dispute without any interference from any sort of people..... During the reign of late King Amachree IV alias Abi, the people of Kalabari immigrated to their new settlement about 62 or 63 years since. The people of Tombia also migrated from the old shipping following the Kalabari people, their relatives. The then king Amachree IV and his Chiefs on firm resolution, located the people of Tombia on their present site for habitation. On the first or initial stage of settlement of the Tombia people on their present site, no boundary of demarcation was fixed with the obvious reason that the Tombia people were traders by profession and not people who had concern with land-bush by profession. The Bukuma people to the understanding that they were first located on the land in dispute gained such access in using the land to any dimension by farming and by any other means charitable to their livelihood. The actual bone of contention between the two contesting parties is that since the habitation of the people of Tombia on the land, they had never at any time applied for an extension of the area or another area of land be annexed to their site. The plaintiffs in case No. 321/46 stated in their vivid dilation that King Amachree IV alias Abi at some time delegated Chiefs Okorocha Amachree and Jack Suku Amachree who erected boundary between the Tombia and Bukuma people. On inspection, the Court found that that boundary had been for long encroached by the Tombia people as burial places; in such respect that line of demarcation is no longer valid. After then during the reign of King Amachree V alias Kieni, another boundary line was erected which was also seen by the Court Bench on inspection. The Court found that the people of Tombia only planted palm-wine trees to that line of boundary without any encroachment done. There were also seen two block buildings at the left side of the boundary line facing northwards which houses

were erected by the people of Tombia which buildings also do not cause any encroachment to the boundary line On close inspection of the land by the Court Bench, no other boundary was seen, of any description. The contesting towns, Tombia and Bukuma had no previous land dispute since their habitation on the land in dispute on different sections of the land-bush other than this present dispute caused by the establishment of the new school site by the people of Tombia on the land in dispute." B

It is plain that it was the boundary (howsoever discovered by the Kalabari Native Court) created by Amachree V alias Kieni which that court accepted as the boundary between Bukuma and Tombia to give judgment for Bukuma (plaintiffs/respondents). It was that boundary that was compromised and shifted in the out-of-court settlement of the suit No.A/4/48 which was later instituted by Bukuma people in order to enforce that boundary. In para.5 of exhibit B which contains the terms of settlement it is stated: D

"5. That Chief Jacob Tom Princewill Amachree and others realized that if the said Charlie Amachree or Kieni Amachree boundary would so exist between the parties there will be an endless trouble and continuous litigation and therefore, for the interest of peace and tranquility between them, set in to modify the boundary as agreed and allowed by the plaintiffs respectively." F

In pursuance of this, a distance of 1216 ft. 7 ins. was added to Tombia's land from that boundary, and this is stated in para.6 of exhibit B as follows:

"6. That 1216 ft. 7ins. from the said Charlie Amachree or Kieni boundary from the upper junction of Tombia down to Bukuma the plaintiffs side be off and added to the said Chief Charlie Davies and others (defendants) of Tombia by the said Chief Jacob Tom Princewill Amachree and others with cement pillars fixed across the land at the end of the given distance starting from Ngiangia Creek point Western, to Obita creek point Eastern, by the full consent of the plaintiffs." [Emphasis mine] G H

This settlement was agreed by both sides and the Tombia people were "in consideration of the above" to pay the amount of forty guineas to the

Bukuma people " as part of the plaintiffs' expenses defrayed in respect of this suit" No.A/4/48 in the Supreme Court of Aba judicial Division, which amount the plaintiffs accepted. There is no issue that that money was not paid. So it would appear there was no ground upon which the settlement would have been repudiated by either party.

In order for the plaintiffs/respondents to succeed in the present suit, they would have to prove that the trespass alleged against the defendants/appellants did take place in contravention of the new boundary. In other words, they would have to show the new boundary to the satisfaction of the court as a prelude to establishing the act of trespass. That is based on the principle that a plaintiff has the burden to prove the case he seeks to make, and can only succeed on the strength of his case: see Kodilinye v Mbanefo Odu (1935) 2 WACA 336 at 337; Udegbe v Nwokafor (1963) 1 ALL NLR 417 at 418; except, of course, a plaintiff is entitled to take advantage of any evidence adduced by the defence which assists, or tends to establish his case: see Akinola v Oluwo (1962) 1 ALL NLR 224 at 225; Sunday Piaro v Tenalo (1976) 12 SC 31 at 37.

The learned trial judge was, unfortunately, oblivious of the fact that his duty was to find a solution to the case from a consistent focus on the relevant terms of exhibit B (the out-of-court settlement). He initially appeared to have realized this, as I indicated earlier, by correctly identifying exhibit B as "the important consideration to guide me in arriving at some definite answer"; and by recognizing, albeit put by him rather clumsily, that the extent of the parties' portions of land on either side of the boundary would depend on what was agreed in exhibit B when he said that "King Amachree VII and his chiefs of Princewill's family gave both sides portions of land on the opposite sides of the boundary line set by him...." The true position is that the boundary set by King Amachree VII and his Chiefs in exhibit B gave more land to the defendants/appellants. However, having managed to have given the impression that exhibit B was crucial, the learned trial judge contrary to the documentary evidence obviously became inconsistent and finally reversed himself when he later said:

"I find that from the whole of the evidence and submissions the identity of the land in dispute is not in doubt; it is AHELE as per the plaintiffs or Tombia piri as per the defendants..... I find, however, that the portion in dispute here falls outside the King Amachree VII's boundary but within the southern part of that boundary, which belongs to the plaintiffs. I find and accept, too that the plaintiffs are owners of that area not as a result of the settlement by King J.T. Princewill Amachree VII but as a result of the Native Court judgments between the parties." [Emphasis mine]

The real basis upon which the cause of the plaintiffs/respondents, even from the relevant averments of their statement of claim, could be examined and decided which is exhibit B was finally misunderstood and ignored by the trial judge. The lower court fell into the same error when it said, per Omosun JCA:

"The learned judge found as stated earlier in this judgment that the title of the respondents is based on the Native Court judgments and not the King Amachree VII settlement Exh 'B'. I have no cause to quarrel with that finding which is amply supported by evidence."

With due respect, I have no doubt that this was an absolute misconception. The learned Justice then went further to say: "I hold the view that Exh. 'B' cannot supersede the Native Court Judgment." This clearly, in my respectful view, betrays a misconception of the commanding and dominant effect of the out-of-court settlement between the parties to it. To recall what Lord Denning M.R. said inter alia in McCallum v Country Residences (supra) at p.660: "When an action is compromised..... it gives rise to a new cause of action..... The plaintiff has only to sue on the agreement....." This proposition approved what Slade, J. said in Green v Rozen (supra) at P. 801 that when parties make an out-of-court settlement-

"the new agreement between the parties to the action supersedes the original cause of action altogether; that the court has no further jurisdiction in respect of the original cause of action which has been superseded by the new agreement, and that, if the terms of the new agreement are not complied with, then the injured party must seek his remedy

on the new agreement."

With due respect, I entirely acknowledge and endorse this proposition of law as right both in law and equity, as well as from a common sense approach.

B The parties themselves to this present case relied on exhibit B in their arguments on appeal both in the court below and in this court. The issue remained how to ascertain the new boundary agreed in that document physically on the ground and whether the survey plan (exhibit A) produced by the plaintiffs/respondents towards that purpose could be
C accepted as truly reflecting that boundary; in other words, whether as regards the new boundary agreed by both sides the said survey plan (exhibit A) and the out-of-court settlement (exhibit B) speak the same language. In not being able to appreciate this singular issue, the two
D courts below failed to decide on what was in essence the real issue submitted before them by the parties.

It was demonstrated before us by Mr. Joseph SAN on behalf of the defendants/appellants that the survey plan, exhibit A, did not take
E proper account of the distance of 1216 ft. 7ins. added to the defendants/appellants' land in exhibit B from the earlier Kieni boundary. It was that boundary that was made the basis of the suit No.A/4/48 which was later compromised. That boundary is indicated in exhibit A as "Line Demar-
F cating the land of Tombia from the land of Bukuma as shown by Bukuma and referred to suit No.A4/1948." Going by that fact and taking measurements from that line towards Bukuma along the Road/Footpath running between Tombia and Bukuma, there are 470 ft + 511 ft + 200 ft to the rear end of the land in dispute which is delineated yellow in exhibit A.
G That distance comes to 1181 ft which is short by 35 ft. 7 ins. of the 1216 ft. 7 ins. added to Tombia's land under exhibit B. The learned Senior Advocate accordingly submitted that the defendants/appellants did not breach the boundary which exhibit B was meant to establish and there-
H fore did not trespass into any part of the land to which the plaintiffs/respondents can now lawfully lay claim. That was a submission that was difficult to fault.

The submission of learned counsel for the plaintiffs/respondents,

Mr. Ofodile, is that exhibit B talks of the new boundary having to be established by cement pillars and that the portions of the cement pillars on the ground as indicated on the plaintiffs/respondents' survey plan, exhibit A, show that the land in dispute is within the plaintiffs/respondents land, which fact proved the trespass complained of. B

The weaknesses in Mr. Ofodile's argument are that (1) the said exhibit B, para.6, clearly provides that the new boundary shall be "With cement pillars fixed across the land at the end of the given distance"; (2) the distance indicated is 1216 ft. 7 ins, so that any distance short of that will not be in compliance with the agreement; (3) cement pillars can be planted in error or deliberately to be short of that distance, or moved mischievously from the correct positions they might have been planted; (4) the end of the distance indicated in exhibit B where cement pillars were to be fixed is "starting from Ngiangia creek point Western (side) to Obita creek point Eastern (side)"; but the survey plan failed to indicate these two creeks which are reliable permanent landmarks for deciding where the cement pillars should be. C D

The other argument of Mr. Ofodile is that the measurement of E the distance of 1216 ft.7 ins. should be taken from the other eastern end of the said line of demarcation established by Kieni. But it will be observed that that line appears to terminate at the easterly end on Orida waterside whereas exhibit B says that the distance should be taken from F "the upper junction of Tombia down to Bukuma." It is the point at which it appears that there is a junction as indicated by the plaintiffs/respondents in their survey plan from which the said distance of 1181 ft was taken and measured southwards.

It is therefore untenable from the demonstrable evidence G to hold that the defendants/appellants committed trespass for which they can be found liable. I am satisfied that the plaintiffs/respondents failed to proved their claim on the balance of probabilities and therefore their action ought to have been dismissed. I will H therefore answer the first issue for determination in the negative. I accordingly find merit in this appeal and allow it. The judgment of the lower court together with the order for costs is set side. The

plaintiffs/respondents' action is hereby dismissed. I award N10,000.00 costs to the defendants/appellants.

B

WALI JSC

I have been privileged to read before now the lead judgment of my learned brother, Uwaifo, J.S.C, and I agree with it.

C

For the same reasons adequately stated in the lead judgment, I also hereby allow the appeal and set aside the judgment of the lower courts. The plaintiffs'/respondents' action is dismissed with N10,000.00 costs to the defendants/appellants.

D

KUTIGI JSC

I read in advance the judgment just delivered by my learned brother Uwaifo, J.S.C. I agree with his reasoning and conclusions. The Plaintiffs clearly on the pleadings failed to prove their case which ought E to have been dismissed. I therefore find merit in the appeal and hereby allow it. Plaintiffs' case is accordingly dismissed. And this shall be the order of the lower courts. I award N10,000.00 costs in favour of the Defendants against the plaintiffs.

F

MOHAMMED JSC

I have had the advantage of reading the opinion of my learned brother Uwaifo, JSC., in the judgment just delivered and from what he G said in the judgment is clear, that this appeal ought to be allowed. I am in entire agreement with, and do not desire to add to the conclusions expressed by my learned brother on the issues canvassed in this appeal. In the result, I concur in holding that the appeal should be allowed. I abide H by the consequential orders made, including the award of costs.

KALGO JSC

The respondents who were plaintiffs at the trial claimed that the were the owners in possession of the land in dispute on which they farmed and exercised divers acts of ownership, having inherited the same from their ancestors from time immemorial. This therefore postulates B that they are either owners of the land or were in exclusive possession of the prior to the alleged trespass by the appellants. They must therefore prove the title to the land before they can succeed in this action.

At the trial, they did not produce any evidence that they inherited C the land in dispute or how the land devolved from their ancestors to them. They failed to prove any acts of ownership nor did they prove possession of the land in dispute.

The respondents however claimed that the land in dispute was D involved in two Kalabari Native Court cases which they won and had since then been in possession thereof. They relied heavily on the survey plan Exhibit 'A' in support of this contention. But a thorough examination of Exhibit 'A' shows that there is nothing in it bearing any relationship with the land fought in the Native Court cases. The respondents who E had the burden or primary duty to prove their case on the strength of their own evidence sought to rely on Charlie Amachree or Kieni Amachree boundary fixed between the parties by Charlie Amachree before the Na- tive Court cases. But they could not do so as Exhibit 'A' upon which they F relied did not distinctly show the said boundary or the land the subject-matter of the Native Court cases. And if they are to succeed in proving that appellants trespassed on the land in dispute, they must show that the appellants built outside the boundary line.

It is common ground however that after the Native Court cases, G the parties agreed to a settlement by which the boundary between them was demarcated and agreed upon by all the parties. This was called J.T.P. Amachree VII's boundary and the agreement which gave rise to this demarcation of the boundary was Exhibit 'B'. There is no doubt that H both parties were bound by Exhibit 'B' and they both relied on it as the ultimate position reached in the final settlement of the boundary between the parties on the land in dispute. Exhibit 'B' added a distance of 1216

feet 7 inches from Charlie or Kieni Amachree boundary to the land of the Tombia people. Paragraph 6 of Exhibit 'B' states:-

"That 1216 feet 7 inches from the said Charlie Amachree or Kieni boundary from the upper junction of Tombia down to Bukuma the plaintiffs side be off and added to the said Chief Charlie Davies and others (Defendants) of Tombia by the said Chief Jacob Tom Princewill Amachree and others with cement pillars fixed across the land at the end of the given distance starting from Ngiangie Creek point Western, to Obita Creek point Eastern, by the full consent of the plaintiffs." (Underlining mine)

As I said earlier both parties agreed with and are bound by Exhibit 'B'. In fact they both relied upon it at the trial and the learned trial judge himself recognized and accepted it as the only reliable evidence in settling the parties' disputes. He made findings of fact to that effect in his judgment. The important issue now is to determine the area of land each party was given by Exhibit 'B' and see whether either of them went beyond his own area thereby committing trespass. By Exhibit 'B' Tombia land was further extended by the addition of a distance of 1216 feet 7 inches and this was done by a boundary across the land.

However, a close examination of Exhibit 'A' the respondents' survey plan, showed that the distance from the gate to Tombia in the North of the plan to peg I in the south is only 1180' and not 1216 feet 7 inches (i.e. 470' + 510 + 200). Also Exhibit 'A' did not show the 2 creeks in support of the cement pillars mentioned in paragraph 6 of Exhibit 'B'. This means that Exhibit 'A' and 'B' are not the same or do not agree. I agree with the learned counsel for the appellants that if the respondents are to succeed in this action, Exhibit 'A' and 'B' must speak the same language and their contents must be consistent and the same. Learned counsel for the respondents however concede that the plan, Exhibit 'A', did not properly explain the features mentioned in paragraphs 6 of Exhibit 'B' but submitted that Exhibit 'B' was only a confirmation of respondents' title to the land and should not be strictly construed.

The learned trial judge on the other hand, though he accepted and realized the importance of Exhibit 'B' in the dispute between the par-

ties deviated later when he held that the Native Court cases confirmed ownership of the land in dispute on the respondents which in effect meant that he reverted to the position under Charlie Amachree or Kieni Amachree before Exhibit 'B' was entered into. This was definitely wrong since Exhibit 'B' was the last agreement, mutually entered into by both parties B and by which they are and must be held bound.

The learned trial judge in his judgment on page 186 of the record said thus:-

"The issue here now is in the face of all the evidence which of the two parties..... own the land in dispute. I find from the whole of the evidence and submission the identity of the land in dispute is not in doubt; it is either AHELE as per the plaintiffs or Tombia piri as per the defendants". C

So far this finding is accord with the evidence before him. But he went D on to say:-

"I find, however, that the portion in dispute here falls outside the King Amachree VII's boundary but within the Southern part of that boundary, which belongs to the plaintiffs. I find and accept, too that the plaintiffs are owners of that area not as a result of the settlement by King J.T. Princewill Amachree VII but as a result of the Native Court judgment between the parties". E

With due respect to the learned trial judge, I disagree with him F on this last finding. In the first place the respondents have failed to identify or describe properly the area in dispute in the survey plan Exhibit 'A' upon which they relied and in the second place the settlement agreement Exhibit 'B', was subsequent to the Native Court cases and superseded G them. The land in dispute in this instant action must be one contemplated by the provisions of Exhibit 'B', in this case paragraph 6 of Exhibit 'B'. The question of the dispute in the Native Court cases was overtaken by the settlement of Amachree VII, and his boundary dictated the extent of the land in dispute. It was therefore wrong for the learned trial judge to H revert to the pre-Exhibit 'B' Native Court cases and rely on them to find for the respondents. The respondents by Exhibit 'A' have not shown that the appellants have trespassed on their land since the line of demarcation

of their land did not comply with the demarcation agreed upon in paragraph 6 of Exhibit 'B'.

The Court of Appeal also fell into the same error as the learned trial judge in confirming his decision. In view of what I said above, I am
B satisfied that there are special reasons to interfere with the decision of the Court of Appeal on the Concurrent findings, and I so do.

Finally, I find that I am in full agreement with my learned brother
Uwaifo JSC that there is merit in this appeal and I allow it. I set aside the
C decision of the Court of Appeal and abide by the consequential orders made in the leading judgment including the order as to costs.

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