

**SUPREME COURT OF NIGERIA**  
3RD DECEMBER, 1999. SC. 258/1993  
**CORAM:- A. G. KARIBI-WHYTE, M. E. OGUNDARE,**  
**S. U. ONU, A. I. IGUH, E. O. AYOOLA, JJSC**

SALIHU OKINO ..... 1ST DEFENDANT/APPELLANT  
(For Ezionogu Clan of Eganyi)

AND

YAKUBU OBANEHIRA & 5 ORS. .... PLAINTIFFS/RESPONDENTS  
(For themselves and as representing  
members of Onoka Clan of Eganyi)

AND

NATIONAL IRON ORE MINING CO. LTD          2ND DEFENDANT/  
RESPONDENT

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***APPEALS** - Court of Appeal, Act 1976 - The provision of section 11 thereof - Cover cases where all the justices that sat on an appeal - Are still in the service of that court on the day of judgment - And had written and signed their judgments.*

***APPEALS** - Evidence - Evaluation of - Where a trial court unquestionably evaluates the evidence - And there is sufficient evidence on record to support the findings of fact made - The appeal court cannot interfere.*

***APPEALS** - Judgment - Court of Appeal Act 1976 - Pursuant to section 11 thereof - It is not necessary for all the three justices - Who heard an appeal at the Court of Appeal - To be present together in court on the day of the delivery of judgment - The opinion of any one of them who is absent - May be read by any other justice of that Court.*

***APPEALS** - Judgments - Opinion of an absent justice - Read as against being pronounced after he had ceased to be a member of such relevant court - Such an opinion would be given without jurisdiction - But the situation in the present case is different.*

**JUDGMENTS** - *Appeals - Opinion of absent justice of the Court of appeal - Section 258(2) of the 1979 Constitution - Contrasted with Section 11 of the Court of Appeal Act, 1976.*

**MAXIMS** - *Omnia Praesumuntur rite esse acta - Presumption of regularity - Is applicable in the instance case - And the judgment in contention is therefore unimpeachable.*

**ORDERS** - *Retrial - Order of - When it is not appropriate to make the order.*

**WORDS & PHRASES** - *The word "pronounced" - Under s. 258 (2) of the 1979 Constitution - The judicial interpretation of the word.*

### **FACTS**

At the Upper Area Court, holden at Lokoja the plaintiffs/respondents brought an action in a representative capacity against the 1st defendant/appellant in a representative capacity and the 2nd defendant/respondent for: an order of court restraining the 1st defendant and members of his clan from holding out themselves as the Owners of the farm lands in dispute, restraining the 1st defendant and members of his clan from making any claim to or receiving any compensation from the 2nd defendant in respect of the farm lands in dispute, restraining the 2nd defendant from paying any compensation to the 1st defendant or any person whatsoever in respect of the farm lands in dispute; and an order that the 2nd defendant shall pay the said compensation to the plaintiffs. The plaintiffs claimed that they are the owners of the five pieces or parcels of farm land in dispute. Further, that they were therefore entitled to all compensation payable by the 2nd defendant in respect of parts of the farm lands in dispute affected by the Ajaokuta - Itakpe rail line. They prayed for the order of court in terms of their claims. The 1st defendant, for his own part, contended that the farm lands in dispute were owned and remained in the absolute possession of his Ezionogu Clan. The 2nd defendant who maintained a neutral posture throughout the proceedings,

waiting to pay compensation to the victorious party proffered no evidence at the trial. At the close of evidence at the trial, the trial court with the parties, their witnesses and learned counsel visited the Locus in quo and made copious notes of this inspection.

At the conclusion of hearing, the trial court in a well considered judgment found for the 1st defendant and dismissed the plaintiffs' claims. Dissatisfied, the plaintiffs appealed to the Appellate Division of the High Court of Justice, holden at Okene. That court unanimously allowed the appeal set aside the decision and orders of the trial court and concluded that the Upper Area Court abdicated its primary responsibility of evaluating the evidence pleaded before it and failed to ascribe probative value to the said evidence. Aggrieved by this decision, the 1st defendant appealed to the Court of Appeal, Kaduna Division. That court unanimously allowed the 1st defendant's appeal. It held that since the appellate High Court failed to re-evaluate the rest of the evidence not considered by the trial court, the case must be remitted for a trial de novo by a different panel of the Upper Area Court, Lokoja. The appeal at the Court of Appeal was heard by a panel Mohammed, Achike and Okunola (JJCA) after which judgment was reserved. On the date of the judgment Mohammed JCA had been elevated to the Supreme Court and sworn in. Achike JCA (as he then was) had to pronounce the judgment of Mohammed JCA (as he then was). Being dissatisfied, the 1st defendant and the plaintiffs have appealed to the Supreme Court. The appeal was determined on three issues.

#### **ISSUES FOR DETERMINATION**

(i) *Whether the Court of Appeal was properly constituted when it delivered its judgment in the appeal on the 9th day of June, 1993.*

(ii) *Whether the judgment of the Court of Appeal, the subject matter of this appeal is legally valid, constitutional and /or otherwise unimpeachable.*

(iii) *whether the Court of Appeal was right to have set aside the judgments of the Appellate High Court and the trial Upper Area Court and to order a retrial of the suit.*

**HELD** (Unanimously allowing the main appeal and dismissing the cross-appeal per lead judgment of **IGUH JSC**)

***Appeals - Judgment***

1. The questions that have arisen under issues 1 and 2 for determination  
 B in this appeal are by no means new. In Alhaji Aminu Ishola v. Societe  
 Generale Bank (Nig) Ltd (1997) 2 N.W.L.B. (part 488) 405, a similar  
 situation that calls for decision in this appeal was considered by this  
 court. In that case, this court held that pursuant to Section 11 of the  
 C Court of Appeal Act, 1976, once an appeal in any cause or matter has  
 been fully heard before the Court of Appeal and judgment is reserved, it  
 shall not be necessary for all the three Justices who heard the appeal to  
 be present together in court on the day appointed for the delivery of the  
 judgment. It is lawful if the written opinion of any one of them who is  
 D unavailable is read by any other Justice of that court. It was further held  
 that the judgment of the Court of Appeal in that case was not void simply  
 because only 2 Justices of the Court of Appeal who were among those  
 who heard the appeal were present to deliver the judgment of court. This  
 E court has not been invited to depart from its decision in the Aminu Ishola  
 case (supra) and, speaking for myself, I can find on reason to change my  
 opinion on the decision of this court in that case. (p. 3024 A)

F ***Appeals - Court of Appeal Act 1976***

2. It must however be stressed that section 11 of the Court of Appeal  
 Act, 1976 appears to cover cases where all the Justices that sat on an  
 appeal are still in the service of that Court on the date of judgment and  
 had written and signed their judgments but because some or all of the  
 G Justice for one reason or the other are unable to be physically present to  
 deliver the judgment, they gave same to other justice or Justices to read  
 them on their behalf. See Lawani Adesokan and others v. Prince Michael  
 Adegorolu (1997) 3 N.W. L.R. (part 493) 261 of 273-274 per Ogundare,  
 H J.S.C. (p. 3024 E)

***Appeals - Opinion of absent justice - S. 258(2) of the 1979 Constitution***

3. Section 11 of the Court of Appeal Act, 1976 must be contrasted with S 258 (2) of the 1979 Constitution. Section 258 (2) of the 1979 Constitution permits the opinion of a justice who joined in the hearing of an appeal but is unable to be present in person for the delivery of the judgment to be pronounced or read by any other Justice whether or not he was present at the hearing.

Accordingly, whereas under section 11 of the Court of Appeal Act, *ibid*, the opinion in issue must be confined only to that of a Justice who sat on the appeal and remained a serving member of the Court of Appeal as at the date of the delivery of the judgment in the case, the opinion of an absent Justice under section 258 (2) of the 1979 Constitution may be pronounced as long as that opinion was given when he was a member of the relevant court. Unlike under section 11 of the Court Appeal Act, it will not matter that such a Justice whose opinion under section 258 (2) of the 1979 Constitution is being pronounced was subsequently elevated to a higher court, died, retired or was dismissed from service before judgment in the appeal was delivered. (pp. 3024 H/3025 E)

***Words and Phrases - The word "pronounced"***

4. The word pronounced has received judicial interpretation in the judgment of this court in Attorney - General of Imo State v. Attorney - General of Rivers State (1983) 8 S.C. 10 where Fatayi - Williams, C.J.N., declared as follows -

*"To my mind, the phrase "may be pronounced" used in subsection (2) above can only mean, in the context, "to utter, speak, declare aloud, or proclaim". Moreover, since the phrase is obviously intended to distinguish what "may be pronounced" from what "may be read", what is pronounced cannot be the same as what is read from a typewritten or handwritten script. It must mean, and I so hold, what is orally proclaimed or declared aloud from personal knowledge.*

*In view of the interpretation which I have put on the phrase "may be pronounced", I also hold that any of the Justices of the Supreme*

*Court who heard any cause or matter can, after a decision has been arrived at by all the Justices, pronounce the opinion of another justice who, for one reason or another, is unable to reduce his opinion into writing or be present when the judgment in the case is being delivered by each of the other Justices."* (p. 3025 A)

***Judgment - Opinion of an absent justice***

5. It must therefore be emphasized that once the opinion of an absent Justice even though written at a time he was a member of the relevant court is read as against being pronounced after he had ceased to be a member of such relevant court by elevation to a higher bench, death, dismissal or retirement, such an opinion would be given without jurisdiction and would consequently be a nullity. See Ogbuinyiya and others v. Obi Okudo and others (1978) 3 L.R.N. 318, at 327 - 328. See too Lawani Adesokan v. Prince Michael Adegorolu, (supra) at page 274 per Ogundare, J.S.C.

In the present case, the appeal was duly heard on the 10th March, 1993 by Uthman Mohammed and Achike JJ.C.A., as they then were, and Okunola J.C.A. Judgment was thereafter reserved. Before the 9th June, 1993 on which , date judgment of the court was delivered, Uthman Mohammed, J.S.C. had been elevated to the Supreme Court bench and therefore ceased to be a judge of the Court of Appeal. Only Achike, J.C.A., as he then was, and Okunola, J.C.A. sat on the date of the delivery of the said judgment. The record of proceedings shows that Achike and Okunola, JJ.C.A. allowed the appeal. It is also clear from the record of proceedings that Uthman Mohammed, J.C.A., as he then was, had before his elevation to the Supreme Court bench submitted a written opinion signed by him to Achike, J.C.A., as he then was in which he merely said -

*" I agree"*

This agreement by Uthman Mohammed, J.C.A. was included in the record of appeal to this court.

The proceeding of 9th June, 1993 after the delivery of the judgments of Okunola and Achike JJ.C.A. went thus -

*"Pronouncement on the Judgment of Uthman Mohammed, J.C.A. (as he then was) by Achike, J.C.A."*

The judgment of Uthman Mohammed, J.C.A., was subsequently proclaimed by Achike, J.C.A. There is no suggestion that the said opinion of Uthman Mohammed, J.C.A. was read by Achike, J.C.A. Indeed Achike, J.C.A. was meticulous enough to indicate and to put it down in writing that the opinion of Uthman Mohammed, J.C.A., was pronounced by him. Indeed, questioned by this court, Learned Counsel for the cross-appellants admitted that he was not present in court when judgment was delivered in the cause. It is plain to me that the opinion of Uthman Mohammed was duly pronounced as indicated by Achike, J.C.A., as required by law and was never read as Dr. Mosugu had submitted. (p. 3026 E)

#### ***Maxim - Omnia praesumuntur rite esse acta***

6. I think it is necessary in this regard to draw attention to the legal presumption of regularity, omnia praesumuntur rite esse acta which, principally, is applied to judicial and official acts. The application of this presumption which is rebuttable was neither challenged nor dislodged by the cross-appellants in any manner in this case. And as I have observed, this is quite understandable as learned cross-appellants' Counsel on his own admission was not in court on the date judgment in the appeal was delivered. In my view the presumption of regularity fully applies to the proceedings of the 9th June, 1993 on which date judgment in the appeal was delivered. It is my view therefore that the judgment of the court below appears to me unimpeachable and I so pronounce. (p. 3027 G)

#### ***Appeals - Evidence***

7. There can be no doubt that the evaluation of evidence and the ascription of probative value to such evidence are the primary functions of the court of trial which saw, heard and assessed *the witnesses*. Where a court of trial unquestionably evaluates the evidence and justifiably appraises the facts, it is not the business of the Court of Appeal to substitute its own views for those of the trial Court. See Akinloye and Another v. Eyiola and others (1968) N.M.L.R. 92 at 95, Woluchem v. Gudi (1981)

5 S.C. 291 at 230. What the Court of Appeal ought to do is to find out whether there is evidence on which the trial court could have acted. Once there is sufficient evidence on record from which the trial court made the findings of fact, the appeal court cannot interfere. See Odofoin v. Ayoola (1984) 11 S.S. 72, Amadi v. Nwosu (1992) 5 N.W.L.R. (part 241) 273 of 280. (p. 3030 F)

### Orders - Retrial

8. And where an appeal is allowed because of the failure of the trial court to make findings on material issues and the determination of such material issues depends on the credibility of witnesses, the proper orders to make is that of retrial. See Karibo v. Grend (1992) 3 N.W.L.R. (part 230) 426. A retrial is however not appropriate where it is manifest that the plaintiff's case has failed in toto and that no irregularity of a substantial nature is apparent on the records or shown to the court. Isaac Ayoola v. Jinadu Adebayo (1969) 1 All N.L.R. 159. It is clear to me that the evidence of the entire witnesses was duly evaluated by the Upper Area Court and that both the Appellate High Court and the Court of Appeal were in definite error by holding that there was no evaluation of the evidence. That being so, the ground upon which an order of retrial of the case was made completely collapses and falls to the ground. Issue three must therefore be resolved against the cross-appellants. (p. 3031 A)

### NOTABLE POINTS OF INTEREST

#### IGUH JSC

##### *1. Criticism of the judgments of courts must be constructive*

It cannot be over-emphasized that in-as-much-as counsel, and indeed, academicians are fully entitled to review and if necessary to criticize, in appropriate cases, any judgments of all courts of law, inclusive of this court, as they may deem fit, it ought to be admonished that such criticisms must not only be constructive but must be based prima facie on some modicum of clarity of thought, if not scholarship. A judgment may not be successfully attacked by the employment of mere verbiage with hardly any rationale and/or substance to justify such a criticism. As I



have already observed, the decisions of this court in the Chief Kalu Igweh and the National Bank of Nigeria cases, (supra) involved cases where a member of this court who fully participated in the hearing of the appeals and had made his decisions in the appeals known at conference died before the delivery of judgments in the cases. His opinions were duly Pronounced as required by law. This practice has been repeatedly followed in various other cases of this court and Court of Appeal in circumstances where a justice of either court who sat on an appeal and deliberated at conference on such appeal died, retired or was elevated to a higher bench before the delivery of judgment, I think counsel's attack on the two decisions in issue is clearly unmeritorious and without substance. (p. 3028 E)

### **ONU JSC**

#### *2. How to deal with customary Court proceedings*

In the light of all I have said earlier on the above decision of the High Court of Appeal is erroneous cannot be justified and / or sustained. This is because, in the first place, the Upper Area Court that tried the case on appeal is a customary court. In such a court one must look at the substance and not the form. Thus, in Studnam v. Slainbridge (1895) 1 Q.B.D.810, it was held, inter-alia, that "court must look at substance rather than the form in deciding what the subject of proceeding is " and this court in an apparent approval of the principle in Ajagunjeun v. Sobo Osho (1977)5 S.C.89, stated that customary courts being survivors of the former native courts, the High Courts in dealing with proceedings from these courts are entitled and are expected to go beyond the claim as framed on the writ; they must ascertain from the entire evidence before that court what precisely are the nature and subject matter of the dispute between the parties to the action. (p. 3047 A)

### **REPRESENTATION**

Dr. S. E. Mosugu, for 1st Respondent/Cross-appellant.

A. Seriki, for 2nd Respondent.

Appellant is absent and is not represented by counsel

**CASES REFERRED TO**

- Ishola v. Societe Generale Bank (Nig) Ltd (1997) 2 N.W.L.B. (part 488) 405
- Adesokan v. Adegorolu (1997) 3 N.W. L.R. (part 493) 261 of 273-274
- B Attorney - General of Imo State v. Attorney - General of Rivers State (1983) 8 S.C. 10
- Ogbuiniya v. Okudo (1978) 3 L.R.N. 318, at 327 - 328
- Akinloye v. Eyiola (1968) N.M.L.R. 92 at 95
- Woluchem v. Gudi (1981) 5 S.C. 291 at 230
- C Karibo v. Grend (1992) 3 N.W.L.R. (part 230) 426
- Booder v. Forse 8 WACA 187
- Udechukwu v. Okwuka (1956) 1 F.S.C. 10
- Amadasun v. Ohenso (1966) NMLR 179
- D Studnam v. Slainbridge (1895) 1 Q.B.D.810
- Madukolu v. Nkemdilim (1962) 1 All NLR 587
- Adeigbo v. Kusimo (1965) NMLR 284

E **STATUTES REFERRED TO**

- Constitution of the Federal Republic of Nigeria, 1979; ss 226 and 258 (2)
- Court of Appeal Act; 1976, ss. 9 and 11

**LEAD JUDGMENT BY IGUH JSC**

- F The proceeding leading to this appeal was first initiated on the 7th day of December, 1988 at the Upper Area Court of the former Kwara State of Nigeria, holden at Lokoja. In that Court, the plaintiffs for themselves and as representing members of the Onoko Clan in Eganyi District
- G of the Okene local Government Area of Kogi State claimed against the defendants as follows:-

- "(1) An Order of court restraining the 1st defendant, his servants, agents, privies and members of the 1st defendant's Ezionogu Clan*
- H *from holding out himself or themselves as the owner or owners of the said farmlands, that is to say, Usoko, Igege, Uhomiri, Ogane and Uwowiri, all Located in Eganyi District of Okene Local Government Area.*
- (2) An order of court restraining the 1st defendant, his servants, agents,*

*privies and members of the Ezionogu clan from making any claim to or receiving any compensation from the 2nd defendant or from any person whatsoever in respect of any part or portion of the aforementioned farm-lands.*

*(3) The plaintiffs also claim against the second defendant, an order of court restraining the 2nd defendant from paying any compensation to the 1st defendant, his agents, servants, privies and or the Ezionogu Clan or to any person whatsoever, in respect of the plaintiffs' farm land at Usoko, igege, Uhomiri (Okuhisihu) Ogane and Uwowiri, all in Eganyi District, acquired by the 2nd defendant, for the construction of an Iron Ore Rail-line.*

*(4) An order that the 2nd defendant shall pay the said compensation to the plaintiffs."*

At the subsequent trial, both parties testified on their own behalf and called witnesses. The plaintiffs called a total of 12 witnesses whilst the 1st defendant, who was sued for himself and as representing members of the Ezionogu Clan of Eganyi, called 5 witnesses.

The plaintiffs' case, briefly, is that they are the owners of the five pieces or parcels of farm land in dispute known as and called Usoko, Igege, Uhomiri, Ogane and Uwowiri. They claimed that they were therefore entitled to all compensation payable by the 2nd defendant in respect of parts of the farm lands in dispute affected by the Ajaokuta - Itakpe rail line. They prayed for the order of court in terms of their claims.

The 1st defendant, for his own part, claimed that the farm lands in dispute were owned and remained in the absolute possession of his Ezionogu Clan. The 2nd defendant who maintained a neutral posture throughout the proceedings, waiting to pay compensation to the winning party, proffered no evidence at the trial.

At the close of evidence at the trial, the trial court with the parties, their witnesses and learned counsel visited the locus in quo and made copious notes of this inspection.

At the conclusion of hearing, the trial court after a careful and meticulous review of the entire evidence placed before it found for the 1st defendant and dismissed the plaintiffs' claims. Said the Upper Area

Court -

".....from the totality of the evidence before us, we hold that, putting the evidence of both sides on an imaginary scale, the evidence in favour of the 1st defendant is heavier than that of the plaintiffs ..... in the circumstances, we dismiss the plaintiffs' claims"

The court then pronounced thus-

"(1) The plaintiffs' claim to the five farmlands, Usoko, Igege, Uhomiri, Ogane and Uwowiri is hereby dismissed.

(2) Therefore the plaintiffs are not entitled to receive the compensation which is expected to be paid on the above five farmlands by the 2nd defendant.

(3) The five farmlands should remain in possession of the 1st defendant's Ezionogu clan and as such, they are entitled to the compensation on them.

(4) All the Exhibits are to be kept for a period of thirty days in case of an appeal.

(5) Exhibits P1 and DI are to remain in this court's case file if there is no appeal. Exhibit P2 is to be returned to the plaintiffs after 30 days if there is no appeal. While Exhibits P3, D2, D3, D4, and D5 are to be returned to the 1st defendant after 30 days if there is no appeal."

Costs assessed and fixed at N500.00 were awarded to the 1st defendant against the plaintiffs.

Dissatisfied with the said judgment, the plaintiffs lodged and appeal against the same to the Appellate Division of the High Court of Justice, Kwara State, holden at Okene. That court, in a unanimous decision, allowed the appeal, set aside the decision and orders of the trial court and concluded as follow

"In conclusion, we hold that since the trial Upper Area Court has abdicated its primary responsibility of evaluating the evidence placed before it and ascribing probative values to the said evidence, it is not competent to express that the plaintiffs have not proved their case by balance of probabilities to the 1st defendant/respondent's evidence..... In the result,.... the appeal succeeds. The judgment and the consequential orders of the trial Upper Area Court are hereby set aside"

Aggrieved by this decision of the Appellate high Court, the 1st defendant appealed to the Court of Appeal, Kaduna Division. That court, again in a unanimous judgment, allowed the 1st defendant's appeal. It held that since it would appear the only evidence considered by the trial Upper Area Court was those of P.W.10 and P.W.11 and High Court failed B to re-evaluate the rest of the evidence of the other witnesses not considered by the trial court, the case must be remitted for a trial *de novo* by a different panel of the Upper Area Court, Ilo-Ilo and it was so ordered.

Being dissatisfied with this decision of the Court of Appeal, the 1st defendant and the plaintiffs have appealed to this court. I shall hereinafter refer to the plaintiffs in this judgment as the respondents or cross-appellants and the 1st defendant as the appellant respectively. C

Two grounds of appeal were filed by the appellant against this decision of the Court of Appeal. I find it unnecessary to reproduce them D in this judgment. It suffices to state that the appellant, pursuant to the rules of this court, filed his brief of argument in which three issues were identified for the determination of this court. These are as follows -

*"(1) whether the Court of Appeal was properly constituted when E it gave her judgment on 9/6/93,*

*(ii) whether the judgment of the Court of Appeal was right and*

*(iii) The proper order this Honourable Court should make".*

The respondents/cross appellants, for their own part, submitted F three issues in their brief of argument as arising in the this appeal for determination. These are couched thus -

*"1. Was the Court of Appeal (Kaduna) properly constituted when G it gave its judgment on 9/6/93?*

*2. Was the Court of Appeal (Kaduna) right to have allowed the Defendant's appeal?*

*3. If so, what was the proper consequential order which the Court of Appeal ought to have made in the circumstances of this case?"*

There is next the cross-appeal by the respondents/cross-appellants in which the issues for determination raised in their brief are as follows:-

*"1. Whether the Court Appeal was right, in view of the "one*

*basic issue" posed for determination by that Court, to have ordered a retrial de novo having conceded that the learned trial Upper Area Court had not properly (or at all) reviewed, appraised, assessed and evaluated the totality of the evidence adduced by both sides at the trial of the action.*

2. *Whether the Court of Appeal, Kaduna delivered a valid judgment (legally and or constitutionally) on 9/6/93 in view of the composition of the court that delivered the judgment at that time."*

No reply to this brief was made by the appellant.

A close study of the issues set out in the respective briefs of the parties reveals that they are substantially identical and refer basically to the same questions. These relate to:-

(i) Whether the Court of Appeal was properly constituted when it delivered its judgment in the appeal on the 9th day of June, 1993.

(ii) Whether the judgment of the Court of Appeal, the subject matter of this appeal is legally valid, constitutional and /or otherwise unimpeachable.

(iii) whether the Court of Appeal was right to have set aside the judgments of the Appellate High Court and the trial Upper Area Court and to order a retrial of the suit.

It is clear that the above three issues fully cover those set out in the respective briefs of the parties and are amply sufficient for the determination of both the appeal and the cross-appeal.

At the oral hearing of the appeal before us, both the appellant and J. O. Ijaodola, Esq. of counsel, who settled his brief of argument were absent although duly served. Mr. Ijaodola had in the appellant's brief of argument submitted that the decision of the Court of Appeal in the present case was null and void in that the Court was not properly constituted as at the time of the delivery of its judgment on the 9th day of June, 1993. He claimed that this was because the presiding Justice of the panel that heard the appeal, Uthman Mohammed, J.C.A., as he then was, was no more a Justice of that court as at the date of the delivery of the judgment of court in the appeal as he was sworn in as a Justice of the Supreme Court on the 3rd of June, 1993. In his view, that judgment was that of an

"amorphous" " and "unknown court, that is to say "Supreme Court/Court of Appeal" as he put it. He concluded by stating that "such an amalgam Court is unknown to our Constitution". He referred to the decisions in Chief Kalu Igwe and others V. Chief Okuwa Kalu and others (1993) 24 N.S.C.C. (part 1) 393 and National Bank of Nigeria Ltd v. Guthrie (Nig) Ltd and Another (1993)24 N.S.C.C. (part 1) 401 in which cases Shehu Usman Mohammed, J.S.C. took full part at the hearing of the appeals but died tragically in a motor accident before the delivery of judgments in the proceedings. Learned Counsel then made bold to submits thus-

*"with all humility and profound respect to our judicial fathers, the two decision cited above cannot stand the test of judicial analysis and the doctrine of judicial precedent. It is our humble view that the two decisions are void since the Supreme Court is not properly constituted unless it is made up of at least 5 Justices of that court"*

He therefore contended that the decision for the Court of Appeal in the present case is null and void as the court was comprised of only two Justices as against three as at the time of delivery of the judgment.

On the merits of the case, the appellant stressed that the admissions against interest by P.W.10 and P.W. 11 were sufficient to defeat the respondents' claims. Attention was also drawn to various findings of the Upper Area Court against the respondents and their witnesses and it was submitted that no other course of action was open to any court in the face of those adverse findings than an outright dismissal of the cross/appellants' claims. It was finally contended that although where an adjudicating tribunal is improperly constituted, the proper order for an appellant court to make would be that of a retrial by a properly constituted court, this court, in the present case, is competent to resolve the same issues which the Court of Appeal was called upon to determine. This court was therefore urged to allow the main appeal and to restore the judgment and orders of the upper Area Court.

Learned Counsel for the respondents/cross-appellants, Dr. S. E. Mosugu in his address adopted the respondents' brief of argument as well as that of the cross appellants. He pointed out that both the appellant and the respondents were attacking the decision of the court below and

that they are both ad idem on the invalidity and unconstitutionality of the said decision. Learned Counsel referred to section 226 of the Constitution of Nigeria, 1979 and stressed that the Court of Appeal shall be duly constituted if it consists of not less than 3 Justices of that court. He drew the attention of the court to the decision in Attorney-General of Imo state v. Attorney-General of Rivers State (1983) 8 S.C. 10 and submitted that in-as-much Achike, J.C.A., as he then was, read out the opinion of Uthman Mohammed, J.C.A., as he then was, from a type-written or hand-written script, there was nothing for Achike, J.C.A. to pronounce on. Questioned by the court on whether learned Counsel was present in court when the said opinion of Uthman Mohammed, J.C.A. was read as he alleged, Dr. Mosugu admitted that he was not in court when the decision in issue was handed down. He expressed agreement with the learned Counsel for the appellant that the judgment of the Court of Appeal in these proceedings was therefore invalid.

On the merits of the case, it is the submission of the respondents that the Appellate High Court had done nothing wrong to warrant its judgment being set aside or reversed by the Court of Appeal. Learned counsel referred to the decision in Chief Oyelakin Balogun v. Akanji (1988) 1 SCNJ 104 and submitted that where a trial court ignored or failed to consider or evaluate evidence, the appeal court can interfere. It is the contention of the cross-appellants that the court below ought in the circumstances of this case to have carried out a re-evaluation exercise of the evidence and to have dismissed the appellant's appeal in the interest of justice and in order not to perpetuate miscarriage of justice which the order for retrial entails. Learned Counsel urged the court to allow the cross-appeal, set aside the judgment of the court below and restore the judgment of the Appellate High Court.

The first two issues, in my opinion, overlap and I propose, in this judgment, to consider them together.

The first arm of the contention of learned Counsel is that on the 9th day of June, 1993 when judgment in this appeal was delivered by the court below, only two Justices of the Court of Appeal sat and that this is contrary to the law and in breach of the Constitution. Counsel therefore



submitted that the purported judgment of the Court of Appeal delivered while improperly constituted was of no effect and null and void.

Section 226 of the Constitution of Nigeria, 1979 which, at all material times, was in operation provided as follows:-

*"226. For the purpose of exercising any jurisdiction conferred upon it by this Constitution or any other law, the Court of Appeal shall be duly constituted if it consists of not less than three Justices of the Court of Appeal ....."*

There is also section 9 of the Court of Appeal Act, 1976 which in the same vein provides thus -

*"9. The Court of Appeal shall be duly constituted for the purposes of hearing and determining any appeal if it consists of at least three Justices....."*

There is, however, the provision of section 11 of the Court of Appeal Act, 1976 dealing with the delivery of judgments which provides as follows -

*"11. When, after an appeal in any cause or matter has been fully heard before the Court of Appeal, judgment is reserved for delivery on another day, then, on the day appointed for delivery of the judgment, it shall not be necessary for all those Justices before whom the appeal in the cause or matter was heard to be present together in court, and it shall be lawful for the opinion of any of them to be reduced into writing and to be read by any other Justice; and in any such case the judgment of the Court of Appeal shall have the same force and effect as if the Justice whose opinion is so read had been present in Court of Appeal and had declared his opinion in person"*

I think reference must at this stage be made to the provisions of Section 258 (2) of the 1979 Constitution which run thus -

*"258 (2) Each Justice of the Supreme Court or of the Court of Appeal shall express and deliver his opinion in writing, or may state in writing, that he adopts the opinion of any other Justice who delivers a written opinion:*

*Provided that it shall not be necessary for all the Justices who heard a cause or matter to be present when judgment is to be delivered,*

*and the opinion of a justice may be pronounced or read by any other Justice whether or not he was present at the hearing"*

The questions that have arisen under issues 1 and 2 for determination in this appeal are by no means new. In Alhaji Aminu Ishola v. Societe Generale Bank (Nig) Ltd (1997) 2 N.W.L.B. (part 488) 405, a similar situation that calls for decision in this appeal was considered by this court. In that case, this court held that pursuant to Section 11 of the Court of Appeal Act, 1976, once an appeal in any cause or matter has been fully heard before the Court of Appeal and judgment is reserved, it shall not be necessary for all the three Justices who heard the appeal to be present together in court on the day appointed for the delivery of the judgment. It is lawful if the written opinion of any one of them who is unavailable is read by any other Justice of that court. It was further held that the judgment of the Court of Appeal in that case was not void simply because only 2 Justices of the Court of Appeal who were among those who heard the appeal were present to deliver the judgment of court. This court has not been invited to depart from its decision in the Aminu Ishola case (supra) and, speaking for myself, I can find on reason to change my opinion on the decision of this court in that case.

It must however be stressed that section 11 of the Court of Appeal Act, 1976 appears to cover cases where all the Justices that sat on an appeal are still in the service of that Court on the date of judgment and had written and signed their judgments but because some or all of the Justice for one reason or the other are unable to be physically present to deliver the judgment, they gave same to other justice or Justices to read them on their behalf. See Lawani Adesokan and others v. Prince Michael Adegorolu (1997) 3 N.W. L.R. (part 493) 261 of 273-274 per Ogundare, J.S.C.

Section 11 of the Court of Appeal Act, 1976 must be contrasted with S 258 (2) of the 1979 Constitution. Section 258 (2) of the 1979 Constitution permits the opinion of a justice who joined in the hearing of an appeal but is unable to be present in person for

the delivery of the judgment to be pronounced or read by any other Justice whether or not he was present at the hearing. The word pronounced has received judicial interpretation in the judgment of this court in Attorney - General of Imo State v. Attorney - General of Rivers State (1983) 8 S.C. 10 where Fatayi - Williams, C.J.N., B declared as follows -

*"To my mind, the phrase "may be pronounced" used in sub-section (2) above can only mean, in the context, "to utter, speak, declare aloud, or proclaim". Moreover, since the phrase is obviously intended to distinguish what "may be pronounced" from what "may be read", what is pronounced cannot be the same as what is read from a typewritten or handwritten script. It must mean, and I so hold, what is orally proclaimed or declared aloud from personal knowledge.* C

*In view of the interpretation which I have put on the phrase "may be pronounced", I also hold that any of the Justices of the Supreme Court who heard any cause or matter can, after a decision has been arrived at by all the Justices, pronounce the opinion of another justice who, for one reason or another, is unable to reduce his opinion into writing or be present when the judgment in the case is being delivered by each of the other Justices."* D

Accordingly, whereas under section 11 of the Court of Appeal Act, *ibid*, the opinion in issue must be confined only to that of a Justice who sat on the appeal and remained a serving member of the Court of Appeal as at the date of the delivery of the judgment in the case, the opinion of an absent Justice under section 258 (2) of the 1979 Constitution may be pronounced as long as that opinion was given when he was a member of the relevant court. Unlike under section 11 of the Court Appeal Act, it will not matter that such a Justice whose opinion under section 258 (2) of the 1979 Constitution is being pronounced was subsequently elevated to a higher court, died, retired or was dismissed from service before judgment in the appeal was delivered. As I had cause to observe in Shitta-Bey v. Attorney - General of the Federation and Another (1998) 10 N.W.L.R. (part 570) 392 at 438 - E F G H

"I think it ought to be stressed, however, that the provision as to the reading of the opinion of any Justice who was on a panel that heard an appeal but is unable to take part in the delivery of the judgment pursuant to section 11 of the Court of Appeal Act, 1976 seems to cover only cases where the unavailable justice who sat on the appeal is still a serving member of the Court of Appeal. This is unlike the provisions of section 258 (2) of the Constitution of the Federal Republic of Nigeria, 1979, particularly the proviso thereof, which clearly deal with cases where the unavailable Justice who heard an appeal, whether in the Supreme Court or the Court of Appeal, but is unable to take part in delivery of the judgment is a serving Justice of the court in issue or has ceased to be a member or a serving justice of either of those courts. In other words, section 258 (2) of the 1979 Constitution seems to cover both serving Justices, of the one part, and retired, dismissed, elevated or deceased justices of those courts, of the other part. The later category of justices by virtue of their retirement, dismissal, elevation or death before the date of judgment obviously ceased to be members of either court as at the date of the delivery of such judgment in issue."

It must therefore be emphasized that once the opinion of an absent Justice even though written at a time he was a member of the relevant court is read as against being pronounced after he had ceased to be a member of such relevant court by elevation to a higher bench, death, dismissal or retirement, such an opinion would be given without jurisdiction and would consequently be a nullity. See Ogbuinyiya and others v. Obi Okudo and others (1978) 3 L.R.N. 318, at 327 - 328. See too Lawani Adesokan v. Prince Michael Adegorolu, (*supra*) at page 274 *per* Ogundare, J.S.C.

In the present case, the appeal was duly heard on the 10th March, 1993 by Uthman Mohammed and Achike JJ.C.A., as they then were, and Okunola J.C.A. Judgment was thereafter reserved. Before the 9th June, 1993 on which , date judgment of the court was delivered, Uthman Mohammed, J.S.C. had been elevated to the Supreme Court bench and therefore ceased to be a judge of the Court of Appeal. Only Achike, J.C.A., as he then was, and Okunola,

J.C.A. sat on the date of the delivery of the said judgment. The record of proceedings shows that Achike and Okunola, JJ.C.A. allowed the appeal. It is also clear from the record of proceedings that Uthman Mohammed, J.C.A., as he then was, had before his elevation to the Supreme Court bench submitted a written opinion B signed by him to Achike, J.C.A., as he then was in which he merely said -

*"I agree"*

This agreement by Uthman Mohammed, J.C.A. was included in the C record of appeal to this court.

The proceeding of 9th June, 1993 after the delivery of the judgments of Okunola and Achike JJ.C.A. went thus -

*"Pronouncement on the Judgment of Uthman Mohammed, J.C.A. (as he then was) by Achike, J.C.A."* D

The judgment of Uthman Mohammed, J.C.A., was subsequently proclaimed by Achike, J.C.A. There is no suggestion that the said opinion of Uthman Mohammed, J.C.A. was read by Achike, J.C.A. Indeed Achike, J.C.A. was meticulous enough to indicate and to E put it down in writing that the opinion of Uthman Mohammed, J.C.A., was pronounced by him. There is no suggestion that the opinion of Uthman Mohammed, J.C.A., as he then was, read on his behalf by Achike, J.C.A., on the date judgment was delivered in the appeal. **Indeed, ques-** F **tioned by this court, Learned Counsel for the cross-appellants admitted that he was not present in court when judgment was delivered in the cause. It is plain to me that the opinion of Uthman Mohammed was duly pronounced as indicated by Achike, J.C.A., as required by law and was never read as Dr. Mosugu had submitted.** G

I think it is necessary in this regard to draw attention to the legal presumption of regularity, omnia praesumuntur rite esse acta which, principally, is applied to judicial and official acts. The H application of this presumption which is rebuttable was neither challenged nor dislodged by the cross-appellants in any manner in this case. And as I have observed, this is quite understandable as learned

cross-appellants' Counsel on his own admission was not in court on the date judgment in the appeal was delivered. In my view the presumption of regularity fully applies to the proceedings of the 9th June, 1993 on which date judgment in the appeal was delivered.

B It is my view therefore that the judgment of the court below appears to me unimpeachable and I so pronounce.

Learned Counsel for the appellant then launched what seemed to me a puerile attack on the decisions of this court in Chief Kalu Igweh and others v. Chief Okuwa Kalu and National Bank of Nigeria Ltd v. Guthrie (supra), He submitted that the judgments of this court in those cases cannot stand "the test of judicial reason". These are cases in which the late Usman Mohammed, J.S.C. took full part in the hearing of the appeals but died before the delivery of the judgments. The judgments of D Usman Mohammed, J.S.C. were duly pronounced as required by law in those cases and it is plain to me that learned counsel's agreement to the effect that those judgments are void is, with respect, totally misconceived and lacking in substance.

E It cannot be over-emphasized that in-as-much-as counsel, and indeed, academicians are fully entitled to review and if necessary to criticize, in appropriate cases, any judgments of all courts of law, inclusive of this court, as they may deem fit, it ought to be admonished that such criticisms must not only be constructive but must be based prima facie F on some modicum of clarity of thought, if not scholarship. A judgment may not be successfully attacked by the employment of mere verbiage with hardly any rationale and/or substance to justify such a criticism. As I have already observed, the decisions of this court in the Chief kalu G Igweh and the National Bank of Nigeria cases, (supra) involved cases where a member of this court who fully participated in the hearing of the appeals and had made his decisions in the appeals known at conference died before the delivery of judgments in the cases. His opinions were H duly Pronounced as required by law. This practice has been repeatedly followed in various other cases of this court and Court of Appeal in circumstances where a justice of either court who sat on an appeal and deliberated at conference on such appeal died, retired or was elevated to

a higher bench before the delivery of judgment, I think counsel's attack on the two decisions in issue is clearly unmeritorious and without substance. I will now turn to issue three which poses the question whether the Court of Appeal was right to have set aside the judgments of the Appellate High Court and the trial Upper Area Court and to order a retrial B of the suit.

A close study of the judgment of the Appellate High Court reveals in no uncertain terms that the appeal before it was allowed on the ground principally that the trial Upper Area Court abdicated its primary C responsibility of evaluating the evidence placed before it and failed to ascribe probative value to the said evidence. Said the court -

*"In conclusion, we hold that since the trial Upper Area Court has abdicated its primary responsibility of evaluating the evidence placed before him and ascribing probative values to the said evidence, it is not D competent to express that the plaintiffs had not proved their case by balance of probabilities to the 1st defendant/respondent's evidence."*

The Court of Appeal was more specific on the point. It sated -

*"From the above findings of fact made no the evidence of PWs E 10 & 11 reviewed supra, the trial Upper Area Court concluded that their evidence is unreliable. This finding is based on credibility of both witnesses. This is the view of the upper Area Court on the evidence of both F pw 10 and 11. In a similar vein, pages 108-115 merely show a review of the evidence of pws 1-12 while pages 115 -118 show the review of evidence of DWs 1-5. The only evidence considered by the trial Upper Area Court as could be seen from the court's appraisal of evidence at page 120 of the Upper Area Court records seem to be only those of the pws 10 and G 11 supra."*

It went on -

*"As can be seen from the trial Upper Area Court's finding of facts reproduced supra, the court merely considered the evidence of PW10 and PW 11. It was therefore not surprising that the High Court (Appel- H late Division) made this the basis of their judgment at pages 228-230 of the records....."*

The Court of Appeal continued thus -

"In conclusion we hold that since the trial Upper Area Court has abdicated its primary responsibility of evaluating the evidence placed before it and ascribing probative values to the said evidence, it is not competent to express that the plaintiffs have not proved their case by balance of probabilities to the 1st defendant/Respondent's evidence."

B It concluded -

"In sum, this appeal succeeds and it is allowed on the ground that the High Court (Appellate Division), Lokoja failed to properly re-evaluate the evidence of other witnesses which the trial Upper Area Court, Lokoja ignored or failed to evaluate. Consequently, judgment of High Court of Kwara State in its appellate jurisdiction sitting in Okene (now Kogi State) in suit No. Kws/Ok/1A/90 presided over by J.A. Ibiwoye and S.K. Otta, JJ, delivered on 15/3/91 which set aside the judgment and consequential orders of the trial Upper Area Court, lokoja in suit No. CVF/36/88 dated 26/1/90 is hereby set aside along with the said judgment and consequential orders of the trial Upper Area Court. In consequence, I orders that this case be retried *denovo* by a different judge and members of the upper Area Court, Lokoja other than those that had at one time or the other been involved in the case."

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It is thus crystal clear that the Court of Appeal found itself able to allow the appeal before it on the ground that the Upper Area Court failed in its primary duty to evaluate the evidence before it and ascribe probative values thereto. The Appellate High Court was also chided for falling into the same error.

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**There can be no doubt that the evaluation of evidence and the ascription of probative value to such evidence are the primary functions of the court of trial which saw, heard and assessed the witnesses. Where a court of trial unquestionably evaluates the evidence and justifiably appraises the facts, it is not the business of the Court of Appeal to substitute its own views for those of the trial Court. See Akinloye and Another v. Eyiola and others (1968) N.M.L.R. 92 at 95, Woluchem v. Gudi (1981) 5 S.C. 291 at 230. What the Court of Appeal ought to do is to find out whether there is evidence on which the trial court could have acted. Once there is**

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sufficient evidence on record from which the trial court made the findings of fact, the appeal court cannot interfere. See Odofin v. Ayoola (1984) 11 S.S. 72, Amadi v. Nwosu (1992) 5 N.W.L.R. (part 241) 273 of 280. And where an appeal is allowed because of the failure of the trial court to make findings on material issues and the determination of such material issues depends on the credibility of witnesses, the proper orders to make is that of retrial. See Karibo v. Grend (1992) 3 N.W.L.R. (part 230) 426. A retrial is however not appropriate where it is manifest that the plaintiff's case has failed *in toto* and that no irregularity of a substantial nature is apparent on the records or shown to the court. Isaac Ayoola v. Jinadu Adebayo (1969) 1 All N.L.R. 159.

I think the first task will be to decide whether, as found by the court below, both the Upper Area Court and the Appellate High Court were right in holding that only the evidence of pw 10 and pw 11 were considered and that the evidence of the rest of the witnesses was neither evaluated nor was there any ascription of probative value to such evidence.

I have carefully studied the judgment of the trial Upper Area Court in issue and confess that it is one of the most painstaking judgments written by an Upper Area Court. I agree that pages 119 to 131 of the printed record of proceedings are mere summary of the evidence and do not therefore constitute an evaluation of such evidence. See Uwegba v. Attorney - General, Bendel State (1986) 1 N.W.L.R. (part 16) 303. However, from page 135 to the end of the judgment at page 138 is a thorough evaluation of all the evidence before that court and the ascription of probative value to such evidence of all the witnesses that testified before it. In that exercise, a number of witnesses for the plaintiffs were castigated and disbelieved. Indeed, Learned Counsel for the cross-appellants on being confronted by this court at the hearing of the appeal appeared to admit that there was ample evaluation of all the evidence adduced before the court. The Upper Area Court concluded thus -

*"But from the totality of the evidence before us, we hold that, putting the evidence of both sides on an imaginary scale the evidence in*

*favour of the 1st defendant is heavier than that of the plaintiffs."*

**It is clear to me that the evidence of the entire witnesses was duly evaluated by the Upper Area Court and that both the Appellate High Court and the Court of Appeal were in definite error by holding that there was no evaluation of the evidence. That being so, the ground upon which an order of retrial of the case was made completely collapses and falls to the ground. Issue three must therefore be resolved against the cross-appellants.**

In the final result, the main appeal of the 1st defendant/appellant is hereby allowed and the judgment and orders of the Court of Appeal remitting the case for retrial by a different panel of the Upper Area Court is hereby set aside. The judgment and orders of the Appellate High Court are also set aside and those of the trial Upper Area Court are hereby restored. The cross-appellants' appeal is without substance and the same is hereby dismissed. There will be costs to the 1st defendant/appellant against the cross-appellants which I assess and fix at N10,000.00.

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### **KARIBI-WHYTE JSC**

I have had the privilege of reading the leading judgment of my learned brother Iguh, JSC in this appeal. I agree with his conclusion that the main appeal of the 1st Defendant succeeds and is hereby allowed. The judgment of the court below remitting the case for trial in the Upper Area Court, before another panel is hereby set aside. The appeal of the cross-Appellant is without merit and is hereby dismissed.

There will be costs to the 1st Defendant/Appellant against the cross-appellants for N10,000.

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### **OGUNDARE JSC**

I have had the privilege of reading in advance the judgment of my learned brother Iguh JSC just delivered. I agree with the conclusion reached by him and the reasoning leading thereto. I however, wish to add a few words of my own.

The facts have been fully set out in the judgment of my learned brother Iguh JSC; I do not intend to go over them again. The resolution of both the main appeal of the 1st Defendant and the cross-appeal of the plaintiffs revolves around two questions that is -

(1) Is the judgment of the court below that is, the Court of Appeal valid having regard to the fact that one of the Justice, Uthman Mohammed JCA (as he then was), who heard the appeal had before judgment was delivered been elevated to the Supreme Court and had thereby ceased to be a Judge of the Court of Appeal?

(2) Is the judgment of the Court below sustainable having regard to the judgment of the trial Upper Area Court ?

I shall first consider the first question.

Following the judgment of the High Court (sitting in its appellate jurisdiction) the 1st defendant against who that judgment went, appealed to the Court of Appeal (Kaduna Division). The appeal was heard by a panel of that Court consisting of Uthman Mohammed, Okay Achike and Muritala Aremu Okunola (JJCA) after which judgment was reserved. On 3rd June 1993 however, Uthman Mohammed JCA was elevated to the Supreme court and sworn in as a justice of that Court. The judgment of the Court of Appeal was delivered on 9th day of June 1993 by a panel consisting of Okay Achike JCA (as he then was) and Okunola JCA. On the record for that day, it was noted -

*"(The Hon. Justice Uthman Mohammed who was sworn in as Justice of the Supreme Court on Thursday 3rd June, 1993 was among the Justices who heard this appeal)."*

Thereafter Okunola JCA read the lead judgment. Okay Achike JCA (as he then was) then read his own concurring judgment. After the judgment of Achike JCA, the record shows the following note -

"Pronouncement on the judgment of Uthman Mohammed, JCA (as he then was) by Okay Achike, JCA."

*My learned brother, Uthman Mohammed, JCA as he then was, presided over this appeal. Reproduced hereunder is his judgment which he handed over to me before his elevation to the Supreme Court. Judgment of Uthman Mohammed, JCA*

*I agree."*

It is now the contention of both parties before us that the judgment of the Court of Appeal is rendered a nullity by the non participation of Uthman Mohammed JCA.

B The issue raised here has been subject of judicial pronouncements since the coming into force of the constitution of the Federal Republic of Nigeria 1979 beginning with the decision of this Court in the Attorney-General of Imo State v. Attorney-General of River State (1983) 8 SC 10 where Fatayi-Williams CJN pronounced at pages 10-11 as follows:

*"In accordance with the provisions of section 258 subsections (2) and (3) of the Constitution of the Federal Republic of Nigeria 1979, I would also pronounce the opinion of the late Justice Idigbe that the claims should be dismissed for the reasons stated by Justice Sowemimo in his judgment. The late Justice Idigbe was a member of the panel which heard the case and which later agreed that the claims should be dismissed for those reasons."*

E After setting out section 258 subsections (2) and (3) of the Constitution, the learned Chief Justice went on to say at pages 11-12:

*"To my mind, the phrase 'may be pronounced' used in subsection (2) above can only mean, in the context, to utter, speak, declare aloud, or proclaim. Moreover, since the phrase is obviously intended to distinguish what 'may be pronounced' from what 'may be read', what is pronounced cannot be the same as what is read from a typewritten or handwritten script. It must mean, and I so hold, what is orally proclaimed or declared aloud from personal knowledge."*

G *In view of the interpretation which I have put on the phrase 'may be pronounced', I also hold that any of the justices of the Supreme Court who heard any cause or matter can, after a decision had been arrived at by all the Justices, pronounce the opinion of another Justice who, for one reason or another, is unable to reduce his opinion into writing or be present when the judgment in the case is being delivered by each of the other justices."*

Both the Court of Appeal and this court have followed the practice laid

down by the learned *Chief justice since then. See Ibrahim Kano v. Gbadamosi Oyelakin* (1993) 2 NWLR 399, 424; *Alhaji A. Aliyu v. Dr. J. A. Sodipo* (1994) 5 NWLR 1, 1994 5 SCNJ 1, 23; *Lawani Adesokan & Ors. v. Sunday Adetunji & Ors.* (1994) 5 NWLR 540, (1994) 6 SCNJ 123.

In *Lawani Adesokan & Ors. v. Adegorolu & Ors.* (1997) 3 NWLR 261 I had course to review the above cases and the position in England and I concluded thus at page 278 of the report:

".....that while I am of the view that the written opinion of a justice of the Court of Appeal cannot be delivered after he has retired from the court, on the facts of this case where the opinion of Agoro JCA was pronounced by Ogwuegbu JCA as provided for in section 258 (2) of the Constitution, the Court of Appeal was duly constituted as provided in section 226 of the Constitution, when judgment was delivered by it in this case on 27th February 1991."

Before I conclude this part of my judgment I need also refer to the decision of this Court in *Alhaji Aminu Ishola v. Societe Generale Bank of Nig. Ltd.* (1997) 2 NWLR 405 where the facts are similar to the facts in this case. This Court upheld the validity of the judgment delivered by the Court of Appeal after one of the Justices that participated in it, Uthman Mohammed JCA (as he then was) had been elevated to the Supreme Court before the date of judgment.

In the light of all the authorities I have cited above and the general practice of this court and of the Court of Appeal in a situation where a Justice that participated at the hearing of an appeal ceased to hold office before the date of judgment but participated at conference held before so ceasing to hold office, a practice which has been held by this Court to accord with the provisions of section 258 (2) of the 1979 constitution, I must hold and I agree with my learned brother Iguh JSC, that the judgment of the Court of Appeal in this case is valid.

I now turn to my Question (2). The basis on which the appellate High Court set aside the judgment of the trial Upper Area Court is contained in the concluding part of the judgment of that court and reads:

*"In conclusion we hold that since the trial Upper Area Court has*

*abdicated its primary responsibility of evaluating the evidence placed before him and ascribing probative values to the said evidence, it is not competent to express that the plaintiffs has not proved their case by balance of probabilities to the 1st defendant/respondent's evidence."*

B The Court of Appeal affirmed this view of the High Court, Okunola JCA in his lead judgment observed as follows:

*"As can be seen from the trial Upper Area Court's finding by facts reproduced supra, the court merely considered the evidence of PW.10 and PW.11. It was therefore not surprising that the High Court (appellate division) made this the basis of their judgment....."*

And after quoting from the judgment of the High Court the learned Justices of the Court of Appeal went on to say:

D *"It is trite that where the trial court as in the instant case ignored or failed to consider or evaluate evidence of witnesses, the appellate court is justified in interfering as the High Court had done in the instant case."*

In effect both appellate courts below found that the trial Upper Area Court did not evaluate the evidence before it, before coming to its conclusion and both, therefore interfered with it. The High Court entered judgment for the plaintiff put the Court of Appeal held, and quite rightly in my view, that for the reasons given by them for interfering with the judgment of the trial court, the proper order would be one for a retrial. But are the two Courts right in holding that the Upper Area Court failed in its duty to evaluate the evidence before it? I think both Court are wrong.

The trial Upper Area Court not only reviewed the evidence of all the witnesses before it, that court also evaluated such evidence and ascribed probative values to the principal witnesses before proceeding to make its findings of fact. The court, correctly in my respectfully view, addressed its mind to the burden of proof on the plaintiffs and it focussed its mind on the importance of the evidence of the witnesses. In its judgment that court observed as follows:

*"Whether guided by the Evidence Law or not, Area Courts generally are enjoined to do substantial justice in any case before them. The position of the law is that, in any civil case, the burden of proof lies*

solely on the plaintiff. Therefore the issue to be resolved in this case, is whether the plaintiffs have discharged that burden of proof placed on them by the law. To enable us do this properly, we have to examine the evidences of the plaintiffs' witnesses very carefully. As can be seen from the addresses of both counsels (sic), the evidence of PW10 and PW11 are very crucial to the plaintiffs' case. These two witnesses are the elders from Onoko or Ezionoko clan who traced the history of the various clans' first settlement on Eganyi hill."

After evaluating the evidence of PW10 and PW11, two witnesses whose evidence was crucial to the success of the plaintiffs' case, the Upper Area Court observed:

"As stated earlier, PW10 and PW11's evidence are very material to the plaintiffs' case because both witnesses of them are elders of Onoko clan and are therefore Principal witnesses for the plaintiffs. But we observe that there are material contradictions in their evidence. For example, while PW10 told the court that Idoti is owned by Eheda clan, PW11 said that Idoti is owned by Ezionogu clan. While PW10 said Ezionogu people first arrived Eganyi and settled with those people who gave them land to farm, PW11 said Ezionogu people first settled at Ogune. While PW10 agreed that Akpanku land is now owned by Anibasse people, PW11 said the land case over Akpanku was later abandoned due to the death of his opponent called Ogu. Thus, PW11's evidence is full of self-contradictions. E.g. he told the court in his evidence in-chief that he learnt that Anibasse disputed Akpanku land with them. But the same PW11 told us under cross-examination that, he personally litigated Akpanku land case with Anibasse clan, and later shared N100.00 out of the compensation paid by the 2nd defendant over Akpanku. Exhibit P3 shows clearly that the court case over Akpanku was won by Anibasse clan.

Under such a situation, we find it difficult to believe the evidence of both PW10 and PW11, and we are, therefore, of the view that their evidence, is unreliable. We therefore, hold that, test No. (a) as proffered by the Supreme Court in the case of *Idundun and Daniel Okumagba* which is proof by traditional evidence has not been satis-

fied."

After rejecting the evidence of these two principal witnesses for the plaintiff the Upper Area Court turned to the evidence of the other witnesses for the plaintiff and observed as follows:

B "Evidence shows that, PW1, PW7, PW10, PW11 and PW12 are all from the plaintiffs' Ozionoko clan. While PW2, PW3 and PW4 are from boundary clans. PW5, PW6 and PW8 are tenants to the plaintiffs on the land. Apart from PW5 who said he had his farm on Osoko, both PW6 and PW8 told us that they had their farms at Ogene. As we have earlier stated, if we believe that Ogene farmland belongs Ezionogu clan by act of first settlement, then both late Obanabira and Sheidu Owuda (PW11) who were alleged to have given the lands to them for farming, did so wrongly. Therefore PW6 and PW8's rightful landlords are the D Ezionogu clan. What more, both PW6 and PW8 did not show us their farms or the location of their farms during our visit to the disputed farmlands. Although we were shown PW5's hut wrong mango trees by PW1 on the day we went for inspection, PW5 himself did not show us this hut on E that day, to confirm that, he owns that hut and that it is located on his farm.

Similarly, PW1, PW11 and PW12 told us in their evidence in-chief that they had their farms at Osoko. But PW12 said he now farm in F Ondo State and no more at Usoko. Unfortunately, both PW1 and PW11 did not show us their farms during our inspection to enable us confirm that they are actually farming on the land. PW7 told us that he had his farm at Ogene but he too like others, did not show us his farm. But assuming that he was able to show us his farm during our inspection, we G have already found that ogene farmland is owned by the 1st defendant's Ezionogu clan. Therefore PW7 is on Ezionogu's land and not Ezionoko land. Both PW9 and PW10 said they had their farms at Agbozua and Ogele respectively. We don't intend to make further comments on this H since, both Agbada and Ogele farmlands are not in dispute before us. No witness showed us a single economic tree he ever harvested. Thus from the above, we hold that, tests Nos. (c) and (d) in the case of Idundun and Okumagba Supra which are proof of numerous acts of ownership and



acts of long possession and enjoyment have not been met by the plaintiffs.

Both PW2 and PW3 are boundary witnesses from Akabe and Okpatoku clans of Beregu respectively. In their evidence, they never told the court that they shared boundary with the plaintiffs' Ezionaka clan. They merely told us that Iyesa stream is their boundary with Ebira people, and that they knew one Sule Ogirima (PW7) and Ali Ogande (PW6) farming at the other side of Iyase stream. PW2 even said that he did not know their clan. As we have seen both PW6 and PW7 were farming on Ogene land which does not belong to Ezionoko clan. Therefore, it cannot be rightly said that, both PW2 and PW3 are Ezionoko's boundary men at Iyase stream."

The Court turned attention to the evidence to the evidence of pw4 and after a consideration of his evidence vis-a-vis that of DW1, the Court said:

"Since the evidence of PW4 and DW1 from the same clan contradict each other, the question now, is who is to be believed between PW4 and DW1. We are of the view that, being a ward-Head in Eganyi and a senior person to PW4, we hold that DW1 should know better about the land in dispute than PW4 who was merely sent to represent his clan during the enumeration of the economic trees by the surveyors - Toki and Company. We therefore believe the evidence of DW1 than that of PW4. From the above, it can be seen that PW2, PW3 and PW4 have nothing to offer so as to convince us that their respective clans share boundaries with Ezionoko clan"

With this remark the court concluded:

"In the circumstances, we hold that, plaintiffs have also failed to satisfy test No. (c) in the case of Idundun v. Okumagba Which is, proof of possession of connected or adjacent land."

The trial court next turned its attention to the case for the 1st defendant and after a consideration of the evidence led in support of the defence, it concluded:

"It has been held that, in civil cases the Judge will give judgment for the plaintiff if, after hearing all the witnesses, he finds that the

plaintiff has established his case by a balance of probabilities. But from the totality of the evidence before us, we hold that, putting the evidence of both sides on an imaginary scale the evidence in favour of the 1st defendant is heavier than that of the plaintiffs. What is more, it is a well established principle of law that, in a claim for declaration of title, the onus is always on the plaintiff to establish his claim, and that it is not open to him to rely on the weakness of the defendant's case. In the circumstances, we dismiss the plaintiffs' claim."

It is strange that two appellate Courts after all the above efforts of the trial Court could still come to the conclusion that that Court failed in its primary duty to evaluate evidence before it and ascribe credibility. With profound respect to their lordships of the two appellate courts below, their conclusion is not borne out by the record. The trial upper Area Court in my respectful view did a marvellous job as no arguments have been advanced in this court to persuade me to interfere with their findings of fact, I have no hesitation whatsoever in affirming the judgment of the Upper Area Court

Consequently I allow the appeal of the 1st Defendant/Appellant and set aside the judgments and orders of both the Court of Appeal and the High Court and restore the judgments and orders of the Upper Area Court to the effect -

"1. The plaintiffs' claim to the five farmlands, the Usoko, Igege, Uhomiri, Ogane and Uwowiri is hereby dismissed.

2. Therefore the plaintiffs are not entitled to receive the compensation which is expected to be paid on the above five farmlands by the 2nd defendant.

3. The five farmlands should remain in possession of the 1st defendant's Ezionogu clan and as such, they are entitled to the compensation on them."

The cross appeal of the plaintiffs is totally lacking in substance and is hereby dismissed. I abide by the Order for costs as made in the lead judgment of my brother Iguh, JSC.

## ONU JSC

I had the advantage of a preview of the judgment of my learned brother Iguh, JSC. just delivered. I am in entire agreement with his reasoning and conclusion that the appeal succeeds and it is accordingly allowed by me. The cross-appeal being devoid of merit is accordingly dismissed. B

I wish to add by way of expatiation to the very comprehensive judgment of my learned brother. The facts giving rise thereto, in my opinion, need no recapitulation here. Suffice it to add that the case which is about ownership of land began in the Upper Area Court sitting at Lokoja in then Kwara (but now Kogi) State. The case was dismissed and the appellant being dissatisfied went to the Appellate High Court which allowed the appeal but made a consequential order with which the appellant was unhappy. The appellant still dissatisfied appealed to the Court of Appeal, which ordered trial de novo. The appeal of this court is from the decision of the latter court premised upon two grounds at the instance of the 1st defendant, now appellant, while for the respondents/cross-appellants three identical issues were also proffered. E

The three questions which arose from the two grounds of appeal for our determination as formulated by the appellant and which I herein adopt as sufficient for the disposal this appeal herein are:-

*"(i) Whether the Court of Appeal was properly constituted when it gave her judgment on 9/6/93.* F

*(ii) whether the judgment of the Court Appeal was right, and  
(iii) the proper order this Honourable Court should make."*

As appears clear from the judgment of the Court of the court of trial, the Upper Area Court lokoja, the evidence of each of the twelve witnesses who testified for the plaintiffs (appellants herein) was thoroughly reviewed, weighed and evaluated. See pages 121-128 of the Record of Proceedings. The trial Upper Area Court, equally considered the defence by reviewing, weighing and unquestionably evaluating the testimonies of the five witnesses for the defence (see pages 128 -131 of the Record of Proceedings), before visiting the locus in quo where it meticulously conducted a visit thereto. The latter act done, it went ahead to G

write its judgment which, in my opinion, cannot be faulted. On issue (1), I adopt all that my learned brother Iguh, JSC. has therein considered in its entirety since I have nothing further to add thereto, except to regard it as unmeritorious and lacking in substance.

B ISSUES (II), AND (III):

In my consideration of these two issues together, it being well settled by various decisions of this court that when a trial court as in the case on hand has unquestionably evaluated the evidence before it, it is not for an Appellate Court to re-evaluate the same evidence and come to its own decision. This court will in such a situation approach any findings of facts by the court below with due caution and I so caution myself. See Etowa Enang & Ors. v. Fidelis Ikor Adu (1981) 11-12 S. C. 25 at pages 38-40 (per Nnamani, JSC); and Balogun v. Labiran (1988) 3 NWLR (part 80) 66 at 84. But when in its primary duties of appraisal of evidence, oral or documentary, the court of first instance drew wrong conclusions from accepted or proved facts which those facts do not support or indeed approached the determination of those facts in a manner which those facts cannot and do not in themselves support, the Appellate Court (in the present case this court) will make its own findings. See Omoriegbe v. Edo (1971 1 All NLR 282 at 289; Fashanu v. Adekoya (1974) 1 All NLR 35 at 41; Okolo v. Uzoka (1978) 4 S.C. 77 at 86; Egonu v. Egonu (1978) 11-12 S.C. 111 at 129; and Atolagbe v. Shorun (1985) 4 S.C. 250 at 285, to cite but a few of such cases. Such a situation is far from the case in the case in hand.

In the instant case, the trial Upper Area Court, after appraising and evaluating the evidence adduced on both sides and using its searchlight with the finesse and thoroughness of a toothcomb, inter-alia, arrived at the following conclusions:-

*"At the end of both the plaintiffs' and defence cases, the court inspected the farmlands in dispute on 3/1/90 with both parties, their counsels and witnesses present. At the locus in quo the court took evidence from both parties and their Counsel. We equally viewed the various features on the land. All the happenings on that day are contained in our inspection Report and the various features shown on our rough sketch*

*map of the disputed area which we feel is not necessary to reproduce here. But suffice it to say that both sides refer to the various farmlands in different names, e.g. the land called Ideti by the 1st defendant and his witnesses is called Udeja by the plaintiffs. Sometimes, two different names are given to one farmland, e.g. that Uku-Iduru and Ajibata are the same land and that Idokumkum and Ogene are the same land. While the plaintiffs refer to the shrine in Usoku land as a shrine, the defendants called it a deity, they agreed later that a shrine and a deity mean the something. However, the area in dispute is marked in red in our rough sketch."*

Continuing, the trial Upper Area Court said:-

*"Having carefully studied the whole evidence before us, we have the following to say:*

*We wish to point out right from the onset that, the plaintiffs are claiming only Usoko, Igege, Ihomiri, Ogane and Uwowiri farmlands in the suit. Therefore, we will not flog any issue in respect of other lands, e.g. Ideti, Akpanku and Agbada which featured prominently throughout the proceedings....."*

*Whether guided by the Evidence law or not, Area courts generally are enjoined to do substantial justice in any case before them. The position of the law is that, in any civil case, the burden of proof lies solely on the plaintiff. Therefore, the issues to be resolved in this case, is whether the plaintiffs have discharged that burden of proof placed on them by law....."*

*As can be seen from the addresses of both Counsels (sic), the evidence of PW10 and PW11 are (sic) very crucial to the plaintiffs' case. These two witnesses are the elders from Onoko or Ezionoko clan who traced the history of the various clans' first settlement at Eganyi hill."*

Under cross-examination by the 1st defendants' Counsel, PW10 agreed that he did not know of any other land except the land they were falsely claiming. We agree that PW10 was rigorously cross-examined by the 1st defendant's Counsel, as such he was under fatigues when that last question was asked. But we are of the view that no amount of pressure will make a witness deviate from saying the truth over his prop-

erty. In other words, no amount of pressure from the 1st defendant's counsel will make PW10 give an answer which he knew would be fatal to his clan's case. We expected PW10 to remain unshaken under any condition. Therefore, as we have earlier ruled, we agree that PW10's last answer in cross-examination is against the interest of the plaintiffs' though contradictory and questionable. In the circumstances, we hold that PW10's admission that they were dishonestly claiming the land had seriously weakened the plaintiffs' case". (Underlining above supplied by me).

As regards PW11, the Court continued thus:-

*".....he agreed that 1st defendant's clan first settled at Ogene. This means that Ogene is owned by the 1st defendant's Ezionogu clan by act of first settlement. But plaintiffs' claim include Ogene farmland. PW11's evidence as regards Ogene farmland is contrary to the plaintiffs' claim. We therefore hold that Ogene farmland is owned by Ezionogu clan by act of first settlement.*

*Furthermore, PW11 admitted under cross-examination that he warned the plaintiffs not to file this suit in court but they refused. This statement has created a very serious doubt in our minds. It is on record that PW11 agreed that he litigated Akpanku land case in the court with Anibesse clan. This shows that, in the past, PW11, was active and always prepared to protect his Onoko clan's land against any intruder. We therefore wonder why he has decided to abandon this noble role which he played in the past, if he strongly believed that the farmland in dispute actually belong to his clan. By asking the plaintiffs not to file this action in court, we are of the view that PW11 believed that the disputed farmlands do not belong to his Onoko clan."*

*The judges after further pointing out how the two witnesses being elders of Onoko clan, and a fortiori principal witnesses for the appellants, manifested in their evidence glaring contradictions. Thus, in such a situation, they found it difficult to believe the unreliable evidence of these two witnesses (PW10 and PW11) and they therefore proceeded to hold that under test No. (a) as proffered by this court in the case of Idundun v. Daniel Okumagba (1976) 6 S.C. 227, 246-248, which is proof*

by traditional evidence, has not been satisfied.

Also, that as for test No. (b) which is by production of documents of title, the plaintiff conceded they were unable to prove it. The judges went on to state how the evidence proffered before them depicted PW1, PW7, PW9, PW10, PW11, and PW12, as hailing from Ozionoko B Clan; PW2, PW3, and PW4 as coming from boundary clans, while PW5, PW6, and PW8, are tenants of the plaintiffs. They then evaluated the quantum of evidence adduced before them and pointing out how the evidence of PW4 and DW1 from the same clan contradicted each other C and pertinently asked the question who out of these two witnesses should be believed. They took the view that being a ward head in Eganyi and a senior person to PW 4, DW1 should know better about the land in dispute and this the moreso, that PW4, was merely sent to represent his clan during the enumeration of the economic trees by the surveyors - Toki and D Company."

Having chosen to prefer the evidence of DW1 to that of PW4, they proceeded to hold as follows:

"From the above, it can be seen that PW2, PW3 and PW4, have E nothing to offer so as to convince us that their respective clans share boundaries with Ezionoko Clan".

adding that:-

"In the circumstances, we hold that plaintiffs have also failed to F satisfy test No (c) in the case of Idundun v. Okumagba, which is, proof of possession of connected or adjacent land."

The judges of the trial Upper Area Court then went on to give a dispassionate consideration to the defence and after examining all the documentary evidence therein tendered, held in conclusion thus:- G

"It has been held, that in civil cases, the Judge will give judgment for the plaintiff if, after hearing all the witnesses, he finds that the plaintiff has established his case by a balance of probabilities. But from the totality of the evidence before us, we hold that, putting the evidence H of both sides on an imaginary scale the evidence in favour of the 1st defendant is heavier than that of the plaintiffs. What is more, it is a well established principle of law that, in a claim for declaration of title, the

onus is always on the on the plaintiff to establish his claim, and that it is not open to him to rely on the weakness of the defendant's case." (Underlining is mine for emphasis).

They therefore proceeded to dismiss the appellants' claim. Upon appeal  
B to the High Court of Appeal, the latter on allowing it held, inter-alia, as follows:-

"We are not unaware that an appellate court is not entitled to interfere and reverse the findings of fact if it is unsound or perverse (See Alhaji Aliyu Balogun v. Alhaji Shittu Labiran (1988) 3 NWLR (part 80)  
C 66). We are of the view that the over reliance by the trial Upper Area Court on the evidence of PW10, and PW11 has resulted in miscarriage of justice in this case. The trial Upper Area Court should have realized that justice of this case demands that the evidence adduced by both parties  
D and their witnesses must be equally considered."

Continuing, the Appellate High Court further held as follows:-

"It will be re-called that the plaintiffs are claiming five farm-lands which have been amply described by evidence. We observe there-  
E fore that failure of the trial Upper Area Court to place probative value on the evidence of the witnesses has affected the decision of that court in giving the land to the 1st respondent. (See A.R. Mogaji v. Madam Rabiatu Odofin & Ors. (1978) 3 SC.91 at 93; Lawal v. Dawodu (1972) 9-10  
F S.C.83 at 114-115)."

It then proceeded to conclude thus:-

"In conclusion we hold that since the trial Upper Area Court, has abdicated its primary responsibility of evaluation the evidence placed before him (sic) and ascribing probative values to the said evidence, it is  
G not competent to express that the plaintiff has not prove (sic) their case by (sic) balance of probabilities to the 1st defendant / respondent's evidence .....

In the result, we find that all the grounds of appeal argued by Dr.  
H Mosugu learned counsel for the plaintiffs / Appellants succeed and the appeal also succeeds. The judgment and the consequential Orders of the trial Upper Area Court, are hereby set aside." (underlining is also mine for emphasis)



In the light of all I have said earlier on the above decision of the High Court of Appeal is erroneous cannot be justified and / or sustained. This is because, in the first place, the Upper Area Court that tried the case on appeal is a customary court. In such a court one must look at the substance and not the form. See Booder v. Forse 8 WACA 187; Divisional Chief Gbogboluji of Vakpo Afeyi v. Head Chief Hodo of Akukome 7 WACA 165; Udechukwu v. Okwuka (1956) 1 F.S.C. 10; and Amadasun v. Ohenso (1966) NMLR 179. Thus, in Studnam v. Slainbridge (1895) 1 Q.B.D.810, it was held, inter-alia, that "court must look at substance rather than the form in deciding what the subject of proceeding is " and this court in an apparent approval of the principle in Ajagunjeun v. Sobo Osho (1977)5 S.C.89, stated that customary courts being survivors of the former native courts, the High Courts in dealing with proceedings from these courts are entitled and are expected to go beyond the claim as framed on the writ; they must ascertain from the entire evidence before that court what precisely are the nature and subject matter of the dispute between the parties to the action. See also Ajayi v. Aina (1952) 10 NLR 67 at page 71. That is precisely why this court has held in several cases that Customary Court trials are not set aside solely on the ground of technicalities and/or every irregularity vide Section 55 of the customary Court Law; Madukolu v. Nkemdilim (1962) 1 All NLR 587, and Adeigbo & Ors. v. Kusimo & Ors. (1965) NMLR 284.

In the instant appeal, I am of the firm view that the Upper Area (trial) court neither over-relied on the evidence of PW10 and PW11 nor abdicated its primary responsibility of evaluating the evidence placed before it when it ascribed probative values thereto. Rather it made unimpeachable findings of fact.

Where, as in the instant appeal a court of trial - in this case the Upper Area Court that saw and heard the witnesses came to specific findings of fact on the evidence on issues before it, an appellate court which had no similar opportunity should refrain, indeed should be cautious from coming to different findings unless it can show that the conclusions could not follow from the evidence before it. See Ebba v. Ogodo (1984) 4 S.C.84 at 98; Odofin v. Ayoola (1984) 11 S.C.72 at 106; The

State v. Iyaro (1988) 2 S.C. (part 1) 167 at 172, and Babatunde Ajayi v. Texaco (1987) 9-11 S.C1 at 27. Although, it is settled law that there is no doubt that an appellate court is usually very reluctant to interfere with the trial court's findings of fact, yet it will do so where the conclusions of fact of the trial court are perverse or where the trial court has not considered the totality of the evidence before it (see Mogaji v. Odofin (1978) 4 S.C 91; Kate Enterprises Ltd. v. Daewoo (Nig.) Ltd. (1986) 2 NWLR. 116; and Awoyale v. Ogunbiyi (1986) 2 NWLR.626 at 646), where, as in the instant case, the trial Upper Area Court thoroughly evaluated the evidence adduced before it and having been re-inforced with the background evidence of a visit to the locus the Court of Appeal, would be acting wrongly to substitute its own findings with those of the trial court. Indeed, in the instant case on appeal where the evaluation of evidence and findings of facts are matters within the exclusive province of the trial Upper Area Court, the appellate High Court could only interfere where those findings of fact are found to be perverse and a misapprehension of the facts. See Iyaro v. The State (supra). Not so in the instant case where it is not the business of the appellate High Court to re-open the dispute and start trying the case, as it were, de novo - a course this court deprecated (per Oputa, JSC) in Igbanude Olomu & Anor v. Emmanuel Ogba & Others (1987) 2 NWLR (part 54) 1 at page 10. The function of an appellate court being to oversee, to superintend and to review the way the dispute and the issues raising therefrom were tried to see whether the trial court used the correct procedure and/or arrived at the right and proper decision, it is only where the findings of fact of the trial court are not borne out of the evidence in that court, the Court of Appeal will be called upon to re-assess such evidence. See Alero Jadesimi v. Adolo Okotie-Eboh (1986) 1 NWLR (part 16) 264.

In the case in hand, therefore, the High Court of Appeal was clearly wrong, in my opinion, to have upset the decision of the trial Upper Area Court which, looked at from all angles, is unimpeachable.

The Court of Appeal to which the appeal lay, for the wrong reason, in my view, upturned the decision of the High Court sitting on appeal over the matter. It therefore in the result arrived at the wrong

conclusion when, in my opinion, the held as follows:-

*"In sum, this appeal succeeds and it is allowed on the ground that the High Court (Appellate Division) Lokoja failed to properly re-evaluate the evidence of other witnesses which the Upper Area Court, Lokoja ignored or failed to evaluate. Consequently, judgment of High Court of Kwara State in its appellate jurisdiction sitting in Okene (now Kogi State) in suit No. KWS/OK/IA/90 presided over by J.A. Ibiwoye and S.K. Otta, JJ. delivered on 15/3/91, which set aside the judgment and consequential orders of the trial Upper Area Court, Lokoja, in suit No. CVF/36/88 date 26/1/90, is hereby set aside along with the said judgment and consequential orders of the trial Upper Area Court. In consequence, I order that this case be retried de novo by a different judge and members of the Upper Area Court, Lokoja, other than those that had at one time or the other been involved in the case. In view of the communal nature of this case, I order that parties bear their costs."*

The above conclusions being wrong and perverse in the light of all I have said herein before, I restore the trial Upper Area Court's decision dismiss the cross-appeal and subscribe to the conclusion and consequential orders made in the leading judgment of my learned brother, Iguh, JSC. inclusive of costs. I adopt the judgment of my learned brother as mine in its wholesomeness.

### AYOOLA JSC

I have had the privilege of reading in advance the judgment delivered by my learned brother Iguh, J.S.C. I agree with him that the appeal of the 1st defendant appellant should be allowed and that plaintiffs' cross-appeal should be dismissed.

I find no substance in the contention that the judgment of the Court Appeal was not valid. I too would rely for this conclusion on the decisions in Lawani Adesokan & Ors v. Adegorolu & Ors (1997) 3 NWLR H 261 and Alhaji Aminu Ishola v. Societe Generale Bank of Nigeria Ltd (1997) 2 NWLR 405 which have been referred to in the judgment of my learned brother, Ogundare, JSC, which I have had privilege of reading in

draft.

It is manifest that the Court Appeal had ordered a retrial of the suit upon an obvious erroneous appreciation of the judgment of the Upper Area Court. The Court of Appeal was of the view that that court B considered the evidence of PW10 and PW11 only whereas that was far from being so. By any standard the exercise undertaken by the Upper Area Court was a qualitative and impressive evaluation of the entire evidence in this case . The conclusion by the Court of Appeal that there was C no evaluation of the evidence by that court is not only erroneous but also surprising.

I too would allow the 1st defendants' appeal and dismiss the Cross-appeal. I would set aside the judgments of the Court of Appeal and the High Court and restore the judgment and orders of the Upper D Area Court. I abide by the order for costs by my learned brother, Iguh, JSC.

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