

SUPREME COURT OF NIGERIA
17TH DECEMBER, 1999. SC. 233/1993
CORAM:- S. M. A. BELGORE, E. O. OGWUEGBU,
A. I. KATSINA-ALU, O. ACHIKE, U. A. KALGO, JJSC

OKONKWO OKONJI & ORS. APPELLANTS
AND
GEORGE NJOKANMA & ORS. RESPONDENTS

***APPEALS** - Briefs - Reply brief - Court will not allow appellant - To extend earlier contentions - In the guise of a reply brief - Reply brief can only deal with new points - Raised in respondent's brief.*

***APPEALS** - Concurrent findings of fact - Will not be interfered with - As appellants have failed to show any special circumstances.*

***APPEALS** - Evidence - Evaluation of - Is the duty of trial court and not the appellate court - And that duty was properly carried out by trial judge.*

***APPEALS** - Evidence - Wrongful admission of - Does not ground reversal in all cases - Duty of showing substantial miscarriage of justice - Is on the appellant.*

***APPEALS** - Issues raised - Lower court is under a duty - To consider and determine all non hypothetical issues placed before it - And need not raise the suo motu issue it raised.*

***APPEALS** - Suo motu raising of new issue - Is erroneously alleged - As court of Appeal merely referred to sections of an Act - To buttress its judgment.*

***EVIDENCE** - Admissibility - Courts - Admission of evidence under a wrong section of the law - Is not sufficient ground to reverse the judg-*

ment.

EVIDENCE - Admissibility of document - By trial judge under wrong section of the law - Will be corrected by appellate court - Unto retaining the evidence so admitted.

EVIDENCE - Documents - Admissible for one purpose - Will not be admissible for another purpose - If specific requirements under the law for that other purpose - Are not satisfied.

EVIDENCE - Documents - Admissibility - Three main criteria - That govern admissibility of a document.

EVIDENCE - Document - Foundation for admission - Is to be laid by the party that pleaded that document - Document admitted in contravention of the Act - Will be expunged.

EVIDENCE - Documents - Public document - Admissibility - Conditions for under ss. 111 & 112 Evidence Act - Having been fulfilled - Document in issue was rightly admitted.

EVIDENCE - Documents - Presumption of genuineness - Of document kept in proper form and produced from proper custody - Is enjoined upon the courts - By ss. 116 & 117 Evidence Act.

EVIDENCE - Relevance of facts - Is determined by the surrounding circumstances.

LAND LAW - Traditional evidence - Being inconclusive - Trial judge rightly reverted to acts of possession in recent times - As laid down in *Kojo v. Bonsie*.

PLEADINGS - New issue - Courts - Specific reference to sections of the Evidence Act - Is not tantamount to raising new issues by court - Court

need not invite further address from counsel - Merely because it referred to sections of an Act.

FACTS

Before the Asaba High Court, the plaintiffs/respondents filed an action against the defendants/appellants claiming declaration of title, damages for trespass and injunction in respect of the land in dispute. Defendants cross claimed in similar terms. The two suits were consolidated and tried together. The trial court found the traditional evidence of both parties inconclusive and adverted to acts of possession in recent times in line with the principle laid down in the case of Kojo v. Bonsie. Exhibits "B" and "D" admitted by the trial judge were seriously contested to be inadmissible by the defendants.

The trial court found in favour of the plaintiffs. Defendants' appeal to the Court of Appeal was unsuccessful. Upon appeal, the Supreme Court ordered a rehearing before the Court of Appeal. After the rehearing, the lower court still gave judgment in favour of the plaintiffs. Still dissatisfied, defendants have further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"(1) Were the appellants not denied their right to fair hearing when the Court of Appeal raised suo motu and decided the issue of the admissibility of Exh. 'B' in the proceedings under the provisions of section 111, 112, 129 and 130 of the Evidence Act, without affording the parties, particularly the appellants, an opportunity of being heard on the issue so raised?

(2) In the above circumstance are the appellants not entitled ex debito justitiae to have the judgment set aside and a re-hearing ordered?

(3) Are the appellants not entitled to judgment on the points which were canvassed in briefs of the parties on the admissibility of Exh. 'B' and 'D' under section 20 (3) (a) & (b), 34 (1) and 199 of the Evidence Act, respectively as issues (b) and (d) in appellants' Brief at page 248, 252-259 of the Record and in Respondents Brief at page 279, 283-285 of the Records? Etc, see p. 3122

HELD (Unanimously dismissing the appeal per lead judgment of **ACHIKE JSC**)

Documents - Admissibility - Three main criteria

1. The position of the law in relation to the question of admissibility of a document in evidence is that admissibility is one thing while the probative value that may be placed thereon is another. Generally, three main criteria govern the admissibility of a document in evidence, namely:

- (1) is the document pleaded?
- (2) is it relevant to the inquiry being tried by the court?, and
- (3) is it admissible in law?

See Dunniya v. Jomoh (1994) 3 NWLR (pt. 334) 609 at 617. (p. 3124 D)

Relevance of facts

2. In the law of evidence, the relevance of facts encompasses a wide area; see sections 6,7,8,9,10,11,12,13,14,15,16,17 and 18 of the Evidence Act. Generally, evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as may be declared under the Evidence Act to be relevant; see section 6 of the Evidence Act. No doubt, it is the surrounding circumstances that will determine the relevancy of a fact. The that Exh. 'B' was extensively pleaded by the respondents confirms its relevancy to their case. (p. 3126 B)

Documents - Public document - Admissibility

3. We may recall that Exh. 'B' was the record of judicial proceedings in Suit No. 1/1931. Undoubtedly, it is a public document and is subsumed as such under section 109(a)(iii) of the Evidence Act. The formalities for admissibility of public documents, such as Exh. 'B' are lucidly and comprehensively laid down under sections 111(1) and 112 of the Evidence Act. In the result, I am satisfied that there being proper conformance with those provisions of the Evidence Act, Exh. 'B' was properly admitted in evidence. It became self-explanatory that being a record of proceedings of a tribunal, it is a public document; on its face, it confirmed that it was duly certified and that appropriate legal fees were paid and that it was duly stamped. These facts, as stated above, were glaringly obvious on the

face of Exh. 'B' that it would be ridiculous to invite counsel to expatiate on it when it is a truism that a document when admitted in evidence speaks for itself. (p. 3126 E)

Documents - Presumption of genuineness

B

4. The court, under sections 116 (formerly 115) and 117 (formerly 116) is enjoined to presume the genuineness of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and if produced from proper custody. (p. 3127 E) C

Suo motu raising of new issue

5. It is pulling the wool over the eye for appellants' learned counsel to submit that in deciding the issue of admissibility of Exh. 'B' the Court of Appeal suo motu raised and decided that question by raising new issues. Perhaps, what can be underlined is that the Court of Appeal made specific references to sections of the Evidence Act in an attempt to elucidate the issues at stake but that cannot be taken as raising any new issues not raised in parties' pleadings nor did it go outside specific issues formulated by the parties. Where the court buttresses its' judgment by reference to express provisions of the Evidence Act, or any Act for that matter, it is not the practice known to this Court to invite counsel to further address it on any references made to the Evidence Act. (p. 3127 F) D E F

Courts - Admission of evidence under a wrong section

6. In any event, even if the appellants were correct that Exh. 'B' was wrongly admitted in evidence under a wrong section of the law, (which is not conceded) I am clearly of the opinion that that alone, without more, would not be good ground for challenging the fact of admissibility of Exh. 'B'. The law has long been settled that if a court arrives at a correct decision but cites a wrong and inappropriate section of the law, that would not be sufficient to upturn the judgment. The appellate court will evoke the plenitude of its judicial power to correct the error and substitute the relevant law. See Folabi v Folabi (1976) 9 SC 1 at 11 and Henry Stephen G H

Engineering Co. Ltd. v Complete Ent. Nigeria Ltd (1987) 1 NWLR (Pt.47) 40 at 48. (p. 3128 D)

Briefs - Reply brief

B 7. It may be recalled that the appellants filed a Reply brief. A Reply brief affords the appellants an opportunity to deal with new points raised in the respondent's brief. Obviously, it is not a necessity. Care must be taken not to use the filing of a reply brief either to extend the scope of the Appellants' brief or to raise issues that did not arise as new matters in the respondents' brief. The Court cannot permit appellants to unduly extend their earlier contentions in their brief in the guise of a Reply brief. To do otherwise is, as it were, to give the appellants a second bite at the berry and the opportunity for the last word unwarranted by the Rules of Court.
D (pp. 3128 H / 3129 E)

Documents - Admissible for one purpose

E 8. A document may be admissible in evidence if it satisfies the prescribed conditions for admissibility for that purpose yet those conditions may be wholly unsatisfactory if such document is sought to be admitted in evidence for yet a different purpose. This is another way of saying that even if a document is admissible under certain provisions of the Evidence Act that does not ipso facto make the same document admissible for all intents and purposes because where such document is intended in proof of a specific item under the relevant law, the specific requirements or provisions under that law must be satisfied to the hilt in order to effectuate the reception of that document in evidence. If the matter of admissibility of Exh. 'B' rested simply on whether Exh. 'B' was a relevant, genuine and public document, no doubt, the cumulative effect of the provisions of sections 111, 112 and 130 of the Evidence Act would ordinarily have given the admissibility of Exh. 'B' the necessary pass mark. But, on the contrary,
H the admissibility of Exh. 'B' was predicated on the strict compliance with the provision of section 34 (1) which the lower court, as we had earlier shown, neglected to give any consideration whatsoever.

Having fully examined the arguments agitated by both learned

counsel, I am clearly of opinion that the lower court was in error to have affirmed the admissibility of Exh. 'B' in evidence by merely placing reliance only on sections 111, 112 and 130 of the Evidence Act whereas such exercise ought to have been rooted and predicated on strict compliance with section 34(1) of the Evidence Act. This was, however, not the case. (pp. 3130 D / 3134 G) B

Appeal - Issues raised

9. The appellants' complaint of the mutedness of the lower court on this apparently all-important issue regarding section 34(1) is undoubtedly justified. They have justifiably appealed to this Court on the same point. I am clearly of opinion that the lower court was under a duty to give ample consideration and determine all issues (not hypothetical) placed before it. This is so because a judgment of a court of record must demonstrate a dispassionate consideration of all the issues canvassed by the parties and in turn show the result of such exercise, see Jamgbadi v Jamgbadi (1963) NSCC 281 at 282, D

The consideration of prerequisites for the admissibility of Exh. 'B' was, as it were, swept under the carpet by the lower court and brazenly said that "regardless of all the conditionalities given under section 34(1) for admitting evidence in previous proceedings, it is nevertheless our law under section 130 of our Evidence Act, 1990 (formerly S. 129) that documents over 20 years old are presumed to be genuine." First, I think that the lower court was in grave error not to have given the much-needed consideration to section 34(1). Second, the reference by the lower court to section 130 of the Evidence Act, a matter not raised by the parties but raised suo motu by the lower court in its judgment, to say the least, was diversionary and at best it was obiter. It does not deserve our consideration. (pp. 3131 B / 3133 F) E F G

Document - Foundation for admission

10. It is the party who pleads a document and wishes to rely thereon who must lay the evidentiary foundation to warrant the admissibility of that document, bearing in mind the appropriate section of the Evidence Act H

under which the said document is sought to be admitted. If the requirements under the Evidence Act are not strictly met, the document so admitted in contravention of the Act must be expunged. (p. 3131 E)

B *Admissibility under wrong section of the law*

11. I have no doubt that in so far as the trial judge believed he was admitting Exh. 'D' under section 199, the trial Judge, was gravely in error. It was a slip in his judgment as regards the citation of the wrong section of the law. The Court of Appeal, while confirming the judgment of the trial Judge, did not correct that judgmental slip. That slip is minor and pardonable. The court, in the interest of justice, has invariably corrected wrong citation of sections of the statute or filled the gap where none was cited so long as the law sought to be relied on is extant and correct. Again, I refer to Afolabi v Afolabi (supra). In any event, the judgmental error was that of the trial Judge because respondents' counsel at the court of trial only failed to cite a specific provision of the Evidence Act. And correctly in the respondents' brief, their learned counsel submitted that Exh. 'D' was admissible under section 210(c) of the Evidence Act. This is correct because Exh. 'D' was introduced to cross-examine DW6 as to credit. (p. 3136 H)

Land law - traditional evidence

12. There cannot be any question that the learned trial Judge dispassionately and painstakingly reviewed and evaluated the evidence tendered at the trial. The record eloquently attest to this fact. Consequent to that he arrived at the conclusion, and rightly in my view, that the traditional evidence led by the parties was inconclusive and accordingly he invoked the principles laid down in Kojo v Bonsie. Thereupon he firmly fixed his findings on acts of possession in recent times. Obviously, in making such findings on acts of possession, it is imperative that such findings on acts of possession in recent times must be those in which most of the witnesses who testified are alive; their demeanour and credibility were crucial and important for the court to take into consideration. This was precisely what the learned trial Judge did and the same was approved by the Court of Appeal. (p. 3139 F)

Appeals - Evidence - Evaluation of

13. The sifting of the evidence tendered which is based on credibility is peculiarly within the province and preserve of the learned trial Judge and this court, in exercise of its appellate jurisdiction, cannot make a finding on such point nor can it disregard a finding of fact based upon the credibility of witnesses; see Akinola & anor v Oluwo & ors (1962) 1 ALL NLR (Part 2) 224. It is certainly my view that appellants' submission and complaint that the learned trial Judge simply rested his decision on the subterfuge of "I believe" and "I do not believe" is not borne out by the content of the record. (p.3140 C) B
C

Concurrent findings of fact

14. This Court has repeatedly made it clear and emphasized that it will not interfere with concurrent findings of fact by both the trial court and the Court of Appeal unless special circumstances are shown to establish that it is in the interest of justice so to do. I am satisfied that the appellants have failed to show any special circumstances that warrant re-opening of the question in the interest of justice or to avert a miscarriage of justice. See Akpere v Barclays Bank of Nigeria Ltd & anor (1977) 1 SC 1. (p.3140H) D
E

Evidence - Wrongful admission of

15. It is important to delineate the fact that mere wrongful admission of evidence cannot ipso facto lead to a reversal of the decision reached in a case because the appellate courts by the plenitude of their power, as earlier noted, can either prune down the wrongfully admitted evidence or allow the judgment to stand if no substantial miscarriage of justice had actually occurred, more so when the remaining properly-admitted evidence is enough to sustain the judgment. It must however be emphasized that it is the party complaining of wrongful admission that must show that without such evidence the decision complained of would have been otherwise. In other words, this burden is on the appellants. They have not discharged it. F
G
H

The irresistible conclusion under Issues Nos. 5 and 6 that I am bound to reach is that even if Exhs. 'B' and 'D' were expunged from the record the judgment of the High Court as confirmed by the lower court

would remain intact and unassailable. (p. 3145 A)

NOTABLE POINTS OF INTEREST

ACHIKE

B 1. *Need for counsel to furnish appropriate sections of law he is relying upon*

I would only add that it is not good advocacy for counsel to relegate to the court the burden of filling in the gap(s) of the appropriate section(s) of the Evidence Act that counsel wishes to rely on. Nevertheless, such counsel's omissions are pardonable and cannot be fatal nor be allowed to defeat the justice of the case because invariably the court performs that thankless job, all in the interest of justice. See Afolabi v. Afolabi (supra). (p.3132G)

D 2. *Five ways to prove ownership of land*

The Supreme Court had long ago set out the five ways whereby proof of title of ownership of land can be established by a plaintiff in an action. This was in that oft-quoted case of Idundun v Okumagba (1976) 9-10 SC 227 at pp 248 - 252 or (1976) NMLR 200. Delivering the leading judgment in that case Fatayi-Williams, JSC postulated five ways thus:

(1) *"Ownership of land may be proved by traditional evidence. This may be done by oral evidence of witnesses or by citation of authoritative books of such traditional evidence.*

F (2) *Ownership of land may be proved by production of documents of title which must be duly authenticated in the sense their due execution must be proved unless they are proved from proper custody in circumstances giving rise to the presumption in favour of due execution*
G *in the case of documents 20 years old or more at the date of the contract.*

(3) *Acts of the person or persons claiming the land such as selling, leasing or renting out all or part of the land in dispute or farming on it, are also evidence of ownership.*

H (4) *Acts of long possession and enjoyment of the land may also be prima facie evidence of ownership of the particular piece or quantity of land with reference to which such acts are done. Such acts of long possession, in a claim of declaration of title are really a weapon more of*

defence than of offence.

(5) Proof of long possession of connected or adjacent land, in circumstances rendering it probable that the owner of such connected or adjacent land would, in addition, be the owner of the land in dispute".

(p. 3137 G)

B

3. Court has no duty of speculating on point made by counsel

It is not the duty of the court to speculate on the point being made by counsel, nor is it the duty of the court to guess what counsel has in the inner recesses of his mind. (p. 3138 G)

C

REPRESENTATION

B.A.M. Fashanu, Esq for the appellants.

Chief Olisa Chukura, S.A.N., With him,

Chris D. Okoh, for the respondents.

D

CASES REFERRED TO

Kojo II v. Bonsie (1957) 1 NWLR 1223 at 1226 - 1227

Omosanya v. Anifowoshe (1950) 4 FSC 94

Sunmonu v. Otapo (1987) 2 NWLR (Pt. 58) 587 at 605

Folabi v. Afolabi (1976) NMLR 169

Finnih v. Imade (1992) 1 SC. 114 at 141

Abusi-Odu Transport) v. Jibowu (1972) 6 SC. 747

Ochomma v. Uonsi (1965) NMLR 321

Dunniya v. Jomoh (1994) 3 NWLR (pt. 334) 609 at 617 Oba R.A.A.

Igbonla v. H.R.H. Oba Alediosu II & ors (1992) 6 NWLR (pt. 249) 550 at 559

Folabi v Folabi (1976) 9 SC 1 at 11

Henry Stephen Engineering Co. Ltd. v Complete Ent. Nigeria Ltd (1987) 1 NWLR (Pt.47) 40 at 48

E

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G

H

STATUTE REFERRED TO

Evidence Act ss.111, 112,129, 130, 20,(3), 34(1), 199, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 210(c)

LEAD JUDGMENT BY ACHIKE JSC

The plaintiffs/respondents filed Suit No. A/10/73 at the High Court, Asaba in March 1973 and claimed against the defendants/appellants for declaration of title to land, damages for trespass and injunction. B The defendants/appellants cross-claimed, in similar terms, against the plaintiffs/respondents in Suit No. A/16/73 in April 1973. The two actions were consolidated and accordingly tried together. Judgment was delivered in favour of the plaintiffs/respondents on 30/3/81. Dissatisfied with that judgment, the defendants/appellants appealed to the Court of C Appeal, Benin City and lost. Still dissatisfied, they further appealed to the Supreme Court. The Supreme Court ordered a re-hearing of the appeal in the Court of Appeal. At the conclusion of the re-hearing, the Court of Appeal on 9/7/93 again, gave judgment in favour of plaintiffs/respon- D dents. With leave of the Supreme Court the appellants appealed and argued on grounds of law, mixed law and facts.

Both parties filed and exchanged briefs of argument in accordance with the Rules of this Court. Be it noted that the appellants also filed a E Reply Brief in answer to Respondents' brief. Appellants' learned counsel, Mr. H. A. Lardner S.A.N., in the appellants' brief, identified six issues for determination in the appeal, namely,

"(1) *Were the appellants not denied their right to fair hearing F when the Court of Appeal raised suo motu and decided the issue of the admissibility of Exh. 'B' in the proceedings under the provisions of section 111, 112, 129 and 130 of the Evidence Act, without affording the parties, particularly the appellants, an opportunity of being heard on the issue so raised?*

G (2) *In the above circumstance are the appellants not entitled ex debito justitiae to have the judgment set aside and a re-hearing ordered?*

(3) *Are the appellants not entitled to judgment on the points which were canvassed in briefs of the parties on the admissibility of Exh. 'B' H and 'D' under section 20 (3) (a) & (b), 34 (1) and 199 of the Evidence Act, respectively as issues (b) and (d) in appellants' Brief at page 248, 252-259 of the Record and in Respondents Brief at page 279, 283-285 of the Records?*

(4) *Whether the trial court having found the traditional historical evidence inconclusive correctly applied the principle laid down in the case of Kojo II v. Bonsie (1957) 1 NWLR 1223 at 1226 - 1227 When it decided the case on the credibility of witnesses and was the Court of Appeal right in approving the manner in which the principle was applied by the trial court?* B

(5) *Whether the learned trial Judge and the Lord Justices of the Court of Appeal have correctly and sufficiently scrutinized the evidence and examined the exhibits tendered before the court by both sides to the case before they came to concurrent judgments?* C

(6) *If exhibits 'B' and 'D' were expunged from the records, can it reasonably be (sic) held that the decision would have been the same".*

The respondents' learned counsel, Chief Olisa Chukura, S.A.N. adopted the appellants' issues for determination as theirs. D

It is worthy of note that both parties were ad idem, and rightly in my view, that "the main complaint in this appeal centres around the denial of fair hearing and the admission and use made of Exhs. 'B' and 'D' in the proceedings in the two lower courts amongst other grounds." E

At the oral hearing before us, each learned counsel adopted his brief of argument; appellants' counsel additionally adopted his Reply brief. Each counsel concisely but substantially reiterated his argument on the vexed question of admissibility of Exhs. 'B' and 'D' as contained in the briefs. F

Issues 1 & 2

Appellants argued Issues Nos 1 and 2 together. Learned appellants' counsel, Mr. B.A.M. Fashanu at the oral hearing, submitted that it was improper for the Court of Appeal to have raised the issues of fact, relating to G

(1) Whether or not Exh. 'B' was a public document.

(2) Whether it was duly certified.

(3) Whether legal fees were paid at the time it was obtained, and H

(4) Whether it was duly stamped, and suo motu proceeded to answer them without calling on the counsel to the parties to address the court on the issue.

Relying on several legal authorities, he submitted on appellants' behalf that the judgment of the Court of Appeal ought to have been confined to the issues placed before the court and not those raised suo motu by the court. It is further his submission that the lower court erred by failure to
 B deal with Exh. 'B' as record of previous proceedings which is what it really is but treated it as a 'deed'. In so doing, counsel submitted that the lower court failed to realize that Exh. 'B' contained no recitals of a contract in favour of which the presumption created by S.130 of the Evidence Act is to be drawn and relied on Omosanya v. Anifowoshe (1950) 4 FSC 94,
 C more so when there is no contract to which Exh. 'B' was referable. It is also counsel's submission that the denial of a fair hearing vitiates the proceeding of the lower court and relies on Sunmonu v. Otapo (1987) 2 NWLR (Pt. 58) 587 at 605. Since the decision of the lower court was based on
 D Exh. 'B', counsel urged this Court to interfere and reject Exh. 'B', and to decide the case based on legal evidence. This grave error, according to counsel, should be viewed as special circumstance to warrant this Court to interfere with the concurrent findings of the two lower courts, because the
 E error created a failure of Justice.

It was also argued that the Court of Appeal erred in approving the admission of Exh. 'B' in evidence not only under a wrong section of the law but also to have used the contents (i.e. the evidence of Obidi Okwaona
 F therein) as evidence before the Court and relying on the said evidence in reaching the conclusion that 'Estoppel by conduct had been proved against the appellants', when the appellants were not proved, either directly or by representation, to be parties to the 1931 case - Exh. 'B', and no such pleading was made to show that the appellants were claiming through any of
 G the parties or through Obidi Okwaona.

On the two issues, respondents' learned counsel, Chief Olisa Chukura, S.A.N. in his brief, submitted that new issues were raised in the Court of Appeal and that if counsel omitted to refer to relevant and appropriate sections of the Evidence Act, the Court could do so in so far as its aim is to resolve the issues in controversy between the parties. Secondly, by sections 115 (now 116) and 116 (now 117) of the Evidence Act, a court is enjoined to presume the genuineness of every document

purportedly directed to be kept by any person if such document is kept substantially in the form required by law and produced from proper custody and when a document is so admitted it speaks for itself. Further, even if a document is admitted under a wrong section of the Evidence Act, the wrong citation will not vitiate the decision; he cites the authority of Folabi v. Afolabi (1976) NMLR 169. Counsel finally submitted that the appellants were wrong to submit that they were denied a fair hearing by the lower court because that court did not raise any issue not canvassed before it or the trial court. It also finally submitted that it was not necessary for the appellants to insist that they be invited to address the court further on application of the Evidence Act. B C

In order to produce clarity, particularly in the discussion of the complaint levelled against the admissibility of Exhs. 'B' and 'D', I would prefer to deal immediately with the submissions made by parties' counsel in respect of each of the two exhibits, more so as the parties are wholly in agreement, as stated in their respective briefs of argument, that the central issue in this appeal centres around the denial of fair hearing and the admission and use made of Exhs. 'B' and 'D' in the proceedings in the two lower courts. I have had a second hard look at the complaint canvassed in respect of admissibility of Exh. 'B'. Specifically, the gravamen of Issue No. 1 deals with the denial of fair hearing wherein it is submitted, on behalf of the appellants, that the leading judgment in the Court of Appeal delivered by Akpabio, JCA, made reference to sections 111, 112, 129 and 130 of the Evidence Act without inviting the parties' counsel to make any input before finally resolving the issue or issues in controversy. Obviously, the indictment on the lower court of denial of fair hearing is sufficiently crucial that, if established, the appellate court would be obliged to intervene and remit the case to the lower court for re-trial. There is a chain of authorities of this Court that seriously frowns on such short-comings of the lower courts - be it the trial court or intermediate appellate court-involving decisions reached without inviting either or both counsel to address the court on the issues that call for resolution. After all, our adversary system only recognizes the office of the Judge as that of an unbiased umpire in the sense that he is detached from the controversy between the parties D E F G H

and should so remain outside the arena of conflict in order to properly decide the issues in controversy fairly, and only after hearing parties or their counsel. The trial or appellate court can, as of right, raise issues that may aid the determination of the issue in controversy but cannot
 B decide such issues without the parties counsel reacting to such issues raised suo motu by the court. See R. A. F. Finnih v. J. O. Imade (1992) 1 SC. 114 at 141 and Kuti (Trading as Abusi-Odu Transport) v. Oludademu Jibowu (1972) 6 SC. 747. In order to maintain the judicial neutrality and
 C thereby enable the Judge to refrain from deciding a case on issues raised by him suo motu in his judgment, the best posture for the Judge is to confine himself to issues of facts solely raised by the parties. See Ochomma v. Uonsi (1965) NMLR 321.

Was Exhibit 'B' admissible in Law?
 D **The position of the law in relation to the question of admissibility of a document in evidence is that admissibility is one thing while the probative value that may be placed thereon is another. Generally, three main criteria govern the admissibility of a document in
 E evidence, namely:**

- (1) is the document pleaded?
- (2) is it relevant to the inquiry being tried by the court?, and
- (3) is it admissible in law?

F See Dunniya v. Jomoh (1994) 3 NWLR (pt. 334) 609 at 617 and Oba R.A.A. Oyediran of Igbonla v. H.R.H. Oba Alebiosu II & ors (1992) 6 NWLR (pt. 249) 550 at 559.

Was Exhibit 'B' pleaded?

G Perhaps, our starting point must be the position at the court of trial wherein Exh. 'B' was sought to be tendered. It was opposed on several grounds. It is therefore useful to examine at page 69 of the record the contest for the reception of that document in evidence in order to appreciate what transpired at the trial court when an attempt was made by plaintiff's
 H counsel to tender the document that was subsequently received in evidence as Exh 'B'. Learned defendants' counsel in opposition raised the following four-pronged grounds of objection:

"(1) The document is not certified as claimed by counsel for the

plaintiffs;

(2) *Even if it was certified it has to be tendered only by the Registrar;*

(3) *The evidence of Obidi Okwaona is not relevant to this proceedings; and*

(4) *Portions of a document cannot be tendered until, the full document goes in evidence. I urge the court to reject the document."*

In reply Mr. Onwuelo, learned counsel for the plaintiffs said he would be prepared to tender the whole document; he also said that the document was duly certified by the Higher Registrar of the Warri High Court, at p. 12, and the certification was paid for. Counsel proceeded to refer to sections 110 (now 111) and 111 (now 112) of the Evidence Act and submitted that it is the Registrar who would tender the original copy while anybody could tender the certified copy. Counsel went further and said, "In reply to objection 4, counsel emphasized that an admission made by a person whether solely or jointly, by a co-owner of a property against his proprietary interest, is a relevant fact. He also stated categorically that the document was not being tendered as estoppel per rem judicatam" but as a relevant fact, and referred to section 20(3) (b) of the Evidence Act to support its admissibility, as well as section 33 (c) to support its relevancy. In a short Ruling, the learned trial Judge over-ruled the objection and the document was admitted as Exh. 'B'. The objection on admissibility of Exh. 'B' was predicated on the provisions of sections 111, 112, 20(3) (b) and 33(c) of the Evidence Act.

It may be recalled from the perusal of the record of appeal that this vexed document, Exh. 'B' was the Record of Proceedings in Suit No. 1/1931 between Obi Ugboko (representing Ogbe-Ilo compound of Asaba) as Plaintiff and Okocha and Obi Mordi, representing Idumugbe compound of Asaba, as defendants; the claim was for ₦100 damages for trespass. Exh. 'B' was an important document that had a bearing on the two consolidated suits which constitute the subject matter in this appeal. Exh. 'B', as Suit No.1/1931, and because of its importance, was comprehensively pleaded at paragraphs 11,12 and 13 of plaintiffs'/respondents' statement of claim. It is worthy of note that the defendants/appellants only feebly

replied to the said paragraphs 11,12 and 13 at paragraph 10 of their Statement of Defence: this was simply a case of general traverse and in accordance with the rules of pleadings, the relevant facts averred in paragraphs 11,12 and 13 of the statement of Claim remained, in effect, unchallenged even though they were substantially proved in oral evidence.

Is it relevant to the inquiry

In the law of evidence, the relevance of facts encompasses a wide area; see sections 6,7,8,9,10,11,12,13,14,15,16,17 and 18 of the Evidence Act. Generally, evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as may be declared under the Evidence Act to be relevant; see section 6 of the Evidence Act. No doubt, it is the surrounding circumstances that will determine the relevancy of a fact. The fact that Exh. 'B' was extensively pleaded by the respondents confirms its relevancy to their case.

Is it admissible in Law?

Having scaled the hurdles of pleading and relevancy, the next question - which is the real bone of contention under Issue No.1 - is whether the formal requirements laid down under the Evidence Act for the admissibility of such documentary evidence were satisfied?

We may recall that Exh. 'B' was the record of judicial proceedings in Suit No. 1/1931. Undoubtedly, it is a public document and is subsumed as such under section 109(a)(iii) of the Evidence Act. The formalities for admissibility of public documents, such as Exh. 'B' are lucidly and comprehensively laid down under sections 111(1) and 112 of the Evidence Act. Section 111(1) and 112 stipulate as follows:

" 111(1) Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefore, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to

make use of a seal, and such copies so certified shall be called certified copies."

" 112 Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies."

A careful examination of Exh. 'B' shows that the formal requirements stipulated above have been satisfied. It is not contested by any party that Exh. 'B' is not a public document within the purview of section 109(a)(iii) of the Evidence Act. Ex facie it bears out the facts that it was duly certified by the Higher Registrar, High Court, Warri as a "Certified True Copy". Furthermore, it states that the sum of N8.16 was paid as the legal fees in respect thereof. Finally, it shows that it was duly stamped with the High Court of Justice stamp on 16/5/73. **In the result, I am satisfied that there being proper conformance with those provisions of the Evidence Act, Exh. 'B' was properly admitted in evidence. It became self-explanatory that being a record of proceedings of a tribunal, it is a public document; on its face, it confirmed that it was duly certified and that appropriate legal fees were paid and that it was duly stamped. These facts, as stated above, were glaringly obvious on the face of Exh. 'B' that it would be ridiculous to invite counsel to expatiate on it when it is a truism that a document when admitted in evidence speaks for itself. The court, under sections 116 (formerly 115) and 117 (formerly 116) is enjoined to presume the genuineness of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and if produced from proper custody. It is pulling the wool over the eye for appellants' learned counsel to submit that in deciding the issue of admissibility of Exh. 'B' the Court of Appeal suo motu raised and decided that question by raising new issues. Perhaps, what can be underlined is that the Court of Appeal made specific references to sections of the Evidence Act in an attempt to elucidate the issues at stake but that cannot be taken as raising any new issues not raised in parties' pleadings nor did it go outside specific issues formulated by the parties. Where the court**

buttresses its' judgment by reference to express provisions of the Evidence Act, or any Act for that matter, it is not the practice known to this Court to invite counsel to further address it on any references made to the Evidence Act.

B It will be recalled that I had earlier given a detailed consideration of the genesis of the issue of the admissibility of Exh. 'B' at the trial court and the controversy was again considered by the lower court which affirmed the decision of the trial court in this regard. All in all, I am unable to be persuaded by the appellants that the lower court denied them a fair hearing in consideration based on the admissibility of Exh. 'B'. I also do not share the view of learned counsel for the appellants that in the treatment of the issue of admissibility of Exh. 'B' the lower court denied them a fair hearing as that court never raised any new issue not canvassed by the parties either before it or at the trial Court. **In any event, even if the appellants were correct that Exh. 'B' was wrongly admitted in evidence under a wrong section of the law, (which is not conceded) I am clearly of the opinion that that alone, without more, would not be good ground for challenging the fact of admissibility of Exh. 'B'. The law has long been settled that if a court arrives at a correct decision but cites a wrong and inappropriate section of the law, that would not be sufficient to upturn the judgment. The appellate court will evoke the plenitude of its judicial power to correct the error and substitute the relevant law. See Folabi v Folabi (1976) 9 SC 1 at 11 and Henry Stephen Engineering Co. Ltd. v Complete Ent. Nigeria Ltd (1987) 1 NWLR (Pt.47) 40 at 48. I therefore resolve issue No. 1 against the appellants.**

G Under Issue No.2, which is being taken together with Issue No.1, the appellants submitted that if Exh. 'B' was not properly admitted in evidence in accordance with the provisions of the law, and particularly as they were denied a fair hearing, should this Court *ex debito justitiae* not set the judgment against the appellants aside? This issue is not tenable where Issue No.1 fails.

It may be recalled that the appellants filed a Reply brief. A Reply brief affords the appellants an opportunity to deal with new

points raised in the respondent's brief. Obviously, it is not a necessity. Care must be taken not to use the filing of a reply brief either to extend the scope of the Appellants' brief or to raise issues that did not arise as new matters in the respondents' brief. The parties' issues for determination in this appeal were the same, respondents' counsel having rightly adopted Appellants' issues for determination. In respondents' brief, paragraph 4.3 (b), they dealt with Issues Nos 1 & 2 i.e. Denial of Fair Hearing and nothing was discussed about section 34(1) of the Evidence Act, yet under the reply brief, Appellants' learned counsel has extended the argument on Denial of Fair Hearing to the problem of relevance and admissibility which arise under section 34(1) of the Evidence Act. Even the authorities of Jamgbadi v. Jamgbadi (1963) NSCC 281 at 282 and Okonji v Njokanma (1991) 7 NWLR (pt.202) SC 137 at 145, 146 which were relied on under Appellants' Issue 3 are now being cited in respect of Issues 1 and 2 (dealing with Issue on Denial of Fair Hearing). This is an unnecessary introduction of new matter under Issues 1 and 2 under the subterfuge that they arose under the Respondents' Brief. **The Court cannot permit appellants to unduly extend their earlier contentions in their brief in the guise of a Reply brief. To do otherwise is, as it were, to give the appellants a second bite at the berry and the opportunity for the last word unwarranted by the Rules of Court.**

Issue No.3:

It runs thus:

"Are the appellants not entitled to judgments on the points which were canvassed in briefs of the parties on the admissibility of Exhibits 'B' and 'D' under section 20(3)(a) & (b), 34(1) and 199 of the Evidence Act, respectively as issues (b) and (d) in appellants' brief at page 248, 252-59 of the Record and in Respondents Brief at page 279, 283 - 285 of the Records?"

Under this issue, the appellants further canvass the point that Exh. 'B' is inadmissible on the grounds that the requirements of section 34(1) have not been met. The same issue was subsumed under Issue (b) of the appellants' brief in the Court of Appeal. A similar issue, though not el-

egantly or comprehensively couched was also raised under Issues (i) and (ii) of the respondents' brief at the lower court. The aim of Exhibit 'B', from the respondents' pleadings was to introduce the evidence of one Obidi in Suit 1/1931 which was inadmissible in evidence in that the B requisite evidentiary foundation for its admissibility was not laid, bearing in mind the maxim res inter alios acta alteri nocere non debet (which literally means that a person ought not be prejudiced by transactions which have taken place between others). The respondents, at the lower court, by the inelegant way they couched their Issues (i) and (ii) for C determination, in contradistinction to appellants' issue (b), did not fully or adequately address the problem of admissibility of Exh. 'B' as postulated by the appellants.

We have earlier under Issues 1 & 2 discussed the admissibility of D Exh. 'B' yet it is being raised again under Issue 3. I must hasten to say that a document may be admissible in evidence if it satisfies the prescribed conditions for admissibility for that purpose yet those conditions may be wholly unsatisfactory if such document is sought to be admitted in E evidence for yet a different purpose. This is another way of saying that even if a document is admissible under certain provisions of the Evidence Act that does not ipso facto make the same document admissible for all intents and purposes because where such document is F intended in proof of a specific item under the relevant law, the specific requirements or provisions under that law must be satisfied to the hilt in order to effectuate the reception of that document in evidence.

It may now be asked, what was the attitude of, and the treatment G by, the Court of Appeal, regarding the reception of Exh. 'B' in evidence, (i.e. the record of proceedings in Suit 1/1931) vis-a-vis section 34(1) of the Evidence Act? The leading judgment of Akpabio, JCA, in this regard was concise but to the point:

H "Regardless of all the conditionalities given under section 34(1) for admitting evidence in previous proceedings, it is nevertheless our law under section 130 of our Evidence Act, 1990 (formerly S.129) that documents over 20 years old are presumed to be genuine."

Obviously, it is manifest that the leading judgment of Akpabio, JCA, did not address the provisions of section 34(1) of the Evidence Act. It is enough to say that both Ogundere and Ogebe, JJCA, in their concurring judgments neither said a word nor addressed section 34(1) of the Evidence Act. **The appellants' complaint of the mutedness of the lower court on this apparently all-important issue regarding section 34(1) is undoubtedly justified. They have justifiably appealed to this Court on the same point. I am clearly of opinion that the lower court was under a duty to give ample consideration and determine all issues (not hypothetical) placed before it. This is so because a judgment of a court of record must demonstrate a dispassionate consideration of all the issues canvassed by the parties and in turn show the result of such exercise, see Jamgbadi v Jamgbadi (1963) NSCC 281 at 282, Ojogbue & ors v Ajie Nnubia & ors (1972). ALL NLR (Pt.2) 226 and Okonji v. Njokanma (1991) NWLR (Pt.202) 137 at 145, 146.**

But any issue raised, no matter how alluring it may be, which has no bearing on the pleadings and evidence led by the parties, may, at the end of the day, become inconsequential so that even if it was not considered by the lower court, would not materially affect the outcome of the appeal in hand. Undoubtedly, **it is the party who pleads a document and wishes to rely thereon who must lay the evidentiary foundation to warrant the admissibility of that document, bearing in mind the appropriate section of the Evidence Act under which the said document is sought to be admitted. If the requirements under the Evidence Act are not strictly met, the document so admitted in contravention of the Act must be expunged.** The question then arises whether from the pleadings and evidence placed before the court the respondents/plaintiffs sought and satisfied the reception of Exh. 'B' under section 34(1) of the Evidence Act. The relevant paragraphs of the respondents/plaintiffs' pleadings in their Statement of Claim are 11, 12 and 13 and they run thus:

" (11) In Suit No.1/1931 between Obi Ugboko representing Ogebeilo compound of Asaba AND Okocha and Obi Mordi representing

Idumugbe compound of Asaba, the said Ogbeilo compound sued the Idumugbe compound for damages for trespass to AKWU-ULO land and AKWUOSE land. The defendants of UMUODOGWU Family knew of the proceedings in the said suit and were aware of the facts thereof and
 B *did nothing.*

(12) In the said Suit No.1/1931 in the provincial court at Ogwashi-Uku before it. Commander J.G. Pyke-Nott, it was decided later alia that "the established right of the plaintiff to exercise control of ownership in accordance with native law and custom over AKWU-ULO and AKWUOSE
 C *land must be recognized....."*

(13) During the proceedings in the said Suit No. 1/1931, one OBIDI (OBIDI OKWAONA), the father of the 4th defendant on record gave evidence in the Suit and stated inter alia as follows: " I know that
 D *AKWUOSE belongs to the plaintiff but our compound Umuodogwu of Ibusa used to farm on it with the plaintiffs permission". This admission will be founded upon."*

Briefly put, it is the admission made by one Obidi against proprietary
 E interest that the respondents intended to use the proceedings in Suit 1/1931, i.e Exh. 'B' to establish. Clearly, this admission contained in Exh. 'B' would be receivable in evidence not under section 33 (c) but squarely under section 34(1) of the Evidence Act. I am fully aware that respon-
 F dents did not invoke section 34(1) specifically but their learned counsel submitted, and rightly in my view, that "if counsel omits to refer to relevant and appropriate sections of the Evidence Act, the Court is fully entitled to use the whole of the Evidence Act to arrive at its decision if the use of any section of the Evidence Act can, in its opinion, resolve the
 G matters in contest." I would only add that it is not good advocacy for counsel to relegate to the court the burden of filling in the gap(s) of the appropriate section(s) of the Evidence Act that counsel wishes to rely on. Nevertheless, such counsel's omissions are pardonable and cannot be fatal
 H nor be allowed to defeat the justice of the case because invariably the court performs that thankless job, all in the interest of justice. See Afolabi v. Afolabi (supra).

For ease of reference, it is appropriate at this stage to reproduce

the provisions of section 34(1) of the Evidence Act. It states as follows:

" 34. (1) Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it B stages, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or when his presence cannot be obtained without an amount of delay or expense which, in the circumstances of the case, the court considers unreasonable: C

(a) that the proceeding was between the same parties or their representatives in interest:

(b) that the adverse party in the first proceeding had the right D and opportunity to cross-examine; and

(c) that the questions in issue were substantially the same in the first as in the second proceeding."

It is manifest that under section 34(1) of the Evidence Act the admissibility of Exhibit 'B' would depend on a party's satisfactory plead- E ing of material facts - not evidence - that brings him within the purview of that sub-section. This will include the fact of the litigated suit; whether the witness whose testimony is sought to be relied on is 'dead' or cannot be found or is incapable of giving evidence or is kept out of the way by the F adverse party or etc.' Furthermore, be it noted that section 34(1) has three other provisions which call for serious scrutiny and consideration. **The consideration of prerequisites for the admissibility of Exh. 'B' was, as it were swept under the carpet by the lower court and brazenly said that "regardless of all the conditionalities given under section G 32(1) for admitting evidence in previous proceedings, it is nevertheless our law under section 130 of our Evidence Act, 1990 (formerly S. 129) that documents over 20 years old are presumed to be genuine."** First, I think that the lower court was in grave error not to have H given the much-needed consideration to section 34(1). Second, the reference by the lower court to section 130 of the Evidence Act, a matter not raised by the parties but raised suo motu by the lower

court in its judgment, to say the least, was diversionary and at best it was obiter. It does not deserve our consideration.

It is startling to note at p.5 of Respondents' brief the observation by respondents' counsel that "in joining issue on these vital facts (i.e. the parties' pleadings and the pleaded facts on Exh. 'B') the appellants did not address the specific points raised e.g. that Obidi Okwuona was the father of the 4th Defendant.

They did not plead that Obidi died in 1928 or at any other time." This observation, with respect, is rather bizarre. If the respondents as plaintiffs, desired to delineate the fact of the death of Obidi who featured in Suit 1/1931, being one of the prerequisites to be established in order to invoke section 34(1) they are under the duty to aver and lead evidence in respect thereof. If they fail to do so the provisions of section 34(1) may not avail them. There is no such corresponding obligation on the defendant/appellants to do so, more so when that fact of the death of Obidi was not pleaded by the respondent herein. The respondents not having pleaded this fact of death of Obidi, yet testified to it, it is a matter that goes to no issue under our rules of pleading and that piece of evidence" will neither avail the appellants nor the respondents. See Adimora v. Ajufo (1988)3 NWLR (Pt.80) 1 and Emegokwe v Okadigbo (1973) 4 SC. 113 Of course, at the end of the day, it is the respondents' case that has been weakened by that pleading error.

The sum total of what we are trying to establish is that the statement made by one Obidi in Suit 1/1931 in Exh. 'B', which is crucial to the respondents' case that could have been admitted in evidence under section 34(1) of the Evidence Act had the proper foundation been laid both in the respondents' pleadings and in evidence. **If the matter of admissibility of Exh. 'B' rested simply on whether Exh. 'B' was a relevant, genuine and public document, no doubt, the cumulative effect of the provisions of sections 111, 112 and 130 of the Evidence Act would ordinarily have given the admissibility of Exh. 'B' the necessary pass mark. But, on the contrary, the admissibility of Exh. 'B' was predicated on the strict compliance with the provisions of section 34 (1) which the lower court, as we had earlier shown, neglected to give any**

consideration whatsoever.

Having fully examined the arguments agitated by both learned counsel, I am clearly of opinion that the lower court was in error to have affirmed the admissibility of Exh. 'B' in evidence by merely placing reliance only on sections 111, 112 and 130 of the Evidence Act whereas such exercise ought to have been rooted and predicated on strict compliance with section 34(1) of the Evidence Act. This was, however, not the case. In the final analysis, admissibility of Exh. 'B' is resolved in appellants' favour.

This brings us to the consideration of admissibility of Exh. 'D'. This document belongs to a different kettle of fish. It was tendered and admitted in evidence to challenge the credibility of DW6, 6th Appellants' witness, Obi Ojima Iloba. The learned counsel for the respondents, as plaintiffs, sought the leave of the court to use part of the proceedings in Suit No. A/31/72 to confront DW6 in order to establish that by virtue of his testimony in that suit it would be obvious that he (DW6) was untruthful to the court in the case leading to this appeal. The appellants herein submitted that the lower court failed to consider the provisions of sections 198 and 199 of the Evidence Act in relation to the admissibility of Exh. 'D' more so as it accepted and affirmed the decision of the trial court without itself testing and stating that Exh. 'D' was received in evidence to test the credibility of DW6. For example, appellants' learned counsel drew attention to the fact that nowhere in the record was it shown that DW6's attention was drawn to any part of Exh. 'D' to evince the contradictory portion(s) of his testimony with what he stated in Suit No. A/31/72 before that document was finally tendered in evidence in compliance with section 199 of the Evidence Act. Finally, that even though the lower court reproduced the entire provisions of section 199 it failed to pronounce on appellants' contention of non-compliance with provisions of section 199 by the respondents in not laying the proper evidentiary foundation before Exh. 'D' was admitted in evidence. Accordingly, counsel cites Jamgbadi v. Jamgbadi (Supra) and submits that the appellants were entitled to have a decision of the lower court on this issue which it failed to pronounce upon.

On behalf of the respondents, their learned counsel submitted

that against the following answers given by DW6 under cross-examination, namely,

(a) "*I have never seen an Asaba man from Ogbeilo farm on the land.*", and

B (b) "*It is not correct that there was litigation between my family and Idumugbe in respect of that land and judgment was given in favour of Idumugbe.*"

Which were contradictory to the witness' statement in Suit No. A/31/72, now Exh. 'D' the lower court was right in confirming the reception of Exh. 'D' in evidence by the trial court to impeach DW6's credit when at the trial he denied that there was such litigation between his family and Idumugbe. Exh. 'D' on its reception positively demonstrated the falsity of that denial. Accordingly, counsel finally submits that that Exh. 'D' was properly admitted under section 209(c), now 210(c), of the Evidence Act and urges us to hold that the appellants are not entitled to judgment on the complaint based on the admissibility of Exh. 'D'.

I have carefully examined the contentions of both learned counsel: appellants' counsel is of the view that the admission of Exh. 'D' under section 199 for testing DW6's credibility was imperfectly done by the trial court while respondents' counsel contends that Exh. 'D' was properly admitted under section 210(c). The question is who right? Mr. Onwuelo. Learned counsel for the respondents, as plaintiffs, simply urged the court to admit the copy of Suit No. A/31/72 i.e. Exh. 'D' to enable him impeach DW6. He did not refer specifically to any section of the Evidence Act. The learned trial judge took the view that Exh. 'D' was admissible by reason of sections 110, now 111, 111, now 112 and 198, now 199, of evidence Act. No doubt, he was partially right to the extent that Exh. 'D' could be considered for reception in evidence under sections 111 and 112 of the Evidence Act, being a public document that has been certified but could not be specifically admitted in evidence under section 199 as the strict conditions under that section of drawing DW6's attention to those parts of Exh. 'D' sought to be used to contradict him had not been met. This is crucial. It is the gravamen of the contention of learned counsel for the appellants herein. **I have no doubt that in so far as the trial judge**

believed he was admitting Exh. 'D' under section 199, the trial Judge, was gravely in error. It was a slip in his judgment as regards the citation of the wrong section of the law. The Court of Appeal, while confirming the judgment of the trial Judge, did not correct that judgmental slip. That slip is minor and pardonable. The court, in the interest of justice, has invariably corrected wrong citation of sections of the statute or filled the gap where none was cited so long as the law sought to be relied on is extant and correct. Again, I refer to Afolabi v Afolabi (supra). In any event, the judgmental error was that of the trial Judge because respondents' counsel at the court of trial only failed to cite a specific provision of the Evidence Act. And correctly in the respondents' brief, their learned counsel submitted that Exh. 'D' was admissible under section 210(c) of the Evidence Act. This is correct because Exh. 'D' was introduced to cross-examine DW6 as to credit.

The end result is that I resolve the issue of admissibility of Exh. 'B' in favour of the appellants and that of Exh. 'D' in favour of the respondents.

Issue No. 4

Issue No.4 reads as follows:

"Whether the trial court having found the traditional historical evidence inconclusive correctly applied the principle laid down in the case of Kojo v Bonsie (1957) 1 WLR 1223 at 1226 - 1227 or (1958) 3 WALR 257 when it decided the case on the credibility (sic) of witnesses and was on the Court of Appeal right in approving the manner in which the principle was applied by the trial court?"

The Supreme Court had long ago set out the five ways whereby proof of title of ownership of land can be established by a plaintiff in an action. This was in that oft-quoted case of Idundun v Okumagba (1976) 9-10 SC 227 at pp 248 - 252 or (1976) NMLR 200. Delivering the leading judgment in that case Fatayi-Williams, JSC postulated five ways thus:

(1) *"Ownership of land may be proved by traditional evidence. This may be done by oral evidence of witnesses or by citation of authoritative books of such traditional evidence."*

(2) *Ownership of land may be proved by production of documents of title which must be duly authenticated in the sense their due execution must be proved unless they are proved from proper custody in circumstances giving rise to the presumption in favour of due execution in the case of documents 20 years old or more at the date of the contract.*

(3) *Acts of the person or persons claiming the land such as selling, leasing or renting out all or part of the land in dispute or farming on it, are also evidence of ownership.*

(4) *Acts of long possession and enjoyment of the land may also be prima facie evidence of ownership of the particular piece or quantity of land with reference to which such acts are done. Such acts of long possession, in a claim of declaration of title are really a weapon more of defence than of offence.*

(5) *Proof of long possession of connected or adjacent land, in circumstances rendering it probable that the owner of such connected or adjacent land would, in addition, be the owner of the land in dispute".*

Both parties relied on traditional history; the trial Judge for good and sufficient reasons, found the traditional evidence unsatisfactory and accordingly rejected the accounts given by both parties . Today, the courts have established that where the traditional evidence led by both parties is in conflict, that is, inconclusive, then, the best way to test the traditional history is by reference to the facts in recent years as established by evidence and by seeing which of the two competing histories is more probable. The test was invoked by the learned trial Judge.

The complaint of the learned appellants' counsel (see p.9 of Appellants' Brief) is that "that trial court having held that the traditional evidence adduced by parties is not conclusive, rather than applying on credibility of witnesses and thus misdirected itself in law, which misdirection occasioned a miscarriage of justice." I am utterly at sea to appreciate the point being made by counsel. It is not the duty of the court to speculate on the point being made by counsel, nor is it the duty of the court to guess what counsel has in the inner recesses of his mind. Accordingly, I discountenance that submission. Counsel, however, goes on to further submit that the trial court in evaluating the evidence to draw its conclusion in-

stead of confirming itself to the evidence of recent acts of ownership or possession adduced by the parties wandered into the arena of 'I believe' and 'I do not believe' which borders on credibility of the witnesses which principle, according to counsel, was "advised against" in Kojo II v Bonsie (supra). Finally, counsel referred to page 214 of record and cited an excerpt from the judgment of the trial court at the said page, lines 20-29. Concluding, counsel submitted that the Court of Appeal was in error to have approved the trial court's reversion to the question of credibility rather than address the application of the principle enunciated in Kojo v Bonsie. C

In response, learned Senior Advocate for the respondents argued to the contrary, strongly supporting the judgments of the two lower courts, bearing in mind that the respondents' claim for title was two fold namely, traditional historical evidence and acts of ownership and possession. He submitted that the trial court properly and dispassionately evaluated the evidence adduced before making findings of fact and no ground of appeal has been raised against any of the specific findings of fact. He also submitted that the lower court properly applied the principles laid down in Kojo v Bonsie when he found that the traditional evidence led by the parties was inconclusive. It was also his submission that findings of fact depend on the credibility of witnesses as may be evaluated by the trial court and as a condition precedent for believing one side or the other. Finally, he submitted that this Court should be reminded of its long established practice of not easily interfering with concurrent findings of fact by the two lower courts. D E F

There cannot be any question that the learned trial Judge dispassionately and painstakingly reviewed and evaluated the evidence tendered at the trial. The record eloquently attest to this fact. Consequent to that he arrived at the conclusion, and rightly in my view, that the traditional evidence led by the parties was inconclusive and accordingly he invoked the principles laid down in Kojo v Bonsie. Thereupon he firmly fixed his findings on acts of possession in recent times. Obviously, in making such findings on acts of possession, it is imperative that such findings on acts of possession in recent times must be those in which most of the witnesses who testified are G H

alive; their demeanour and credibility were crucial and important for the court to take into consideration. This was precisely what the learned trial Judge did and the same was approved by the Court of Appeal, per Akpabio, JCA, in his leading judgment in these words:

B *"However, the case did not end there..... In accordance with this rule, I myself have considered all the evidence of acts of ownership and possession done by both parties on the land, and find that only the respondents could show acts of ownership or possession in recent times."*

C The learned trial Judge having elaborately evaluated the evidence tendered, his findings of facts, which have not been challenged, cannot but depend on the credibility of witnesses who testified. **The sifting of the evidence tendered which is based on credibility is peculiarly within**
D **the province and preserve of the learned trial Judge and this court, in exercise of its appellate jurisdiction, cannot make a finding on such point nor can it disregard a finding of fact based upon the credibility of witnesses; see Akinola & anor v Oluwo & ors (1962) 1 ALL NLR**
E **(Part 2) 224. It is certainly my view that appellants' submission and complaint that the learned tried Judge simply rested his decision on the subterfuge of "I believe" and "I do not believe" is not borne out by the content of the record.** As I had earlier stated, when the evidence
F on traditional evidence was described by the trial Judge as inconclusive, he became obliged to decided the issue of recent acts of ownership or possession on the evidence placed before him which was largely based on the oral testimonies of witnesses. A close examination of the testimonies of these witnesses in terms of their credibility became paramount. It was
G only after the difficult task of evaluating these testimonies that the evidence of one party was preferred to that of the other party, it cannot be otherwise. I am clearly of the view that the submission of learned counsel for the appellants on Issue No.4 is not well founded.

H Finally, on Issue No.4 learned counsel for the respondents called attention to the fact that by this appeal this Court is invited to upset the concurrent findings of fact by the two lower courts which the Court should be slow to do. **This Court has repeatedly made it clear and**

emphasized that it will not interfere with concurrent findings of fact by both the trial court and the Court of Appeal unless special circumstances are shown to establish that it is in the interest of justice so to do. I am satisfied that the appellants have failed to show any special circumstances that warrant re-opening of the question in the interest of justice or to avert a miscarriage of justice. See Akpere v Barclays Bank of Nigeria Ltd & anor (1977) 1 SC 1. Ibodo v Enarofia & ors (1980) 5 SC 319 and Woluchem v Gudi (1981) 5 SC 319 at pp 326-330.

Accordingly, I resolve Issue No. 4 against the appellants.

Issues Nos 5 & 6

Like the parties' counsel I wish to deal with Issues Nos 5 & 6 together.

First, the appellants' complaint on Issue No.5 is one questioning whether the two lower courts correctly and sufficiently scrutinized the totality of the evidence and exhibits tendered before the court. While in the view of the appellants, the record of the trial, including Exhs. 'B' and 'D' and the record of appeal at the lower court did not demonstrate a dispassionate consideration of the evidence of both parties; in contrast, the respondents hold a contrary view on the same point. The question is which party's view prevails?

I have given a second hard look at both the record of trial and that of the lower court. On a calm reflection of the evidence tendered and the evaluation carried out in sifting the evidence, I am satisfied that the trial court's evaluation of all the evidence and material placed before it was thorough. This is how the learned trial Judge summarized the situation after painstakingly evaluating the totality of the evidence tendered:

"From my observation of the demeanour of the witnesses for the plaintiffs in the witness box, they impressed me as truthful and sincere witnesses and I believe their evidence. On the other hand, the witnesses of the defendants did not favourably impress me as truthful witnesses and in the main I do not believe their evidence. On the whole, I prefer the evidence adduced by the plaintiffs in support of their case to the one of the defendants, and furthermore all the exhibits tendered by the plain-

tiffs appear to me as genuine."

Thereafter, he granted the reliefs prayed by the plaintiffs/respondents and dismissed the defendants/appellants action.

It is also note-worthy that the Court of Appeal reviewed the entire case on the issues submitted to it for determination and after exhaustive review and evaluation of evidence it confirmed the findings of the trial High Court. The learned trial Judge, from his evaluation, made specific findings -

- (i) on acts of ownership and enjoyment of the land in dispute;
- (ii) on the identity of the land in dispute; and
- (iii) on Exh. 'B' and "D";

all in favour of the plaintiffs/respondents. There has been no specific appeal on, nor challenge of, the findings of fact of the trial court. It was transparent to the knowledge of the appellants, through their former head of family, Obidi Okwuona, that title in respect of the land in dispute was long ago decided in favour of the respondents in Exh. 'B'. That judgment subsists to date, not having been appealed against nor set aside. More importantly is that the learned trial Judge made findings of fact on the issue of possession which were established on the credibility of witnesses, since these findings are peculiarly within the province of the trial court, neither the lower court nor this Court can be invited to make their findings on the points unless such findings are not supported by evidence or are unreasonable having regard to the evidence; see Lengbe v Imale (1959) WNLR 325, Akinola v Oluwo (1962) 1 ALL NLR 224 and Obisanya v Nwoko (1974) 6 SC 69. Finally this Court will not interfere with concurrent findings of fact by both the trial court and the Court of Appeal unless there exists special circumstances that would establish that the interest of Justice warrants such interferences. The appellants have failed to show any special circumstances to justify the re-opening of such concurrent findings of facts. See Kale v Coker (1982) 12 SC 252, Woluchem v Gudi 5 H SC 319 at 326-330 and Lokoyi v Olojo (1983) 2 SC NLR 127.

Next is Issue No.6. The question is whether the judgment of the trial Judge would stand if Exhs 'B' and 'D' are expunged. Appellants' contention is that undue weight was given to Exhs 'B' and 'D' by the

learned trial Judge as well as the Court of Appeal and if therefore these two exhibits are expunged from the proceedings, as inadmissible and as contended by them, there would be insufficient evidence available to warrant the trial court finding in favour of the respondents; and for the same reason the Court of Appeal would not have been disposed to confirm the trial court's decision in favour of the respondents. The respondents on their part contend to the contrary and submit that the trial High Court made findings of fact independent of Exhs 'B' and 'D' and referred to these two exhibits as evidence which confirmed the facts already found. In other words, it is their submission that the trial court as well as the court below did not rely unduly on Exhs 'B' and 'D'.

It may be recalled that each party predicated its case on traditional evidence. The trial court was not impressed by the parties' evidence proffered in this regard. Each party was obliged to turn to acts of ownership or possession in recent times in order to succeed in this regard. To that issue, I shall return presently. Suffice it to say that the respondents proceeded to give evidence of the land case in 1931 which they contested against the Idumugbe compound of Asaba in Suit No. 1/1931 wherein they sued the appellants for trespass without their prior permission and payment of customary tributes to them as they did in the past.

Earlier on in this judgment, I had reproduced an excerpt of the judgment of the learned trial Judge, wherein consequent to his observation, exhaustive and thorough evaluation of the evidence placed before him, he showed preference of the evidence adduced by the respondents in support of their case to that proffered by the appellants. The trial Judge specifically stated that applying the principle laid down by this Court in Idundun v Okumagba (176) 9-10 SC 227, proof of ownership of the land in dispute by the method of acts of ownership and acts of long possession and enjoyment of the said land was duly established by the respondents and that Exh.'D' was received in evidence for a limited use, namely, to impeach the credit of one of the appellants' witnesses, to wit, Obi Ojima Ilobo who testified as DW6. The point that calls for clarity and emphasis is that the earlier statement of DW6 in Suit No. A/31/72 had no connection whatsoever with the land matter in this case in the trial High Court;

and as earlier noted, it was introduced simply to undermine the credibility of DW6. As I had earlier decided herein, the circumstances under which Exh. 'D' was admitted in evidence was undoubtedly within the formal requirements of the Evidence Act and there is no compelling reason to B rehearse it without being unduly repetitive. The trial High Court made findings independent of Exh. 'B' and 'D' and made reference to the two exhibits as confirmatory evidence of the facts found. There is nothing on the record to show that that court relied unduly on Exh. 'B' and Exh. 'D'.

C The lower court, after a review of the whole case on the issues raised by the parties, unhesitatingly confirmed the decision of the learned trial Judge and also reached its decision (at p.323 of record) that " based on the evidence and considerations it cannot be said that the learned trial D Judge gave undue weight to Exh. 'B'....." Continuing (at p.324), it affirmed that the learned trial Judge was correct in admitting Exh. 'D' in evidence. Also he did not give undue weight to either of these exhibits." After a calm review of the evidence placed before the two lower courts, I E am equally of opinion that the said courts were correct in their respective opinions that they did not rely unduly on Exhs. 'B' and 'D'.

Even if my view in this regard is questionable, then it becomes imperative to fall back on the statutory provisions governing wrong recep- F tion of evidence at trial and the role of the appellate court in such situations. It is section 227(1) of the Evidence Act that calls for close examination. It states:

G *" The wrongful admission of evidence shall not of itself be a ground for the reversal of any decision in any case where it shall appear to the Court of Appeal that the evidence so admitted cannot reasonably be held to have affected the decision and that such decision would have been the same if such evidence had not been admitted."*

It therefore follows that under our law a wrongful admitted peice of evi- H dence is not sacrosanct; it is still subject to the closest scrutiny by the appellate courts. The appellate courts are under a duty to cut down and expunge any evidence that is wrongfully admitted. See Ugbala v Okorie (1975) 12 SC 13-15 and Yassin v Barclays Bank (1968) 1 ALL NLR 171

at 179 - 180 where the statutory provisions were comprehensively agitated. **It is important to delineate the fact that mere wrongful admission of evidence cannot ipso facto lead to a reversal of the decision reached in a case because the appellate courts by the plenitude of their power, as earlier noted, can either prune down the wrongfully admitted evidence or allow the judgment to stand if no substantial miscarriage of justice had actually occurred, more so when the remaining properly-admitted evidence is enough to sustain the judgment. It must however be emphasized that it is the party complaining of wrongful admission that must show that without such evidence the decision complained of would have been otherwise. In other words, this burden is on the appellants. They have not discharged it.** The decision of the erstwhile West African Court of Appeal in Timitimi & ors v. Chief Amabebe & ors (1953) 14 WACA 374 is aptly illustrative. Here that court held that although a judgment of a native court had been wrongly admitted it was clear on the evidence that the trial Judge did not regard the judgment as establishing the plaintiff's title to the land but had shown that he based his decision on a body of other properly admitted evidence. See also Chief Dugbo & ors v Chief Kporoaro & ors (1958) WRNLR 73. I dare say that the situation in relation to the reception of Exh. 'B' in the instant appeal comes within the ambit of Timitimi & ors case. It would be recalled that contrary to the concurrent findings by the two lower courts, I was of the clearest and firm view that Exh. 'B' was wrongfully admitted. Nevertheless, from the copious findings of fact earlier referred to under Issues Nos. 5 and 6, I am satisfied that appellants' contention under these issues are baseless, both in fact and in law.

The irresistible conclusion under Issues Nos. 5 and 6 that I am bound to reach is that even if Exhs. 'B' and 'D' were expunged from the record the judgment of the High Court as confirmed by the lower court would remain intact and unassailable. Consequently, Issues Nos 5 and 6 are jointly and severally resolved against the appellants.

In the final analysis, even though the appellants succeed partially in the persuasive and admirable advocacy tenaciously agitated by their learned counsel with regard to the inadmissibility of Exh. 'B', the appeal

deserves to fail. Accordingly, I would dismiss it with N10,000.00 costs in favour of the respondents.

B

BELGORE JSC

I had the privilege of reading before now the judgment of my learned brother, Achike JSC, and I adopt his reasoning and conclusion as mine in dismissing this appeal. I make the same order as costs.

C

OGWUEGBU JSC

I have had the privilege in draft, the judgment just delivered by my learned brother, Achike, J.S.C. and I agree with him that the appeal should be dismissed. My brother Achike, J.S.C. has dealt fully with the issues of law and findings of fact that I need only add my own views in amplification of the admissibility of Exhibits "B" and "D".

As to Exhibit "B", it was the contention of the appellant in the court below that the said exhibit did not fulfil the requirements of section 34(1) of the Evidence Act, that the court below made no conclusive pronouncement on the issue, that rather, the court considered it as a document which is twenty years old under section 130 of the Evidence Act. It was further contended in this court that Exhibit "B" has to satisfy the specific conditions laid down in section 34(1) of the Evidence Act in addition to the requirements of section 130 of the Evidence Act and that genuineness alone is not enough.

I think there is force in the argument against the admissibility of Exhibit "B" in evidence. Section 34(1) of the Evidence Act provides:

"34(1) Evidence given by a witness in a judicial proceedings, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or when his presence cannot be obtained without an amount of delay or expense which, in the circum-

stances of case, the court considers unreasonable:

Provided-

(a) that the proceeding was between the same parties or their representatives in interest;

(b) that the adverse party in the first proceeding had the right B and opportunity to cross-examine; and

(c) that the questions in issue were substantially the same in the first as in the second proceeding."

It was the duty of the plaintiffs respondents to establish that primary evidence cannot be given because the witness is dead, or unable to be found or incapable of giving evidence or that he is kept out of the way by the adverse party or that his presence could not be obtained without unreasonable delay or expense. None of these conditions were pleaded let alone established by evidence and therefore the trial court was in error to have admitted the court proceedings in Suit No.1/1931 in evidence and the court below was equally in error when it glossed over the conditions laid down in section 34(1) and proceeded to determine the issue under sections 111(1) and 112 of the Evidence Act. Therefore, the evidence given by the said Obidi Okwaona in Exhibit "B" which is material to the case of the plaintiffs' cannot be let in under section 34(1) of the Evidence Act because the plaintiffs failed to comply with the conditions set out in the said subsections of the Evidence Act. In the circumstance, Exhibit "B" was wrongly admitted in evidence and the court below should not have affirmed the conclusion of the learned trial judge on its admissibility. C D E F

Coming to Exhibit "D", one Obi Ojima Iloba (D.W.6 in the present proceedings) testified in Suit No. A/10/73 (Exhibit "D"). The learned counsel for the plaintiffs applied to the trial court to use part of the evidence given by D.W.6 in Suit No. A/10/73 to cross-examine him as to his credit. His testimony was admitted in evidence as Exhibit "D" after the learned trial judge overruled the objection of counsel for the defendants on its admissibility. G H

The learned appellants' counsel contended in his brief that the requirements of sections 198,199 and 209 of the Evidence Act were not met before Exhibit "D" was admitted in evidence. He further submitted

that the courts below relied heavily on Exhibit "B" and "D" and that their reliance on the two exhibits influenced their judgments which led to a grave miscarriage of justice.

The learned trial judge relied on sections 110, 111 and 198 of the Evidence Act (now sections 111, 112 and 199) in admitting Exhibit "D" in evidence. Reliance on sections 111 and 112 of the Evidence Act was justified since Exhibit "D" is a certified true copy of a public document. The learned trial judge however, did not fully comply with the requirements of section 199 of the Evidence Act. He thought he was complying with the section when he referred to it in his ruling on the objection. That section provides that before the writing or statement can be proved, attention of the witness must be drawn to those portions of the previous statement which are to be used for the purpose of contradicting him.

It was submitted in the respondents' brief that Exhibit "D" was tendered under section 210(C) of the Evidence Act to impeach the credit of D.W.6 when he testified that there was no previous litigation between his family and Idumugbe whereas Exhibit "D" showed that there was in fact such litigation.

I do not entertain any doubt that Exhibit "D" was properly admitted in evidence under section 210(c) of the Evidence Act. What happened in the courts below was that the right decision was arrived at with regards to the admissibility of Exhibit "D" but the courts cited a wrong section of the Evidence Act. The error is not fatal and this court is entitled to apply the correct provision of the evidence law. There was full compliance with section 210(c) of the Evidence Act. The plaintiffs cannot be penalized because of this slight error committed by the court in arriving at a correct decision. See Folabi v Folabi (1976) N.M.L.R. 169 at 176, and G.B. Ollivant v. Vanderpuye (1935) 2 W.A.C.A. 369 at 370.

Having held that Exhibit "B" was wrongly admitted in evidence, its effect on the decisions reached by the courts below will now be considered. If Exhibits "B" and "D" are expunged, can the findings of the lower courts stand? If the answer is in the affirmative as I believe it is, then, no miscarriage of justice is occasioned.

It is not every irregularity that can nullify entire proceedings. It

is my view that the wrongful admission of Exhibit "B" did not engender any miscarriage of justice. See Eboh & Ors v. Akpotu (1968) ALL N.L.R. 218 at 222 and Timitimi & Ors. v. Kporoaro & Ors . (1958) W.R.N.L.R.. 72. See also section 227(1) of the evidence Act which provides that a wrongful admission of evidence shall not of itself be a B ground for the reversal of any decision in any case where it shall appear to the court that the evidence so admitted cannot reasonably be held to have affected the decision and that such a decision would have been the same if such evidence had not been admitted. There were abundant C findings of facts by the courts below and these findings were supported by evidence. I see no reason to interfere with those findings of facts and the appeal must therefore fail.

There is no merit in this appeal and I hereby dismiss it and the appellants shall pay the respondents costs fixed at N10.000.00. D

KATSINA-ALU JSC

I agree with the analysis of fact and law, the reasoning and the E conclusions in the judgment of my learned brother Achike, JSC. There is nothing I can usefully add. I would also dismiss the appeal with N10,000.00 costs in favour of the respondents.

KALGO JSC

I have read in draft the judgment just delivered by my learned brother Achike, JSC and I entirely agree with him that there is no merit in the appeal. I adopt his reasoning and conclusions as mine and accordingly G dismiss the appeal. I award N10,000.00 costs in favour of the respondents

H