

SUPREME COURT OF NIGERIA

5TH MARCH, 1999. SC. 201/1992

**CORAM:- M. L. UWAI CJN, S. M. A. BELGORE, E. O. OG-
WUEGBU, U. MOHAMMED, S. U. ONU, JJSC**

LIASU ADEPOJU DEFENDANT/APPELLANT

(For himself and on behalf of

Ladumoye and Abinusedun Families)

(Substituted by Order of this Honourable Court

dated 2nd November, 1988.)

AND

RAJI OKE PLAINTIFF/RESPONDENT

(For himself and on behalf of Alegbeleye family)

ACTIONS - *Trespass - Issue estoppel - In continuing trespass - Successful action can be brought from time to time in respect of its continuance - Issue estoppel does not arise.*

LAND LAW - *Boundaries - Proof - Survey plan - Where the plaintiff filed a survey plan which was admitted in evidence - And the defendants did not file a counter plan - They cannot contend that the plaintiff did not prove the boundaries of the land in dispute.*

TRESPASS - *Continuing trespass - Where the defendants' act of building on the plaintiff's land was unlawful - And the houses have been left on the land - The trespass is a continuing one.*

FACTS

The plaintiff/respondent instituted an action at the Oshogbo High Court claiming against the defendants/appellants jointly and severally for declaration of title, damages for trespass and injunction. The plaintiff's case was that the land in dispute originally belonged to the Ataoja Matanmi who made a grant of it to the plaintiff's ancestor called Ojo Alegbeleye. The land in dispute is within the Oshogbo Township walls and land within

the Oshogbo Township walls had been settled to belong to the Ataoja of Oshogbo (vide *Oyetona v Thomas Ajani* (1959) W.N.L.R 213). The plaintiff traced his root of title to the Ataoja who granted a large parcel of land including the land in dispute to the plaintiff's ancestor (Ojo Alegbeleye) Ojo Alegbeleye was succeeded on the land by various heads of the family including Gbadamosi Olaniyan. Each of these heads built houses on the land as well as farming the land and they planted various economic trees thereon. Grants of parts of the land were also made to persons who are not members of the Alegbeleye family including Orisabatayi - the ancestor of Abinusedun family whose descendant are in possession of areas not granted as shown in Exhibit "B" (Plaintiff's survey plan) The parcels in dispute are marked "C" and "D" and edged blue in Exhibit B. The plaintiff had earlier in 1966 brought an action on the same land against the same defendants in suit No. 11/66 which terminated in the Court of Appeal as suit No. FCA /1/162/77. The defendant erected some buildings on the land after the commencement of the 1966 action and the houses have continued to remain in the land hence the present action which was instituted in 1979. The defendants claimed ownership of the land in dispute. It was their case that the land belonged to the 1st defendants family Bale Gbonmi whose father settled on it. That Bale Gbonmi made grants of part of the land to Alegbeleye and the Abinusedin families (3rd and 4th defendants)

They also claimed that the land in dispute was in Gbonmi area and also within the Oshogbo Town walls but maintained that Gbonmi is a separate town from Oshogbo.

The learned trial judge in a considered judgment granted all the reliefs claimed by the plaintiff. Dissatisfied the defendants appealed to the Court of Appeal, Ibadan Division. That appeal was dismissed and they further appealed to the Supreme Court raising the following issues.

ISSUES FOR DETERMINATION

"(1) (a) What is continuing trespass in law?

(b) Is there a continuing trespass (technically so-called) where "A" built 5 houses between 1966 or 1968 on "B" s" land?

(c) Can trespass committed in 1966 be continuing trespass for an

act of building done in June, 1968?

(2) have the plaintiffs/respondents discharged the ONUS placed on them by law to prove with preponderance of evidence and with certainty:

(a) The Oshogbo Town Wall and the Gbonmi Town Wall marking the boundaries of Bale Gbonmi's land since they are both adjoining land owners?

(b) The boundaries of the disputed land marked Blue in Exhibit B?

(c) The extent of the land said to be granted by the plaintiffs/respondents family to the defendants/appellants family?

*(4) Whether the two lower courts were right in holding that the decision in Oyetona v. Thomas Ajani (1959) W.N.L.R. 213 is binding on the defendants/appellants (merely on the principle of so-called judgment *in rem*) who were not parties to the said suit and without proof of the said Oshogbo Town Wall?"*

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

Trespass - Continuing trespass

1. The learned trial judge was right in his conclusion that the act of the defendants which led the plaintiffs to institute Suit No. 11/66 in Oshun Divisional Grade "A" Customary Court that terminated in the Court of Appeal on 19/5/78 as Suit No. FCA/1/162/77 was a continuing one and fresh causes of action for trespass arose after the termination of Suit No. FCA/1/162/77 (Exhibit "D"). The judgment in Exhibit "D" (FCA/1/162/77) did not terminate the continuance of the trespass which is the erection of houses on the land which the learned trial judge found to be in the possession of the plaintiff/respondent before 1966 and the houses have continued to remain on the land while the act of erection was unlawful. There was no appeal against the finding that the land in dispute was in the possession of the plaintiff's family. The original erection of the houses did influence the continuance of the act of trespass and it remained a

continuing trespass from the very erection of those houses. There is therefore an act of continuity of the trespass by the defendants since the houses are still on the land which the learned trial judge found to be in the possession of the plaintiff. Since the act of building on the plaintiff's land B was unlawful and the houses have been left on the said land, the trespass continued as long as the houses were on the land and the defendants were rightly found to be liable. (pp. 542 D & 543 D)

C ***Actions - Trespass***

2. In the present proceedings the defendants/appellants were sued because they entered the land in dispute and continued to build on it. In continuing trespass, successive action can be brought from time to time in respect of its continuance. This is precisely what happened in this D case. In this case, therefore, issue estoppel did not even arise. The Courts below also agreed that estoppel per rem judicatam did not also apply. (p. 544 D)

E ***Land law - Boundaries***

3. The plaintiff filed a survey plan where the area of land claimed by the plaintiff is verged red. The area granted to Abinusedun family is verged yellow and the portion trespassed on by the defendants is verged blue. F That survey plan was admitted in evidence as exhibit "B". The defendants did not object to its admissibility in evidence. They did not file a counter plan. They cannot be heard to contend that the plaintiff did not prove with certainty the boundaries of the land in dispute. (p. 545 F)

G **NOTABLE POINTS OF INTEREST**
ONU JSC

1. The doctrine of continuing trespass

Thus, Since the doctrine of continuing trespass relates to cases where H something has been brought on land and wrongfully left there and does not extend to cases where the defendant fails to restore the land to the same condition in which he found it, and since the appellants acknowledge that if the thing placed on the land in dispute continues to cause

damage it will give rise to actions de die in diem, so long as it lasts and since the unlawful acts of entry committed after Suit No. 11/66 consisted in the building of houses which are still on the land when the action giving rise to the present appeal was instituted in 1979, a case of continuing trespass has been made out in so far as the buildings put on the land are still there. See Louis Oniah and 2 Ors. v. Chief Obi J.I.G. Onyia (1989) 1 NWLR (part 99) 514. (p. 551 B)

2. Who can sue in an action for trespass

It is a cardinal principle of law that if land is in possession of a tenant, it is the tenant and not the landlord who can sue for trespass. In almost all cases, it is the person in possession of the property who can sue for trespass. See Wallis v. Hands (1893) 2 Ch. 75; Amori v. Akande (1975) 2 W.S.C.A. 143; Awooner Renner v. Annan 2 WACA 258 and Oyetona v. Ajani (1959)-60) WNLR 213. See also Christopher Okolo v. Eunice Uzoka (1978) 4 SC. 77 at 78 where this Court held:-

"It is the law and this Court has so held times without number that trespass to the land is actionable at the suit of the person in possession of the land. The slightest possession in the plaintiff enables him to maintain trespass if the defendant cannot show a better title. (p. 551 E)

REPRESENTATION

Chief Lere Adebayo Esq., for the Appellant

Alhaji Y. Ade Agbaje SAN with him A. O. Akintomiwa Esq. for the Respondent

CASES REFERRED TO

Oniah v. Onyia (1989) 1 NWLR (part 99) 514

Wallis v. Hands (1893) 2 Ch. 75

Amori v. Akande (1975) 2 W.S.C.A. 143

Renner v. Annan 2 WACA 258

Oyetona v. Ajani (1959)-60) WNLR 213.

Okolo v. Uzoka (1978) 4 SC. 77 at 78

Thompson v. Gibson (1841) 151 E.R. Exch. 845

Hudson v. Nicholson (1839) 151 E.R. Exch. 185
 Commissioner For Lands v. Abraham 19 NLR 1
 Bell v. Holmes (1956) 3 All E.R. 449 at 453
 Derrick v. Williams (1939) 2 All E.R. 559 at 566

B

LEAD JUDGMENT BY OGWUEGBU JSC

This appeal was brought by the defendants against the judgment of the Court of Appeal, Ibadan Division which dismissed their appeal and affirmed the decision of the High Court of Oyo, Oshogbo Judicial Division, granting declaration of title, damages for trespass and injunction in favour of the plaintiffs.

The plaintiff instituted the action for himself and on behalf of Alegbeleye family against 1st and 2nd defendants for themselves and on behalf of Ladumoye family and the 3rd and 4th defendants for themselves and on behalf of Abinusedun family.

The plaintiff's claim against the defendants jointly and severally is for:-

1. *"A declaration that the plaintiffs (sic) are the persons entitled to be granted title to statutory or customary right of occupancy in respect of all that piece or parcel of land situate lying and being at Gbonmi, Oshogbo.*

2. *The plaintiff claims against each of the defendants the sum of N500.00 being damages for trespass committed on the land in dispute which was in possession of the plaintiff when the defendants unlawfully entered the land in possession in 1966.*

3. *An injunction restraining the defendants, their servants and agents from committing further acts of trespass on the said parcel of land."*

The action was tried on pleadings filed by both parties following the order of the court of trial.

The plaintiff's case was that the land in dispute originally belonged to Ataoja Matanmi who made a grant of it to the plaintiff's ancestor called Ojo Alegbeleye. The land in dispute was said to be within the Oshogbo Township Walls and that the land within the Town Walls had

been settled to belong to the Oba. It is the Oba that used to grant the area within the Town Walls to other people. The Ataoja Matanmi granted large parcel of land including the land in dispute to Ojo Alegbeleye. Ojo Alegbeleye was succeeded on the land by various heads of the family including Gbadamosi Olaniyan. It was the plaintiff's case that each of B these heads built houses on the land as well as farming the land they planted economic trees thereon such as Kola, coconut, cocoa and food crops. Grants were made of parts of the land to persons who were not members of Alegbeleye family while the family remained in possession C of the area not granted.

Some of the grantees of the Alegbeleye family include Orisabatayi - the ancestor of Abinusedun family whose descendants are in possession of the areas not so granted as shown in Exhibit "B" (plaintiffs survey D plan), some mechanics who built workshops on the land and pay rent for their holdings, the District council and Nawarudeen for building schools and Asani who built a house on the portion granted to him. The parcels in dispute are marked "C" and "D" and edged blue in Exhibit "B". These are small part of the entire area alleged to have originally belonged to the E Alegbeleye family by virtue of the grant from Ataojo Matanmi.

The defendants' case was that the land in dispute belonged to the 1st defendant's family, Bale gbonmi. It was the defendant's case that the land in dispute belonged to Bale Gbonmi whose father settled on it and it F was located in Gbonmi area. That Bale Gbonmi made grants of part of the land to Alegbeleye and the Abinusedun families (the 3rd and 4th defendants). It was also their case that the land in dispute was in Gbonmi area and also within the Oshogbo Town walls though maintained that Gbonmi is a separate town from Oshogbo. They also claimed that it was G Bale Gbonmi that made a grant of some portions of the land to the District Council and Nawarudeen to build Schools and not the plaintiffs family.

The learned trial judge in a considered judgment granted all the H reliefs claimed by the plaintiff. N100.00 damages for trespass was awarded against the 1st and 2nd defendants and an order of injunction was made against all the defendants. The defendants were not satisfied

with the judgment of the learned trial judge and appealed to the Court of Appeal, Ibadan Division. That appeal was dismissed and they further appealed to this court.

Briefs of argument were filed on behalf of the parties. From the grounds of appeal filed, the following issues were formulated in the appellants' brief for determination in the appeal:

"(1) (a) What is continuing trespass in law?

(b) Is there a continuing trespass (technically so-called) where

"A" built 5 houses between 1966 or 1968 on "B's" land?

(c) Can trespass committed in 1966 be continuing trespass for an act of building done in June, 1968?

(2) have the plaintiffs/respondents discharged the ONUS placed on them by law to prove with preponderance of evidence and with certainty:

(a) The Oshogbo Town Wall and the Gbonmi Town Wall marking the boundaries of Bale Gbonmi's land since they are both adjoining land owners?

(b) The boundaries of the disputed land marked Blue in Exhibit B?

(c) The extent of the land said to be granted by the plaintiffs/respondents family to the defendants/appellants family?

(4) Whether the two lower courts were right in holding that the decision in Oyetona v. Thomas Ajani (1959) W.N.L.R. 213 is binding on the defendants/appellants (merely on the principle of so-called judgment in rem)

Who were not parties to the said suit and without proof of the said Oshogbo Town Wall?"

The respondent raised an objection in his brief to grounds 3, 4 and 5 of the amended grounds of appeal and Issues Nos. 3 and 4 formulated from them. He contended that:

"(a) The point sought to be raised and argued in ground 5 issue 4 is a new point which was not raised and argued in the High Court or Court of Appeal and therefore cannot be raised for the first time in the Supreme Court.

EJIOFODOMI V. OKONKWO (1982) 11 SC 74 at pages 93-98 (1982)
VOL. 1 NSCC at page 422

(b) Grounds 3 and 4 are grounds of facts or mixed facts and law for which leave is required by virtue of Section 213(3) of the Constitution of Federal Republic of Nigeria 1979 and are therefore incompetent since no leave to appeal has been granted." B

In the respondent's view, the issues arising from the proper grounds of appeal are:

"(1) Whether the learned Justices of the Court of Appeal were right in upholding the decision of the Learned Judge that the appellants are trespassers on the land in dispute? If so whether the trespass is a continuing one?" C

(2) Whether or not the respondent is bound by the decision in FCA/1/162/77 and estopped from bringing this fresh action." D

It is convenient at this stage to dispose of the notice of objection given in the respondent's brief of argument before proceeding to consider the questions raised in this appeal. On 21-4-93 this court granted leave to the appellants to amend the grounds of appeal contained in their notice of appeal and for leave to file and argue the additional grounds of appeal "contained in the document attached to the affidavit and marked Exhibit A."

I have no doubt that the learned Senior Advocate of Nigeria appearing for the respondent became aware of this order hence he did not pursue the objection at the hearing of the appeal on 7-12-98. The objection is therefore struck out. F

The appellants argued the first and second issues for determination together in their brief. It was contended that there was no act of continuing trespass in this case because the alleged trespass of 1966 or 1968 which was before the judgment in Suit No. FCA/1/162/77 consisted of the building of four or five houses on the land in dispute by the defendants/appellants herein. That a continuing trespass occurs prospectively and the plaintiff's right of action for the trespass of 1966 or 1968 had been consumed in Suit No. FCA/1/162/77 unless a fresh act of trespass took place after that judgment. G H

In reply, it was the contention of the respondent that the appellants overlooked the crucial finding of the learned trial Judge at page 40 lines 25 - 2 of the records to the effect that the plaintiff's family were in possession or had the right to possession of the area of land in dispute before 1966 and that the act of entering such an area and erecting buildings thereon established a liability in trespass and that they were liable in trespass. It was further submitted that the appellants did not appeal against this finding.

The plaintiff/respondent further contended that since the defendant/appellants agreed in their brief that if the thing placed on land continued to cause damage it would give rise to actions de die in diem so long as it lasted and since the unlawful act of entry complained of by the plaintiff in suit No. 11/66 was the building of houses on the land in dispute and those buildings are still on the land when the present proceedings were instituted in 1979, a case of continuing trespass had been made out because the buildings are still on the land.

As to the continuing act of trespass the plaintiff/respondent pleaded as follows in paragraphs 20, 21, 22, 23 and 24 of the amended statement of claim:-

"20(a) *The plaintiff's family have been in exclusive possession of the area verged blue until the defendant in 1966 unlawfully entered the area verged Blue and marked C & D and started to build on portions thereof after 1966 which trespass is till continuing.*

(b) *When the plaintiff challenged them the defendants claimed the said land hence the plaintiff sued Alimi Adejumo, Salako Abinusedun and Karimu Abinusedun in Suit No. 11/66 before Oshun Divisional Grade A Customary Court in 1966 and won.*

21. *The said defendants in Suit 11/66 were dissatisfied with decision of the learned President of Grade "A" Customary Court and appealed to Oshogbo High Court which allowed their appeal.*

23. *When the plaintiff was dissatisfied with the decision of the learned Judge of Oshogbo High Court, he appealed to the Court of Appeal which confirmed the Judgment of the High Court with modification.*

24. *The plaintiff contend that Alegbeleye family are the owners*

and holders of the land in dispute verged Blue and the said parcel of land up to the 29th day of March, 1978 was being lawfully used by Alegbeleye family for Agricultural purposes except for the Apostolic Church built by Tella a member of the plaintiff's family.

25. Whereof the plaintiff claims as per his writ of Summons." B

The claims indorsed on the Writ of Summons are:-

"1. The plaintiffs' claims against the defendants jointly and severally is title to a declaration that the plaintiffs are the persons entitled to be granted statutory or customary right of Occupancy in respect of all that piece or parcel of land situate lying and being at Oke Gbanu, Oshogbo. C

2. The Plaintiff's claims against each of the defendants the sum of N500.00 being damages for trespass committed on the land in dispute which was in possession of the plaintiff's when the defendants unlawfully entered the land in possession in 1966. D

3. Injunction "

In his evidence before the learned trial Judge, the plaintiff (Raji Oke) testified that the defendants unlawfully entered the land in dispute and started to build thereon in 1966 and he sued them and that they still occupy the land and the houses up till the time he was testifying on 26/6/79. In answer to cross-examination, the plaintiff answered:- E

"The houses built by the defendants which we showed to our Surveyor were not built in 1966. In 1966 we sued the defendants for trespassing on our land; but which (sic) they started building on it is why we made a second survey plan which was drawn by Mr. Bamgbose and which I earlier identified. F

We are complaining as we did in 1966 because the defendants have not vacated our land. The building by the defendants were of concrete blocks. G Some have been roofed some have not got to that stage. Some are at foundation level."

The D.W. 2 Yesufu Oluajo admitted in his evidence that they had built about four houses on the land in dispute since the action was instituted. On the claim for damages for trespass, the learned trial Judge found as follows:- H

"In the present action the plaintiff's claim is for N500 damages

for trespass committed on the land in dispute which was in the possession of the plaintiff when the defendants unlawfully entered the land in possession in 1966. Such claim in a way postulates an element of continuity in the act of trespass because it talks of unlawfully entering the land in
 B 1966. Where there is a continuous act of trespass then the fact that the entry started at an earlier time, in this case in 1966 and the time of start would not seem in my view to exhaust the act of trespass and if in this case the trespass is regarded as a continuing one, then fresh causes of
 C trespass would have arisen after the termination of the cause of action in the earlier judgment and before the commencement of the present one My finding in relation to the claim for title show that the plaintiff's family were in possession or had the right to possession of the
 D area and erecting such buildings thereon establishes a liability in trespass."

The learned trial judge was right in his conclusion that the act of the defendants which led the plaintiffs to institute Suit No.
 E 11/66 in Oshun Divisional Grade "A" Customary Court that terminated in the Court of Appeal on 19/5/78 as Suit No. FCA/1/162/77 was a continuing one and fresh causes of action for trespass arose after the termination of Suit No. FCA/1/162/77 (Exhibit "D"). The
 F judgment in Exhibit "D" (FCA/1/162/77) did not terminate the continuance of the trespass which is the erection of houses on the land which the learned trial judge found to be in the possession of the plaintiff/respondent before 1966 and the houses have continued to remain on the land while the act of erection was unlawful. There
 G was no appeal against the finding that the land in dispute was in the possession of the plaintiff's family.

The original erection of the houses did influence the continuance of the act of trespass and it remained a continuing trespass
 H from the very erection of those houses. There is therefore an act of continuity of the trespass by the defendants since the houses are still on the land which the learned trial judge found to be in the possession of the plaintiff.

The learned counsel for the appellants referred the court to the cases of Thompson v. Gibson (1841) 151 E.R. Exch. 845 and Hudson v. Nicholson (1839) 151 E.R. Exch. 185. Those cases are clearly against the contention of the appellants' counsel and in fact support the case of the respondent. The former was an action for continuing nuisance to the plaintiff's market by a building which excluded the public from a part of the space on which the market was lawfully held. The building was erected in 1938 under the superintendence and direction of the defendants on a parcel of land belonging to a Corporation of which they were members. The owner of the market demised it to the plaintiff in 1939 and the plaintiff instituted the action against the defendants for continuing a nuisance to his market. The latter case was one of continuing trespass. In each of them, the court held that the plaintiff has a right of action for the continuing nuisance/trespass.

Since the act of building on the plaintiff's land was unlawful and the houses have been left on the said land, the trespass continued as long as the houses were on the land and the defendants were rightly found to be liable.

On the issue of estoppel per rem judicatam, it was submitted in the appellants' brief that the trial court was wrong in law in allowing the plaintiff to relitigate the same issues litigated upon in an earlier suit (Suit No. 11/66) and that he had the opportunity or recovering in the earlier suit what he is trying to recover in the present proceedings.

Alhaji Agbaje, S.A.N. for the respondent in reply submitted as follows:-

"(1) Since the cause of action 1966 was in respect of allegation of bare entry which was not proved, the decision of the Court of Appeal in FCA/1/162/77 can only operate as estopped on those three findings. In other words, the Respondent will be estopped from contending that the appellants entered the land in dispute and caused any damage.

(2) Since the cause of action now is unlawful entry and building on the land in dispute which caused damage and the area trespassed is identified and ascertainable the present cause of action cannot be the same as that before 1966 which led to 1966 action. Because the same

evidence will not support both."

The Court was referred to the cases of Commissioner For Lands v. Abraham 19 NLR 1, Bell v. Holmes (1956) 3 All E.R. 449 at 453 and Derrick v. Williams (1939) 2 All E.R. 559 at 566.

B The act of trespass complained of in Suit No. 11/66 can be gathered from the evidence of the plaintiff in that case.

He stated:-

"Sometime in June, 1966 the defendants entered the land. I commenced this action against them"

C That case terminated in the Court of Appeal in Suit No. FCA/1/162/77. That court held that the area of the alleged trespass was not ascertainable and there was no evidence from which the area could be ascertained. The Court of Appeal further held that there was no evidence D to show the "nature and extent of the damage done in consequence." It dismissed the claim for trespass and injunction.

In the present proceedings the defendants/appellants were sued because they entered the land in dispute and continued to E build on it. In continuing trespass, successive action can be brought from time to time in respect of its continuance. This is precisely what happened in this case. In this case, therefore, issue estoppel did not even arise. The Courts below also agreed that estoppel per rem judicatam did not also apply.

F On the 3rd, 4th and 5th issues for determination, the appellants contended that the respondent who is seeking a declaration of title succeeds on the strength of his own case and not on the weakness of the defendants' case. (Ekpo v. Ita X1 N.L.R. 68). The appellants are in G effect saying that the onus of proof of title on a claim for declaration of title to land lies on the respondent and that he failed to discharge that onus. In paragraphs 7 and 8 of the amended statement of claim, the plaintiff/respondent averred:-

H *"7. The whole of the area verged Red on the plan attached here-with the formal part of the land within Oshogbo Town Wall indisputable bona fide property of Ataoja of Oshogbo and all members of the Ruling family of Oshogbo vide Oyetona v. Thomas Ajani (1959) W.N.L.R. 213.*

8. *The plaintiff will also rely on the admission of Alimi Adejumo 2nd, defendant in his evidence in Suit No. 11/66 Between Raji Oke v. Alimi Adejumo that the area verged Red is within Oshogbo Town Wall."*

He led evidence in line with the above pleading. On this the learned trial Judge held as follows:-

"It follows therefore in my view that such finding of possession of the land within the Oshogbo Town Walls by Taylor, J. in Oyetona v. Ajani Supra should bind the parties in this case, because it has the effect of establishing in rem. The right of the Ataoja of Oshogbo and the princes of Oshogbo who are descendants of Laaro to the possession of lands within Oshogbo Town Walls..... The result is that as between the plaintiff who has traced his family grant of the land in dispute to Ataoja Matanmi and the defendants who did not claim to derive title from any Ataoja or the Princes of Oshogbo but from original settlement the plaintiff would appear to have established a better right to the land in dispute.

I have in this connection considered exhibit "E" in which during the proceedings in an action between the parties for the same relief, as in the present action, before the Oshogbo Grade "B" Customary Court in 1961, the Ataoja of Oshogbo Oba Adenle 1 intervened and judgment was declared in favour of the Ataoja and all members of the Ruling Family. The result then is that the plaintiff is entitled, as claimed, to be granted title to Statutory or Customary Right of Occupancy in respect of the land in dispute being area "C" and "D" edged blue in Exhibit "B" and I so declare."

The plaintiff filed a survey plan where the area of land claimed by the plaintiff is verged red. The area granted to Abinusedun family is verged yellow and the portion trespassed on by the defendants is verged blue. That survey plan was admitted in evidence as exhibit "B". The defendants did not object to its admissibility in evidence. They did not file a counter plan. They cannot be heard to contend that the plaintiff did not prove with certainty the boundaries of the land in dispute.

In its own findings, the court below held:-

"By the Judgment of the case quoted in the paragraph of the statement of claim, the title of the overlord of the plaintiff respondent was established. I do not think it requires further assertion to prove the title of the overlord."

B All the issues identified by the appellants having been resolved against them, the appeal fails and I hereby dismiss it. The judgment of the Court below which upheld the decision of the learned trial Judge is hereby affirmed. The respondent is entitled to costs which I assess at N10,000.00.
C

UWAIS CJN

D I have had the opportunity of reading in draft the judgment read by my learned brother Ogwuegbu, J.S.C I entirely agree that the appeal is devoid of merit and that it should be dismissed.

I accordingly hereby dismiss the appeal with N10,000.00 costs against the Appellant.

E

BELGORE JSC

F I read in advance the judgment of my learned brother, Ogwuegbu, JSC., and I agree with this appeal based on concurrent findings of facts by the lower courts has no merit. For the reasons in the same judgment, I also dismiss the appeal with N10,000.00 costs to the respondents.

G

MOHAMMED JSC

H I have had the advantage of reading, in draft, the judgment of my learned brother, Ogwuegbu, JSC, and I agree with him that this appeal has failed. My learned brother has considered the issue of continuing trespass which is the main issue in this appeal and has resolved that since the defendant has built houses unlawfully on the plaintiff's land and had left them there the trespass will be held to have continued. I agree

entirely that the trial court is right to find the defendant liable.

The appellant having filed this appeal against two concurrent findings of the lower courts must establish special circumstances to warrant disturbance of those findings. The appellant has failed to do so. The appeal is accordingly dismissed. I abide by the order made in the lead judgment on costs.

ONU JSC

I have been privileged to read in draft before now the judgment just delivered by my learned brother Ogwuegbu, JSC. I agree with him that this appeal lacks merit and ought therefore to fail.

In expatiating on the case, I wish to commence by pointing out that this is a land matter wherein the Plaintiff in the trial court, now respondent, claimed against the Defendant/Appellant in their Writ of Summons as follows:-

1. "A declaration that the Plaintiffs are the persons entitled to be granted title to statutory or customary right of occupancy in respect of all that piece or parcel of land situate lying and being at Gbonmi, Oshogbo.

2. The Plaintiff's claim against each of the defendants the sum of N500.00 being damages for trespass committed on the land in dispute which was in possession of the Plaintiffs when the defendants unlawfully entered the land in possession in 1966.

3. An injunction restraining the defendants, their servants and agents from committing further acts of trespass on the said parcel of land."

At the trial embarked upon after pleadings were exchanged by the parties, the respondent tendered the survey plan of the land in dispute as Exhibit B showing the:-

- (a) Area claimed as verged Red.
- (b) Area granted to the appellant as verged Yellow and
- (c) Area trespassed upon as verged Blue and on which were erected by the appellant new buildings.

They also tendered the plan used in the 1966 case as Exhibit C. The respondent sought and obtained leave of the trial court to amend paragraph 20 of his Statement of Claim which now reads:-

"20(a) *The Plaintiff's family have been in exclusive possession of the area verged Blue until the Defendants in 1966 unlawfully entered the area verged blue and marked C and D and started to build on portions thereof after 1966 which trespass is still continuing.*

20(b) *Some of the new houses which the Defendants built after the institution of the 1966 action are shown on the area verged blue on Plaintiff's Plan No. OB. 4046 referred to in paragraph 5 above."*

The respondent also gave evidence in support of the trespass pleaded as follows:-

"In 1966 the defendants unlawfully entered into the land in dispute and started to build thereon, and we sued them to court. We showed the houses to our surveyor. They still continue to occupy the land and the houses up till now."

In answer to the ensuring cross-examination, he said as follows:-

"The houses built by the defendants which we showed to our surveyor were not built in 1966. In 1966 we sued the defendants for trespassing on our land, but when they started building on it that is why we made a second survey plan which was drawn by Mr. Bamgbose and which I earlier identified. The Court of Appeal directed that we should indicate in a plan where our land was trespassed upon and that is why we made a second plan. We are complaining as we did in 1966 because the defendants have not vacated our land. The building by the defendants were of concrete blocks. Some have been roofed, some have not got to that stage. Some are at foundation level."

Plaintiff called 3rd P.W. (Olawuyi Bamgbose) the Surveyor who started, inter alia, as follows:-

"The plaintiff instructed me that out of the five buildings shown in the area marked 'C' and edged blue, those three that were not marked with any names were erected by the defendants."

The second of the three witnesses called by the appellants was 2nd DW (Yesufu Oluajo). He admitted under cross-examination after testifying in

chief thus:

"We have built some houses on the land in dispute within the past few years. By the time this action was instituted, we have built four houses thereon."

The learned trial Judge in his judgment held inter alia in respect of the issue of trespass as follows:-

"Such claim in a way postulates an element of continuity in the act of trespass because it talks of unlawfully entering the land in 1966.

Where there is a continuous (sic) act of trespass then the fact that the entry started at an earlier time, in this case, in 1966 and the time of start (sic) would not seem in my view to exhaust the act of trespass. The continuing act constitute (sic) fresh acts of trespass and it in this case the trespass is regarded as a continuing one, then fresh causes of trespass would have arisen after the termination of the cause of action in the earlier judgment and before the commencement of the present one. From the premises that the present writ is capable of being regarded as a continuing trespass then the cause of action would not, in my view, be the same.

My findings in relation to the claim for title show that the plaintiff's family were in possession or had show that the plaintiff's family were in possession or had right to possession of the area in dispute in 1966. The act of the defendants in entering such area and erecting buildings thereon establishes a liability in trespass. There was no positive identification of the particular defendants who committed the trespass. Although the 2nd defendant admitted it ostensible (sic) on behalf of his family represented by the 1st and 2nd defendants, I have no positive evidence with regard to trespass by the Abinusedun family represented by the 3rd and 4th defendants in respect of the area in dispute."

The appellants were dissatisfied with the said decision and their appeal to the Court of Appeal (hereinafter in the rest of this judgment referred to as the court below) on five grounds on which four issues were culled in their (appellants') brief for determination, was dismissed and the decision of the trial Judge accordingly upheld.

On the appellants' grouse on appeal as to whether the learned

Justices of the court below were right in upholding the decision of the learned trial Judge that the appellants are trespassers on the land in dispute and if so whether the trespass is a continuing one, my answer must performe be in the affirmative. The appellant's argument on the issue, which in my view, overlooks the learned trial Judge's most important finding to the effect that the respondent's family were in possession or had right to possession of the area in dispute before 1966 and that the act of entering such an area and erecting buildings thereon established a liability in trespass and further that they were therefore liable in trespass. The appellant, remarkably enough, did not appeal against this finding. I am therefore of the firm view and do hold that the learned trial Judge rightly held on the issue of trespass and court below confirmed same the act of wrongful entry and erecting buildings on the land in dispute was established, not denied and indeed was admitted by the appellants.

Thus, the court below in affirming the trial court's decision held as follows:

"Learned counsel for the respondent, Alhaji Y.A. Agbaje, SAN in reply said that there is nothing wrong in the statement made by the learned trial Judge in holding that the 1st and 2nd defendants are liable in trespass, because, accordingly to him the 1st and 2nd defendants are sued in representative capacity for and on behalf of the Ladumoye family and they fought the case on that basis.

Where two or more persons committed an act of trespass or are sued as representatives of their family, they are all equally liable jointly and severally in damages for trespass.

I am unable to uphold the contention that damages for trespass cannot properly be awarded against named defendants who were sued as representatives of their family; since the evidence given at the hearing clearly established that the defendants actually trespassed on the land. Throughout, they admitted entering the land and building on it and since their liability is joint and several, the person injured by such action has a cause of action against any or all of them and may obtain judgment for trespass against them jointly and severally. The trial Judge's comment complained against does not detract from his finding that members of the

defendant's family have committed trespass on the land in dispute.

And as to whether the trespass was a continuing one, the court below in confirmation of what the trial court said on the point, viz:-

"..... *The respondent knew at all material times that the members of his family have been building on other people's land and they continued to do so despite the protest and action filed in court against them.*"

Thus, Since the doctrine of continuing trespass relates to cases where something has been brought on land and wrongfully left there and does not extend to cases where the defendant fails to restore the land to the same condition in which he found it, and since the appellants acknowledge that if the thing placed on the land in dispute continues to cause damage it will give rise to actions de die in diem, so long as it lasts and since the unlawful acts of entry committed after Suit No. 11/66 consisted in the building of houses which are still on the land when the action giving rise to the present appeal was instituted in 1979, a case of continuing trespass has been made out in so far as the buildings put on the land are still there. See Louis Oniah and 2 Ors. v. Chief Obi J.I.G. Onyia (1989) 1 NWLR (part 99) 514. It is a cardinal principle of law that if land is in possession of a tenant, it is the tenant and not the landlord who can sue for trespass. In almost all cases, it is the person in possession of the property who can sue for trespass. See Wallis v. Hands (1893) 2 Ch. 75; Amori v. Akande (1975) 2 W.S.C.A. 143; Awooner Renner v. Annan 2 WACA 258 and Oyetona v. Ajani (1959)-60) WNLR 213. See also Christopher Okolo v. Eunice Uzoka (1978) 4 SC. 77 at 78 where this Court held:-

"It is the law and this Court has so held times without number that trespass to the land is actionable at the suit of the person in possession of the land. The slightest possession in the plaintiff enables him to maintain trespass if the defendant cannot show a better title.

Finally, on the issue of estoppel or Res Judicata the facts disclosed at the trial revealed that the 1st appellant had sued the respondent in 1960 for declaration of title before Grade 'B' Customary Court in Suit No. LC/3/60 and lost when the Ataoja of Oshogbo intervened to claim ownership of

the land. The Court held that the land in dispute belonged to the Ataoja of Oshogbo and directed that any party who wanted to own the land should apply to the Ataoja. The appellants appealed to the Chief Magistrate Court in Appeal No. MIF/22/A/62 vide Exhibit E and lost. There was no further appeal on the case.

The respondents and others in 1962 applied to the Ataoja who granted them the land in dispute as evidenced by Exhibit A. The appellants did not. The 1966 case arose from unlawful entry into the land in dispute by the appellant whereof the respondent sued him for trespass in Suit No. 11/66 in the Grade 'A' Customary Court and won. Both the trial court and the court below held that trespass (i.e. the bare entry) was not established. The issue of estoppel therefore did not arise. The decisions of the two courts below being concurrent, I see no reason to interfere therewith, they not having been shown to be perverse nor amounting to a miscarriage of justice. See Elike v. Nwankwoala (1984) 12 SC. 301 at 325; Nwadike v. Ibekwe (1987) 4 NWLR (Part 67) 718; Okagbue v. Romaine (1982) 5 SC. 133 at 170 and Adimora v. Ajufo (1988) 1 NSCC 1005 at 1016, to mention but a few.

For the reason I have given and the fuller ones contained in the leading judgment of my learned brother Ogwuegbu, JSC I too dismiss the appeal with N10,000.00 costs as assessed therein.

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