

SUPREME COURT OF NIGERIA
9TH APRIL, 1999. SC. 92/1992
CORAM:- I. L. KUTIGI, M. E. OGUNDARE, S. U. ONU,
O. ACHIKE, U. A. KALGO, JJSC

CHIEF ASABA EMIRI & 4 ORS. APPELLANTS
(For themselves and on behalf of the Emiri Family)

AND

CHIEF DOMINIC IMIEYEH & ANOR. RESPONDENTS
(For themselves and on behalf of Umu-Edeme-Opia
family of Ase)

ACTIONS - Claim - For declaration of title to land - Identity of the land
- Survey Plan - Is not a sine qua non - But there must be some clear
description to make a disputed land ascertainable.

APPEALS - Court of Appeal Act, 1976 - Provisions of s. 16 - The extent
of the power of the Court of Appeal under it.

APPEALS - Court of Appeal - Powers - It has full powers and jurisdic-
tion - To amend any judgment of the trial High Court - On appeal before
it.

APPEALS - Concurrent findings of fact - Attitude of the Supreme Court
- To it.

COURTS - Court of Appeal Act, 1976 - Provisions of s. 16 - The extent
of the power of the Court of Appeal under it.

COURTS - Court of Appeal - Powers - It has full powers and jurisdic-
tion - To amend any judgment of the trial High Court - On appeal before
it.

EVIDENCE - Declaration of title - Pleadings and evidence - Where they tallied with all that was contained in the Survey Plan - The identity of the land over which declaration of title is sought - Has been proved.

JUDGMENTS - Court of Appeal - Powers - It has full powers and jurisdiction - To amend any judgment of the trial High Court - On appeal before it.

JUDGMENTS - Concurrent findings of fact - Attitude of the Supreme Court - To it.

LAND LAW - Declaration of title - Proprietary interest - Regarding the land in dispute - Is not affected by Exhibit "C" which described the land as "Government Land".

LAND LAW - Declaration of title - Proof - Identity of the land in dispute - Sufficient evidence must be produced to ascertain the definite and precise boundaries of the land - In order to be entitled to a grant.

LAND LAW - Claim - For declaration of title to land - Identity of the land - Survey Plan - Is not a sine qua non - But there must be some clear description to make a disputed land ascertainable.

LAND LAW - Declaration of title - Pleadings and evidence - Where they tallied with all that was contained in the Survey Plan - The identity of the land over which declaration of title is sought - Have been proved.

STATUTES - Court of Appeal Act, 1976 - Provisions of s. 16 - The extent of the power of the Court of Appeal under it.

FACTS

Before the Kwale High Court of former Bendel State (Now in Delta State) the plaintiffs/respondents claimed against the defendants/appellants for inter alia, a declaration of title to the land in dispute and

damages for trespass. The plaintiffs/respondents owned a large area called Odo-Ugili which they inherited from their great great grandfather called Onwala who came from Benin and settled on the land at Imonite with his son called Ase. The respondents descended from Ase and are known as Umu-Edeme family of Ase. From this land of the respondents certain portion was leased to the Government for development purposes. Also, one Emiri the father of the appellants was given another portion of the land by the 1st respondent's father. Subsequent grants were made to members of the appellants' family, but later request by the appellants was turned down by the respondents. The appellants then trespassed on the land. It also turned out from the evidence that a relation of the respondents, one madam Ifebure, between 1899 and 1904 borrowed the equivalent of the sum of #3.00 (3 pounds) (about N6.00) from the grandfather of the appellants chief Igwe Emiri and pledged part of the Odo-Ogili land to him. Madam Ifebure was unable to repay the loan before she died and so the appellants claimed that their grandfather bought the land from Ifebure and that it was not pledged to him. This was the cause of the dispute. The 1st respondent as the head of the family wrote a letter shortly before he instituted the present action to the secretary of Ndokwa Local Government wherein he complained of the trespass on the land which he referred to as government land by the appellants.

At the conclusion of hearing the learned trial judge found in favour of the Plaintiffs/Respondents and entered judgment for them. Dissatisfied the appellants unsuccessfully appealed to the Court of Appeal, Benin Division. They have further appealed to the Supreme Court raising three issues.

ISSUES FOR DETERMINATION

1. *Whether the Respondents are not estopped from claiming proprietary interest over land in dispute in the face of their admission contained in EXHIBIT "C" that the land belongs to the Government.*
2. *Whether the Respondents had discharged the onus on them to show clearly the exact area of land in respect of which they sought declaration of title and injunction.*
3. *Whether it was proper for the Court of Appeal to amend the*

order of the trial Court in the circumstances of this matter".

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

B Land Law - Declaration of title

1. Learned counsel for the appellants submitted in his brief that since the respondents called the land in Exhibit 'C' Government Land", and admitted giving it to the Ndokwa Local Government, they could not sue for declaration of title to the same land. He cited the case of Sanyaolu v Coker (1983) 3 S.C. 124 at page 163 and Alhaji Raji Oduola & ors v. S. B. Coker & ors (1981) 5 S.C. 197 to support his submission. With respect, this cannot to the case in this appeal. The 1st respondent who was the author of Exhibit 'C' emphatically and categorically stated in his evidence that the government land is not the land in dispute here. He was amply supported by the plans Exhibit 'A' and 'B' and other witnesses at the trial. The question of sale of the land in dispute to the Government did not arise here at all, and so the case of Sanyaolu v. Coker (Supra) did not and could not apply to this case. I have also read the case of Alhaji Raji Oduola v. Coker (supra) and found that it has no relevance to the circumstances of this case. On the whole, I find that Exhibit 'C' did not in any way or form affect the proprietary interest of the respondents regarding the land in dispute. This issue therefore fails. (pp. 692C/693 D)

Declaration of title - Proof

2. It has long been established by a plethora of decided cases of this court that in a claim for declaration of title to land, a plaintiff must produce sufficient evidence to ascertain the definite and precise boundaries of the land claimed, in order to be entitled to the grant. The acid test on the sufficiency of such proof is whether a surveyor taking the record of proceedings, can produce a plan showing accurately the land to which title has been given. Ate Kwadzo v. Kwasi Adjei 10 WACA 274; Arabe v. Asanlu (1980) 5-7 S.C. 78. (p. 694 E)

Land Law - Claim

3. One important way now commonly used by parties in land dispute is to establish the identity of the land in dispute by filing a detailed and accurate survey plan of the land showing the various features on such land sufficient to point to the clear boundaries thereof. See Udofia v. Afia 6 WACA 216; Okorie v. Udom (1960) SCNLR 326; Olusanmi v. Oshasona (1992) 6 NWLR (part 245) 22 at 29. There is however no law or practice which established that a plan is Sine Qua non in a claim for declaration of title to land but there must be some clear description to make a disputed land ascertainable. Where there is no difficulty in identifying the extent of the land in dispute or the parties have agreed that an identifiable piece of land is in dispute between them, even if they refer to that land with different names, a declaration of title to the land can be made without any plan thereof. Ibihuja v. Dikibo (1976) 6 SC 97; Eletiko v. Aroyewun (1959) 4 FSC 129; Akinhanmi v. Daniel (1977) 6 SC 125. (p. 694 F)

Declaration of title - Pleadings and evidence

4. On the whole, I find that the pleadings and evidence tallied with all what was contained in the survey plan of the respondents, Exhibit 'A'. I therefore find and entirely agree with the Court of Appeal that the respondents have proved the identity i. e. the exact area, over which they sought a declaration of title. Issue two also fails. (p. 697 H)

Courts - Court of Appeal Act, 1976

5. By virtue of the provisions of this Section, the Court of Appeal has all the powers of the High Court in any appeal before it. And in order to settle completely and finally the matters in controversy between the parties and to avoid Multiplicity of legal proceedings, it can grant any remedy or make any orders to which any of the parties before it may appear to be entitled. This means that the Court shall have full jurisdiction and control over the whole proceedings as if the proceeding were or had been initially instituted before it as a Court of first instance, and may rehear the case wholly or in part as the case may be. See Okoya v.

Santilli (1990) 2 NWLR (part 131) 172; Fatuade v. Onwoamanam (1990) 2 NWLR (part 132) 322; Oshoboja v. Amuda (1992) 6 NWLR (part 250) 690; Akpan v. Otong¹ (1996) 10 NWLR (part 476) 108. (p. 699 D)

B Courts - Court of Appeal - Powers

6. As I stated earlier, the area verged "yellow" in Exhibit 'A' was not part or within the area of the land in dispute verged "green" in Exhibit 'A'. Therefore since the learned trial Judge made separate findings on the land in dispute and the land pledged to late Igwe Emiri, it would appear to be a "slip" on the part of the learned trial Judge to mention late Igwe Emiri's land is his declaratory order as if it were part of the land in dispute which it was not. Therefore in my view, the Court of Appeal was perfectly right in deleting from the learned trial Judge's declaration order, any reference to late Igwe Emiri's land. I am also satisfied that in the circumstances of this case, it was not necessary for the respondents to appeal or even file any Respondent's notice on the issue. It seems to me therefore that the Court of Appeal has full powers and jurisdiction to amend any judgment or order of the trial High Court on an appeal before it, whether the amendment to be made arises from clerical error or a mere "slip" or not, provided that it was supported by evidence on record and was done to settle matters in controversy between the parties and to avoid multiplicity of proceedings and do substantial justice between the parties. I am satisfied that this was achieved in the instant appeal by the order of the Court of Appeal complained of. I hold that the order as amended is consistent with the evidence on the record of appeal. Issue three has no substance at all and I resolve it against the appellants. (p. 699 G)

Appeals - Concurrent findings of fact

7. In this appeal, there has been concurrent findings of fact made by both the trial Court and the Court of Appeal, as a result of which the appellants lost in both Courts. It has been held in many decisions of this

¹ Akpane v. Otong is reported in (1996) 12 KLR (pt 46) 1986

Court that the Supreme Court will not interfere with the concurrent findings of fact made by the said lower Courts where there is sufficient evidence in support of such findings and where there is no substantial error apparent on the record such as miscarriage of justice or a violation of some principle of law or procedure. See Akeredolu v. Akinyemi B (1989) 3 NWLR (part 108) 164; Ibado v. Enarofia (1980) 5-7 S. C. 42; Ogunbiyi v. Adewunmi (1988) 5 NWLR ((part 93) 217; Adigun v. Governor of Osun State ² (1995) 3 NWLR (part 385) 513. I have not seen any such reason in this appeal to justify or call for the interference C with the findings of the trial Court as confirmed by the Court of Appeal. (p. 701 B)

NOTABLE POINTS OF INTEREST

ONUJSC

1. Onus of proof in a claim for title to land

The defendants/appellants having on their own showing acknowledged the ownership thereof, the onus to prove otherwise was on them. See the case of G. A. Awomuti v. Alhaji Jimoh Salami & ors. (1978) 3 SC. E 105, where this court laid the principle of law that the onus lies on the plaintiff to prove his title to land and he succeeds on the strength of his own case but where the land in dispute has been accepted by both parties as being originally family land and either party claims title to that land F through that family, the plaintiff only has to discharge the onus of proof of title in him; thereafter the onus shifts to the defendants, who has claimed title to the land. Indeed, there is no static onus of proof in civil cases; the onus preponderates. See Section 136(1) and (2) as well as Section 138 of the Evidence Act, Cap. 112 Laws of the Federation of G Nigeria, 1990. See also Ajide v. Kelani (1985) 3 NWLR (part 12) 248; Nigerian Maritime Services Ltd. v. Alhaji Bello Afolabi (1978) 2 SC. 79 and Kate Enterprises Ltd. v. Daewoo Ltd (1985) 2 NWLR (part 5) 16. In H the case in hand, there was a large tract of land which was in dispute and the trial court found it belonged to the respondents and the decision was

² Adigun v. Governor of Osun State is reported in (1995) 3 KLR 671

confirmed by the court below without an appeal by the appellants on the concurrent findings of facts. Exhibit A, the respondents' plan of the land in dispute was found to be identical to Exhibit B, the appellants' plan. The Yellow portion on Exhibit A alleged to have been pledged to the appellants at the turn of the century by the respondents' family and depicted to be outside the land in dispute while the rest of the entire area was shown to belong to the respondents. As it was common ground that the alleged sale of the land was not proved by the appellants who acknowledged that the area verged Green was the piece in dispute, they (appellants) being in possession of the only areas given to them, the identity of that piece of land as between the parties no longer was in doubt and I so hold. See Baruwa v. Ogunshola (supra) and Awote v. Owodunni No. 2 (1987) 2 NWLR (part 57) 367. (p. 709 E)

2. It is not every slip of the Court of Appeal that will result in a judgment being overturned

It is not every slip of the Court of Appeal, it ought to be born in mind, that will result in a judgment being overturned by the Supreme Court, albeit that this Court possesses the inherent power to amend its clerical slips in order to avert any misapprehension that may arise therefrom. See Section 16 Court of Appeal Act, 1976. The Supreme Court equally has the inherent as well as statutory power under Section 22 of the Supreme Court Act, Cap. 424 to correct such a slip made by the courts below. See Asiyanbi v. Adeniji (1967) 1 All NLR 82 and Attorney-General of Oyo State v. Fair Lakes Hotel & Anor. (1988) 2 SCNJ 1 at 12. It is in the light of the foregoing that I entirely agree with the submission of the respondents that the attitude of the court below and its action in correcting the slip is in accord with the spirit of Section 16 of the Court of Appeal Act, 1976 and are also in consonance with Order 1 Rules 20(1), (4) and (5) and Rule 21(1) and (2) of the Court of Appeal Rules, 1981, as amended vide Onyejekwe v. The State (1992) 3 NWLR (part 230) 444; (1992) 9 LRCN 780 at 782. (p. 711 E)

REPRESENTATION

Augustine Alegeh for the appellants
C. O. Nwabuokey for the respondents

CASES REFERRED TO

Sanyaolu v Coker (1983) 3 S.C. 124 at pages 163	B
Oduola v S. B. Coker (1981) 5 S.C. 197	
Kwadzo v. Kwasi 10 WACA 274	
Arabe v. Asanlu (1980) 5-7 S.C. 78	
Okedare v. Adebara (1994) 6 NWLR (part 349) 157	C
Udofia v. Afia 6 WACA 216	
Okorie v. Udom (1960) SCNLR 326	
Ibihuja v. Dikibo (1976) 6 SC 97	
Eletiko v. Aroyewun (1959) 4 FSC 129	D
Akinhanmi v. Daniel (1977) 6 SC 125	
Ibihuja v. Dikibo (1976) 6 SC 97	
Eletiko v. Aroyewun (1959) 4 FSC 129	
Akinhanmi v. Daniel (1977) 6 SC 125.	E
Ibado v. Enarofia (1980) 5-7 S. C. 42	
Ajide v. Kelani (1985) 3 NWLR (part 12) 248	
Nigerian Maritime Services Ltd. v. Afolabi (1978) 2 SC. 79	
Kate Enterprises Ltd. v. Daewoo Ltd (1985) 2 NWLR (part 5) 16	F

STATUTES & RULES REFERRED TO

Court of Appeal Act, 1976, s. 16	
Court of Appeal Rules, o.1 rr. 20 and 21	
Evidence Act, Cap. 112 Laws of the Federation of Nigeria, 1990 ss. 136 and 138	G

LEAD JUDGMENT BY KALGO JSC

The respondents in this appeal were the plaintiffs at the trial H Court, and the appellants were the defendants. In suit No. HCK/13 82 which was filed in the Kwale High Court of former Bendel State, the respondents claimed against the appellants, as per their further amended

statement of claim, the following reliefs:-

"(1) A declaration that the plaintiffs are the owners in possession of that piece or parcel of land know and called Odo-Ugili land lying and situate at Ase town within the jurisdiction of this Honourable Court and are entitled to the customary right of Occupancy.

(2) A claim of N10,000.00 (Ten Thousand naira) damages in that on or by early 1980 an continuing the 5th defendant without obtaining the consent or permission of the plaintiffs trespassed into the plaintiffs family land egged on by 1st - 4th defendants.

(3) An injunction restraining the defendants, their privies, servants and/ or agents from ever trespassing on the Plaintiffs' land and/ or molesting the plaintiffs or doing anything injurious to the land or detrimental to the plaintiffs' interest in and/ or enjoyment and user of the land.

(4) An order of forfeiture against Ist and 2nd Defendants and eviction of all the Defendants including Madam Ubege Emiri for the Defendants through Ist and 2nd Defendants dared challenge the title of the plaintiffs who are their Landlords.

(5) A declaration that the plaintiffs are entitled to be given the certificate of occupancy in respect of the land in dispute as more properly and particularly described and delineated in their plan No.KP.2338."

At the trial, pleadings were filed and exchanged by the parties. In proof of their case, each party called witnesses and tendered documents which were admitted in Court. The respondents as plaintiffs called six witnesses including the Ist plaintiff/respondent while the defendants/appellants called six witnesses including the 3rd and 4th defendants/appellants. At the close of the case, learned counsel for both sides addressed the trial Court at length.

On the 27th day of February, 1987, the learned trial judge, Bazunu J. delivered a considered judgement in which he found for the plaintiffs/respondents and made the following orders:-

(i) A declaration of title to the land in dispute, excluding the area pledged to the late grandfather of the Defendants and the areas given to the Ist Defendant and his brother John by way of gift, as shown in

Exhibit "A", plan. No.KP.2338 of 4/1/85, subject to the provisions of Section 40 of the Land Use Decree 1978

(ii) N300 general damages against the Defendants jointly and severally for trespass.

(iii) Perpetual injunction restraining the Defendants by themselves, their privies, servants and or agents from further trespassing on the land without the prior consent and or authorization of the plaintiffs. B

The appellants herein were dissatisfied with the judgement of the learned trial Judge and they appealed to the Court of Appeal Benin Division. They filed a notice of appeal containing three grounds of appeal initially on the 30th of April, 1987. On the 2nd day of May, 1987, the appellants filed an application in the Court of Appeal Benin praying the Court to grant them leave to file and argue four more additional grounds of appeal which application was later heard and granted as prayed. The appellants had therefore seven grounds of appeal, filed in their appeal in the Court of Appeal, Benin. C D

In the Court of Appeal, written briefs were filed by both parties which were also exchanged between them in accordance with the rules of Court. The issues for determination set out by the parties in their respective briefs were not very much different, and the Court of Appeal after hearing counsel for both parties on their briefs and considering the evidence before the trial Court in the record of appeal, came to the following conclusion per Uche Omo JCA (as he then was):- F

"Accordingly this appeal must be and is hereby dismissed. In further exercise of my powers under Section 16 of the Court of Appeal Act I would amend the first order of the learned trial Judge by removing therefrom the words "the area pledged to the late grand father of the defendants and ", so that it reads:- G

"Declaration of title to the land in dispute, excluding the areas given to the 1st Defendant and his brother John by way of gift, as shown in Exhibit A, plan No. KP.2338 of 4/1/85, subject to the provision of H section 40 of the Land Use Decree 1978."

Subject to this amendment I confirm the orders of the learned trial Judge."

The appellants were still not happy with this decision of the Court

of Appeal and they appealed to this Court on seven rounds thus:-

 GROUNDS OF APPEAL

 The learned Justice of the Court of Appeal erred in Law in affirming the lower Court's Judgments in the face of Evidence on the printed
B records that the Respondent have no proprietary right and or legal interest in the land in dispute.

 PARTICULARS OF ERROR

 (i) The respondents by EXHIBITS "C" and "D" stated that the
C land in dispute was Government land.

 (ii) P.W. I in his evidence confirm that the land was Government land.

 (2) The learned Justices of the Court of Appeal erred in law and thereby occasioned a miscarriage of Justice when they held as follows:-

D *"..... It is the plaintiff who sets out the land in dispute. In a land matter this is best done by delineating the boundaries of the land in a survey plan, which the respondents in this appeal have done by filling, and relying on a survey plan wherein land in dispute is shown as Verged
E Green. Issues was (sic) clearly joined by the Appellants (as Defendants) on this claim the land in dispute can not thereafter be uncertain. All that is left is for the claim to be proven..."*

 PARTICULARS OF ERROR IN LAW

F (i) The mere tendering of a survey plan by the Respondents is not sufficient proof of the land in dispute in the absence of supporting evidence.

 (ii) The pleadings and evidence by the Respondents at trial Court did not tally with the details contained in their litigation survey plan EX-
G HIBIT "A".

 (iii) Evidence at variance with pleadings go to no issue.

 (3) The learned Justices of the Court of Appeal erred in law when they held as follows:-

H *"The areas of land in dispute trespassed upon are quite close enough to the land granted to the N.A. Calling in aid the Ndokwa Local Government Counsel in respect of trespass on adjoining land by means of EXHIBITS "C" & "D" IS TO BE EXPECTED."*

PARTICULARS OF MISDIRECTION

(i) EXHIBITS C and D are documents which speak for themselves.

(ii) P.W. I confirm in his evidence the contents of Exhibits C and D that the land in dispute was government land. B

(iii) There was no evidence on the printed record that Exhibits C and D refer to adjoining lands.

(4) The learned justices of Court of Appeal after holding as follows:-

"..... the words land in dispute have been used interchangeably cover the area Verged "green" in Exhibit "A" which is stated on that plan to be in dispute, and the area Verged "Yellow" which is outside the land in dispute as depicted in Exhibit "A". erred in law in subsequently holding that the Respondents have shown clearly the land in dispute". C

PARTICULARS OF ERROR IN LAW D

(i) The findings of the Court of Appeal from the evidence showed that there was a patent confusion as to the exact area in dispute.

(ii) This confusion was never resolved by the evidence on the printed record. E

(5) The learned justices of the Court of Appeal erred in law and thereby occasioned a miscarriage of justice in amending the order of the trial court in exercise of its powers under Section 16 of the Court of Appeal Act, 1976, in the absence of a Respondent's notice and without affording the appellants any opportunity to be heard on the issue. F

PARTICULARS OF ERROR

(i) The Respondents did not file any Respondent's Notice praying the court to amend the order of the trial Court.

(ii) The appellant was not heard on the issue before the order was amended. G

(iii) There was no material before the Court warranting the amendment of the order of the trial Court.

(6) The learned Justices of the Court of Appeal erred in law in amending H an order of the Court relating to the area of land in dispute which order was based on the evidence led by the Respondents at the trial Court.

PARTICULARS OF ERROR

(i) The order of the learned trial Judge was based on a clear finding made by the trial Judge.

(ii) The finding of the trial Judge was based on the evidence led by the Respondents during the trial.

B (iii) The evidence on which the finding was based was not challenged by the Respondents in the Appeal.

(7) The Judgment is against the weight of printed evidence before the Court".

C In this Court the parties also their briefs of argument and exchanged them between themselves. The appellants in their brief, formulated three issues for the determination of this Court from their seven grounds of appeal thus:-

D 1. Whether the Respondents are not estopped from claiming proprietary interest over land in dispute in the face of their admission contained in EXHIBIT "C" that the land belongs to the Government.

E 2. Whether the Respondents had discharged the onus on them to show clearly the exact area of land in respect of which they sought declaration of title and injunction.

3. Whether it was proper for the Court of Appeal to amend the order of the trial Court in the circumstances of this matter".

F The Respondents also set out three issues for determination in their brief which read:-

G *"1. Have Exhibits C and D the legal force of divesting the title of the land in dispute from the plaintiffs to those whose claim to the land in dispute is at best frivolous as both their pleading and evidence showed that they could never prove their case to the ownership of the land in dispute?"*

2. Had the use of the term "land in dispute" deceived the Appellants as to make their case/claim worthy of consideration or give it any merit?"

H *3. Was the Court of Appeal right in exercising its undoubted right to correct the slip as to the inclusion of an area outside the land in dispute as part of the land in dispute?"*

The three issues for determination raised by the appellants are

not different in substance from those framed by the respondent. It is my respectful view however that the issues set out by the appellants are more germane to the grounds of appeal filed in this appeal. I therefore adopt them for the purpose of determining the dispute in this appeal.

Before going into the discussion on the issues raised, it appears B to me that for the proper understanding of the nature of the dispute, it is reasonable to set out albeit briefly the background to the dispute as disclosed by the evidence at the trial.

The case of the plaintiffs/respondents was that they owned a large area of land called Odo-Ugili which they inherited from their great C great grandfather called Onwala who came from Benin and settled on the land at Imonite with his son called Ase. The respondents were the descendants of Ase who are known as Umu-Edeme family of Ase.

From the main Odo-Ugili land of the respondents, certain por- D tion was leased to the Government which built a dispensary and a maternity on the land. Also, one Emiri, the father of the appellants was given another portion of land by the 1st respondent's father where he (Emiri) built a house. Later in time, the respondents' uncle, gave one Asaba E Emir, another plot of land of land out of the family land where he built a house. This was followed by another request for land by John, (Asaba Emiri's brother,) to the 1st respondent who also acceded to the request and gave him (John) a piece of land to build on. All these are from the F land of the respondents' family; but later request by the appellants was turned down by the respondents. The appellants then trespassed upon the land.

The defendants/appellants are the children of Emiri and the 1st G appellant (now deceased) was the son-in-law to the 1st respondent. Also according to the evidence at the trial, a relation of the respondents, one madam Ifebure, between 1899 and 1904 borrowed the equivalent of the sum of #3.00 (3 pounds) (about N6.) from the grand father of the appellants and pledged part of the Odo-Ogili land to the appellant's grand fa- H ther Chief Igwe Emiri. Madam Ifebure was unable to replay the loan before she died and so the appellants claimed that their grandfather Chief Emiri Igwe bought the land from Ifebure and that it was not pledged to

him. This was the cause of the dispute,.

The respondents therefore claimed for declaration of title to the land in dispute, damages and injunction.

At the trial both parties gave evidence in support of their plead-
B ings. The respondents tendered a plan of their whole holding of the Odo-
Ogili land which was admitted in evidence as Exhibit "A" showing the
land occupied by some members of the Umu-Edeme-Opia family, verged
"red"; the lend which the family gave away as gift to the grandfather of
C the appellants Chief Emiri Igwe and this was verged "yellow"; the land
which was leased to the government to build a dispensary and maternity
verged "brown" and the land which was granted as gift by the family to
1st appellant's father and his brother John verge "orange" and the land
now in dispute between the parties verged "green".

D The appellants also tendered a plan of the whole land which was
admitted in evidence as Exhibit 'B' showing similar features as in Exhibit
'A' but distinctly showing the land where the dispensary and maternity
were built by the Government verged "yellow"; the land upon which the
E Christ Babalola Church was built and various other buildings scattered
over the land in dispute verged "red".

I will now discuss the issues raised by the appellants in their
brief in the light of the evidence and the legal position applicable thereto.

F The 1st issue reads:-

*"Whether the Respondents are not estopped from claiming pro-
prietary interest over the land in dispute in the face of their admission
contained in Exhibit 'C' that the land belongs to the Government".*

G It is common ground that it was as a result of the constant and
repeated trespasses on the land in dispute by the family of the appellants
that the respondents decided to file this action before the Kwale High
Court seeking for declaration of title to the land. This was pleaded in
paragraph 11 of the further amended statement of claim and was sup-
H ported by the evidence of the 1st respondent on page 87 of the record of
appeal.

The 1st respondent as the head of the Ume-Edeme-Opia family
of Ase admitted under cross-examination that he wrote a letter Exhibit

"C" to the secretary Ndokwa Local Government asking him to remove their properties from the land in dispute. He also admitted that he referred to the land as Government land. Exhibit "C" reads:-

Chief Dominic A. Imieyeh, B
Head of Umu-Edeme Opia
Family, of Ase Town,
Ogbonome quarter, Ase.
16th March, 1982. C

To:
The Secretary,
Ndokwa Local Government,
P.M.B. 006, Kwale.

Thro: D
The Higher Health Supt.,
Health Office, Kwale.

Thro: E
The Chief pharmacy Asst.
Health Office, Kwale.

Sir,

"TRESPASS INTO GOVERNMENT LAND IN ASE"

" I wish to inform you that land given to government for the purpose of development at Ogbonome land by Umu-Edeme Opia family of Ase Town in Ndokwa Local Government Area of Bendel State as far back as 1922 was trespassed by Messrs. Albert Ikani, Asaba Emiri, Patrick Emiri, Itenku Emiri and John Emiri. F

The Government seat was transferred from Ase to Ughelli in 1932. G
The Local Government Council has been using the land for the past years. As from about 6 years ago Mr. John O. Emiri, Mr. Asaba Emiri, Mr. Patrick Emiri and Albert Ikani trespassed into the said land. The matter was discussed at Ase by the Igwe-In-Council on 12th February, 1982 and they were found guilty for trespassing into the said Government Land. H

On account of this the above-mentioned persons who trespassed into the

said land, dispute arose and the said persons got Police at kwale and arrested my people."

(Sgd) Chief Dominic A. Imieyeh)

Head of Umu-Edeme Opia family of Ase Town, Ase."

B It is very clear that Exhibit "C" was written on 16th of March, 1982 and the respondents took out a writ against the appellants in this action in the Kwale High Court on the 15th of April, 1982; only 30 days interval. It is also very clear from Exhibits 'A' and 'B' that the land in dispute between the parties is contiguous and adjacent to the land upon which the dispensary and maternity were built now referred to or called Government land. Further more in his evidence on page 88 of the record the 1st respondent said categorically that "the land in dispute is not government land". Then he proceeded to explain that his own son Berbard D Emiri and some members of his family had their houses on the land. And on page 89 lines 8-13 of the record, he added:-

"The defendants have a house in the land in dispute because a piece of land was given to the 1st defendant by Ekpeti who was the E father-in-law of the 1st defendant. The grandfather of the defendants had a house on the land in dispute and it is on that part that Ekpeti built his own house."

Also DW2, Mrs. Ogbuotobo who is a relation of the appellants, F said in her evidence on page 96 of the record thus:-

"I know the land in dispute, the defendants live on it, but I do not know the boundaries of the land."

These piece of evidence put together are enough to show that there is clear difference between the land in dispute and the so called G Government land. In fact in the plan Exhibit 'A' Government land where the dispensary and maternity were built was verged "yellow". This, together with the clear and unequivocal statement of the 1st respondent in his evidence that the land in dispute is not Government land, would not in H my view stop the respondents from claiming interest over the land in dispute.

The main complaint of the appellants in the brief was that the learned trial Judge did not properly consider the effect of the provisions

of Exhibit "C" on the interest of the respondents on the land in dispute, and that when they raised the same issue in the Court of Appeal, that Court merely said that what the respondents did by drawing the attention of the Local Government to the trespass on the land was to be expected in view of the proximity of the Government land to the land in dispute. B The appellants contended that the explanation of the Court of Appeal was unacceptable as it was not supported by any evidence and the parties were not called upon to address the Court on it. They cited the cases of Bamgboye v. Olarewaju (1991) 4 NWLR (part 184) 132 and Olaniyan v. C Unilag (1985) "NWLR (part 9) 599 in support.

The learned trial Judge in dealing with this issue said on page 121 of the record:-

"In my view the opposite is the case in view of the evidence of the plaintiffs, which I believe, that they were the ones who gave out the land concerned to Government, and that this is also confirmed in exhibit 'C', thus if anyone is found encroaching on the land, it will be their duty to bring this fact to the knowledge of the Government." D

This extract must be understood in the context of the fact that the learned trial Judge had accepted and believed that the land given to the Government was leased to them by the respondents. Therefore they (respondents) have a duty to warn the Government of any trespasser on the land. If one examines Exhibit 'C' carefully one would find in paragraph one, that the 1st respondent was referring specifically to the land which was given to the Local Government "for the purpose of development" by his family. The evidence at the trial has disclosed this fact clearly and the learned Judge accepted and believed it. That evidence according to the learned trial Judge, was confirmed by Exhibit 'C' and this observation in my respectful view had nothing to do with the proprietary interest of the respondents on the land in dispute. F G

The Court of Appeal, on this issue, had this to say on page 187 of the record:- H

"The areas of the land in dispute trespassed upon are quite close enough to the land granted to the N.A. Calling in aid the Ndokwa Local Government Council in respect of trespass on adjoining land by means of

Exhibit "C" and "D" is to be expected."

It is true that no evidence was given to the effect that because the Government land was near to the land in dispute which was trespassed, the respondents, in protecting their land, must tell the Local Government of the trespass. But there is sufficient evidence on the plans Exhibits 'A' and 'B' that the land in dispute and the Government land where the dispensary and maternity were built are near each other. Therefore in my opinion, it is not out of place to say that the respondents were wrong in forming the Government of the trespass. That was the view of the Court of Appeal which I consider reasonable in the circumstances.

Learned counsel for the appellants submitted in his brief that since the respondents called the land in Exhibit 'C' Government Land", and admitted giving it to the Ndokwa Local Government, they could not sue for declaration of title to the same land. He cited the case of Sanyaolu v Coker (1983) 3 S.C. 124 at page 163 and Alhaji Raji Oduola & ors v S. B. Coker & ors (1981) 5 S.C. 197 to support his submission.

In the Sanyaolu case (Supra) Aniagolu JSC at page 163 of the report said:-

"A person cannot obviously eat his cake and have it. This is simple common sense namely that a plaintiff cannot have what he says he has given away. A plaintiff who says he has sold his land to a purchaser cannot obviously turn round to claim a declaration of title to the very land he has sold."

The appellants counsel quoted this statement and relied upon it in that the respondents gave their land to the Government and now claimed a declaration of title to it. **With respect, this cannot to the case in this appeal. The 1st respondent who was the author of Exhibit 'C' emphatically and categorically stated in his evidence that the government land is not the land in dispute here. He was amply supported by the plans Exhibit 'A' and 'B' and other witnesses at the trial. The question of sale of the land in dispute to the Government did not arise here at all, and so the case of Sanyaolu v. Coker (Supra) did not and could not apply to this case.**

I have also read the case of Alhaji Raji Oduola v. Coker (supra) and found that it has no relevance to the circumstances of this case. In the Oduola case, the action was for declaration of title and recovery of possession. The plaintiffs were successful at the trial as the original defendants showed no interest in the proceedings and did not participate. The plaintiffs then transferred their interest in the land to one Abolade Coker, their witness at the trial. Three persons applied and were granted leave by the Western State Court of Appeal to appeal to represent original defendants. The appeal was heard by Federal Court of Appeal, (the Western Court of Appeal having been abolished) which dismissed the appeal. On further appeal to Supreme Court, the parties were nonsuited as there was need to join other parties in the case particularly the Ibadan City council whose interest would irreparably be prejudiced if an order joining them as parties is not made. This decision did not in any way apply to the issue now under consideration in this appeal.

On the whole, I find that Exhibit 'C' did not in any way or form affect the proprietary interest of the respondents regarding the land in dispute. This issue therefore fails.

Issue two deals with the identity of the area of land in respect of which the respondents sought for declaration of title. In their brief of argument the appellants submitted that they were not in agreement with the respondents as regards the identity of the land in dispute and that the respondents have failed both in their pleadings and evidence to prove clearly and with absolute certainty the area of land in dispute. It was further submitted that there was contradictory evidence as to the identity of the land in dispute and that the tendering of the plan, Exhibit 'A' simpliciter by the respondents in the light of the contradictory evidence on identity of the land, was insufficient to satisfy the legal proof required in the claim for declaration of title. Learned counsel cited in support the cases of Irimi v. Erhurhobara (1991) 2 NWLR (part 173) 253; Osibe v. Aigbe (1977) 7 SC. 1; Epi v. Aigbedion (1972) 10 SC 53; Buraimoh v. Bamgbose (1989) 3 NWLR (part 109) 352. Learned counsel further submitted that while the pleadings and oral evidence of the respondents did not tally with the plan Exhibit 'A' the findings of the learned trial Judge

were also clearly at variance with the plan itself. He therefore finally submitted that the respondents have failed to prove with clarity the identity of the land in respect of which they sought for a declaration and that this appeal should be allowed.

B The learned counsel for the respondents submitted in his brief that the land in dispute in this case was clearly defined and delineated "green" in the plan Exhibit 'A' and that although the respondents claimed the land earlier granted to the appellant's father/grandfather which was
C verged "yellow" in Exhibit 'A' the latter land was only in dispute between the parties at the Elders council in Ase. Learned Counsel further pointed out that it was after the Elders Council of Ase settled the issue of the land granted to Chief Igwe Emiri, (the appellant's grandfather) that the appellants invaded and trespassed upon the area verged "green" in Exhibit 'A'
D which gave birth to this case. This, according to the learned counsel, was fully pleaded by the respondents. Counsel finally submitted that the Court of Appeal dealt with this matter extensively in its judgment and urged this Court to affirm the judgment and dismiss the appeal.

E **It has long been established by a plethora of decided cases of this court that in a claim for declaration of title to land, a plaintiff must produce sufficient evidence to ascertain the definite and precise boundaries of the land claimed, in order to be entitled to the grant. The acid test on the sufficiency of such proof is whether**
F **a surveyor taking the record of proceedings, can produce a plan showing accurately the land to which title has been given. Ate Kwadzo v. Kwasi Adjei 10 WACA 274; Arabe v. Asanlu (1980) 5-7 S.C. 78; Okedare v. Adebara (1994) 6 NWLR (part 349) 157; One**
G **important way now commonly used by parties in land dispute is to establish the identity of the land in dispute by filing a detailed and accurate survey plan of the land showing the various features on such land sufficient to point to the clear boundaries thereof. See**
H **Udofia v. Afia 6 WACA 216; Okorie v. Udom (1960) SCNLR 326; Olusanmi v. Oshasona (1992) 6 NWLR (part 245) 22 at 29. There is however no law or practice which established that a plan is Sine Qua non in a claim for declaration of title to land but there must be**

some clear description to make a disputed land ascertainable. Where there is no difficulty in identifying the extent of the land in dispute or the parties have agreed that an identifiable piece of land is in dispute between them, even if they refer to that land with different names, a declaration of title to the land can be made without any plan thereof. Ibihuja v. Dikibo (1976) 6 SC 97; Eletiko v. Aroyewun (1959) 4 FSC 129; Akinhanmi v. Daniel (1977) 6 SC 125. I will now proceed to examine the extent to which the respondents have succeeded or otherwise in proving the identity of the land in dispute.

In their further amended statement of claim, the respondents pleaded in paragraphs 5, 6, 7, 8 and 13 thus:-

"5. At the time beyond human memory the descendants of Isheani called Edeme Opia and his children farmed extensively and exclusively at the said Odo-Ugili land including the area now verged red in the plan No. KP. 2338 dated 4/1/85 drawn by T.K. Kpeji licensed surveyor to be filed along with this further amended statement of claim. The plaintiff shall rely on the said plan at the trial.

6. Later in point of time the children of Edeme-Opia began to settle in the area verged red which is but one of the farm - lands of their ancestors. The settlement in these farm-lands was later booster when a part of Ogbe-Onome was given to the Catholic mission for their church and school. The houses in the area verged red are owned by the children of Umu-Edeme-Opia save those granted to their blood relations or relation by marriage. The area is bound by the lands of Umu-Oji family, Umu-Edeme-opia other lands, Umu-Uku family and Umu-Ugbe family lands and finally in the eastern flank, by the Ase-creek.

7. The plaintiff's father and grand father, Imieyehn granted a small piece of land verged yellow to Chief Igwe Emiri who later in point of time gave a loan of N6.00 (Six Naira), i. e. three pounds to Imieyeh's sister Ifebure, who never repaid the loan when she died. At the death of Igwe Emiri, the area became vacant and reverted to the plaintiffs. Years later the children of Emiri after the death of father then sought to build on the land claiming that the area was sold or pledged to their father Emiri.

8. *The plaintiffs' then headed by Chief Akpati Elebuwe contested the claim most vigorously wherefore the matter was heard at the Okpala-Uku's Council/Court at Ase, where the sister of the 1st defendant Nwachukwu Emiri confessed that rather than take juju oath as customary, that she would tell the truth and thereby said that it was only a loan which the father gave to Ifebure and not a sale of the land or pledge of the land.*

13. *The plaintiff further aver that the entire land verged red is the property of the descendants of Edeme Opia and that it was their family who originally gave the then Native Authority the area housing the maternity/ dispensary buildings including the temporary dispensary attendant's quarters in desuetude verged brown .xxxxxxxxxxxxxxxxxxxxxx*

At the trial, five (5) witnesses gave evidence for the respondents. The evidence of the 1st respondent, was to the effect that the land in dispute belonged to the respondents great great grandfather who came from Benin and settled in Ase. He later gave birth to the Umu-Edeme Opia family of Ase and founded the Odo-Ugili farm lands part of which is now in dispute. He testified that part of the land was leased to the government on which a dispensary and maternity was built, and part of it was given out where the church of Babalola was built. All these, according to him were on the land in dispute. 1st respondent also recounted that the appellants' father was also granted, on request, part of the land where he built a house which land was disputed as to whether it was sold or pledged to their grandfather.

The 1st respondent also testified that as the head of the Umu-Edeme Opia family, he asked surveyor to survey the land in dispute and produce a plan. P. W. 4 was the licensed surveyor who carried out the survey and produced a plan which was admitted in evidence as Exhibit 'A'. He said he was show round the land and some of the detail features on the land. P. W. 4 confirmed that the area verged red on the plan is the respondent' land within which the land in dispute is situated. The survey plan Exhibit 'A' was tendered and admitted at the trial without any objection.

Exhibit 'A' has shown clearly the area of whole land owned by

the Umu-Edeme Opia family of Ase and verged it red on the plan. Within this area, the lands not in dispute were clearly marked. The land leased to the government where the dispensary and maternity were built was also shown verged "brown" and the land which was earlier given to the appellants' grandfather by the respondents' ancestors was also shown verged "yellow". The rest of the land area marked and verged "green" must therefore be the area of the land in dispute. It is important to observe that the 1st respondent in his testimony mentioned all the features of the land as described and depicted on the plan, even though he did not specifically mention the area verged "green" as the land in dispute. The evidence of the licensed surveyor who produced the plan also confirmed that the area marked and verged "red" was the whole land of the respondents' family and that he was shown all the features on the land before he produced the plan Exhibit 'A'. In paragraph 5, 6, 7, 8 and 13, of the further amended statement of claim set out above, the respondents have pleaded all what was given in evidence at the trial. The 1st respondent had carefully described all the features on the land and the plan Exhibit 'A' has clearly shown all the various parts of the land marking them with different colours. What remained of the land and which stood out clearly was the area verged "green" which is the land in dispute.

It seems to me that land in dispute means a disputed land which as in this case, both parties are claiming to be their own. It also appears to me that in a claim for declaration of title to land, once there are some features or some descriptions in the evidence which make a disputed land ascertainable, the identity of the land is proved and a grant can be made with or without a survey plan. Sokpu IIV Agbozo 111 13 WACA 241; Rotimi v. Macgregor (1970) 1 All NLR 321; Ezeudu v. Obiagwu (1986) 2 NWLR (part 21) 208.

In this case, Exhibit 'A' was not shown to be inaccurate; infact no such challenge was ever made. Therefore the case of Olufosoye v. H Olurunfemi (1989) 1 NWLR (part 95) 26 cited and relied upon by the learned counsel for the appellants in his brief is irrelevant here.

On the whole, I find that the pleadings and evidence tallied

with all what was contained in the survey plan of the respondents, Exhibit 'A'. I therefore find and entirely agree with the Court of Appeal that the respondents have proved the identity i. e. the exact area, over which they sought a declaration of title. Issue two also fails.

In the 3rd issue for determination; the appellants complained about the amendment by the Court of Appeal of the declaratory order made by the learned trial Judge in his judgment. This amendment was made pursuant to the provisions of Section 16 of the Court of Appeal Act, 1976; The issue arose as a result of the findings of the learned trial Judge in his judgment on page 121 of the record where he said:-

" (c) That the area upon which the grandfather of the Defendants (the late Igwe Emiri) built his house was pledged to him by a member of the plaintiffs' family"

and in his final order he said inter alia on page 122 of the record thus:-

" (i) A declaration of title to the land in dispute, excluding the area pledged to the late grandfather of the Defendants and the areas given to the 1st Defendant and his brother John by way of gift, as shown in Exhibit "A" plan No.KP.2338 of 4/1/85, subject to the provisions of Section 40 of the Land Use Decree 1978"

(Underlining mine)

The learned trial Judge found that the area of land verged "green" on the plan Exhibit "A" was the land in dispute between the parties, and the land which he found to have been pledged to the Igwe Emiri, the appellant's grandfather was verged "yellow" on the plan Exhibit 'A'. A careful look on the respondents' survey plan Exhibit 'A' shown that the building of late Igwe Emiri was clearly outside the land in dispute and verged "yellow". Therefore there was no need and infact it was not right for the learned trial Judge to lump it together in his declaratory order with the land in dispute which was separate from it. The land area verged "yellow" on Exhibit 'A' was not within the land in dispute. The Court of Appeal found that this was a "slip" and it proceeded to amend the declaratory order by deleting the words, "the area pledged to the late grandfather of the defendants" which was the area of land verged "yellow" in

Exhibit 'A' . The order now reads:-

"(i) Declaration of title to the land in dispute, excluding the areas given to the 1st Defendant and his brother John by way of gift, as shown in Exhibit 'A', plan No. KP. 2338 of 4/1/85, subject to the provisions of the Land Use Decree 1978".

The learned counsel for the appellants contended in his brief that since the order made by the learned trial Judge was based on his own findings after the review of the evidence, what was amended in the order could not be considered to be a "slip" on his part. Learned counsel further argued that since the order made was supported by evidence, the only course open to the respondents was to either cross-appeal or file a Respondent's Notice on the matter, without which it would be wrong for the Court of Appeal to make such an amendment. This amendment was made pursuant to Section 16 of the Court of Appeal Act, 1976. **By virtue of the provisions of this Section, the Court of Appeal has all the powers of the High Court in any appeal before it. And in order to settle completely and finally the matters in controversy between the parties and to avoid Multiplicity of legal proceedings, it can grant any remedy or make any orders to which any of the parties before it may appear to be entitled. This means that the Court shall have full jurisdiction and control over the whole proceedings as if the proceeding were or had been initially instituted before it as a Court of first instance, and may rehear the case wholly or in part as the case may be. See Okoya v. Santilli (1990) 2 NWLR (part 131) 172; Fatuade v. Onwoamanam (1990) 2 NWLR (part 132) 322; Oshoboja v. Amuda (1992) 6 NWLR (part 250) 690; Akpan v. Otong (1996) 10 NWLR (part 476) 108.**

As I stated earlier, the area verged "yellow" in Exhibit 'A' was not part or within the area of the land in dispute verged "green" in Exhibit 'A' . Therefore since the learned trial Judge made separate findings on the land in dispute and the land pledged to late Igwe Emiri, it would appear to be a "slip" on the part of the learned trial Judge to mention late Igwe Emiri's land in his declaratory order as if it were part of the land in dispute which it was not. Therefore

in my view, the Court of Appeal was perfectly right in deleting from the learned trial Judge's declaration order, any reference to late Igwe Emiri's land. I am also satisfied that in the circumstances of this case, it was not necessary for the respondents to appeal or even file any Respondent's notice on the issue.

In the case of A. G. Bendel State V Aideyan (1989) 4 NWLR (part 118) 646, this Court confirmed the order of the Court of Appeal in which it substituted the relied of "mesne profit" to generic name "mesne profit", without any appeal or Respondent's Notice filed on the matter. On page 680 of the report Nnaemeka-Agu JSC. said:-

"I regard it as a hair-splitting play upon words to complain whether the amount awarded was called by the generic name "damages for trespass" or the specific name "mesne profit". For the same reason, I believe that the appellants have put the issue too highly by saying that the error, if any, committed by the Court of Appeal was that it, without a cross appeal or a respondent's notice, resurrected a claim which had been struck out by the Court of trial and gave judgement on it. They only substituted the specific name for the award for the generic.

I am of the clear view that what the Court of Appeal did in the matter was only consistent with the justice of the case and in accordance with the law and rules under which it operates".

In considering this matter, the Supreme Court also examined the provision of Order 3 rule 23 of the Court of Appeal Rules and held that the rule enables that Court "to give any judgement and make any orders as the justice of the case may require, which the trial Judge could have made whether or not there is an appeal by any of the parties in respect thereof."

It seems to me therefore that the Court of Appeal has full powers and jurisdiction to amend any judgment or order of the trial High Court on an appeal before it, whether the amendment to be made arises from clerical error or a mere "slip" or not, provided that it was supported by evidence on record and was done to settle matters in controversy between the parties and to avoid multiplicity of proceedings and do substantial justice between the parties. I am satisfied that this was achieved in the instant appeal by the

order of the Court of Appeal complained of. I hold that the order as amended is consistent with the evidence on the record of appeal. Issue three has no substance at all and I resolve it against the appellants.

In this appeal, there has been concurrent findings of fact made by both the trial Court and the Court of Appeal, as a result of which the appellants lost in both Courts. It has been held in many decisions of this Court that the Supreme Court will not interfere with the concurrent findings of fact made by the said lower Courts where there is sufficient evidence in support of such findings and where there is no substantial error apparent on the record such as miscarriage of justice or a violation of some principle of law or procedure. See Akeredolu v. Akinyemi (1989) 3 NWLR (part 108) 164; Ibado v. Enarofia (1980) 5-7 S. C. 42; Ogunbiyi v. Adewunmi (1988) 5 NWLR ((part 93) 217; Adigun v. Governor of Osun State (1995) 3 NWLR (part 385) 513. I have not seen any such reason in this appeal to justify or call for the interference with the findings of the trial Court as confirmed by the Court of Appeal.

All the issues having been resolved against the appellants in this appeal, their appeal fails and is hereby dismissed, with N10, 000.00 costs in favour of the respondents.

KUTIGI JSC

I read in advance the judgment by my learned brother kalgo, J.S., I agree with his reasoning and conclusions. There has been concurrent findings of fact by the lower courts which findings were amply supported by evidence. I cannot therefore interfere. The appeal fails and it is dismissed with N10,000.00 costs for the respondents.

OGUNDARE JSC

I have read in draft the judgment of my learned brother, kalgo, JCS just delivered. I agree with him that this appeal is bereft any merit.

On issue (1), I think the contention of the Appellants is nothing more than a storm in a teacup. It is clear on the evidence and the plans tendered by both sides that the land dubbed "government land" in Exhibit C & D is different, though adjacent, to the land in dispute. It is not the case of either side that the land in dispute was at any time given to the Government by the respondents. The case of Sanyaolu v. Coker (1983) 2 SC, 124 is, therefore, not apt. Nor is the case of Alhaji Raji Oduola v. Coker & Ors. (1981) 5 sc. 197 applicable; there was no reason to join government in this action.

On issue (2), it is settled law that the respondents, as plaintiffs, had the primary duty of proving, with certainty, the extent of the land they laid claim to. That is, the identity of the land must be proved with certainty before a declaration or an order of injunction could be made thereto. In the case on hand, there is concurrent finding of the two Courts below that the respondents discharged the burden on them and that the identity of the land in dispute is proved with certainty. I am not satisfied that the appellants have made a case justifying my interfering with this findings. The respondents prepared and tendered in evidence a plan testified that respondents showed him round the land and the features on it which he indicated in the plan. The 1st respondent who testified at the trial described the features on the land in line with Exhibit A (the Plan). Exhibit A was admitted in evidence without objection. The appellants have not shown that it is inaccurate.

I resolve issue (2) against the appellants.

On issue (3), I think the Court below rightly exercised its power under section 16 of the Court of Appeal Act to amend the declaration granted by the learned trial Judge. It was evident on the record that the area allegedly pledged to appellants' grandfather is outside the area in dispute edged "green" on Exhibit A. A part error was, therefore, made by the learned trial Judge when he referred to this area in the declaratory order he made as if it was part of the area edged "green". The Court below was right to correct this error which it had power to do pursuant to Order 3 rule 23 of the Court of Appeal Rules which provides:

"23. The Court shall have power to give any judgment or make

any order that ought to have been made, and to make such further or other order as the case may required including any order as to costs. These powers may be exercised by the Court, notwithstanding that the appellant may have asked that part only of a decision may be reversed or varied, and may also be exercised in favour of all or any of the respondents B or parties, although such respondents or parties may not have appealed from or complained of the decision."

and section 16 of the Court of Appeal Act.

See also: A.G. Bendel State v. Aideyan (1989) 4 NWLR 646, 680 SC. I C think it is in the overall interest of justice that the trial court's error be corrected as was done by the Court below.

I find no merit in this appeal which I dismiss with costs as assessed by my learned brother Kalgo JSC.

D

ONU JSC

The claims of the plaintiffs Respondents in the High Court of the defunct Bendel State (now Delta State) Kwale Judicial Division holden at E Kwale, as endorsed in the Writ of Summons filed on 9th April, 1982, were for:-

"1. A declaration that the plaintiffs are the owners in title of that piece or parcel of land known and called Odo-Ugili lying and situate F at Ase town within the jurisdiction of this Honourable Court and are entitled to the customary right of occupancy.

2. A claim of N10,000.00 (Ten thousand Naira) damages in that on or by early 1980 and continuing the 5th defendant without obtaining the consent or permission of the plaintiffs trespassed into the G plaintiffs' family land egged on by 1st - 4th defendants.

3. An injunction restraining the defendants' their privies, servants and/or agents from ever trespassing on in the plaintiffs' land and/or molesting injurious to the land or detrimental to the plaintiffs' interest in H and/or enjoyment and user of the land."

The plaintiffs/respondents (hereinafter referred to as the respondents) filed the action in a representative capacity for themselves

and on behalf of the Umu-Edeme-Opia family of Ase while the defendants/appellants (hereinafter called appellants) were later given leave by the trial court to defend the action in a representative capacity for themselves and on behalf of the Emiri family of Ase.

B After pleadings were duly filed and exchanged by the parties -
with the respondents further amending their Statement of Claim before
the case went to trial - the learned trial Judge (Bazunu, J.) entered judgment
in favour of the respondents. Being dissatisfied with the judgment the
appellants appealed to the Court of Appeal, Benin Division sitting in Benin
C city where Omo, J.C.A.(as he then was) delivering the lead judgment,
dismiss their appeal. Further aggrieved by this decision, the appellants
have appealed to this Court where they have filed a Notice and grounds
of Appeal containing seven grounds. The appellants formulated three
D issues for determination over lapping the seven grounds respectively which
the respondents appear clearly to have adopted in three similar but more
expansive issues, namely:-

1. *Whether the respondents are not estopped from claiming*
E *proprietary interest over the land in dispute in the face of their admission*
contained in EXHIBIT "C" that the land belongs to the Government.

2. *Whether the respondents had discharged the onus on them to*
show clearly the exact area of land in respect of which they sought
F *declaration of title and injunction.*

3. *Whether it was proper for the Court of Appeal to amend the*
Order of the trial Court in the circumstances of this matter.

My learned brother kalgo, JSC has, in his leading judgment with
which I entirely agree, so comprehensively set out the facts and considered
G the issues arising therein, that I only wish to expatiate briefly on a few
salient points that make me to arrive at the same conclusion that this
appeal lacks merit and so ought to be dismissed.

I propose herein to deal with the appellants' issues which, in my
H view, would be enough to dispose of the appeal. Suffice it to add that at
the hearing of the appeal on 12th January, 1999 in the absence of the
parties and their counsel, we took the briefs as having been argued and
adjourned same to today for judgment.

ISSUE NO.1.

In arguing this issue the appellant has sought to show that the whole land in dispute as can be deciphered from Exhibit 'C' was Government land. Thus, at page 7 of the appellant's claimed that "The foregoing shows clearly that the Respondents had no illusions of what B land they referred to as "Government land " for according to them, it was the land in dispute (underlining supplied by me).

I am of the firm view that the conclusion is incorrect and misconceived since 1st plaintiff, Dominic Imieyeh, said in answer to the cross-examination by the defence counsel that "the land in dispute is not C Government land" meaning that the piece of land was that given to Government as in Exhibit 'C'. When therefore the appellants' counsel criticized the learned trial Judge for failing to address his mind to the issue by the appellants and treated Exhibit 'C' as a document that confirmed D the titled of the respondents to the land in dispute or that the appellants misconceived issues and foisted their misconception of the facts and law on the trial Judge, he was wrong. The learned trial Judge did indeed advert his mind to the complaint of the appellants regarding Exhibit 'C' E and also to its legal effect. Indeed, he did exactly what was expected of him when he held, inter alia, as follows:-

"Learned Counsel for the Defendants also made reference to Exhibits "C" and "D" and submitted that they are against the interest of F the plaintiffs. With due respect to the learned counsel for the Defendants I do not agree with this submission. In my view the opposite is the case in view of the evidence of the plaintiffs, which I believe, that they were the ones who gave out the land concerned to the Government, and this is G also confirmed in Exhibit "C". Thus, if anyone is found encroaching on the land, it will be their duty to bring this fact to the knowledge of the Government."

The court below was similarly attacked on the same question of Exhibits 'C' and 'D' in which the appellants, inspite of the clear version of H the respondents' case, wrongly alleged that the respondents claimed in Exhibit 'C' that the land in dispute is government's land and a little later he said 'it is true I referred to the land as "Government land" and No "It is

true that I referred to the "land in dispute" as Government land. This is clearly and correctly borne out by Exhibit 'A' which showed what government land is as opposed to the land in dispute.

The Court below, however, put matters beyond peradventure B when it held as follows:-

"There is no merit whatsoever in issue 2 to which Ground 4 relates. It is the case of the respondents that they granted land to N.A. on which it built a maternity and dispensary. This land is verged brown in Exhibit 'A'. All the land surrounding it is claimed to belong to them by the respondent (sic). It is the contention of the appellants that Exhibit C and D which described the land trespassed as "Government land" relates to the whole land in dispute. The areas of the land in dispute trespassed upon are quite close enough to the land granted to the N.A. calling in aid D the Ndokwa Local Government Counsel in respect of trespass on adjoining land by means of Exhibit C and D is to be expected. Be it noted also that the area verged back in Exhibit A (this time within the land in dispute) was at some point in time (given) to N.A. to build an Attendant's building, E even though the house is now in disuse. I agree with the finding of the learned trial Judge that Exhibits C and D do not constitute any admission by the respondents against their interest. The answer to issue 2 therefore is that the respondents have shown a clear and existing proprietary interest F in the land in dispute which is consistent with and not taken away by EXHIBITS C and D. Ground 4 therefore fails."

The argument of the appellants that the respondents failed to proffer the explanation above then being offered by the court below, is to say the least, naive and most incorrect. Besides, the two lower courts having G dealt with this issue, it needed the appellants to show (and which they have been unable to do) that the two lower courts were wrong.

Furthermore, as it would appear that the real issue for determination in my view is: Have Exhibits C and D any legal force H behind them as to divest the ownership of the land in dispute (not the land given to Government) from the respondents to the appellants? I have examined Exhibits C and D myself. I see nothing in them which show that the land in dispute is Government's land. Indeed, as can be seen, the

evidence of P.W.1 was to the effect that the land in dispute between the parties as was brought to the Elders of Ase was the land in which there was the argument as to whether or not that land was given or sold to Igwe Emiri or it was pledged to him. Significantly enough, P.W.1 was never confronted with Exhibits C and D on the above modes of transfer of the land in dispute. That being so, assuming that Exhibits C and D contained what the appellants are contending, could they in all seriousness be awarded the land in dispute? In the first place, the appellants lacked the traditional history to back their claim vis a vis respondents' which was to the effect that their ancestor, Edeme-Opia founded the land in dispute including the portions granted to the Local Government Authority for their dispensary and maternity as well as the abodes of the family - all verged red in Exhibit A. Secondly, the appellants while admitting this, proffered in their pleadings that their father/grandfather, Igwe Emiri bought the land from Ifebure and another two daughters of one Omoni from the respondents' family but in their evidence the appellants, notably 3rd and 4th appellants either did not know how much the land was sold to their father or whether Ase people sell land as the trun of the century. Indeed, while both defendedants could not tell how much was the amount of the sale, 3rd appellant confessed under cross-examination that he did not know how his father acquired the land. PW2 had earlier in a unshaking evidence (evidence which DW3, the Regent of Ase, slater supported in examination in chief) asserted that according to Ase custom an indigene cannot transfer land to a stranger; that an indigene can transfer land to an indigene but not by way of sale; that indigene can give but not sell and that once land is given out it can never be taken back. The technical points now being canvassed by the appellants, even if successful could not enure to their (appellants) benefit for the land would revert to the owners if the "Government" shows no proprietary or legal interest in the land. See Waghregor v. Josiah Aghenghen (1974) 1 NMLR 270 at 274; Essi v. Itshekiri Communal Land Trustees (1961) WNLR 15 at 21; Ekpan H v. Uyo (1986) 3 NWLR 63 and Mayfair Property Co. v. Johnston (1896) 1 Ch. 308. But here, the Government had not queried the respondents for litigating over its land, if its land it is. For as a matter of fact, the

litigation did not pretend to involve their land. The court below rightly, in my view, upheld the decision of the trial court and as these constitute concurrent findings by the two courts below, I will be loath to disturb them unless exceptional circumstances are shown. See Karimu Olujinle v. Bello Adeagbo (1988) 4 SCNJ 1; Bakare v. The State (1987) 1 NWLR (part 52) 579; Efe v. The State (1976) 11 SC. at 75 and Emariwuwu v. Oviru (1977) 2 SC. 31 and Obi v. Owolabi (1990) 5 NWLR (part 153) 702.

The issue is resolved against the appellants.

C ISSUE NO.2.

This issue which relates to the identity of the land in dispute was argued next. The appellants' contention here is that the parties were not in agreement as to the identity of the area in dispute. Having regard to my consideration of issue one above, I need only advert to what the trial court said in its judgment on the issue, to enable me dispose of the argument therein, shortly. Said the learned trial Judge in his judgment:-

"The issues to be resolved in this case have, in my view, been narrowed down. This is in view of the fact that both the plaintiffs and the Defendants agreed that the land in dispute originally belonged to the family of the plaintiffs. The bone of contention between both parties is whether or not the land in dispute was given, pledged or sold to the forefathers of the Defendants."

Before arriving at the answer to what it regarded as the bone of contention between both parties, the learned trial Judge came to the following conclusions, to wit:

"From the evidence of these two witnesses, it is clear beyond all doubt that the custom of the Ase people forbids the sale of land but allows land to be used as a pledge or as a gift. Thus, the evidence of Defence witness 3 who is the Regent of the Ase people supports the case of the plaintiffs, see the case of Akinola v. Oluwo (1962) 1 All NLR (part 2) 224 at page 227. Furthermore, the plaintiffs have by traditional evidence traced their title to their ancestors and I believe their evidence. The Defendants on their own part are alleging that their forefather bought the land from a member of the plaintiffs' family. Thus, the onus is on the

Defendants to prove that Purchase. No attempt whatsoever was made by the Defendants to discharge this onus, (see the case of Adebanjo & Ors. v. Olowosago & Ors. (supra) and Onobruchere v. Esegine (supra).

I therefore hold that the area of land upon which the grandfather of the Defendant built his house got to his possession by way of pledge B and not by way of sale. I also hold that the areas built upon by the 1st Defendant and his brother John were given to them by the Plaintiffs' family by way of gift.

It was submitted by the learned counsel for the Defendants that C even if the court believes that the land in dispute was pledged to the ancestors of the Defendants the plaintiffs will not be entitled to judgment because there is no such claim before the court and reference was then made to the case of Ekpenyong v. Nyong (supra). I have read the authority D and I am of the view that the facts of that case are not the same as in the instant case; paragraphs 7 and 8 of the Further Amended Statement of Claim refers."

From the extracts above there was credible evidence from the respondents of their ownership of the entire tracts of land. The defendants/appellants E having on their own showing acknowledged the ownership thereof, the onus to prove otherwise was on them. See the case of G. A. Awomuti v. Alhaji Jimoh Salami & ors. (1978) 3 SC. 105, where this court laid the principle of law that the onus lies on the plaintiff to prove his title to land F and he succeeds on the strength of his own case but where the land in dispute has been accepted by both parties as being originally family land and either party claims title to that land through that family, the plaintiff only has to discharge the onus of proof of title in him; thereafter the onus G shifts to the defendants, who has claimed title to the land. Indeed, there is no static onus of proof in civil cases; the onus preponderates. See Section 136(1) and (2) as well as Section 138 of the Evidence Act, Cap. 112 Laws of the Federation of Nigeria, 1990. See also Ajide v. Kelani (1985) 3 NWLR (part 12) 248; Nigerian Maritime Services Ltd. v. Alhaji H Bello Afolabi (1978) 2 SC. 79 and Kate Enterprises Ltd. v. Daewoo Ltd (1985) 2 NWLR (part 5) 16.

In the case in hand, there was a large tract of land which was in

dispute and the trial court found it belonged to the respondents and the decision was confirmed by the court below without an appeal by the appellants on the concurrent findings of facts. Exhibit A, the respondents' plan of the land in dispute was found to be identical to Exhibit B, the appellants' plan. The Yellow portion on Exhibit A alleged to have been pledged to the appellants at the turn of the century by the respondents' family and depicted to be outside the land in dispute while the rest of the entire area was shown to belong to the respondents. As it was common ground that the alleged sale of the land was not proved by the appellants who acknowledged that the area verged Green was the piece in dispute, they (appellants) being in possession of the only areas given to them, the identity of that piece of land as between the parties no longer was in doubt and I so hold. See Baruwa v. Ogunshola (supra) and Awote v. Owodunni No. 2) (1987) 2 NWLR (part 57) 367.

ISSUE NO. 3

The question posed in this issue simply is whether it was proper for the court below to amend the order of the trial court in the circumstances.

In my consideration of the point taken hereof, it is necessary for me to refer firstly to the findings of the trial court that led to the order now being assailed; to wit:

- (a) that the land in dispute belongs to the family of the Plaintiffs;
- (b) that the Plaintiffs' family gave as a gift to the 1st Defendant and his brother John the areas upon which they built their houses;
- (c) that the area upon which the grandfather of the Defendants (the late Igwe Emiri) built his house was pledged to him by a member of Plaintiffs' family and
- (d) that the above three pieces of land do not extend to the whole land in dispute but are within it. (Underlining supplied)

The above views having undoubtedly been arrived at based on the following:-

- (i) the pleadings and Plan
- (ii) the evidence led in support which was unimpeachable
- (iii) the conclusion of the learned trial Judge by making primary

finding of fact that the "Land in dispute verged Green Belongs to the Plaintiffs Family" was attacked by the appellants that he does not know the land in dispute.

the holding by the learned trial Judge aforementioned three pieces of land do not extend to the whole land but within it, is therefore patently a slip. B I am of the firm view that it is a slip - a genuine one at that, because the learned trial Judge had accepted that the "land in dispute" belonged to the respondents' family; and patently the area in which the late grandfather of the appellants (the late Igwe Emiri) built his house is not within the land in dispute but outside it. C The court below was justified to invoke its undoubted powers - statutory and inherent - to correct what was obviously a slip. See Onajobi & Anor. v. Bello Olanipekun & ors. (1985) 2 SC. (part 2) 156 at 162-163 applied in Ezeoke v. Nwagbo (1988) 1 NWLR (part 72) 616 at 626; Makanjuola v. Oyelakin Balogun (1989) 3 NWLR D (part 108) 192; Taiwo Ayeni & ors. v. William Abiodun Sowemimo (1982) 5 SC. 60 at 74 citing Ukejianya v. Uchendu 13 WACA 45 at 46; Linus Onwuka v. R. Omogwe (1992) 3 NWLR (part 230) 393; Onyejekwe v. The State (1992) 3 NWLR (part 230) 444 and Obioha v. Ibero (1994) 1 E NWLR (part 322) 503 at 533-535; (1994) 1 NWLR 1, the latter which aptly summarizes what is perhaps the true state of the law. It is not every slip of the Court of Appeal, it ought to be born in mind, that will result in a judgment being overturned by the Supreme Court, albeit that this Court F possesses the inherent power to amend its clerical slips in order to avert any misapprehension that may arise therefrom. See Section 16 Court of Appeal Act, 1976. The Supreme Court equally has the inherent as well as statutory power under Section 22 of the Supreme Court Act, Cap. 424 to correct such a slip made by the courts below. See Asiyanbi v. Adeniji G (1967) 1 All NLR 82 and Attorney-General of Oyo State v. Fair Lakes Hotel & Anor. (1988) 2 SCNJ 1 at 12.

It is in the light of the foregoing that I entirely agree with the submission of the respondents that the attitude of the court below and its H action in correcting the slip is in accord with the spirit of Section 16 of the Court of Appeal Act, 1976 and are also in consonance with Order 1 Rules 20(1), (4) and (5) and Rule 21(1) and (2) of the Court of Appeal

Rules, 1981, as amended vide Onyejekwe v. The State (1992) 3 NWLR (part 230) 444; (1992) 9 LRCN 780 at 782.

The answer to this issue is accordingly rendered by me in the affirmative.

B For the reasons I have given and the more elaborate ones contained in the lead judgment of my learned brother Kalgo, JSC, a preview of which I was privileged to have before now, I make similar consequential orders inclusive of those as to costs contained in that judgment.

C

ACHIKE JSC

I have before now had the opportunity of reading, in draft, the judgment of my learned brother, kalgo, JSC. I am in agreement with him D that this appeal lacks merit.

There is apparent force in issue (1) but on closer examination the controversy on this issue is clearly hinged on a mix-up. A portion of land earlier occupied by the Government herein called "government land" E lies adjacent to the land in dispute. Although the two portions of land are reasonably proximate, nevertheless they are distinct as may be ascertained from the plans Exhibits C and D. The impression sought to be created by the appellants is that the respondents gave their land to the Government F and they turned round to claim a declaration of title in respect thereof. That is not correct; rather the evidence of 1st respondent, as well as those of other witnesses are in unison that the government land is separate from the land in dispute, and in any event, there was no sale of land to the Government. In the circumstances, the authorities of sanyaolu v coker G (1983) 3 SC. 124 and Oduala v coker (1981) 5 SC heavily relied on by the appellants could not avail them against the respondents claim for declaration of title nor does it raise the plea of nemo dat quod non habet against them.

H Issue (2) was concerned with the identity of the land in dispute. The respondents tendered Exhibit A, their survey-plan and the land in dispute was verged green. If the land in dispute is easily identifiable or is in fact very well-known to the parties, the court can make a declaration of

title to the disputed land even without the production of a plan. See Ibihuja v Dikko (1976) 6 SC 125, and in the instant case, a survey plan of the respondents was admitted in evidence without opposition. Furthermore, 1st respondent gave a detailed account in evidence of the features of the various portions of the content of Exhibit A which differentiated them from the land in dispute. B

On the third issue, it became obvious and evident that the trial court in granting the declaration sought by the respondents exceeded the limits of the land in dispute. Indeed, the declaration extended to the portion duly pledged to appellants' grandfather which was not in dispute between the parties. The error was glaring and the Court of Appeal could not shut its eyes to that obvious slip. To correct the error, the Court of Appeal evoked its general and expensive powers under section 16 of the Court of Appeal Act. 1976 which, inter alia, gives it D

"Full jurisdiction over the whole proceedings as if the proceedings have been instituted in the Court of Appeal as court of first instance and may re-hear the case in whole or in part....."

The amendment to the declaratory order of title to the land in dispute made by the Court of Appeal brought to focus the proper order the trial court would have made but for the slip. Its power under section 16 as shown above is a beneficent provision at the disposal of the Court of Appeal which empowers it to amend the judgment of a trial court rather than remit the said judgment to the trial court with a directive to make the desired amendment. F

It is for these reason and the fuller reasons contained in the leading judgment of my learned brother kalgo, JSC that I hold that the appeal is unmeritorious and I dismiss it with N10,000.00 costs in favour of the respondents. G