

SUPREME COURT OF NIGERIA,
23RD APRIL, 1999. SC. 29/1989
CORAM :- A. B. WALL, I. L. KUTIGI, A. I. IGUH, S. O.
UWAIFO, E. O. AYOOLA, JJSC.

AWA OKORIE UCHENDU & 2 ORS.

(For themselves and as representing 1ST SET OF APPELLANTS
the people of Abia in Ohafia Division of Abia State -
formerly part of East Central State)

AND

ELDER NNANA OBASI & ANOR.

(For themselves and as representing 2ND SET OF APPELLANTS
the people of Achara Ihie in Arochukwu
Division of Abia State)

AND

1. CHIEF EYO OGBONI & 2 ORS. RESPONDENTS

(For themselves and as representing the people
of Biakpan in Akamkpa Division of Cross
River State formerly part of South Eastern State)

ACTIONS - *Sheriffs and Civil Process Act -The provisions of ss. 97, 98 and 99 - Their combined effect - Is to make the writ in the instant case one for service outside the jurisdiction - Which must allow for thirty days for the defendant to appear.*

APPEALS - *Miscarriage of justice - Where the judgment of the Court of Appeal - Is not supported by the record of the trial court - And there was failure to consider some grounds of appeal - It resulted in a miscarriage of justice.*

JUDGMENTS - *Award - Of title - To the plaintiffs in respect of the land in dispute - Before considering the defence of the defendants - Is a sheer parody of justice.*

JUDGMENTS - Declaration of title - And an order for injunction - Could not be granted once it was held that both parties were in possession of the land in dispute - Unless the respondents in the present case can prove a better title.

JUDGMENTS - Declaration of title - And an order of injunction - Made in favour of the respondents - Where from the evidence the land in dispute belong to both Parties - Is erroneous.

JUDGMENTS - Miscarriage of justice - Where the judgment of the Court of Appeal - Is not supported by the record of the trial court - And there was failure to consider some grounds of appeal - It resulted in a miscarriage of justice.

JUDICIAL PRECEDENTS - Ratio decidendi - Of Skenconsult case - As regard s. 99 of the Sheriffs and Civil Process Act - An objection as to non-compliance with the provision - Must be taken before trial.

LAND LAW - Declaration of title - And an order for injunction - Could not be granted once it was held that both parties were in possession of the land in dispute - Unless the respondents in the present case can prove a better title.

LAND LAW - Declaration of title - And an order of injunction - Made in favour of the respondents - Where from the evidence the land in dispute belong to both Parties - Is erroneous.

PRACTICE & PROCEDURE - Interlocutory applications - Motion - Failure to state a particular rule of court or law under which a motion is brought - Will neither make the motion incompetent - Nor the order granted invalid.

PRACTICE & PROCEDURE - Service - Of processes - An amended original writ - By the addition or substitution of a party thereto - Ought

to be seen as the equivalent of a new writ issued against that party - And to be served according to the service rules.

PRACTICE & PROCEDURE - Joinder - Of parties - Failure to amend the writ before service on the parties joined - This is not an aspect of incompetence of a court process - Which will make the proceedings a nullity.

PRACTICE & PROCEDURE - Sheriffs and Civil Process Act -The provisions of ss. 97, 98 and 99 - Their combined effect - Is to make the writ in the instant case one for service outside the jurisdiction - Which must allow for thirty days for the defendant to appear.

STATUTES - Sheriffs and Civil Process Act -The provisions of ss. 97, 98 and 99 - Their combined effect - Is to make the writ in the instant case one for service outside the jurisdiction - Which must allow for thirty days for the defendant to appear.

STATUTES - Interpretation - Sheriffs and Civil Process Act - s. 99 thereof - The purpose of the provision.

STATUTES - Ratio decidendi - Of Skenconsult case - As regard s. 99 of the Sheriffs and Civil Process Act - An objection as to non-compliance with the provision - Must be taken before trial.

FACTS

In the High Court, Calabar, of former South Eastern State but now Cross River State the plaintiffs/respondents for themselves and as representing the people of Biakpan in Akamkpa Division of Cross River State claim for (a) a declaration that the land known as Okporokum as delineated in the plaintiffs' plan No. EAAC/489/LD is part of Biakpan communal land and (b) perpetual injunction against the defendants. The 1st set of defendants/appellants who were sued for themselves and as representing the people of Abia in Ohafia Division of Abia State were originally the only defendants.

As between them and the plaintiffs, issues were joined on the pleadings sometime in March, 1975 and hearing of the case by Koofrey then Ag Chief judge commenced on 2 July, 1975. But while the cross-examination of the P.W. 1 was continuing, the court ordered the joinder of the B 2nd set of defendants on 6 January 1976 upon an application made by them. The 2nd set of defendants/appellants were representing the people of Achara Ihie in Arochukwu Division of Abia State. After the joinder, the writ of summons and the statement of claim was not amended. Even C the statement of defence filed by the 2nd set of defendants in March, 1976 did not properly reflect them as party to the suit as such. The title of the suit remained as it was before the joinder. Also no notice under Order 4. r.5(1) of the High Court Rules (cap 51) Laws of Cross River State, 1979 was issued after the order of joinder was made.

D On the basis of the issues joined in the circumstances of the irregularities, and the evidence led, the learned chief judge gave judgment for the respondents. Dissatisfied, both sets of defendants appealed to the Court of Appeal Enugu Division, which dismissed their appeals. Further E dissatisfied they have now appealed to the Supreme Court. The first set of defendants/appellants raised five issues but their appeal was determined on three issues, while the 2nd set of defendants/appellants raised four issues for their own appeal.

F **ISSUES FOR DETERMINATION**

"Whether the Court of Appeal was in error in not holding that the order of joinder of the 5th and 6th defendants made by the trial Judge was wrong, and that in consequence the whole proceedings were a nullity in law."

G "(4) Whether the Court of Appeal was not in error when it affirmed the decision of the learned trial Judge in which a declaration of title to the land in dispute was made in favour of the plaintiffs/respondents.

H "(5) Whether the Court of Appeal was not in error when it affirmed the decision of the learned trial Judge by which he made an order of injunction against the appellants."

"(a) Did the court below perform its statutory function of determining the appeal of the 2nd set of appellants therein on all the

grounds of appeal canvassed by them?

(b) If no, did the default in failing to so consider all the grounds of appeal occasion a serious miscarriage of justice?

(c) Was the interpretation which the court below placed on the effect of s. 99 of the Sheriffs and Civil Process Act on the proceedings in the trial court as expounded by this court in *Skenconsult (Nigeria) Limited v. Godwin Ukey* (1981) 1 S.C. 6 correct in law? B

(d) If the answers to (a) and (b) are in the negative and affirmative respectively, was the court below right in law in affirming the judgment of the trial court having regard to the complaints of the 2nd set of appellants herein against the said judgment particularly the failure of the trial court to give effect to the admissions of the plaintiffs in favour of Achara Ihie? C

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

Practice and procedure - Interlocutory applications

1. It is true that a particular rule of court or law under which a motion is brought is generally stated on the motion paper. But failure to do this will neither make the motion incompetent nor the order granted upon the motion invalid, so long as there exists a rule or law which can back up the motion. This is elementary sense of justice which needs no authority. But see *Onea v Egbuchi* (1970-71) 1 ECSLR 80. (p. 732 B) E
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Practice and Procedure - Service of processes

2. It is, I think, a rule of first principles, that an action commenced by writ of summons or other process must be served on the defendant. In the same way, and amended original writ by the addition or substitution of a party thereto ought to be seen as the equivalent of a new writ issued against that party, and therefore the plaintiff has to serve the amended writ according to service rules or as may be directed by the court. The decision of the House of Lords in *Kettleman v Hansel Properties Ltd* (1987) AC 189; (1988) 1 ALL ER 38, though given in the interpretation of RSC Ord. 15, rr.6,7 & 8 (4), is very instructive in principle. There G
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may not, in certain rules of court, be an express provision for re-serving a defendant who had already been served with a writ before it was amended as a result of a plaintiff having been added, or substituted or struck out by an order of court. But it has been held that as a matter of
 B prudence or practice the court will see that the amended writ is served personally or by substituted service if there is any possibility of injustice being done to the defendant: see Jamaica Railway Co. v Colonial Bank (1905) 1 Ch. 677. (p. 733 D)

C ***Practice and Procedure - Joinder of Parties***

3. The foregoing underlines the requirement to amend and serve a writ (as well as statement of claim) where there has been a joinder of parties. There is no direct rule in the High Court Rules of Cross River State in this
 D regard. However, it would appear to me that a broad interpretation of Order 4, r.5(1) already reproduced above would cover the requirement to amend and serve a writ in a situation like this case. In the present case, the writ was not duly amended although the original writ was served
 E on the 2nd set of appellants. Although I must not be seen as condoning the tardy procedure followed and the processes filed after the joinder of parties in the present case, I do not see, on the whole, how the 1st set of appellants were prejudiced by the failure to amend the writ before service
 F on the 2nd set of appellants. The case was contested to finality at the trial court without even a whimper from any one that some 'fundamental' irregularity had occurred. This is not an aspect of incompetence of a court process which will affect the proceedings ab initio and make them a nullity. The issue raised thereby is without merit and I answer it in the
 G negative. (p. 733 H)

Land Law - Declaration of title

4. Once it was held that both parties were in possession of the land in
 H dispute, the respondents could not get a declaration of title and an order of injunction unless they were able to prove that better title to the land was in them. It must be remembered that it was the respondents who sought the reliefs of title and injunction in respect of the land in dispute

and who bore the burden of proving their entitlement to those reliefs: see Amakor v. Obiefuna (1974) 1 All NLR 119 at 126. To succeed in trespass they must prove exclusive possession of the land: see Ogunbiyi v. Adewunmi (1988) 19 NSCC 268 at 272; (1988) 5 NWLR (pt. 93) 215 at 221. It was therefore an error in law for the learned trial judge to have given judgment to the respondents in the face of that finding he made. Accordingly, the Court of Appeal was wrong to have upheld the judgment. (p. 737 B)

Judgments - Award of title

5. The grounds of appeal indicated in the brief which were not considered by the court below were grounds 3, 10 and 11. In my view, they were substantial grounds. The said ground 3 simply reads: "The learned trial judge erred in law in awarding title to the plaintiffs before considering the case of the 5th and 6th defendants." The learned judge gave the impression that the 2nd set of appellants had a claim (or counterclaim) in the proceedings. That is not so. They were merely defending the respondents' claim. It can therefore be clearly appreciated that the learned judge having given the said respondents judgment in respect of the land in dispute, it would present, unfortunately, as sheer parody of justice to proceed thereafter to consider the defence of the 2nd set of appellants. That would serve no purpose at all. That was what happened in Odofin v Mogaji (1978) 11 NSCC 275 which at pp.278-279 was deprecated by this court. (p. 738 C)

Judgments - Declaration of title

6. The next is the said ground 10 which, without the particulars, reads: "The court below misdirected itself in law and on the facts in awarding title to the entire land in dispute to the plaintiffs against the 5th and 6th defendants of Achara contrary to the evidence in the case tendered on behalf of the plaintiffs." The most crucial of the said evidence was given by the 3rd plaintiff who testified as P.W. 1. He said in cross-examination: "The land in dispute belongs to Achara and Biakpan. Biakpan and Achara have a boundary within the land in dispute. That boundary starts from

the Ngwu tree and runs to a stream where (sic) we call 'Ofong'." In re-examination, he said: "Okporokum is the name of the land in dispute. Achara people have land within the land called Okporokum." By way of a reminder, Achara people are the 2nd set of appellants while Biakpan people are the respondents (plaintiffs). With this evidence, there could be no basis for awarding a declaration of title to the land in dispute and an order of injunction in favour of the respondents. (739 A)

Judgments - Miscarriage of justice

7. A careful study of the judgment of the lower court does not seem to me to be supported by the record of the trial court. Also, if the lower court had considered grounds 3, 10 and 11 of the appeal of the 2nd set of appellants, I have no doubt that it would have affected the result of the appeal. I will accordingly answer questions (a), (b) and (d) as follows: Question (a), no; question (b), yes and question (d), no. The appeal of the 2nd set of appellants must be allowed. (p. 740 B)

Statutes - Sheriffs and Civil Process Act

8. Section 99 of the said Act provides that:

"99. The period specified in a Writ of Summons for service under this part as the period within which a defendant is required to answer before the court to the writ of summons shall be not less than thirty days after service of the writ has been effected, or if a longer period is prescribed by the rules of the court within which the writ of summons is issued, not less than that longer period."

When this provision is read along with ss. 97 and 98 of the Act, which I need not reproduce, it will be clear that the writ in question is one for service outside the jurisdiction. A writ so served must allow for at least thirty days for the defendant to answer to it before the court. (p. 740 H)

Statutes - Interpretation

9. Now, the whole purpose of section 99 is, for obvious reasons, to afford a defendant outside the jurisdiction sufficient time (which the law makers in their wisdom considered to be 30 days) to arrange to answer

to the writ before the court from the date it was served on him as a matter of mere convenience so that no order may be made behind his back within that period. If for any cause (mistake or oversight of the provision of s. 99, maybe) less than thirty days is endorsed on the writ, but the defendant duly appeared and participated in the proceedings, the proceedings cannot be regarded as a nullity simply because the defendant had less than thirty days to answer to the writ. The mere non-compliance with s. 99 does not create a jinx on the proceedings that follow. (p.741C)

Statutes - The ratio decidendi

10. The ratio decidendi of Skenconsult case as regards s. 99 has been fully explained by this court in subsequent cases. To begin with, an objection as to non-compliance with s. 99 of the Act must be taken before trial. It seems to me that when a defendant has truly submitted to jurisdiction or, worse still, has taken part in proceedings in respect of which he complains later that s. 99 of the Sheriffs and Civil Process Act was not complied with, he cannot be heard to say either that the writ was defective for non-compliance or that the proceedings were a nullity in reliance on ss. 97-99 of the Act or the decision in Skenconsult. The 2nd set of appellants fall within this having fully participated in the proceedings after the order of joinder. (pp. 741F/742 F)

NOTABLE POINTS OF INTEREST

UWAIFO JSC

1. How to plead traditional history as a root of title

It is clear from the statement of claim that the respondents did not plead traditional history as their root of title. To so plead there must be averments as to the devolution of the land right from the original founder to the present respondents without leaving any unexplained or unexplainable gaps in the line of successors. This court has established this principle of law in several cases notable among which is Owoade v. Omitola (1988) 2 NWLR (pt. 77) 413 at 424 - 425 and needs no restatement. The Court of Appeal has since been going by that principle. The insufficient averment as to the founding of the land in dispute in this case is in para.

7 of the statement of claim and it reads: "The people of Biakpan are descendants of the first son (Akpan) of Ubaghara, the common ancestor of Ubaghara clan which consists mainly of Biakpan and Ikun groups. Biakpan means in English, descendants of the first son. At the time Biakpan was founded at its present site there was no place known as Abia." This does not show the devolution of the land and so the respondents did not, and could not, found the claim on traditional history. The root of title relied on by the respondents is therefore exclusive possession from time immemorial.

C (p. 735 B)

2. *Grounds of appeal concerned with issues of facts - Need to obtain leave*

D The appeal of the 1st set of appellants will only be considered within a fairly narrow compass. This is because all the arguments as to facts are not supported by competent grounds of appeal since no leave was obtained in respect of those grounds. Learned counsel for the respondents raised this points in the brief of argument of the respondents and I think he is justified. This Court has on a number of occasions made pronouncements on this issue. In Akpasubi v. Umweni (1982) 11 SC. 132 at 139-140; (1982) 13 NSCC 438 at 440, Eso JSC observed:

F *"Now, it seems to me that the ground of appeal argued by the appellant's counsel is one of fact. No leave was given to the appellant either by the Federal Court of Appeal or this court to file a ground of fact. The appellate jurisdiction of this court on question of fact only exists where there has been leave of the Federal Court of Appeal or of this court. No appeal on question of fact lies to this court without such leave. In other words, where as it would appear to me in this case, question of fact has been brought before this court without leave, the court has no jurisdiction."*

H Section 213(3) of the Constitution of the Federal Republic of Nigeria, 1979, was then cited as authority. Similarly, in Ige v. Olunloyo (1984) 1 SCNLR 158 at 184; (1984) 15 NSCC 102 at 122, Nnamani JSC said inter alia: "In ground 3 of the grounds of appeal the appellant was concerned

with issues of facts argument on issue of facts was not open to the appellant since he did not obtain leave of this court to argue issue of facts. See section 213(3) of the Constitution of the Federal Republic of Nigeria, 1979." (p. 736 A)

3. *How to resolve conflict in traditional evidence*

When considering submission of the inadequacies in the evidence as to title and how the learned trial judge dealt with them, the learned Justice of the Court of Appeal, Aseme JCA who read the leading judgment, said: "The submission under this head of issues for determination overlooked the impeccable evaluation of the evidence of the plaintiffs and indeed also that of the defendants. The learned trial judge properly reviewed the evidence of parties separately before coming to his conclusions." The learned Justice even considered that there was conflicting traditional evidence by the three communities which he held the learned trial judge resolved satisfactorily by 'a straight finding of fact' as to whose evidence he believed. I have earlier pointed out that there was no traditional history pleaded in the form demanded by law. Even if such history had been pleaded by each of the three communities and traditional evidence conflicted one with the other, that could not be resolved by 'a straight finding of fact' as to which to believe. The well-known rule in Kojo II v. Bonsie (1957) 1 WLR 1223 would have had to be closely applied. (p. 739 F)

IGUHJSC

4. *Onus of proof in a case for declaration of title*

It is a basic principle of law that the onus of proof lies on the plaintiffs to satisfy the court that they are entitled on the evidence brought by them to a declaration of title. In this regard, they must rely on the strength of their own case and not on the weakness of the defendants' case and, if this onus is not discharged, the proper judgment will be for the defendants. See Kodilinye v. Mbanefo Odu 2 W.A.C.A. 336 at 337. Frempong v. Brempong 14 W.A.C.A 13. It must, however, be conceded that this rule does not apply where the defendant's case itself supports that of the

plaintiff and contains evidence on which the plaintiff is entitled to rely. See Josiah Akinola and another v. Fatoyinbo Oluwo and others (1962) 1 All N.L.R. (part 2) 224, Nwagbogu v. Chief Onoli Ibeziako (1972) 1 All N.L.R. (part 2) 200, Oduaran v. Asara (1972) 1 All N.L.R. (part 2) 137.

B The present case, however, does not belong to the category where the defendants' case, by any means, lends support to the case of the plaintiffs. In my view, the above observation of the learned trial Judge amounts to a definite finding that the plaintiffs were not in exclusive possession of the land in dispute. The plaintiffs' case having been founded substantially on numerous and exclusive acts of possession, the finding of the trial court that they were not in such exclusive possession of the land they claimed disentitled them to the declaration of title and the injunction sought. (p. 744 D)

D

AYOOLA JSC

5. How to distinguish ground of law and ground of fact

In the final analysis, the issue must remain: whether the trial judge was not wrong in law in giving a declaration of title to a plaintiff who had failed to prove exclusive possession when his case was based on inference of ownership to be drawn from such possession, and whether the Court of Appeal was not wrong in confirming the judgment of the trial court. This is purely a matter of law. A passage from the judgment of this court in Ogbechie & Ors v. Onochie & Ors (1986) 1 NSCC 443, 447 is apt. There, this court said, per Eso, JSC.

"Where therefore a trial court fails to apply the facts which it has found, correctly to the circumstances of the case before it, and there is an appeal to a court of appeal which alleges a misdirection in the exercise of the application by the trial court, the ground of appeal alleging the misdirection is a ground of law and not of fact. When the Court of Appeal finds such application to be wrong and decides to make its own findings such findings made by the Court of Appeal are issues of fact and not law. Where the Court of Appeal interferes in such case and there is a further appeal to a higher court of appeal on the application of the facts, the ground of appeal alleging such misdirection by the lower court of

appeal is a ground of law and not of fact. It is only where there is an appeal against the finding made by the Court of Appeal in this exercise that issues of fact arise and leave will be required."

The present case is a case in which the court of trial had failed to apply the facts which it had found and the Court of Appeal had confirmed the decision of the court of trial. The issue raised is, therefore, of the error of both courts in law and no leave is required. (p. 748 H)

6. *The test for determining the fairness of a judgment*

Where there are two or more sets of defendants, the plaintiff, in order to obtain a declaration of title, must show that he is entitled to a declaration of title against all the defendants. The approach of the trial court in first awarding a declaration to the respondents before considering the case of the second set of appellants, as if he could at the end of that exercise have held that the respondents had no title against the second set of appellants, was entirely erroneous and unacceptable. Although it is now accepted that there is no uniform method of writing judgments, where it is manifest on the face of the judgment that conclusion on material issues in the case may have been reached before a consideration of the totality of the case of any of the parties and an evaluation of the entire evidence, as may be relevant, the fairness of the proceedings must be suspect. The test, in my opinion, is whether an objective reader of the judgment would be able to come to the conclusion that, as far as evaluation of the evidence and consideration of the respective cases are concerned, the judicial scale has been evenly weighted. See Duru v. Nwosu (1989) 4 NWLR (part 113) 24. In view of the evidence on record, of admission which enures to the benefit of the appellants, and the inherent weakness of the respondents' case as shown by the findings made by the trial judge, it is evident that, notwithstanding the wrong approach of the trial judge, the proper verdict should have been one of dismissal of the respondents' case. (p. 750 G)

REPRESENTATION

Tani A. Molajo Esq. for the 1st set of appellants

Chief Chidube Ezebilo for the 2nd set of appellants

N.A. Nta Esq., with Mba E. Ukwani Esq. for the respondents

CASES REFERRED TO

- B *Onea v Egbuchi* (1970-71) 1 ECCLR 80
Kettleman v Hansel Properties Ltd (1987) AC 189; (1988) 1 ALL ER 38
Jamaica Railway Co. v Colonial Bank (1905) 1 Ch. 677
Adeleke v Awoliyi (1962) 1 ALL NLR 260
C *Owoade v. Omitola* (1988) 2 NWLR (pt. 77) 413 at 424 - 425
Akpasubi v. Umweni (1982) 11 SC. 132 at 139-140; (1982) 13 NSCC 438 at 440
Amakor v. Obiefuna (1974) 1 All NLR 119 at 126
Ogunbiyi v. Adewunmi (1988) 19 NSCC 268 at 272; (1988) 5 NWLR (pt. 93) 215 at 221
D *Kojo II v. Bonsie* (1957) 1 WLR 1223
Skenconsult (Nigeria) Ltd. v. Ukey (1981) 1 SC. 6; (1981) 12 NSCC

E BOOKS REFERRED TO

Aguda, Practice and Procedure, 2nd edn,
paras. 12.30 to 12.31.

F STATUTES & RULES REFERRED TO

High Court Rules, cap.51 Laws of Cross River State 1979, 0.4 r.5(1)
Constitution of the Federal Republic of Nigeria, 1979, S. 213(3).
Sheriffs and Civil Process Act, SS 97, 98 and 99

G LEAD JUDGMENT BY UWAIFO JSC

These appeals come from a decision of the Court of Appeal Enugu Division given on 7 February, 1987. They are in respect of a land dispute between three villages which, in a primary context, may be regarded as border villages of two States. The plaintiffs of Biakpan in Akamkpa Division of the erstwhile South Eastern State (now more particularly of the Cross River State) claim the land to be theirs, naming it Okporokum. The 1st set of defendants of Abia village in Ohafia Division of the erst-

while East Central State (now particularly of Abia State formerly part of Imo State) call the land Aliedo while the 2nd set of defendants of Achara Ihie village in Arochukwu Division also now of Abia State call the land Ugwu Ofo. The claim brought on 12 October, 1973 in the High Court, Calabar of now Cross River State was for (a) a declaration that the land known as Okporokum as delineated in the plaintiffs' plan No. EAAC/489/LD is part of Biakpan communal land and (b) perpetual injunction to restrain the defendants by themselves, their servants, agents or assigns from alienating, dealing with or doing anything in the said Okporokum inconsistent with the communal ownership of Biakpan of it. The 1st set of defendants were originally the only defendants. As between them and the plaintiffs, issues were joined on the pleadings sometime in March, 1975 and hearing of the case by Kooffrey, then Ag. Chief Judge, commenced on 2 July, 1975.

But while the cross-examination of the first of the plaintiffs' witnesses (P.W1) was continuing, the court ordered the joinder of the 2nd set of defendants on 6 January 1976 upon an application made by them. There is nothing to show that the writ of summons was accordingly amended, nor was the statement of claim. Even the statement of defence filed by the 2nd set of defendants in March 1976 did not properly reflect them as party to the suit as such. The parties constituting the title of the suit were simply stated thus:

Chief Eyo Ogboni & 2 Ors..... Plaintiffs (for themselves and as representing the people of Biakpan in Akamkpa Division of East Central State).

AND

Chief Awa Aja & 3 OrsDefendants (for themselves and as representing the people of Achara Ihie in Arochukwu Division of East Central State)

It will be observed, first, that the plaintiffs were erroneously described as people of Biakpan in Akamkpa Division of East Central State instead of South Eastern State. Second, the defendants on record stated in the statement of defence are simply those representing the 1st set of defendants of Abia in Ohafia Division which, in that sense, exclude the

2nd set of defendants themselves. Third, over and above that, those inadequately stated on record as the defendants were erroneously described as people of Achara Ihie in Arochukwu Division whereas they are Abia people of Ohafia Division.

B All the above-noted irregularities were not formally corrected. There was indeed throughout no amended writ of summons. As to the other irregularities, it was only in some subsequent motions that the representative capacities of the parties were indicated. Even so, all the parties on record were not specifically named. It would appear also that after the order of joinder was made no notice under Order 4, r. 5(1) of the High Court Rules (Cap 51) Laws of Cross River State, 1979 was issued. Arguments in respect of some aspects of the defaults in this joinder procedure have been canvassed by the 1st set of defendants (to
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D who I shall hereafter refer as the 1st set of appellants) on their appeal. The 2nd set of defendants shall be referred to as the 2nd set of appellants while the plaintiffs shall be the respondents. On the basis of the issues joined in the circumstances of the irregularities already identified, and the
E evidence led, the learned Chief Judge gave judgment for the respondents on 26 November, 1979.

The 1st set of appellants through their counsel, Mr. Kehinde Sofola SAN, extensively canvassed at the Court of Appeal the inadequacies in the evidence relied on by the respondents, the supported findings of fact
F by the learned trial Chief Judge and misdirection as to the burden of proof. On the other hand, the 2nd set of appellants represented by Mr. A.N. Anyamene SAN raised issues of some irregularities in the proceedings at the trial court, but more particularly attention was drawn to the failure
G of the respondents to prove title either by traditional evidence or by acts of ownership extending over a sufficient length of time numerous and positive enough to warrant the inference of exclusive ownership. The learned trial Chief Judge was criticized for (1) ignoring the clear evidence
H coming from the respondents that the land belonged jointly to them and the 2nd set of appellants, (2) making perverse findings of fact and (3) giving Judgment for the respondents before considering the case of the 2nd set of appellants and making findings thereon as faulted in Odofin v

Mogaji (1978) 4 SC. 91.

The Court of Appeal in its judgment of 9 February, 1987 dismissed the appeals. On appeal against that judgment the 1st set of appellants raised five issues for determination in their brief of argument. But I think at the hearing of the appeal, the main focus was on the pleadings, B the evidence and the manner in which the learned trial Chief Judge dealt with them. It was the contention of learned counsel Mr. Molajo who appeared for the 1st set of appellants in this Court in his oral presentation of the appeal that the learned trial Chief Judge failed in his primary duty to properly evaluate the evidence and that in addition to that he made a C finding which ought to lead to the dismissal of the respondents' case: the finding in effect being that one party showed evidence of positive and numerous acts of possession on the land in dispute and the other party showed similar evidence also on the land. It was therefore argued that D going by the strength of the evidence and also the nature of the said finding made, the learned trial Chief Judge had no justification to give judgment for the respondents. Consequently, that the Court of Appeal was in error to have affirmed that judgment. E

The last two of the five issues raised are made the basis of the argument in question and I think they are indeed sufficient to dispose of the first appeal. They read as follows:

"(4) Whether the Court of Appeal was not in error when it affirmed F the decision of the learned trial Judge in which a declaration of title to the land in dispute was made in favour of the plaintiffs'/respondents.

(5) Whether the Court of Appeal was not in error when it affirmed G the decision of the learned trial Judge by which he made an order of injunction on against the appellants."

However, it will be recalled that I adverted to some irregularities in the processes filed following the order for the joinder of the 2nd set of appellants as defendants. Having regard to that circumstance I consider it might be worth dealing briefly with issue 2 which reads: "Whether the H Court of Appeal was in error in not holding that the order of joinder of the 5th and 6th defendants made by the trial Judge was wrong, and that in consequence the whole proceedings were a nullity in law." I need to

formally say that issues 1 and 3 are, in my view, of no moment. In whatever way they are resolved that will not remotely affect the result of this appeal. I find no cause therefore to set them out, or to place on record any possible resolution of them, on this appeal.

B Let me dispose of issue 2 first. The first aspect of the argument of the 1st set of appellants on this issue goes like this: the motion paper upon which the prayer for joinder of parties was sought did not indicate which rule of court was relied on. That obviously, in my view, is not a strong point. **It is true that a particular rule of court or law under which a motion is brought is generally stated on the motion paper. But failure to do this will neither make the motion incompetent nor the order granted upon the motion invalid, so long as there exists a rule or law which can back up the motion. This is elementary sense of justice which needs no authority. But see Onea v Egbuchi (1970-71) 1 ECSLR 80.**

Next it was argued that the learned trial Chief Judge did not comply with Order 4, r.5(1) of the High Court Rules of Cross River State, 1979.

E The said rule provides:

"5(1) If it shall appear to the court, at or before the hearing of a suit, that all the persons who may be entitled to or who claim some share or interest in the subject-matter of the suit, or who may be likely to be affected by the result, have not been made parties, the court may adjourn the hearing of the suit to a future day, to be fixed by the court, and direct that such persons shall be made either plaintiffs or defendants in the suit, as the case may be. In such case the court shall issue a notice to such persons, which shall be served in the manner as the court thinks fit to direct; and on proof of the due service of such notices, the persons so served, whether he shall have appeared or not, shall be bound by all proceedings in the cause: Provided that a person so served, and failing to appear within the time limited by the notice for his appearance, may, at any time before judgment in the suit, apply to the court for leave to appear, and such court shall think fit."

The submission was that a notice should have been issued to such parties whether or not they were in court when the Order was made; and that

that not having been done, the Order for joinder was defective.

I feel unable, with due respect, to accept that contention. I think such a notice will primarily be needful if the parties concerned were not in court. If they were, the time within which to appear would have been recorded and read out by the court. But I think what ought to be insisted B on is that the writ of summons and statement of claim be amended pursuant to the Order of joinder of parties, and served, unless there is any rule which enable the court to dispense with that as it was in the case of Odadhe v. Okujeni (1973) 11 S.C. 343 at 351 - 352; (1973) 8 NSCC C 537 at 540-541. Otherwise, the amended writ should ordinarily be served since "*the writ as amended becomes for this purpose the original commencement of the action....*": see Sneade v Wotherton Barytes and Lead Mining Co. (1940) 1 K.B. 295 at 297 per Collins MR.

It is, I think, a rule of first principles, that an action D commenced by writ of summons or other process must be served on the defendant. In the same way, and amended original writ by the addition or substitution of a party thereto ought to be seen as E the equivalent of a new writ issued against that party, and thereto the plaintiff has to serve the amended writ according to service rules or as may be directed by the court. The decision of the House of Lords in Kettleman v Hansel Properties Ltd (1987) AC 189; (1988) 1 ALL ER 38, though given in the interpretation of RSC Ord. 15, F rr.6,7 & 8 (4), is very instructive in principle. There may not, in certain rules of court, be an express provision for re-serving a defendant who had already been served with a writ before it was amended as a result of a plaintiff having been added, or substituted G or struck out by an order of court. But it has been held that as a matter of prudence or practice the court will see that the amended writ is served personally or by substituted service if there is any possibility of injustice being done to the defendant: see Jamaica Railway Co. v Colonial Bank (1905) 1 Ch. 677. H

The foregoing underlines the requirement to amend and serve a writ (as well as statement of claim) where there has been a joinder of parties. There is no direct rule in the High Court Rules of

Cross River State in this regard. However, it would appear to me that a broad interpretation of Order 4, r.5(1) already reproduced above would cover the requirement to amend and serve a writ in a situation like this case. In the present case, the writ was not duly amended although the original writ was served on the 2nd set of appellants. The 1st set of appellants argued finally on this point thus: "If a writ was not served, then the proceedings thereafter became null and void and there is no evidence that this procedure was followed. It would appear, however, that the 5th and 6th defendants filed a statement of defence on March 1, 1976. There is no evidence that the plaintiffs served any amended writ on the appellants nor is there evidence that the second set of defendants were served with the amended writ which the plaintiffs in law bound to do. See Bello Adeleke v Falode Awoliyi & Anor. (1962) 1 ALL NLR 260." I observe that this same case was cited in Practice and Procedure by Aguda 2nd edn. para. 12.31 in support of amending and serving a writ when there is a joinder of parties. I am afraid I cannot find that that case so directly decided after a careful reading of it. But certainly I endorse the comments made in paras. 12.30 to 12.31 which I reproduce inter alia:

12.30 *"The party wanting a joinder makes an application to the Court supported by an affidavit. Since such an application is one in a pending cause, all the existing parties to the action are entitled eo ipso to be served with the notice of the proposed joinder However, it is not necessary to give to the party to be joined notice of such an application*

12.31 *If the application is granted, the Court will issue a notice to the persons joined which will be served in the manner provided for the service of summons or in any other manner as the Court may direct. The writ of summons is amended accordingly and the plaintiff, unless otherwise ordered by the Court, files a copy of the amended writ and serves the new defendant with the writ as amended."*

Although I must not be seen as condoning the tardy procedure followed and the processes filed after the joinder of parties in the present case, I do not see, on the whole, how the 1st set of appel-

lants were prejudiced by the failure to amend the writ before service on the 2nd set of appellants. The case was contested to finality at the trial court without even a whimper from any one that some 'fundamental' irregularity had occurred. This is not an aspect of incompetence of a court process which will affect the proceedings ab initio and make them a nullity. The issue raised thereby is without merit and I answer it in the negative.

Issues 4 and 5 will be considered together. It is clear from the statement of claim that the respondents did not plead traditional history as their root of title. To so plead there must be averments as to the devolution of the land right from the original founder to the present respondents without leaving any unexplained or unexplainable gaps in the line of successors. This court has established this principle of law in several cases notable among which is Owoade v. Omitola (1988) 2 NWLR (pt. 77) 413 at 424 - 425 and needs no restatement. The Court of Appeal has since been going by that principle. The insufficient averment as to the founding of the land in dispute in this case is in para. 7 of the statement of claim and it reads: "The people of Biakpan are descendants of the first son (Akpan) of Ubaghara, the common ancestor of Ubaghara clan which consists mainly of Biakpan and Ikun groups. Biakpan means in English, descendants of the first son. At the time Biakpan was founded at its present site there was no place known as Abia." This does not show the devolution of the land and so the respondents did not, and could not, found the claim on traditional history.

The root of title relied on by the respondents is therefore exclusive possession from time immemorial. This is pleaded in paras. 15 and 16 as follows:

"15. The land in dispute has been in the exclusive possession of the plaintiffs from time immemorial. Plaintiffs have exercised maximum acts of ownership including cultivating the land in dispute, tapping raffia wine palm, cutting sticks for building, fishing in the streams and ponds, planting of economic trees on the land in dispute.

16. Plaintiffs' people have a number of plantations on the land in dispute. These include plantations of Offiong Ubio, Ekpezu Mbra,

Chief Mbaogar Ekpe, Ase Okara, Chief Uno Mba and others. Plaintiffs also have large cassava and other farms on the land in dispute."

The appeal of the 1st set of appellants will only be considered within a fairly narrow compass. This is because all the arguments as to facts are not supported by competent grounds of appeal since no leave was obtained in respect of those grounds. Learned counsel for the respondents raised this points in the brief of argument of the respondents and I think he is justified. This Court has on a number of occasions made pronouncements on this issue. In Akpasubi v. Umweni (1982) 11 SC. 132 at 139-140; (1982) 13 NSCC 438 at 440, Eso JSC observed:

"Now, it seems to me that the ground of appeal argued by the appellant's counsel is one of fact. No leave was given to the appellant either by the Federal Court of Appeal or this court to file a ground of fact. The appellate jurisdiction of this court on question of fact only exists where there has been leave of the Federal Court of Appeal or of this court. No appeal on question of fact lies to this court without such leave. In other words, where as it would appear to me in this case, a question of fact has been brought before this court without leave, the court has no jurisdiction."

Section 213(3) of the Constitution of the Federal Republic of Nigeria, 1979, was then cited as authority. Similarly, in Ige v. Olunloyo (1984) 1 SCNLR 158 at 184; (1984) 15 NSCC 102 at 122, Nnamani JSC said inter alia: "In ground 3 of the grounds of appeal the appellant was concerned with issues of facts argument on issue of facts was not open to the appellant since he did not obtain leave of this court to argue issue of facts. See section 213(3) of the Constitution of the Federal Republic of Nigeria, 1979."

The short point therefore on this appeal is the legal consequence of what the learned trial judge found as to the evidence of possession by the 1st set of appellants and the respondents in respect of the land in dispute. He said:

"There is evidence of possession and use of the land, positive and numerous on both sides but I see nothing in that of the Abia defendants to warrant the inference that their possession of the land was to the ex-

clusion of the plaintiffs."

What the above observation means is that though Abia people (i.e. 1st set of appellants) are in possession of the land, they do not possess it exclusively; the respondents are also in possession of part of it. In other words, the respondents are themselves not in exclusive possession of the land. **Once it was held that both parties were in possession of the land in dispute, the respondents could not get a declaration of title and an order of injunction unless they were able to prove that better title to the land was in them. It must be remembered that it was the respondents who sought the reliefs of title and injunction in respect of the land in dispute and who bore the burden of proving their entitlement to those reliefs: see Amakor v. Obiefuna (1974) 1 All NLR 119 at 126. To succeed in trespass they must prove exclusive possession of the land: see Ogunbiyi v. Adewunmi (1988) 19 NSCC 268 at 272; (1988) 5 NWLR (pt. 93) 215 at 221. It was therefore an error in law for the learned trial judge to have given judgment to the respondents in the face of that finding he made. Accordingly, the Court of Appeal was wrong to have upheld the judgment.**

In regard to the appeal by the 2nd set of appellants, four questions were set down in the brief of argument prepared by their counsel Mr. A. N. Anyamene SAN for determination as follows:

"(a) Did the court below perform its statutory function of determining the appeal of the 2nd set of appellants therein on all the grounds of appeal canvassed by them?

(b) If no, did the default in failing to so consider all the grounds of appeal occasion a serious miscarriage of justice?

(c) Was the interpretation which the court below placed on the effect of s. 99 of the Sheriffs and Civil Process Act on the proceedings in the trial court as expounded by this court in skenconsult (Nigeria) Limited v. Godwin Ukey (1981) 1 S.C. 6 correct in law?

(d) If the answers to (a) and (c) above are in the affirmative, was the court below right in law in affirming the judgment of the trial court having regard to the complaints of the 2nd set of appellants herein against

the said judgment particularly the failure of the trial court to give effect to the admissions of the plaintiffs (respondents herein) in favour of Achara Ihie?"

Note: I think the opening part of question (d) is really misleading as what follows after does not fit in having regard to the supporting argument. The question, in my view, should read:

(d) If the answers to (a) and (b) are in the negative and affirmative respectively, was the court below right in law in affirming the judgment of the trial court having regard to the complaints of the 2nd set of appellants herein against the said judgment particularly the failure of the trial court to give effect to the admissions of the plaintiffs in favour of Achara Ihie?

The grounds of appeal indicated in the brief which were not considered by the court below were grounds 3, 10 and 11. In my view, they were substantial grounds. The said ground 3 simply reads: "The learned trial judge erred in law in awarding title to the plaintiffs before considering the case of the 5th and 6th defendants." The learned trial Chief Judge in his judgment said:

"I have therefore to give the plaintiffs the declaration and the injunction sought subject to whatever is their limitation of the right as a result of the operation of the Land Use Decree. See the case of Darke v. Agyakwa 9 WACA 163.

The next point is to consider the claim of the 5th and 6th defendants, Achara Ihie people. They have stated that the plaintiffs have added their land called Ugwu Ofo to their claim when suing the Abia defendants. The evidence of Achara people was to the effect that they gave the Abia people where they are now settled and did not give them the area now in dispute."

The learned judge gave the impression that the 2nd set of appellants had a claim (or counterclaim) in the proceedings. That is not so. They were merely defending the respondents' claim. It can therefore be clearly appreciated that the learned judge having given the said respondents judgment in respect of the land in dispute, it would present, unfortunately, as sheer parody of justice to proceed thereafter to consider the defence of the 2nd set of appellants.

That would serve no purpose at all. That was what happened in Odofin v Mogaji (1978) 11 NSCC 275 which at pp.278-279 was deprecated by this court.

The next is the said ground 10 which, without the particulars reads: "The court below misdirected itself in law and on the facts in awarding title to the entire land in dispute to the plaintiffs against the 5th and 6th defendants of Achara contrary to the evidence in the case tendered on behalf of the plaintiffs." The most crucial of the said evidence was given by the 3rd plaintiff who testified as P.W. 1. He said in cross-examination: "The land in dispute belongs to Achara and Biakpan. Biakpan and Achara have a boundary within the land in dispute. That boundary starts from the Ngwu tree and runs to a stream where (sic) we call 'Ofong'." In re-examination, he said: "Okporokum is the name of the land in dispute. Achara people have land within the land called Okporokum." By way of a reminder, Achara people are the 2nd set of appellants while Biakpan people are the respondents (plaintiffs). With this evidence, there could be no basis for awarding a declaration of title to the land in dispute and an order of injunction in favour of the respondents. These two aspects of oversight by the learned trial judge were adequately emphasized by Chief Ezebilo in his presentation of the oral argument on behalf of the 2nd set of appellants. The remaining ground 11 is, in my view, a combination of these grounds 3 and 10 already considered.

The question is, how and why did the Court of Appeal overlook those grounds in considering the appeal of the 2nd set of appellants? When considering submission of the inadequacies in the evidence as to title and how the learned trial judge dealt with them, the learned Justice of the Court of Appeal, Aseme JCA who read the leading judgment, said: "The submission under this head of issues for determination overlooked the impeccable evaluation of the evidence of the plaintiffs and indeed also that of the defendants. The learned trial judge properly reviewed the evidence of parties separately before coming to his conclusions." The learned Justice even considered that there was conflicting traditional evidence by the three communities which he held the learned trial judge

resolved satisfactorily by 'a straight finding of fact' as to whose evidence he believed. I have earlier pointed out that there was no traditional history pleaded in the form demanded by law. Even if such history had been pleaded by each of the three communities and traditional evidence conflicted one with the other, that could not be resolved by 'a straight finding of fact' as to which to believe. The well-known rule in Kojo II v. Bonsie (1957) 1 WLR 1223 would have had to be closely applied.

A careful study of the judgment of the lower court does not seem to me to be supported by the record of the trial court. Also, if the lower court had considered grounds 3, 10 and 11 of the appeal of the 2nd set of appellants, I have no doubt that it would have affected the result of the appeal. I will accordingly answer questions (a), (b) and (d) as follows: Question (a), no; question (b), yes and question (d), no. The appeal of the 2nd set of appellants must be allowed.

I turn to question (c). The argument canvassed by Mr. Anyamene in the brief, in a nutshell, is that what Skenconsult (Nigeria) Ltd. v. Ukey (1981) 1 SC. 6; (1981) 12 NSCC I established is that failure to comply with s. 99 of the Sheriffs and Civil Process Act (which provides that where a writ of summons is issued in one State for service in another State a period of at least 30 days must elapse between the date of service and the date that the defendant is required to appear in court) leads inexorably to the proceedings conducted thereafter being declared a nullity. It is said that Achara Ihie was not allowed up to 30 days within which to answer before the court after the service of the writ on them following their joinder to the action. The argument was concluded thus: "The argument of Achara Ihie in the court below was that the proceedings being a nullity, their joinder was a nullity. They could not argue that their joinder was a nullity without showing that the proceedings up to the point they were joined were a nullity." It should be noted that the said Achara Ihie people took part in the proceedings after the joinder which was at their instance.

I therefore find this argument not only unattractive but also clearly untenable. **Section 99 of the said Act provides that:**

"99. The period specified in a Writ of Summons for service

under this part as the period within which a defendant is required to answer before the court to the writ of summons shall be not less than thirty days after service of the writ has been effected, or if a longer period is prescribed by the rules of the court within which the writ of summons is issued, not less than that longer period."

When this provision is read along with ss. 97 and 98 of the Act, which I need not reproduce, it will be clear that the writ in question is one for service outside the jurisdiction. A writ so served must allow for at least thirty days for the defendant to answer to it before the court.

Now, the whole purpose of section 99 is, for obvious reasons, to afford a defendant outside the jurisdiction sufficient time (which the law makers in their wisdom considered to be 30 days) to arrange to answer to the writ before the court from the date it was served on him as a matter of mere convenience so that no order may be made behind his back within that period. If for any cause (mistake or oversight of the provision of s. 99, maybe) less than thirty days is endorsed on the writ, but the defendant duly appeared and participated in the proceedings, the proceedings cannot be regarded as a nullity simply because the defendant had less than thirty days to answer to the writ. The mere non-compliance with s. 99 does not create a jinx on the proceedings that follow.

The ratio decidendi of Skenconsult case as regards s. 99 has been fully explained by this court in subsequent cases. To begin with, an objection as to non-compliance with s. 99 of the Act must be taken before trial. In Ezomo v. Oyakhire (1985) 1 NWLR (pt. 2) 195, one of the issues was the contention "that there was no compliance with s. 99 of the Sheriffs and Civil Process Act, Cap. 189 volume IV, Laws of the Federation in that the period between service of the writ of summons on a defendant outside the jurisdiction and the return date of the summons should not be less than 30 days.": see pages 201-202. At page 203 Aniagolu JSC, who read the leading judgment which was concurred in by all the other four Justices, said: "By contesting the case to the full, on the merit, without earlier taking preliminary objection be-

fore trial, the appellant must be deemed to have waived whatever right he had under that section." This position was put beyond doubt in Saude v. Abdullahi (1989) 4 NWLR (pt. 116) 387 at 405 per Uwais JSC (no CJN) as follows:

B *"It has since been established by a plethora of authorities that the appropriate time at which a party to proceedings should raise an objection based on procedural irregularity is at the commencement of the proceedings or at any time when the irregularity arises. If the party sleeps on that right and allows the proceedings to continue on the irregularity to finality,*
 C *then the party cannot be heard to complain at the concluding stage of the proceedings or on appeal thereafter; that there was a procedural irregularity which vitiated the proceedings."*

D In the case of Adegoke Motors Ltd. v. Adesanya (1989) 3 NWLR (pt. 109) 250 in which Skenconsult was similarly relied upon, although there had been due appearance to a writ which did not specify the minimum period of 30 days within which the defendant should answer to it, Agbaje JSC observed at page 293:

E *"It appears clear to me that Nnamani, JSC, in his judgment was concerned with a situation where a defendant has not been served with a writ of summons, in which case the court would have no jurisdiction over that defendant. He was not concerned with a case of submission to the jurisdiction of the court by a defendant, a situation which will give the*
 F *court jurisdiction over that defendant."*

It seems to me that when a defendant has truly submitted to jurisdiction or, worse still, has taken part in proceedings in respect of which he complains later that s. 99 of the Sheriffs and Civil
 G **Process Act was not complied with, he cannot be heard to say either that the writ was defective for noncompliance or that the proceedings were a nullity in reliance on ss. 97-99 of the Act or the decision in Skenconsult. The 2nd set of appellants fall within this having fully**
 H **participated in the proceedings after the order of joinder. I think learned counsel for the respondents quite effectively met the arguments of the appellants under question (c) on this appeal. I will answer that question in the affirmative.**

Having regard to all the circumstances of this case, I allow the appeal of the 1st set of appellants. I also allow the appeal of the 2nd set of appellants. I hold that the respondents failed to establish their case and accordingly the action is dismissed. I award N10,000.00 costs to each set of appellants against the respondents.

B

WALI JSC

I have been privileged to read before now the lead judgment of my learned brother Uwaifo JSC with which I entirely agree. My learned brother has thoroughly discussed and dealt with all the issues raised and canvassed in this appeal and there is nothing left for me to add.

For the reasons so ably stated in the lead judgment which I hereby adopt, I also allow the appeal, set aside the judgments of both the trial court and the Court of Appeal and substitute them with a verdict in favour of the Plaintiffs/Appellant's case. I adopt the order of costs in favour of the appellants made in the lead judgment.

E

KUTIGI JSC

I read in advance the judgment just rendered by my learned brother Uwaifo, JSC. He has exhaustively dealt with the issues raised in the appeal. I agree with his reasoning and conclusions. The appeal is accordingly allowed. The judgments of the lower courts are set aside. The plaintiffs/respondents' case is dismissed with costs as assessed.

G

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Uwaifo, J.S.C. and I am in entire agreement with him that this appeal is meritorious and ought to be allowed.

One cardinal point that must come into focus is the vital fact that the learned trial Judge was unequivocal in his finding that both the appellants and the respondents were in effective possession of the land in dispute. Said he -

"There is evidence of possession and use of the land, positive and numerous on both sides, but I see nothing in that of the Abia defendants to warrant the inference that their possession of the land was to the exclusion of the plaintiffs'.

B It seems to me clear that the learned trial Judge, having affirmed the copious evidence of use and possession of the land in dispute, positive and numerous on the side of both parties, proceeded, quite wrongly in my view, to shift the onus of proof in the case from the plaintiffs to the
C defendants. This is a definite error on the part of the trial court as the onus was on the plaintiffs who were seeking for a declaration of title to prove their alleged acts of exclusive ownership, extending over a period of time to warrant the inference that they were the owners of the land claimed. See Ekpov. Chief Ita II N.L.R. 68, Abudulai v. Manne 10
D W.A.C.A. 172.

It is a basic principle of law that the onus of proof lies on the plaintiffs to satisfy the court that they are entitled on the evidence brought by them to a declaration of title. In this regard, they must rely on the
E strength of their own case and not on the weakness of the defendants' case and, if this onus is not discharged, the proper judgment will be for the defendants. See Kodilinye v. Mbanefo Odu 2 W.A.C.A. 336 at 337. Frempong v. Brempong 14 W.A.C.A 13. It must, however, be conceded
F that this rule does not apply where the defendant's case itself supports that of the plaintiff and contains evidence on which the plaintiff is entitled to rely. See Josiah Akinola and another v. Fatoyinbo Oluwo and others (1962) 1 All N.L.R. (part 2) 224, Nwagbogu v. Chief Onoli Ibeziako (1972) 1 All N.L.R. (part 2) 200, Oduaran v. Asara (1972) 1 All N.L.R. (part 2) 137.
G The present case, however, does not belong to the category where the defendants' case, by any means, lends support to the case of the plaintiffs. In my view, the above observation of the learned trial Judge amounts to a definite finding that the plaintiffs were not in exclusive
H possession of the land in dispute. The plaintiffs' case having been founded substantially on numerous and exclusive acts of possession, the finding of the trial court that they were not in such exclusive possession of the land they claimed disentitled them to the declaration of title and the in-

junction sought. I think the court below, with respect, was in definite error when, contrary to the finding of the trial court who saw and assessed the witnesses, it held thus -

"The Abia community had never been in possession of the land except by the very act of trespass".

In my view, the Court of Appeal was in error when it affirmed the trial court's award of declaration of title, damages for trespass and perpetual injunction in respect of the land in dispute in favour of the plaintiffs.

It is for the above and the more elaborate reasons contained in the leading judgment of my learned brother, Uwaifo, J.S.C. that I, too, allow the appeals of the 1st and 2nd set of defendants/appellants. The judgments and orders of both courts below are hereby set aside and in substitution thereof the plaintiffs/respondents' claims are dismissed in their entirety. There will be the costs of this appeal to each set of defendants/appellants against the plaintiffs/respondents which I assess and fix at N10,000.00.

AYOOLA JSC

I agree with judgment delivered by my learned brother Uwaifo, J.S.C I desire to comment on some of the issues that have emerged from this appeal.

The respondents who were the plaintiffs in the High Court of the Cross River State, claimed a declaration that the land in dispute was part of Biakpan Communal Land and injunction. They relied in part on traditional history such as how Abia derived its name, how the Abia people were tenants of the respondents on land not part of the land in dispute and how the Abia people having vanquished the Ububa Ohafia people, the erstwhile boundary men of the respondents, became the respondents' boundary men. However, the pillar of their case was exclusive possession and use of the land from time immemorial. The trial judge found that: "There is evidence of possession and use of the land, positive and numerous on both sides" In a case in which the parties had relied on possession from time immemorial, that finding in more devastating to the case of the respondents who were the parties seeking a declaration that they were

owners of the land, than to the 1st set of appellants. The 1st set of appellants not being counter-claimants or parties seeking a declaration of title, the further opinion of the trial judge that " .. I see nothing to warrant the inference that their possession of the land was to the exclusion of the plaintiffs.", was unnecessary, as the 1st set of appellants did not need to prove that their use and possession of the land was to the exclusion of the respondents, who were the plaintiffs, in order to defeat the claim of the respondents to a declaration of title.

The plaintiff in an action for declaration of title must succeed on the strength of his case and not on the weakness of the defendant's case: Kodilinye v. Odu (1935) 2 W.A.C.A. 336. A qualification of this principle is that the plaintiff is entitled to take advantage of any element of the defendant's case that strengthens his own case: Akinola & Anor V. Oluwo & Ors (1962) N.S.C.C. 157. The meaning of that really is that it is not sufficient for the appellant to say that the defendants case is weak. There must be something positively to his benefit in the defendant's case. That the 1st set of appellants have not been able to prove that their possession of the land was to the exclusion of the respondents, if it is even regarded as a weakness in the case put forward by the 1st set of appellants, disclosed nothing positively to the benefit of the respondents. I venture to think that the weakness that a plaintiff can take advantage of must be an admission or evidence given as part of the defendant's case that proves an issue in favour of the plaintiff. A party who claims declaration of title to land may prove the title he claims by evidence of acts of ownership, numerous and positive, extending over a long period of time to lead to an inference that he is the owner of the land: Ekpo v. Ita 11 N.L.R. 68. Such inference cannot be drawn unless he is in exclusive possession and use of the land. A finding that there is evidence of possession and use of the land, positive and numerous on both sides, makes it impossible to draw such inference.

In this case, the weakness of the respondents' case was manifested in two directions: first, in the finding earlier referred to, which destroyed the inference of ownership that the respondents had wanted the court to draw from the fact of possession and use of the land; and secondly, in

the evidence, given as part of the respondents' case, that the land in dispute belongs to the plaintiffs and the second set of defendants.

Although the respondents' counsel, on this appeal, and argued that the 1st set of appellants could not argue questions of fact since they have not obtained necessary leave, he found himself constrained to argue B facts in an attempt to render the finding of the trial judge harmless to the respondents' case. Conceding that : "Both sides have given evidence of possession and use.", he tried to explain what, in his conception, the trial judge had meant by his finding on the question. It was argued in the C respondents' brief thus:

"Both sides have given evidence of possession and use. That of the 1st set of appellants cannot be used to the exclusion of the respondents. If their evidence of acts of possession did not show that they were in D possession to the exclusion of the facts of complained against. (sic) This is what the trial court found and the Court of Appeal affirmed."

It is evident that the third sentence in the above passage is incomplete and not quite intelligible. If what was meant, however, was that the facts of possession and use relied on by the 1st set of appellants were the very E acts complained of as trespass, that was not borne out by the evidence. Neither in the statement of claim nor in the evidence of the respondent was it averred or claimed that the 1st set of appellants exercised numerous and positive acts of possession and use of the land at all, not to talk of F they doing so as trespassers. Indeed, all that the respondents pleaded was that the 1st set of appellants broke and entered the land and cultivated same sometime in 1973. The present action was taken in that same year. It seems improbable to me that the trial judge would describe an alleged G tortious occupation of the land in 1973, shortly prior to the commencement of the action in the same year, in terms of possession and use which he found common to both parties. The evidence of possession and use of the land by the 1st set of appellants came from those appellants. Their H evidence was that such possession and use predated, by many years, the facts that immediately led to this action. There seems to me to be no room for quibbling about the ordinary meaning of the finding made by the trial judge, that both parties had possession and use of the land. With

respect to the learned Justices of the Court of Appeal, it appears to me not to be an interpretation of finding of the trial judge, but a re-writing of the trial judge's judgment, when they held, per Aseme, JCA, that " the learned Chief Judge believed the evidence of dispossession except the trespassory possession of the Abia Community which was the cause of the action." Perhaps such "re-writing" might have been permissible had the respondents cross-appealed against the finding. There being no cross-appeal, the Court of Appeal was under a duty to ascribe to the finding its ordinary meaning and the necessary legal consequences that followed.

Aseme, JCA, further quoted the finding of the trial judge where the trial judge had said:

"I reject therefore as false the numerous insertion of farms and plantations to land now in dispute. I also accept as true that the plaintiffs were driven out of their land by the Biafran soldiers led by the Abia or Ohafia defendants. I accept also as true that the Abia defendants started to enter the land massively without authority after the war and that has brought this action against them."

This view of the trial judge was used by the Court of Appeal to buttress its opinion that the Abia Community had never been in possession except by the very act of trespass which was the cause of action. On this appeal, the respondents have also referred to the same passage to the same passage in support of the opinion of the Court of Appeal. For my part, I see nothing in the passage inconsistent with the previous finding that both parties were in possession. A reasonable understanding of the passage is that trouble started when one side entered the land massively and tried to oust the other from possession. No doubt such conduct would have disturbed the co-existence of parties, so found by the trial judge, on the land. All these have nothing to do, in my opinion, with proof that is required before the plaintiff can be entitled to a declaration of title based on an inference that arises from possession or use of the land numerous and positive and extending over a long period of time.

In the final analysis, the issue must remain: whether the trial judge was not wrong in law in giving a declaration of title to a plaintiff who had failed to prove exclusive possession when his case was based on infer-

ence of ownership to be drawn from such possession, and whether the Court of Appeal was not wrong in confirming the judgment of the trial court. This is purely a matter of law. A passage from the judgment of this court in Ogbechie & Ors v. Onochie & Ors (1986) 1 NSCC 443, 447 is apt. There, this court said, per Eso, JSC.

"Where therefore a trial court fails to apply the facts which it has found, correctly to the circumstances of the case before it, and there is an appeal to a court of appeal which alleges a misdirection in the exercise of the application by the trial court, the ground of appeal alleging the misdirection is a ground of law and not of fact. When the Court of Appeal finds such application to be wrong and decides to make its own findings such findings made by the Court of Appeal are issues of fact and not law. Where the Court of Appeal interferes in such case and there is a further appeal to a higher court of appeal on the application of the facts, the ground of appeal alleging such misdirection by the lower court of appeal is a ground of law and not of fact. It is only where there is an appeal against the findings made by the Court of Appeal in this exercise that issues of fact arise and leave will be required."

The present case is a case in which the court of trial had failed to apply the facts which it had found and the Court of Appeal had confirmed the decision of the court of trial. The issues raised is, therefore, of the error of both courts in law and no leave is required.

Equally damaging to the respondents' case was admission by their first witness that the land in dispute belongs to Achara, the 2nd set of appellants, and Biakpan, the respondents. With such evidence, it was clearly an error in law for the trial judge to have given judgment for the respondents. The law is clear that a person who claims declaration of title to land must prove that he is the owner. It will not do for him to prove that he and some other person or persons not parties to the action as plaintiffs are owners. It is strange that the trial judge who stated that: "Again the evidence of the Achara Ihe people who are the defendants in their case showed that half of the area now in dispute belonged to the plaintiffs (i.e. Biakpan)..... That being so I have to hold that up to this stage at least half the land in dispute has been conclusively prove to be

that of the plaintiffs.", did not accord the same effect to the admission of the Biakpan witness that the Achara people own part of the land in dispute and find that the ownership of the Achara people of part of the land has to that extent also been conclusively proved as against the plaintiffs.

B The Court of Appeal completely ignored this aspect of the case. Had that court adverted to this aspect of the matter, there is no doubt that it would not have confirmed the judgment of the High Court, for how could an admission that part of the land belonged to the Achara people, a separate community, be reconciled with the declaration sought that the land was C Biakpan Community Land!

One final point usefully taken on behalf of the 2nd set of appellants on their appeal to the Court of Appeal was that the High Court proceeded to consider the case of the second set of appellants after it had already D adjudged the respondents owners of the land and had made a declaration of title to that effect. The Court of Appeal had not given due consideration to the point.

After awarding the declaration sought to the respondents, it is E difficult to see what was left for the trial judge to pronounce on in a case in which the declaration sought was against the two sets of defendant. Nevertheless, the trial judge had proceeded, thereafter, to consider what he described as the claim of the 5th and 6th defendants, i.e. the 2nd set F of appellants. Notwithstanding that there were two sets of defendants, the respondents who had sought a declaration that the land was Biakpan Community Land against the two sets of defendants in the same case, could not have succeeded against one set and failed against the other. In my opinion, such a declaration as was claimed by the respondents was G not divisible so as to make it possible to declare that the land is Biakpan Community Land as against one set of defendants and not so as against the other. Where there are two or more sets of defendants, the plaintiff, in order to obtain a declaration of title, must show that he is entitled to a H declaration of title against all the defendants. The approach of the trial court in first awarding a declaration to the respondents before considering the case of the second set of appellants, as if he could at the end of that exercise have held that the respondents had no title against the second set

of appellants, was entirely erroneous and unacceptable.

Although it is now accepted that there is no uniform method of writing judgments, where it is manifest on the face of the judgment that conclusion on material issues in the case may have been reached before a consideration of the totality of the case of any of the parties and an evaluation of the entire evidence, as may be relevant, the fairness of the proceedings must be suspect. The test, in my opinion, is whether an objective reader of the judgment would be able to come to the conclusion that, as far as evaluation of the evidence and consideration of the respective cases are concerned, the judicial scale has been evenly weighted. See Duru V. Nwosu (1989) 4 NWLR (Part 113) 24. In view of the evidence on record, of admission which enures to the benefit of the appellants, and the inherent weakness of the respondents' case as shown by the findings made by the trial judge, it is evident that, notwithstanding the wrong approach of the trial judge, the proper verdict should have been one of dismissal of the respondents' case.

Most of the points here discussed have been highlighted in the leading judgment. It is for the reasons stated in that judgment which I adopt and for the further reasons stated herein that, I too would allow the appeals of both sets of appellants, set aside the judgments of the High Court of the Cross River State and of the Court of Appeal. I would dismiss the respondents' action. I abide by the order for costs made by Uwaifo, J.S.C.

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