

SUPREME COURT OF NIGERIA

9TH JULY 1999. SC. 159/1994

**CORAM:- S. M. A. BELGORE, I. L. KUTIGI, S. U. ONU,
U. A. KALGO, S. O. UWAIFO, JJSC.**

NATHANIEL ONWUKA AJERO & ANOR. PLAINTIFFS/
(For themselves and as representing the land APPELLANTS
owners of Ubana Nsulu, Northern Ngwa Division)

AND

BERNARD UGORJI & 6 ORS. DEFENDANTS/RESPONDENTS

INJUNCTIONS - Land law - Claim for injunction - Is not necessarily bound to fail - After a claim for a declaration of title fails.

LAND LAW - Possession in law - What it means - And what constitutes evidence of possession.

TRESPASS - Claim - For damages for trespass - Is not dependent on the claim for a declaration of title - As the issues to be determined on the claim for trespass - Are independent to that on the claim for a declaration of title.

FACTS

In the High Court of the former Imo (now Abia) State holden at Isiala Ngwa, the plaintiffs/appellants claimed against the defendants/respondents jointly and severally three parcels of Land, N2,000.00 special and general damages for trespass and perpetual injunction. At the trial two witnesses testified for the plaintiffs. P.W. 1 testified that he took the surveyor to the land in dispute showed him the boundaries and features on the land which were all inserted in the survey plan Exhibit "A", (the only plan produced at the trial). The respondents for their part produced no plan challenging the authenticity of appellant's claim. The plaintiffs led evidence to show how their ancestors deforested the lands in dispute, farmed on the same for at least three generations, that the said ancestors

are now dead and that since their death and up till now the plaintiffs have bear farming on the land. The plaintiffs also testified that they granted parts of the land to the Government of defunct Eastern Nigeria to establish Teachers Training College at Nsulu, and later to East Central State for use as a Games village. The defendants in their statement of defence denied the averments in the statement of claim and joined issues in all of them but they neither attended the trial nor called any witness in defence of the action.

In a reserved judgment the learned trial judge entered judgment in favour of the plaintiffs with respect to all their claims. Aggrieved the defendants appealed to the Court of Appeal, Port-Harcourt Division. The appeal was allowed, the orders of the trial court set aside and in its place an order of dismissal of the plaintiffs' claims was made. The order of dismissal which was made by the Court of Appeal was based on their finding that the evidence of the only two witnesses of the plaintiffs upon which the learned trial judge depended to grant title to the land in dispute to the plaintiffs, was contradictory. The plaintiffs have now appealed to the Supreme Court raising a lone issue.

ISSUE FOR DETERMINATION

"Does the failure to establish a claim to title necessarily involve a failure of a claim for damages for trespass and injunction."

HELD (Unanimously allowing the appeal per lead judgment of **KUTIGI JSC**)

Trespass - Claim

1. I think the law involved is quite clear. It is that the claim for damages for trespass is not dependent on the claim for a declaration of title as the issues to be determined on the claim for trespass are whether the plaintiffs had established their actual possession of the land and the defendant's trespass on it which are quite separate and independent issues to that on their claim for a declaration of title. The plaintiffs in my view did give sufficient evidence of their possession of the land in dispute, and not merely meagre as submitted by defendants' counsel. The learned trial judge accepting these acts of possession on the part of the plaintiffs

found positively in their favour. The findings above were never disturbed by the Court of Appeal. It is patent from the record that the Court of Appeal in allowing the appeal never addressed the issue of possession but concerned itself with the proof of title to the land in dispute. I entertain no doubt in my mind at all that the record shows that the plaintiffs are in exclusive possession of the land in dispute as the trial High Court rightly found above. (pp. 2208 C/2210 A)

Injunctions - Land law

2. While a claim for injunction is also not necessarily bound to fail after a claim for a declaration of title fails, provided the area of land in respect of which an injunction is sought is clearly defined and ascertained (see for example Oluwi v. Eniola (supra), Kareem & Ors. v. Ogunde & Anor (supra). Claim (c) also succeeds and a perpetual injunction is granted restraining the defendants by themselves, their servants, agents or workmen from entering the land in dispute and doing any manner of work therein. (pp. 2208 E/2212 A)

Land law - Possession in law

3. Possession in law means exclusive possession because if it is not exclusive the law will not protect it. It must also be remembered that whether or not the act proved is sufficient to establish possession is a question to be decided on the merit of each case. Cultivation of a piece of land, erection of a building or a fence and demarcation of land with pegs at its corners have all been held to be evidence of possession (see for example Wuta Ofei v. Danquah (1961) 3 All E.R. 596 (P.C.), Alatishe v. Sanyaolu (1972) 2 S.C. 97). A person can also be in possession through a third party such as servant, agent or tenant. And possession of a predecessor-in-title in law is deemed to be continued by his successor. (p. 2211 E)

NOTABLE POINTS OF INTEREST

ONU JSC

1. Action for trespass where the title of both parties is defective

It is trite law that where the title of both parties is defective, court can
 B still find for the Plaintiff in the action for trespass if he establishes pos-
 session. See Kareem & Ors. v. Ogunde & Ors. (1972) All NLR 73;
Adebayo v. Ighodalo (1976) 5 NWLR (part 450) 507 and Akunyili v.
Ejidike (1996) 5 NWLR (part 449) 381. Where a plaintiff has established
 C that he is in possession, it is necessary for an order of injunction to be
 obtained to protect the possession in him. (p. 2215 E)

2. Attitude of the court to unchallenged evidence

Indeed, this Court has held by a host of decided cases that where evi-
 D dence called by a plaintiff in a civil case is neither challenged nor contra-
 dicted, the onus of proof on him is discharged on a minimum of proof.
 See Kosile v. Folarin (1989) 3 NWLR (part 107). Indeed, it is now settled
 law that an unchallenged evidence ought to be accepted by the court as
 E such. See Oni v. L.C.C. (1974) 10. SC. 9; Wiri v. Wuche (1980) 1-2 SC.
 1 at 4 and Emaphil v. Odili (1987) 4 NWLR (part 67) 915 at 939. The
 trial court having accepted the unchallenged and incontrovertible evi-
 F dence of PW1 and PW2 as well as conceding that a plaintiff may fail to
 establish his claim for declaration of title but that does not mean he must
 necessarily fail in his claim for damages for trespass and injunction vide
Oluwi v. Eniola (supra), the court below was wrong to have disturbed
 the trial court's decision arrived at after a clear and dispassionate evalua-
 G tion of the unchallenged evidence. See Odume v. Nnachi (1964) 1 All
 NLR 329 (p. 2217 F)

KALGO JSC

3. Averment in pleadings is not evidence without more

H I cannot agree more with the learned counsel on this submission. It is
 well established and in my view based on common sense that a mere
 assertion or statement should not be accepted without proof thereof. In
 the same way, an averment in pleadings cannot be accepted as evidence

simpliciter without calling evidence to prove it, and if no such evidence is called, the averment is deemed to be abandoned. It must therefore be disregarded. See Awojugbagbe Light Ind. Ltd v. Chinukwe (1995) 4 NWLR 379. (p. 2220 C)

B

4. Evidence of a witness can be believed in one part and disbelieved in another

It is pertinent to observe that despite this conflict in the evidence of the appellants' witnesses, the learned trial judge accepted the evidence of the witnesses. It is settled law that the evidence of a witness can be believed or accepted in one part and disbelieved in another: See Saka Aremu v. Board of Customs & Exercise (1965) NMLR 258; Obiode & Ors v. The State (1970) 1 All NLR 35 at 40; G. B. Olivant v. Mohammed Mustafa 7 NLR 29. So that even if the evidence of the two witnesses of the appellant are disbelieved on whether the land in dispute was divided or not, the other part of their evidence on possession and trespass can be accepted and relied upon. (p. 2221 B)

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E

UWAIFO JSC

5. When a case is undefended minimal evidence is enough to establish it

It is true the evidence is quite terse. But it was not contradicted at all. The respondents filed a statement of defence but they led no evidence nor cross-examined the plaintiffs' witnesses. The law is that when a case is not defended, minimal evidence is enough to establish it: see Kosile v. Folarin (1989) 3 NWLR (pt. 107) 1 at p. 12; Buraimoh v. Bamgbose (1989) 3 NWLR (Pt. 109) 352 at pp. 363-364. Furthermore, in a matter like this, the evidence of possession may be slight but as long as it established exclusive possession, it is enough. (p. 2222 G)

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G

REPRESENTATION

Chief G. O. K. Ajayi SAN with Miss Jaiye Sowemimo for the plaintiffs/ appellants

Mrs. A. J. Offiah for the defendants/respondents

CASES REFERRED TO

- Kareem v. Ogunde (1972) All NLR 73
Adebayo v. Ighodalo (1976) 5 NWLR (part 450) 507
Akunyili v. Ejidike (1996) 5 NWLR (part 449)
B Kosile v. Folarin (1989) 3 NWLR (part 107)
Nwabuoku v. Otth (1961) 1 All NLR 487
Boshali v. Allied Commercial Exporters (1961) 1 All NLR 117
Ukoha v. Okonkwo (1972) 1 All NLR (part 11) 100 at 105
Oni v. L.C.C. (1974) 10. SC. 9
C Wiri v. Wuche (1980) 1-2 SC. 1 at 4
Emaphil v. Odili (1987) 4 NWLR (part 67) 915 at 939
Odume v. Nnachi (1964) 1 All NLR 329
Owosho v. Dada (1984) 7 SC. 149
D Obiode v. The State (1970) 1 All NLR 35 at 40
G. B. Olivand v. Mustafa 7 NLR 29

LEAD JUDGMENT BY KUTIGI JSC

E In their amended statement of claim the plaintiffs' claims against the defendants jointly and severally read as follows:

(a) declaration of title to those certain three pieces or parcels of land known as and called ISIUGWU, ISIMKPA AND UZI situate at Ubaha
F Nsulu, Northern Ngwa Division the annual value whereof is N30.00 (thirty naira);

(b) N2,000.00 (Two thousand Naira) being special and general damages for the acts of trespass committed by the defendants on the said lands since the 22nd day of July, 1974 and;

G (c) Perpetual injunction to restrain the defendants by themselves, by their servants, agents and otherwise from committing further acts of trespass on the said parcels of land."

H Pleadings were ordered, filed and exchanged. Thereafter the case proceeded to trial. At the trial two witnesses testified for the plaintiffs. The defendants who were served with the hearing notices consistently absented themselves from court and they were not represented by any counsel at the hearings.

In a reserved judgment the learned trial judge entered judgment in favour of the plaintiffs against the defendants jointly and severally in the following terms:

"(1) A declaration that the plaintiffs are entitled to the customary right of occupancy of the three pieces of land known as and called Isiugwu, Isinkpa and Uzi situate at Ubaha Nsulu in Isiala Ngwa Judicial Division and clearly verged red in survey Plan No. MEC/489/74 - AB tendered as exhibit A in this case.

(2) N300.00 general damages against the 1st, 2nd and 5th defendants.

(3) Perpetual injunction restraining the defendants by themselves their servants, agents or workmen from entering the land in dispute and doing any manner of work their."

Aggrieved by the judgment of the trial High Court, the defendants appealed to the Court of Appeal holden at Port Harcourt. In their brief they formulated the following three issues for determination by that court -

"(1) Whether the learned trial judge was right in holding that on the scanty and contradicting evidence before him the respondents were entitled to judgment;

(2) Whether it was justified to deny the parties their constitutional right to address the court at the conclusion of evidence as provided by law.

(3) Whether the appellants were given a fair hearing in the case."

The Court of Appeal considered each of the above issues in its judgment. Both issues (2) and (3) failed. Issue (1) succeeded whereby the court came to the conclusion that the learned trial judge was in error to have entered judgment for the plaintiffs/respondents. The appeal was therefore allowed and the judgment of their trial High Court was set aside and in its place and order of dismissal of plaintiffs/respondents' claim was entered.

The plaintiffs being dissatisfied with the judgment of the Court of Appeal have now appealed to this court. The parties filed and exchanged briefs of arguments in the appeal. These were adopted and

relied upon at the hearing during which additional oral submissions were made by counsel on both sides.

Mr. Ajayi, S.A.N., learned counsel for the plaintiffs in his brief of argument formulated the only issue which arises for determination in this appeal thus -

"Does the failure to establish a claim to title necessarily involve a failure of a claim for damages for trespass and injunction?"

It was submitted that the judgment of the Court of Appeal showed that it ordered the dismissal of the plaintiffs' claims simply on the contradiction in the evidence of the plaintiffs in relation to proof of title in respect of the land in dispute. He said the Court of Appeal failed completely to consider the plaintiffs' other two heads of claim namely "damages for trespass and injunction" even though they failed to establish their claim to title. He said since the plaintiffs have proved that they were in possession of the entire land in dispute and have equally proved acts of trespass by the defendants, the Court of Appeal ought to have found in the plaintiffs' favour damages for trespass and injunction because the fact that they failed on a claim for title does not mean that their claim for damage for trespass and injunction to the same piece of land must necessarily fail. A number of cases were cited in support. They include - Oluwi v. Eniola (1967) N.M.L.R. 399 Renner v. Anan 2 W.A.C.A. 28 Kareem v. Ogunde (1972) 1 All N.L.R. 73 Enang v. Adu (1981) 11-12 S.C. 25 Adegbite v. Ogunfaolu (1990) 4 N.W.L.R. (pt. 146) 583.

Learned counsel referred to paragraphs 4,5, 16, 17, 18, 20 and 21 of the amended statement of claim and to the evidence of both P. Ws 1 and 2 which showed that the plaintiffs have been in undisturbed possession of the land in dispute by farming thereon, granting portions to different persons for periodic farming including the grant to the Government of Eastern Nigeria for the construction of a Teachers Training College.

He said P.W. 1 in particular took the surveyor to the land in dispute, showed him the boundaries and features on the land which were all inserted in the survey plan Exhibit A, the only plan produced at the trial since the defendants produced no plan of their own. He said the plain-

tiffs' evidence of acts of possession were accepted by the learned trial judge because their evidence was not challenged at the trial by way of any cross-examination or contradiction. The evidence in support of acts of trespass by the defendants and resistance to these acts were also direct and uncontradicted. He said the legal implication of failure by the defendants to lead evidence in support of their pleadings in that their pleading should be deemed to have been abandoned. He referred to Ojikutu v. Odeh (1951) 14 W.A.C.A 654, Union Dominion Corp. (Nig.) Ltd. v. Ladipo (1971) 1 All N.L.R. 81, Omoboriowo & Anor. v. Ajasin (1984) 1 S.C.L.R. 108; (1984) 1 S.C. 206. We were urged to allow the appeal in part by awarding to the plaintiffs damages for trespass and an injunction as claimed by them.

Responding, Mrs. Offiah learned counsel for the defendants submitted that although the plaintiffs pleaded acts of possession, the evidence led there on was scanty as only two witnesses (P.Ws. 1 and 2) were called by the plaintiffs. She said in a claim for damages for trespass and injunction, the plaintiffs to succeed must prove that they are in possession of the land in dispute which they failed to do. It was further submitted that although the learned trial judge accepted evidence of acts of possession by the plaintiffs, the Court of Appeal found that the two witnesses called by the plaintiffs contradicted themselves, their case therefore failed. She agreed that it is not in all cases that failure to establish a claim for a declaration of title to land carries with it failure to establish claims for trespass and injunction, but added that it is only a person in possession of the land in dispute at the time of trespass that can succeed in a claim of trespass and injunction. She said that p.ws 1 and 2 called by the plaintiffs having contradicted each other, it was not possible to accredit one and discredit the other. The prayers for damages for trespass and injunction must therefore stand or fall on the success or failure of the declaratory relief sought. A number of cases were cited in support including -

Uzoukwu v. Ezeonu (1991) 6 N.W.L.R. (pt. 200) 772; Amakor v. Obiefuna (1974) 1 All N.L.R. 119; Ojibah v. Ojibah (1991) 5 N.W.L.R. (pt. 91) 296; Aromire v. Awoyemi (1972) 2 S.C. 1; Oladehin v. Continen-

2208 Ajero v. Ugorji (1999) 7 KLR Kutigi JSC
tal Textile Mills Ltd (1978) 2 S.C. 23; Adegbite v. Ogunfaolu (1990) 4
N.W.L.R. (pt. 146) 578.

The court was urged to dismiss the appeal and affirm the judgment of the Court of Appeal.

B Before us in court as well as in his brief of argument Mr. Ajayi
for the plaintiffs, made it abundantly clear that he did not seek to chal-
lenge the dismissal of the claim for a declaration of title as he conceded
that there were contradictions in the evidence of the plaintiffs in relation
C to the proof of title in respect of the land in dispute; but he said there was
sufficient evidence of possession by the plaintiffs to warrant a finding
for them on their claims for damages for trespass and injunction which
issue was never addressed by the Court of Appeal. **I think the law
involved is quite clear. It is that the claim for damages for trespass
D is not dependent on the claim for a declaration of title as the issues
to be determined on the claim for trespass are whether the plain-
tiffs had established their actual possession of the land and the
defendant's trespass on it which are quite separate and indepen-
E dent issues to that on their claim for a declaration of title; while a
claim for injunction is also not necessarily bound to fail after a
claim for a declaration of title fails, provided the area of land in
respect of which an injunction is sought is clearly defined and as-
F certained (see for example Oluwi v. Eniola (supra), Kareem & Ors.
v. Ogunde & Anor (supra)).**

It is doubtless from the pleadings that the plaintiffs pleaded various acts of possession in paragraphs 4, 17, 18, 20 and 21 of their amended statement of claim, thus:

G "4. The land, the subject matter of this action (hereinafter called
the land in dispute) is shown with its boundaries, features and abutments
on the plaintiffs plan No. MEC/489/74-AB filed with the statement of
claim and therein verged Red. However, for the sake of convenience in
H that the plaintiffs practice crop rotation, the land in dispute is divided
into 3 portions which portions are given separate names as follows: Uzi
land Isingwu land (shown verged green).

16. The plaintiffs have been in undisturbed possession of the

land in dispute by farming thereon, granting portions to different persons for periodic farming upon payment of money and without let or hindrance from anyone whomsoever including the defendants.,

17. Sometime in 1947, late Chief Josiah Wachuku of Nbawsi, without the leave or consent of the plaintiffs, broke and entered Uzi land, cleared a portion thereof and erected a hut thereof preparatory to establishing thereon an oil mill. The plaintiffs in exercise of their rights of ownership demolished the said hut and set fire to the ruins thereon. As a result, Chief Madugba, Oguama and some other men and women of the plaintiffs people were arrested and detained at the cell of the Ohuite Native Court, Nsulu, near Nbawsi. They were released in evening of the same date of arrest and later that night the Ohuite Native Court Hall was set ablaze after all the courts records, furniture and property had been careful removed from the said building. In consequence there followed a mass arrest of the plaintiffs men and women on the allegation that they burnt down the Ohuite Native Court Hall. Those arrested were detained at the Aba Prisons. About 37 of those arrested were arraigned before the Magistrate Court, Aba, charged with the offence of unlawful assembly while five were charged to the High Court, Aba, with the offence of arson. All the accused persons defended by Mr. J.A. Wachuku and Dr. Udo Udoma were acquitted and discharged.

18. Thereafter the plaintiffs' people resumed peaceable and quiet possession and enjoyment of the lands in dispute.

20. In or about the year 1955 the plaintiffs were approached through their then Councillor or Chief T. O. Okorie, for a grant of their Osogu and Nkpagu lands for the establishment of the Teachers Training College, Nsulu. The plaintiffs granted the said lands to the Government of the former Eastern Nigeria but reserved to themselves the right own, use and enjoy the swamps on the sides of the Ota Miri Ubaha stream. The plaintiffs were notified in writing by Mr. Ogasi the Principal of the said College to remove their crops then growing on the site.

After the war then the Nsulu Teachers Training College was remove to Ihie, the plaintiffs re-entered Osogu and Mkpagu lands and farmed and used the same until the said land were required by the Gov-

ernment of the East Central State for use as a Games Village."

Most of the averments must be deemed to have been abandoned as no evidence was led in support thereof (see) *Oke-Bola v. Molake* (1975) 12 S.C. 61). But **the plaintiffs in my view did give sufficient evidence of their possession of the land in dispute and not merely meagre as submitted by defendants' counsel**, in support of their claims.

P.W. 1 testifying on page 20 of the record said:

"I made a plan of the land in dispute as ordered by the court. I took a surveyor to the land and showed him the boundaries and features on the land which he inserted on the plan. This is the plan I filed in court I know the former Teachers Training College now called Games Village at Nsulu. We grave the land on which the Training College was built to the former Government of Eastern Nigeria. I know the names of our ancestors who deforested the land in dispute After deforestation they farmed on the land."

P.W. 2 also testifying on page 37 of the record said amongst others:-

"I know the land in dispute. The three pieces of land belong to our ancestors. Three succeeding generations had farmed on these lands before our own generation These people are dead and we now farm on the lands."

The learned trial judge accepting these acts of possession on the part of the plaintiffs found positively in their favour when he said in his judgment on a page 43 of the record as follow:

"The plaintiffs led evidence in this case. They were not cross-examined by the defendants who chose to be absent during the trial, although, the court had adjourned this case on several occasions to enable them appear. The evidence of the plaintiffs as to how their named ancestors deforested the lands in dispute, farmed on the same land for at least the last three generations, that the said ancestors are now dead and that since their deaths and up till now the plaintiffs have been farming on the lands in dispute remains unchallenged and uncontradicted. I accept this evidence as I am bound to do so, in view of the authority Isaac Omoregie v. Daniel Pendor Lawani (1980) 3-4 S.C. 108 at 117

and *Odulaja v. Haddad* (1973) 11 S.C. 357. In the same manner I accept their evidence that the defendants entered the lands in dispute wrongfully and that the 3rd, 4th, 5th, 6th and 7th defendants were labourers hired by the 2nd defendant."

The findings above were never disturbed by the Court of Appeal. **It is patent from the record that the Court of Appeal in allowing the appeal never addressed the issue of possession but concerned itself with the proof of title to the land in dispute** when it said in the lead judgment on page 169 of the record that -

"In the light of the evidence adduced, did the respondents (meaning plaintiffs) establish their claim of communal ownership? I think not. The contradiction in the evidence of p.w. 1 and p.w. 2 is a major one. It goes to the basis of the claim which is that the land devolved to the respondents as communal property. The evidence of p.w. 1 that the land was shared is clearly in conflict with their pleadings."

I entertain no doubt in my mind at all that the record shows that the plaintiffs are in exclusive possession of the land in dispute as the trial High Court rightly found above. Possession in law means exclusive possession because if it is not exclusive the law will not protect it. It must also be remembered that whether or not the act proved is sufficient to establish possession is a question to be decided on the merit of each case. Cultivation of a piece of land, erection of a building or a fence and demarcation of land with pegs at its corners have all been held to be evidence of possession (see for example *Wuta Ofei v. Danquah* (1961) 3 All E.R. 596 (P.C.), *Alatishe v. Sanyaolu* (1972) 2 S.C. 97). A person can also be in possession through a third party such as servant, agent or tenant. And possession of a predecessor-in-title in law is deemed to be continued by his successor.

I therefore find merit in this appeal. It is accordingly allowed. The judgment of the Court of Appeal dismissing plaintiffs' claim is set aside, while that of the trial High Court is restored with the exception of order (1) made by that court in its judgment.

For the avoidance of doubt plaintiffs claim (a) for a declaration

of title to the three pieces of land is dismissed. Claim (b) succeeds and the plaintiffs are awarded N300.00 (Three hundred Naira) general damages against the 1st, 2nd and 5th defendants only. **Claim (c) also succeeds and a perpetual injunction is granted restraining the defendants by themselves, their servants, agents or workmen from entering the land in dispute and doing any manner of work therein.**

The plaintiffs are entitled to their costs which are assessed at Ten thousand Naira (N10,000.00) only.

C

BELGORE JSC

I agree that this appeal has merit. The Court of appeal overlooked their issue of possession as distinct from title. The learned counsel for the appellants conceded title but relied on possession which the trial court adequately found in favour but the Court of Appeal overlooked. I therefore adopt the reasoning in the judgment of Kutigi, J.S.C. and allow the appeal by setting aside the judgment of the Court of Appeal, and restoring the trial court's judgment. I make the same order as to costs.

ONU JSC

In their Amended Statement of Claim in the High Court of the former Imo (now Abia) State holden at Isiala Ngwa, the Plaintiffs herein Appellants, claimed against the Defendants, now Respondents, jointly and severally three parcels of land, N2,000.00 special and general damages for trespass and perpetual injunction. After pleadings were ordered, filed and delivered, evidence was led through their two (Appellants') witnesses, to wit: Richard Akwarandu as PW1 and Job Ugboaja as PW2. It was unchallenged evidence which culminated in a considered judgment delivered by the learned trial Judge in favour of the Appellants for their entire claims as made.

It was common ground that the Respondents' case before judgment in the trial court in its annals was at every turn characterized by several adjournments, more pronounced by their absence than appear-

ance. At the end of the trial, the learned trial Judge (J. S. Anyanwu, J.) being no longer prepared to wait for the Respondents who had consistently absented themselves from court, gave judgment for the Appellants on 18th November, 1985 by holding as follows:-

"The plaintiffs led evidence in this case. They were not cross-examined by the defendants who chose to be absent during the trial although the court had adjourned this case several occasions to enable them appear. The evidence of the plaintiffs as to how their named ancestors deforested the lands in dispute, farmed on the same for at least three generations, that the said ancestors who did not share the lands in dispute are now dead and that since their deaths and up till now the plaintiffs have been farming on the lands in dispute remains unchallenged and uncontradicted. I accept this evidence as I am bound to do so, in view of the authority (sic) Isaac Omoregbee v. Daniel Pendor (sic) Lawani (1980) 3-4- SC. 108 at 117 and E.K. Odulaja v. A. F. Haddad (1973) 11 SC. 357. In the same manner I accept their evidence that the defendants entered the lands in dispute wrongfully and that the 3rd, 4th, 5th, 6th and 7th defendants were labourers hired by the 2nd defendant.

In paragraph 26 (b) of the Statement of Claim the plaintiffs claimed N2,000.00 being special and general damages. They did not even specify what amount was claimed as special and general damages. They did not lead any evidence of any damage, special or general. As no specific amount was claimed or proved as special damage I hold that the plaintiffs have failed to prove any special damage. As trespass is a wrong actionable per se I hold that the plaintiffs are entitled to general damages which I assess at N300.00." (Underlining above is mine for emphasis and comment).

Aggrieved by the said decision, the Respondents appealed to the Court of Appeal sitting in Port Harcourt (hereinafter referred to as the court below). The court below allowed the Respondents' appeal set aside the trial court's decision and held inter alia thus:-

"In the light of evidence adduced, did the Respondents establish their claim of communal ownership? I think not. The contradiction in the evidence of PW1 and PW2 is a major one. It goes to the basis of the

claim which is that the land devolved to the Respondents as communal property. The evidence of PW1 that the land was shared is clearly in conflict with their pleadings. And learned trial Judge did not give reasons why he preferred the evidence of PW2 to the effect that the land was shared. In fact, the learned trial Judge completely ignored the evidence that the land was shared

Being dissatisfied with this decision of the court below, the Appellants have now appealed to this Court upon a Notice of Appeal dated 3rd March, 1994 containing a long ground. A lone issue for our determination has been proffered therefrom and it states:-

"Does the failure to establish a claim to title necessarily involves (sic) a failure of a claim for damages for trespass and injunction."

The learned Senior Advocate, Chief G. O.K. Ajayi, at the hearing of this appeal on 26th April, 1999 having conceded in relation to his clients' claim to a customary right of occupancy to the land in dispute thus:-

"We do not quarrel over the finding of the court below in relation to the appellants' customary right of occupancy but we do where we adduced evidence of trespass and injunction indeed, the Court of Appeal did not advert to our case for trespass and injunction."

he has thereby narrowed down the area of dispute in this appeal within a small compass.

Arguing for the Appellants the learned Senior Advocate submitted in respect of EVIDENCE OF POSSESSION as follows:-

The final pleading in the suit at the time when judgment was delivered at the lower court the learned counsel pointed out, stood at:

- (a) The Amended Statement of Claim dated 19th March, 1984.
- (b) The Statement of Defence dated 14th June, 1976.

For a consideration of the issue raised in this appeal our attention was adverted in respect of the Appellants' case to paragraphs 4, 5, 16, 17, 18, 20 and 21 of their Amended Statement of Claim.

EVIDENCE LED IN SUPPORT OF ACTS OF POSSESSION BY THE APPELLANTS. Appellants called two witnesses by first PW1, Richard Akwarandu at whose instance Exhibit 'A' (the only plan pro-

duced at the trial) was so produced by the surveyor. The Respondents, for their part produced no plan challenging the authenticity of Appellants' claim. Evidence was led of the physical boundaries comprising both the entire land of the Appellants' Community and the land in dispute. The most important act of possession, it was pointed out, was the grant of B land to the Government of Eastern Nigeria for the construction of Teachers Training College including the acts of farming on the land. The Appellants' evidence was not challenged at the trial either by way of cross-examination or contradiction. Finally, the trial court in the extract already C set out above, accepted the evidence of these acts of possession.

ACTS OF TRESPASS

With regard to the acts of trespass these were pleaded in paragraphs 17, 22, 23 and 24 of the Amended Statement of Claim in relation D to which evidence was led in support by the Appellants and the resistance to these acts were direct and uncontradicted; the evidence led in support of their being in possession with nothing advanced in opposition thereto by evidence emanating from the Respondents.

It is trite law that where the title of both parties is defective, E court can still find for the Plaintiff in the action for trespass if he establishes possession. See Kareem & Ors. v. Ogunde & Ors. (1972) All NLR 73; Adebayo v. Ighodalo (1976) 5 NWLR (part 450) 507 and Akunyili v. Ejidike (1996) 5 NWLR (part 449) 381. Where a plaintiff has established F that he is in possession, it is necessary for an order of injunction to be obtained to protect the possession in him.

See Christopher Okolo v. Eunice Uzoka (1978) 4 SC. 77. See also Enang v. Adu (1981) 11 - 12 SC. 25 and Adegbite v. Ogunfaolu (1990) 4 NWLR 583 AT 592-593. See also Oluwi v. Eniola (1967) NMLR 339 at 340 for G the proposition that the fact that a claim for title fails does not mean that a claim for trespass and injunction must fail. See also Otuaha Akpapuna v. Obi Nzeka II (1983) 7 SC. 1. In Okolo v. Uzoka (supra) this Court H stated:-

"It is the law and this Court has so held times without number that trespass to the land is actionable at the suit of the person in possession of the land. The slightest possession in the plaintiff enables him to

maintain trespass if the defendant cannot show a better title."

And as regards a claim for damages for trespass the West African Court of Appeal Awoonor Renner v. Anan 2 WACA had this to say:-

"A trespass to land is an entry upon land or any direct and im-
 B mediate interference with the possession of land. The comprehensive
 way of describing a trespass is to say that the Defendant broke and en-
 tered the plaintiffs' close and did damage, and it follows that in order to
 maintain an action for trespass the plaintiff must have a present posses-
 C sory title an owner of land who is legally entitled to possession not being
 competent to maintain an action for trespass before entry."

I am therefore in entire agreement with the Appellants that hav-
 ing established possession and acts of trespass on the land in dispute, the
 court below ought to have found in their favour damages for trespass
 D and injunction because the fact that they failed on a claim for title does
 not mean that their claim for damages and trespass to the same land must
 necessarily fail, since possession and trespass have already been estab-
 lished in their favour. See Oluwi v. Eniola (supra) and Ojibah v. Ojibah
 E (1991) 5 NWLR (part 91) 296.

RESPONDENTS' CASE

It is the Respondents' contention that since in their pleadings
 they made no admission to the Appellants' averments in their Amended
 F Statement of Claim, the Appellants are deemed to have abandoned those
 paragraphs of their pleading of which they gave no evidence vide Adegbite
v. Ogunfaolu (supra) and Leventis Technical Ltd. v. Petrojessica Enter-
prises Ltd. (1992) 2 NWLR (part 224) 459. They conceded that a claim
 G for trespass as the Appellants postulated presupposed that the Appellants
 are in possession of the land at the material time of the trespass vide
Aromire v. Awoyemi (1972) 2 SC. 1; Oladimeji v. Oshodi (1968) 1 All
 NLR 417 and Aderibigbe v. Oki (1971) 1 All NLR 116. They argued
 H (Appellants) are deemed to have abandoned their pleadings. They Re-
 spondents then went on to concede as stated by the Appellants in their
 brief in paragraph 2.05 at page 4 to the effect that the trial Judge ac-
 cepted the evidence of acts of possession. What the trial Judge accepted

is as reproduced earlier on in this judgment. While in its judgment the court below (per Katsina-Alu J.C.A. (as he then was) commented adversely on the trial court's judgment for its failure to evaluate the evidence adduced before it, by hiding behind the expressions "I believe," "I do not believe" or as in this case, "I accept" without really evaluating the same and as stated in the judgment of Edozie, J.C.A., that the learned trial Judge relied on the conflicting evidence of the Appellants' witnesses (PW1 and PW2) as well as on the paucity of the traditional evidence, which made the lower court's judgment unsustainable. It was the Respondents' further contention that they were neither sued nor did they defend the action in a representative capacity, adding that the only Respondent mentioned by PW2 whose evidence was in conflict with that of PW1, is 2nd defendant. The case of Summer v. Brown 25 TLR 745 was called in aid for the proposition that where two equally credible witnesses called by the same party contradict each other, it is not possible to accredit one and discredit the other.

THIS COURT'S VIEW

It is my view that it is the trial court's duty to make a finding. See Omeregbe v. Edo (1971) 1 All NLR 282 at 289 and Odutola v. Aileru (1985) 1 NWLR (PART 1) 91 at 96. In the case in hand the trial court which saw and heard PW1 and PW2 made a finding that it believed these witnesses whose evidence it held it accepted to be unchallenged and uncontroverted. See Akinloye v. Eyiola (1968) 1 NMLR 92 and Ozibe & Ors. v. Aigbe (1977) 7 SC. 1. Indeed, this Court has held by a host of decided cases that where evidence called by a plaintiff in a civil case is neither challenged nor contradicted, the onus of proof on him is discharged on a minimum of proof. See Kosile v. Folarin (1989) 3 NWLR (part 107). See also Nwabuoku v. Ottih (1961) 1 All NLR 487; Boshali v. Allied Commercial Exporters (1961) 1 All NLR 117 and Ukoha v. Okonkwo (1972) 1 All NLR (part 11) 100 at 105. Indeed, it is now settled law that an unchallenged evidence ought to be accepted by the court as such. See Oni v. L.C.C. (1974) 10. SC. 9; Wiri v. Wuche (1980) 1-2 SC. 1 at 4 and Emaphil v. Odili (1987) 4 NWLR (part 67) 915 at 939.

The trial court having accepted the unchallenged and incontro-

vertible evidence of PW1 and PW2 as well as conceding that a plaintiff may fail to establish his claim for declaration of title but that does not mean he must necessarily fail in his claim for damages for trespass and injunction vide Oluwi v. Eniola (supra), the court below was wrong to have disturbed the trial court's decision arrived at after a clear and dispassionate evaluation of the unchallenged evidence. See Odume v. Nnachi (1964) 1 All NLR 329 and Owosho v. Dada (1984) 7 SC. 149.

In consequence, my answer to the lone issue posed for this Court's determination is rendered in the negative.

It is for these and the fuller reasons contained in the leading judgment of my learned brother Kutigi, JSC a preview of which I had had before now that I too allow the appeal and restore the decision of the trial court. I make similar consequential orders inclusive of costs as contained therein.

KALGO JSC

In the Aba High Court, the appellants as plaintiffs claimed against the respondents declaration of title to three pieces of land herein called "land in dispute"; N2,000.00 damages for trespass on the said land, and injunction restraining the respondents, their servants or agents from further trespass on the said land. The appellants were successful in all their claims at the trial and the respondents appealed to the Court of Appeal, Enugu where the appeal was allowed, the orders of the trial court set aside and in its place an order of dismissal of the appellant's claims was made. The appellants now appealed to this court.

The order of dismissal which was made by the Court of Appeal was based on their finding that the evidence of the only witnesses of the appellants upon which the learned trial judge depended to grant title to the land in dispute to the appellants, was contradictory. The contradiction arose in the fact that while P. W. 1 testified that the land in dispute was shared among the descendants of the owners, P.W.2, said that the land has not been shared among them. There is no doubt that there is an apparent contradiction in this evidence and no court or tribunal can rea-

sonably accept and depend on it. In my view, the Court of Appeal was right in rejecting it and as it was the only evidence of the appellants to prove their claim of title to the land in dispute, the declaration of title made by the learned trial judge in their favour cannot stand. But the Court of Appeal in its judgment, did not say anything about the appellant's claim for damages for trespass and injunction. The appeal of the appellants in this court is directed therefore on only damages for trespass and injunction and not on declaration of title to the land in dispute.

In this appeal, the only issue for determination is this:-

"Does failure to establish a claim for declaration of title to a piece of land necessarily involves (sic) a failure of a claim for damages for trespass and injunction?"

In the trial court the appellants pleaded in their statement of claim, the names and delimitations of the land in dispute including its boundaries. They also pleaded that they had been in undisturbed possession of the land in dispute since it was founded by their ancestors and exercised right of ownership thereon. Paragraph 16 of the statement of claim reads:-

"16. The plaintiffs have been in undisturbed possession of the land in dispute by farming thereon, granting portions to different persons for periodic farming upon payment of money and without let or hindrance from any one whom-soever including the defendants."

The appellants also pleaded trespass on the said land by the respondents sometime in 1947 and the subsequent actions they have taken to regain the land trespassed upon. (See paragraph 17). And in 1955, while they were still in possession, they granted parts of the land to the Government of defunct Eastern Nigeria to establish Teacher Training College at Nsulu, and later to East Central State for use as a Games Village. All these are contained in paragraphs 4, 5, 16 - 24 of the statement of claim of the appellants in the trial court.

The respondents in their statement of defence denied the averments in the statement of claim and joined issue in all of them.

At the trial, the appellants called two witnesses in proof of their claims but the respondents neither attended the trial nor called any wit-

ness in defence of the action throughout the trial. The learned counsel for the appellants therefore submitted since the respondents led no evidence on their pleadings, the facts pleaded therein went to no issue and must be disregarded. He further submitted that the consequence of the failure of the respondents to lead evidence in support of their averment in their pleadings will in law, amount to abandoning all the averments contained in the pleadings. He cited in support the cases of Ojikutu v. Odeh (1954) 14 WACA; Union Dominion Corporation (Nig) Ltd v. Ladipo (1971) 1 NWLR 81 at 85 Omoboriowo & Anr v. Ajasin (1984) 1 SCNLR 108, (1984) 1 SC 206 I cannot agree more with the learned counsel on this submission. It is well established and in my view based on common sense that a mere assertion or statement should not be accepted without proof thereof. In the same way, an averment in pleadings cannot be accepted as evidence simpliciter without calling evidence to prove it, and if no such evidence is called, the averment is deemed to be abandoned. It must therefore be disregarded. See Awojugbagbe Light Ind. Ltd v. Chinukwe (1995) 4 NWLR 379; Olanrewaju v. Bamigboye (1987) 3 NWLR (pt. 60) 353 at 354; Emegokwue v. Okadigbo (1973) 4 SC. 113 at 117 - 118.

The appellants however called two witnesses at the trial. The learned trial judge accepted intoto the evidence of these two witnesses and as the respondents offered no evidence to challenge them, he found that the appellants have proved their claims. But, the Court of Appeal found that there is some essential contradiction between the evidence of P.W. 1 and P.W. 2, with regard to the land claimed itself, as a result of which it set aside the decision of the trial court and dismissed the appellants claims. Looking at the evidence of these two witnesses on the record of appeal, there is no doubt that there was some conflict in their evidence relating to the nature of the land, for while P.W. 1 testified that the land in dispute was shared among the owners, P.W. 2 said the land was not shared at all. The Court of Appeal was therefore right up to this point. But the learned counsel for the appellants submitted that there was evidence of possession and trespass on record in favour of the appellants on which the Court of Appeal said nothing about in its judgment. And

since that evidence was not challenged or contradicted by any evidence called by the respondents (who called no evidence at all) the appellants were entitled to judgment on possession having lost title to the land in dispute. They will also be entitled, learned counsel further submitted, to damages for trespass being in possession of the land. B

It is pertinent to observe that despite this conflict in the evidence of the appellants' witnesses, the learned trial judge accepted the evidence of the witnesses. It is settled law that the evidence of a witness can be believed or accepted in one part and disbelieved in another: See Saka Aremu v. Board of Customs & Exercise (1965) NMLR 258; Obiode & Ors v. The State (1970) 1 All NLR 35 at 40; G. B. Olivant v. Mohammed Mustafa 7 NLR 29. So that even if the evidence of the two witnesses of the appellant are disbelieved on whether the land in dispute was divided or not, the other part of their evidence on possession and trespass can be accepted and relied upon. C D

From the record of appeal, there is evidence by both witnesses of the appellant that the land in dispute had been in the possession of their ancestors since the latter deforested the land and that from time to time, the respondents and their ancestors had been trespassing on the land. It seems to me therefore that since the claim for the declaration of title is quite separate and distinct from the claim for possession, the appellants must succeed in their claim for possession on the evidence adduced at the trial. See Nwosu v. Otunola (1974) 4 SC. 21 at 26. Thus having proved possession, the appellants are entitled to recover against a mere trespasser see Bristow v. Carmican (1877 - 8) 3 APP. Cases 641 at 657. The appellant must succeed in trespass in this case because trespass is not dependent on the claim for declaration of title as the issue to be decided in trespass claim is just whether the appellants have established actual possession of the land in dispute and the trespass by the respondent, which is clearly established without contradiction in this appeal. See Oluwi v. Eniola (1967) NWLR 339 at 340. E F G H

In sum, for the above reasons, and those fully set out by my learned brother Kutigi JSC, I allow this appeal and set aside in part the decision of the Court of Appeal delivered on 3rd December, 1993. I

entirely adopt as mine the orders made by my learned brother Kutigi JSC in the leading judgment including the order as to costs.

UWAIFO JSC

B I read in advance the leading judgment of my learned brother Kutigi JSC and I agree with him for the reasons he has given.

C The plaintiffs/appellants sought three reliefs against the defendants/respondents. They got judgment in the trial court in respect of all the reliefs. But on appeal to the Court of Appeal, that court found that the evidence on traditional history in support of the declaration of title was contradictory. This does not suggest of itself that the appellants were not physically on the land. How they came to be on the land will no more be an issue since they no longer pursue the claim for a declaration of title, D not having appealed against the decision of the court below on the question of title.

E All that needs to be done is to examine the pleading of the plaintiffs/appellants and the evidence to ascertain whether possession has been shown. Certain paragraphs of the statement of claim have been reproduced in the leading judgment. After due consideration, I think paragraphs 16, 17 and 18 sufficiently contain facts of possession. The evidence of p.w. 1, Richard Akwarandu, shows that a litigation plan No. F MEC/489/74-AB of the land in dispute was made. It was admitted as exhibit A. It shows 1974 cassava farms belonging to the plaintiffs. This is clear evidence of possessory acts. The evidence of p.w. 2 shows that the plaintiffs/appellants farm on the land. He said: "We have been farming on this land since the decease of our ancestors." As has been shown G in the leading judgment, the amended statement of claim made averments of farming activities by the plaintiffs on the land. A combination of that evidence and the features on exhibit A establishes actual physical possession of the land by the plaintiffs/appellants. It is true the evidence is quite H terse. But it was not contradicted at all. The respondents filed a statement of defence but they led no evidence nor cross-examined the plaintiffs' witnesses. The law is that when a case is not defended, minimal evidence is enough to establish it: see Kosile v. Folarin (1989) 3 NWLR

(pt. 107) 1 at p. 12; Buraimoh v. Bamgbose (1989) 3 NWLR (Pt. 109) 352 at pp. 363-364. Furthermore, in a matter like this, the evidence of possession may be slight but as long as it established exclusive possession, it is enough. In Wuta-Ofei v Danquah (1961) 3 All ER 596, Lord Guest, delivering the judgment of the Privy council, said at p. 600:

"..... in order to establish possession, it is necessary for a claimant to take some active step in relation to the land such as enclosing the land or cultivating it. The type of conduct which indicates possession must vary with the type of land. In the case of vacant and unenclosed land which is not being cultivated, there is little which can be done on the land to indicate possession. Moreover, the possession which the respondent seeks to maintain is against the appellant who never had any title to the land. In these circumstances, the slightest amount of possession would be sufficient. In Bristow v. Cormican (1878), 3 App. Cas. 641 at p. 657, LORD HATHERLEY said:

"There can be no doubt whatever that mere possession is sufficient, against a person invading that possession without himself having any title whatever - as a mere stranger; that is to say, it is sufficient as against a wrongdoer. The slightest amount of possession would be sufficient to entitle the person who is so in possession, or claims under those who have been or are in such possession, to recover as against a mere trespasser."

It seems to me that the plaintiffs/appellants having established exclusive possession of the land in dispute by their unchallenged evidence, the defendants/respondents who went upon the land without their permission are liable for the claim in trespass. For the above-stated reasons and those more elaborately stated in the leading judgment, I allow this appeal on the reliefs of damages for trespass which my learned brother Kutigi JSC put at N300.00 (and I agree) and perpetual injunction restraining the defendants/respondents by themselves, their servants, agents, workmen or otherwise however from entering the land in dispute verged red in survey plan No. MEC/489/74-AB (exhibit A). I also award N10,000.00 costs in favour of the plaintiffs/appellants against the defendants/respondents.