

SUPREME COURT OF NIGERIA

9TH JULY, 1999. SC. 65/1993

**CORAM:- S. M. A. BELGORE, E. O. OGWUEGBU, U. MOHAM-
MED, A. I. IGUH, A. I. KATSINA-ALU, JJSC.**

EJEMRUVWO OYOVBIARE & 2 ORS. APPELLANTS
(For themselves and on behalf of Okoro Family
of Adeje in Okpe Local Government Area)

AND

TED OMAMURHOMU RESPONDENT

EVIDENCE - Burden of proof - In civil cases - Rests upon that party -
Who substantially asserts the affirmative before evidence is gone into.

JUDGMENTS - Retrial order - Finding of fact - Made by a trial court -
Which was supported by evidence - The Court of Appeal was in error to
have disturbed such finding - And ordered a retrial.

LAND LAW - Evidence - Burden of proof - Once it is proved that the
original ownership of property - Is in a party - The burden of proving that
the party has been divested of the ownership - Rests on the other party.

FACTS

In the High Court of former Bendel (now Delta) State, the plaintiffs/appellants in a representative capacity brought an action against the defendant/respondent. The plaintiffs claimed a declaration of entitlement to customary right of occupancy, damages for trespass and an order of perpetual injunction in respect of the land in dispute verged Pink in Exhibit "A" which is within the larger area verged green in the said Exhibit "A". The defendant pleaded purchase of the said parcel of land from the Okoro and Avwiakparu families. He admitted that the plaintiffs' family are the original owners of the land in dispute but that the land was sold to his mother and himself as per Exhibits "E" and "F". He led evidence in proof of the purchase which made his entry lawful. He testified that the

3rd plaintiff is the secretary of Avwiakparu family at the time Exhibit "E" was prepared, he was also the head of Okoro family. The 3rd plaintiff also signed Exhibit "E" as secretary to Avwiakparu family and that the plaintiffs were all present during the transaction. The plaintiffs throughout the proceedings made no effort to challenge the claim by the defendant that he bought the parcel of land in dispute.

The learned trial judge after considering the evidence dismissed the plaintiffs' claims holding that the defendant did not commit any act of trespass on the land in dispute having been put on the land by the 3rd plaintiff on behalf of the Okoro and Avwiakparu families. Dissatisfied with the judgment, the plaintiffs appealed to the Court of Appeal, Benin Division. The court of Appeal concluded that the trial court erroneously placed the onus of proof on the plaintiffs. The appeal was allowed and retrial was ordered. The plaintiffs were dissatisfied with the order for retrial and have further appealed to the Supreme Court, raising a lone issue.

ISSUE FOR DETERMINATION

"Whether the learned Justices of the Court of Appeal were right to have ordered a retrial in this case. In other words, is this a case where a retrial ought to have been ordered."

HELD (Unanimously allowing the appeal but restoring the trial court's judgment per lead judgment of **OGWUEGBU JSC**)

Evidence - Burden

1. There was no misdirection by the learned trial judge as to the onus of proof in this case. He had a clear view of the provisions of section 137 (1) and (2) of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990. In civil cases, the general rule is that the burden of proof rests upon that party, whether plaintiff or defendant who substantially asserts the affirmative before evidence is gone into. This rule is clearly stated by Eso, J.S.C., in Tewogbade v. Akande (1968) N.M.L.R. 404 at 408 thus:-

"The position therefore is this, in a civil case, the burden of proof lies on the person who would fail, assuming no evidence had been

adduced on either side. Further, in respect of particular facts, the burden rests on the party against whom judgment would be given if no evidence were produced in respect of those facts. Once that party produces the evidence that would satisfy a jury then the burden shifts on the party against whom judgment would be given if no more evidence were adduced." (p. 2142 A/H)

Land law - Evidence

2. It is also an established rule that once it is proved that the original ownership of property is in a party the burden of proving that that party has been divested of the ownership rests on the other party. See Isiba & Ors. v. Hanson & Or. (1967)1 All N.L.R. 8 at 10. The defendant, in my view, which accords with that of the learned trial judge successfully discharged the burden of proof that the plaintiffs had been divested of the ownership of the portion of land verged pink in Exhibit "A". See Thomas v. Holder (1946) 12 W.A.C.A 78. (p. 2143 C)

Judgments - Order

3. As I stated earlier, there was no misapprehension as to the onus of proof by the learned trial judge and there was also no misdirection casting the onus on the plaintiffs. Rather, the court below was in error when it misconceived the clear findings of fact made by the learned trial judge. We should constantly remind ourselves that an appellate court should be slow to disturb a finding of fact made by a trial court which is supported by evidence unless it is satisfied that such finding is unsound. That is not the case in the present proceedings. In view of the conclusion reached by the learned trial judge which I hereby affirm, the court below was in error to have ordered a retrial. (p. 2143 E)

NOTABLE POINTS OF INTEREST

MOHAMMED JSC

1. Where the plaintiff's claim failed - An order of retrial will be erroneous
Where it is clear from the evidence that the learned trial judge was quite justified in coming to the conclusion which he did that the plaintiff had

failed to establish the claim he presented before the court and there was no irregularity on the record compelling a remission of the case for retrial it will be an error of the Court of Appeal to order for a retrial. See Chief Abah Ogboda v. Daniel Adulugba (1971) N.S.C.C. 66 at 70. (p. 2145 B)

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IGUHJSC

2. The principles the court should consider before making an order for a retrial

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In the second place, the law is well settled that before deciding to make an order for a retrial an appellate tribunal ought to satisfy itself that the respondent, indeed that none of the parties, is thereby being wronged to such an extent that there would be a miscarriage of justice and that there are no special circumstances as would render it oppressive to put the

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respondent or either of the parties on trial a second time. See Yesufu Abodundu and Others v. The Queen (1959) 4 F.S.C. 70 at 73, Bakare v. Apena and Others (1986) 4 N.W.L.R. 1 at 16 - 17. Accordingly, a retrial is not appropriate when it is manifest that the plaintiff's case has failed in

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toto and that no irregularity of a substantial nature is apparent on the record or shown to the court. See Isaac Ayoola v. Jinadu Adebayo (1969) 1 All N.L.R. 159. Where, however, an appeal is allowed because of the failure of the trial court to make necessary findings on material issues

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and the determination of such material issues depends on the credibility of witnesses, the appropriate order to make is an order for retrial. See Karibo v. Grend (1992) 3 N.W.L.R. (pt. 230) 426. In the present case, the basis upon which the order of retrial was made by the Court of

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Appeal seems to me utterly defective and unsustainable. Secondly, it is clear to me from the findings of the learned trial judge which are amply supported by sufficient evidence on record that the appellants' case has failed in toto and that the court below ought to have dismissed the appeal lodged against the decision of the learned trial judge. I can also identify

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no irregularity of a substantial nature apparent on the records or pointed out to the court. I think an order of retrial in the circumstances of this case would constitute a grave wrong to the respondent to such an extent that a miscarriage of justice would thereby be occasioned. I do not

therefore hesitate to resolve the only issue for determination in this appeal in favour of the respondent. (p. 2148 C)

REPRESENTATION

Appellant absent and not represented

B

O. A. Obelikpeya for the respondent

CASES REFERRED TO

Tewogbade v. Akande (1968) N.M.L.R. 404 at 408

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Isiba v. Hanson (1967) 1 All N.L.R. at 10

Thomas v. Holder (1946) 12 W.A.C.A 78

Abah v. Adulugba (1971) N.S.C.C. 66 at 70

Abodundu v. The Queen (1959) 4 F.S.C. 70 at 73

Bakare v. Apena (1986) 4 N.W.L.R. 1 at 16 - 17

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Ayoola v. Adebayo (1969) 1 All N.L.R. 159

Karibo v. Grend (1992) 3 N.W.L.R. (pt. 230) 426

LEAD JUDGMENT BY OGWUEGBU JSC

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The appellants who were plaintiffs in the trial court instituted the action leading to this appeal against the respondent who was the defendant claiming as follows:-

"(a) A declaration that as owners in possession of the land verged pink within the land verged green in Survey Plan No, KP704 at Adeje Village, outside an urban area and in whom the land was vested prior to 1978, the plaintiffs continue to be holders in possession of the said land and are the person (sic) entitled to the Customary Right of Occupancy over the land.

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(b) The sum of N10,000.00 (ten thousand Naira) being damages for trespass and nuisance committed on the land.

(c) An order of perpetual injunction restraining the defendant from committing any further acts of trespass and nuisance on the said H land."

Pleadings were ordered, filed and exchanged. At the conclusion of the hearing, the learned trial judge Akenzua, J. in a considered judg-

ment dismissed the claims of the plaintiffs. The plaintiffs dissatisfied with the judgment of the learned trial judgment appealed to the Court of Appeal, Benin Division. That Court allowed the appeal and ordered a retrial of the case by the High Court of Delta State. Dissatisfied with the order of retrial, the plaintiffs have further appealed to this court.

By their pleadings and oral evidence given on their behalf the plaintiffs claimed that from time immemorial, their ancestor Okoro founded a large parcel of land verged green in Survey Plan No. KP704 (Exhibit "A"), that by Urhobo Native Law and Custom, the land of a founder or owner upon his death passes on to his descendants from generation to generation and that it is through this process that the land in dispute founded by Okoro passes on to them. They also claimed that from the time of its founding, the plaintiffs' ancestor Okoro and after him his descendants have been in possession of the said land by farming, cultivating economic crops, building houses and granting parcels of its to various persons.

In paragraph 2 of the Statement of Claim the plaintiffs averred:-
 "2. *The defendant is a native of Okwuvo in Okpe Local Government Area. After the death of his father, his mother Ejerha married Akerho Oghoghome (m) of Okwuvo who was the headmaster of L. A. School Adeje in those days. Defendant's mother moved to Adeje with defendant to live with her husband Akerho Oghoghome in a house built on the land by the L. A. School Adeje which plaintiffs' family gave him.*"

The defendant's case is that his mother purchased a piece of land verged brown on Exhibit "G" in 1966 from one Chief Agbi Goba the head of Okoro Family who had since died, that the plaintiffs were present during the transaction, that it was then he first knew the plaintiffs and that there was a written agreement evidencing the sale. That when Chief Agbi died, Avwiakparu family members protested and said that Okoro family had no right alone to sell the piece of land to his mother. Among the members of Avwiakparu family that protested were Chief Oghoro, Ogedegbe, Idisi and Umukoro. The matter was referred to one Idamugolo who testified as P.W. 5 in this case. A new agreement Exhibit "E" was prepared in the house of P.W. 5 by the 3rd plaintiff (John Akpome).

On 14/1/68, the defendant bought another piece of land in his own right from one Orherekeraye Edigbo who had also died. This piece of land is verged pink on Exhibit "G". That an agreement Exhibit "F" was entered into in respect of this transaction and he surveyed the land after the purchase.

He testified that the 3rd plaintiff is the Secretary of Avwiakparu family at the time Exhibit "E" was prepared, he was also the head of Okoro family. The 3rd plaintiff (John Akpome) also signed Exhibit "E" as Secretary of Avwiakparu family and that the plaintiffs were all present during the transaction.

The case of the defendant was clearly brought out in paragraph 8 of the statement of defendant. Paragraph 8 reads:-

"8. In answer to the plaintiff's case the defendant states as follows:-

(i) That the averment in paragraph 2 of the Statement of Claim are correct if the paragraph is intended to mean that Akerho Oghoghome lived in a house built on the land given to him by the plaintiffs' family which land shares boundary with L. A. School, Adeje but the size of the land is incorrectly represented on the plaintiffs' Plan. The correct size is represented on the defendant's Plan and verged Green.

(ii) On 14/6/68 one member of the plaintiffs' family by name Orherekeraye Edigbor sold the land in dispute to the defendant and issued him with a receipt which shall be relied on at the trial. The said Mr. Edigbor sold in his own right as the exclusive owner of that parcel of land. The said portion of land sold is delineated on the defendant's Plan filed in this suit and verged Pink.

(iii) The portion of the land verged BROWN in the defendant's Plan was also sold to the defendant's mother by one Chief Agbi Goba the Head of the Okoro Family at the time of purchase which was effected in the early sixties. In 1973, the 30th June to be precise, the 3rd plaintiff who was the Secretary of the Okoro Family, reduced the purchase agreement into writing which agreement the defendant shall rely on at the trial. This agreement surfaced as the result of an agitation by some extended members of Avwiakparu Family and to pacify them, the 3rd

Plaintiff was commissioned by them to prepared the said agreement to supersede the earlier one also prepared by him.

(iv) *The resultant effect of these transactions is that both the defendant and his mother became owners in fee simple for value of the parcels verged PINK and BROWN on the defendant's Plan and the one verged GREEN by Gift to the defendant's step father."*

The trial judge (Akenzua, J.) after considering the evidence dismissed the plaintiffs' claims holding that the defendant did not commit any act of trespass on the land in dispute having been put on the land by the 3rd plaintiff on behalf of the Okoro and Avwikaparu families. Dissatisfied with the judgment, the plaintiffs appealed to the Court of Appeal. The appeal was allowed and a retrial was ordered. The appealed to this court. A brief of argument was filed by the appellants expired and there was no application for enlargement of time to do so.

From the three grounds of appeal filed, the appellants identified one issue for determination in their brief of argument, namely:-

"Whether the learned Justices of the Court of Appeal were right to have ordered a retrial in this case. In other words, is this a case where a retrial ought to have been ordered."

Chief Okpoko, S.A.N., submitted in the brief that the court below in making the order for retrial based its decision on Onobruhere v. Esegine & Or. (1986) 1 N.W.L.R. (pt. 19) 799 and in doing so, it did not consider whether the facts of that particular case are on all fours with the facts of the case leading to this appeal. He submitted further that the court below clearly understood the complaint brought before it when it held as follows:-

"Based upon the above findings, the appellants are contending that having found in the appellants (sic) favour that they owned the land, the learned trial judge was wrong to have put on the appellants the burden of proving that the appellants' family has not been divested of their title or interest in (the land in dispute), and whether the learned trial judge was also right to have hold (sic) that the respondent has acquired the land in dispute by purchase.

From what I have said above and the above passage from the judgment

of the learned trial judge, what I now have to determine is whether the learned trial judge's conclusion that it was for the appellants' to prove, not only that the respondent became seised (sic) in dispute were bought from the proper persons in the evidence before the court.

But he was clearly wrong to have thereafter paced the burden of proving that the respondent purchased the land in dispute for value and from the proper persons on the appellants. What the learned trial judge had done in this case is what was frowned upon in the authorities which I have referred to above."

The learned appellants' counsel further contended in the brief as follows:-

"Plaintiffs humbly submit that the appeal having succeeded on the issue contested, the learned justices ought to have entered judgment for the plaintiffs in line with the reliefs set out in the Statement of Claim. Instead of doing this, their Lordships without affording the parties a hearing proceeded erroneously to make an order remitting the case back to the High Court for retrial. Plaintiffs submit that there was no basis for ordering a retrial and that the Court of Appeal was wrong to make such an order."

As to the principle on which an appellate court may order a retrial the following cases were cited: Ayoola v. Adebayo & Ors. (1969) 1 All N.L.R. 154 at 157, Odedare v. Adebara (1994) 6 N.W.L.R. (pt. 349) 157, Onobruhere v. Esegine (supra) and Onyekonwu v. Ekwubiri (1966) 1 All N.L.R. 33. It was finally submitted that the defendant having pleaded and admitted that the land is Okoro family land and the trial judge having found that the land is Okoro family land, the burden is on the defendant to prove that Okoro family title has been extinguished by a valid transaction which vested the title in him.

The defendant led evidence in line with his statement of defence and his evidence under cross-examination as to how he came by the piece of land in dispute was not shaken. He stated:-

"On the making of Exhibit E, the first agreement to (sic) my mother was recovered from her by the people. 3rd plaintiff is a Secretary to Avwiakparu family. At the time on 30/6/73 John Akpome was the

Head of the Okoro Family. The 1st plaintiff is next to John Akpome. The 2nd plaintiff is next to the 1st plaintiff. The family gathered together when the Exhibit E was being prepared. The plaintiffs did not sign Exhibit E. John Akpome from Okoro family signed as Secretary. John Akpome is also the Secretary to Avwiakparu family. John Akpome was acting for both Okoro family and Avwiakparu family. Ochegehe was present when Orherekeraye Edigbo sold the piece of land to me. Godwin Aforome too was present. Iboye Ogban was there too. The members of Okoro family did not tell my mother that Okoro family land has been shared among the children of Okoro."

The learned trial judge rightly found that there was no dispute as to the ownership of the land verged green in Exhibit "A" having regard to paragraphs 1, 2, 3, 4, 5 and 6 of the statement of defence and that the only questions that called for determination by him were:-

- "1. Is the defendant in the land of the plaintiffs through a sale of part of it?*
- 2. If so, is the sale binding on the defendant as well as on the plaintiffs?"*

From the totality of the evidence adduced he made the following findings:-

- "John Akpome incidentally is the 3rd plaintiff in this case. He did not give evidence*
- There is evidence that Ihenajerha Oghoghomen was defendant's mother. Third plaintiff is said to have signed Exhibit E not only as a member of Okoro Family and as Secretary to it but also as Secretary to Avwiakparu family acting for both that family and Okoro family. This evidence was not rebutted. The evidence was not challenged.*
- There is evidence that 3rd plaintiff is a descendant of Okoro family through one of Okoro's children call Ezikeme a female.*
- I am therefore left with the irresistible conclusion on the facts before me that the piece of land in controversy as shown in Exhibit A was sold to the defendant's mother and also to the defendant. The plaintiffs should have been more positive about the defence of sale put forward by the defendant. Mere denial of an averment is not enough.*

From the state of the pleadings and the evidence adduced before me I am satisfied that the defendant bought and his mother also bought the piece of land which form the subject matter of this action. The evidence surrounding Exhibit E is that the 3rd plaintiff who drew up the agreement both as a Secretary to Avwiakparu family and as a descendant of Okoro family acted for both Okoro family and Avwiakparu family (sic)

.....

The plaintiffs' claim in this action before me is founded on the trespass as contained in paragraph 9 of the Statement of Claim. In meeting this averment the defendant pleaded that he entered on to the said land and (sic) as a trespasser but as a buyer though not from the plaintiffs directly. This he had substantiated by the production of Exhibit E & F which I believe from the totality of the evidence adduced, he had tendered to show how he entered the land in dispute and as a ground of defence to that allegation by the plaintiffs that he had trespassed.

As Exhibit E is worded (see the reproduction above) I am satisfied that the defendant's entry into plaintiffs' land is justified and warranted."

The court below reversed the findings of the learned trial judge and ordered a retrial thus:-

"From the foregoing averments of the respondent, it is implicit that he has raised as the basis of his claim to the land in dispute the fact that the pieces of land were sold to him to those who were entitled to do. Now ought he not establish these averments? Learned Senior Counsel's contention that the onus lies on the respondent is in my view right. For the justification of my view that the onus rests squarely on the respondent, I refer to the case of Onubruchere v. Esegine (1956) 1 N.W.L.R. (pt. 19) 779.

But he was clearly wrong to have thereafter placed the burden of proving that the respondent purchased the land in dispute for value and from proper persons on the appellants. The effect of what I have said therefore is that this appeal must be allowed by me. The judgment and orders of the Lower Court are hereby set aside. The case is sent back herewith for retrial before another judge of the High Court of Delta State

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I think the court below misconceived the findings of the learned trial judge and was in error when it ordered a retrial.

There was no misdirection by the learned trial judge as to the onus of proof in this case. He had a clear view of the provisions of section 137 (1) and (2) of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990. The plaintiffs claimed a declaration of entitlement to customary right of occupancy, damages for trespass and an order of perpetual injunction in respect of the land in dispute verged pink in Exhibit "A" which is within the large area verged green in the said Exhibit "A". The defendant pleaded purchase of the said parcel of land. He admitted that the plaintiffs' family are the owners of the large area of land verged green in Exhibit "A" and that the portion verged pink comprised portion of land sold to his mother and himself. He led evidence in proof of the purchase which made his entry on the land lawful. This evidence which was uncontradicted was believed by the learned trial judge after evaluating the evidence led by both parties. He came to the conclusion that the defendant satisfactorily proved the purchase and that his entry on the piece of land verged pink on Exhibit "A" was not unlawful.

The plaintiffs throughout the proceedings made no effort to challenge the claim by the defendant in the statement of defence and in evidence at the trial that he bought the parcel of land in dispute. It was not even the plaintiffs' case that the defendant did not buy from their accredited representatives in which case the sale could be void or voidable. The comment made by the learned trial judge on their silence was a mere observation. He nonetheless evaluated the evidence and was satisfied that there was in fact a sale of the pieces of land in dispute to the defendant and his mother. After the defendant led evidence of purchase, the plaintiffs adduced no evidence at all in rebuttal.

In civil cases, the general rule is that the burden of proof rests upon that party, whether plaintiff or defendant who substantially asserts the affirmative before evidence is gone into. This rule is clearly stated by Eso, J.S.C., in Tewogbade v. Akande (1968)

N.M.L.R. 404 at 408 thus:-

"The position therefore is this, in a civil case, the burden of proof lies on the person who would fail, assuming no evidence had been adduced on either side. Further, in respect of particular facts, the burden rests on the party against whom judgment would be given if no evidence were produced in respect of those facts. Once that party produces the evidence that would satisfy a jury then the burden shifts on the party against whom judgment would be given if no more evidence were adduced."

See also *Are v. Adisa & Or.* (1967) N.M.L.R. 304

It is also an established rule that once it is proved that the original ownership of property is in a party the burden of proving that that party has been divested of the ownership rests on the other party. See *Isiba & Ors. v. Hanson & Or.* (1967) 1 All N.L.R. 8 at 10. The defendant, in my view, which accords with that of the learned trial judge successfully discharged the burden of proof that the plaintiffs had been divested of the ownership of the portion of land verged pink in Exhibit "A". See *Thomas v. Holder* (1946) 12 W.A.C.A 78.

As I stated earlier, there was no misapprehension as to the onus of proof by the learned trial judge and there was also no misdirection casting the onus on the plaintiffs. Rather, the court below was in error when it misconceived the clear findings of fact made by the learned trial judge. We should constantly remind ourselves that an appellate court should be slow to disturb a finding of fact made by a trial court which is supported by evidence unless it is satisfied that such finding is unsound. That is not the case in the present proceedings. In view of the conclusion reached by the learned trial judge which I hereby affirm, the court below was in error to have ordered a retrial. To that extent, I allow the appeal and set aside the judgment of the court below dated 12/12/91. I make no order as to costs. The respondent did not file his brief of argument and was not heard in oral argument at the hearing of the appeal.

BELGORE JSC

The trial judge made copious findings of fact which the Court of Appeal in error set aside. I therefore agree with my learned brother, Ogwuegbu, J.S.C., that the order for retrial as made by the Court of Appeal has no basis. I also, for the reasons he adumbrated, set aside the order for retrial and restore the decision of the trial court. I make no order as to costs.

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MOHAMMED JSC

I agree with the opinion of my learned brother, Ogwuegbu, J.S.C., in the judgment in respect of this appeal and I agree with him that the court below was in error to order for retrial of this case.

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The plaintiffs who are the appellants in this appeal claimed for a declaration that they were entitled to customary right of occupancy, damages for trespass and an order for perpetual injunction against the respondent, who was the defendant at the High Court, in respect of a piece of land verged pink in Exhibit "A". The respondent pleaded that he purchased the land and called evidence in proof of his defence that the portion of the land in dispute was sold to him and his mother by the Okoro and Avwiakparu families. The learned trial judge looked into the whole evidence dispassionately and found in favour of the defendant. It was a definite finding based on proper evaluation of the evidence. The plaintiffs could not fault the assertion of the defendant that he was put on the land by his vendor.

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The Court of Appeal referred to pleadings before the trial court and found through paragraphs 8(ii) (iii) and (iv) of the Statement of Defence that the defendant/respondent and his mother bought the disputed pieces of land verged pink and brown from Okoro and Avwiakparu families. The court below also found that the trial High Court admitted Exhibits E & F as documents relied upon by the defendant to establish his claim to the lands in dispute. The Court of Appeal again referred to the portion of the judgment of the trial judge where he considered the evidence led before judgment was entered in favour of the respondent. From

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the above finding it is crystal clear that the respondent has established that the Okoro and Avwiakparu families sold the land in dispute to him and his mother. The Court of Appeal is therefore in error to order for the retrial of the suit.

Where it is clear from the evidence that the learned trial judge B was quite justified in coming to the conclusion which he did that the plaintiff had failed to establish the claim he presented before the court and there was no irregularity on the record compelling a remission of the case for retrial it will be an error of the Court of Appeal to order for a retrial. See Chief Abah Ogboda v. Daniel Adulugba (1971) N.S.C.C. 66 C at 70.

I also allow this appeal. The judgment of the Court of Appeal is set aside. The judgment of the trial High Court is restored. I also do not make any order as to costs. D

IGUHJSC

I have had the privilege of reading in draft the judgment just E delivered by my learned brother, Ogwuegbu, J.S.C., and I agree entirely that there is merit in this appeal and that the same ought to be allowed.

The only issue raised by the appellants in these proceedings for the determination of this court is whether the court below was right to F have ordered a retrial of the suit. This issue has emanated from the three grounds of appeal filed by the appellants in the appeal which raise the single question whether it was appropriate in this case for the Court of Appeal to have ordered that the suit be remitted to the trial court for a G retrial.

It is trite law that generally speaking, the burden of proof lies upon the party who substantially asserts the affirmative of the issue. In the present case, the respondent admitted the original ownership of the land in dispute by the appellants but asserted that he and his mother H bought the same from the said appellants. There can be no doubt that the onus rested squarely on the respondent to establish the alleged sale of the land by the appellant to him as per Exhibits E and F. I have carefully

studied the judgment of the learned trial judge and can find no evidence that he erred in his consideration of the issue whether or not the respondent and his mother purchased the land in dispute from the appellants and/or members of their family by virtue of Exhibits E and F.

B In this regard the trial court approached the issue thus-

"There is no dispute as to the plaintiffs' ownership of the land because the defendant admitted paragraphs 1, 2, 3, 4, 5 and 6 of the Statement of Claim which contained the plaintiffs' averment of title to the area in question in paragraph 1 of the Statement of Defence. The only questions that fall for the court to determine now are as follows:-

C *1. Is the defendant in the land of the plaintiffs through a sale of part of it.*

2. If so, is the sale binding on the defendant as well as on the

D *plaintiffs.*
As to the 1st question, the defendant's evidence is that in 1966 his mother bought the land the plaintiffs are now claiming. He said he also bought a piece in his own right. The defendant tendered Exhibit E & F."

E The learned trial judge next proceeded to examine the entire evidence proffered by the respondent on the sale and stated as follows -

"I am therefore left with the irresistible conclusion on the facts before me that the piece of land in controversy as shown in Exhibit A was

F *sold to the defendant's mother and also to the defendant.*
From the state of the pleadings and the evidence adduced before me I am satisfied that the defendant bought and his late mother also bought the piece of land which form the subject matter of this action."

He concluded -

G *"The plaintiff's claim in this action before me is founded on the trespass as contained in paragraph 9 of the Statement of Claim. In meeting this averment the defendant pleaded that he entered on to the said land not as a trespasser but as a buyer though not from the plaintiffs*

H *directly. This he had substantiated by the production of Exhibit E & F which I believe from the totality of the evidence adduced, he had tendered to show why he entered the land in dispute and as ground of defence to that allegation by the plaintiffs that he had trespassed.*

I am satisfied that the defendant's entry onto plaintiff's land is justified and warranted.

I believe the defendant that he purchased the piece of land described in Exhibit F which is also part of the land in dispute from Orherhekeraye Edigbor. I also believe from the evidence of p.w. 5 Idamuolo B Erhakpotobor, though he tried to distort the facts, that he presided over the new agreement Exhibit E which replaced the old one. I do not believe the story of the plaintiffs. Refusal to call the third plaintiff to give evidence confirms in my mind that the plaintiffs had no answer to Exhibits E & F From the evidence before me I believe the C case put across by the defendant. I believe that the defendant did not break and enter onto the plaintiffs' land as alleged in the plaintiffs' Statement of Claim in paragraph 9. I believed that the defendant and his D mother bought the portion of land in dispute."

In my view, the learned trial judge meticulously considered all the material evidence before him, placing the onus of proof on the issue of the purchase of the land in dispute rightly on the respondent and came to the conclusion that the said sale was established by him. I therefore E find it difficult to accept the observation of the court below to the effect either that -

"..... the learned trial judge was clearly wrong to have placed the burden of proving that the respondent purchased F the land in dispute for value and from the proper persons on the appellants. What the learned trial judge had done in this case is what was frowned upon in the authorities which I have referred to above, and the issue concerning the resolution of the burden of proof by the Lower Court G accordingly succeeds."

or that -

"In the instant case, I need to point out that after the learned trial judge had wrongly shifted the onus of proving what the respondent had asserted in his pleadings, he then proceeded to consider the evidence H led in support of the respondent's pleadings."

I also think that the Court of Appeal was in error when it held that the burden of proof in respect of the purchase of land in issue by the

respondent was placed on the appellants by the court below. No such burden was placed on the appellants by the trial court. In my judgment, the learned trial judge rightly placed this onus on the respondent who, on the finding of the court, satisfactorily discharged the same.

B Turning now to issue of rehearing, the court below, in the first place, was able to make this order on the ground that the trial court wrongly placed on the appellants the burden of proving that they had not been divested of their title or interest in the land in dispute. As I have pointed out, however, the stated reason for the making of the order is, in
C my view, unsupportable and totally misconceived and cannot therefore sustain the order of retrial.

In the second place, the law is well settled that before deciding to make an order for a retrial an appellate tribunal ought to satisfy itself
D that the respondent, indeed that none of the parties, is thereby being wronged to such an extent that there would be a miscarriage of justice and that there are no special circumstances as would render it oppressive to put the respondent or either of the parties on trial a second time. See
E Yesufu Abodundu and Others v. The Queen (1959) 4 F.S.C. 70 at 73, Bakare v. Apena and Others (1986) 4 N.W.L.R. 1 at 16 - 17. Accordingly, a retrial is not appropriate when it is manifest that the plaintiff's case has failed in toto and that no irregularity of a substantial nature is
F apparent on the record or shown to the court. See Isaac Ayoola v. Jinadu Adebayo (1969) 1 All N.L.R. 159. Where, however, an appeal is allowed because of the failure of the trial court to make necessary findings on material issues and the determination of such material issues depends on the credibility of witnesses, the appropriate order to make is an order for
G retrial. See Karibo v. Grend (1992) 3 N.W.L.R. (pt. 230) 426.

In the present case, the basis upon which the order of retrial was made by the Court of Appeal seems to me utterly defective and unsustainable. Secondly, it is clear to me from the findings of the learned
H trial judge which are amply supported by sufficient evidence on record that the appellants' case has failed in toto and that the court below ought to have dismissed the appeal lodged against the decision of the learned trial judge. I can also identify no irregularity of a substantial nature ap-

parent on the records or pointed out to the court. I think an order of retrial in the circumstances of this case would constitute a grave wrong to the respondent to such an extent that a miscarriage of justice would thereby be occasioned. I do not therefore hesitate to resolve the only issue for determination in this appeal in favour of the respondent. B

It is for the above and the more detailed reasons contained in the leading judgment of my learned brother, Ogwuegbu, J.S.C., that I, too, allow this appeal, set aside the judgment and orders of the Court of Appeal and restore the decision of the trial court. I abide by the order as to costs made in the leading judgment. C

KATSINA-ALU JSC

The main question for decision in this appeal is whether the court below was right to have ordered a retrial of this case. The claim of the plaintiffs in the Court of trial was for:- D

(a) A declaration that as owners in possession of the land verged pink within the land verged green in Survey Plan No. KP 704 at Adeje Village, outside an urban area and in whom the land was vested prior to 1978, the plaintiffs continue to be holders in possession of the said land and are the person entitled to the Customary Right of Occupancy over the land. E

(b) The sum of N10,000.00 (ten thousand naira) being damages for trespass and nuisance committed on the land. F

(c) An order of perpetual injunction restraining the defendant from committing any further acts of trespass and nuisance on the said land. G

The case of the defendant is as pleaded in paragraph 8 of the statement of defence. Paragraph 8 avers thus:-

(i) That the averment in paragraph 2 of the Statement of Claim are correct if the paragraph is intended to mean that Akerho Oghoghome lived in house built on the land given to him by the plaintiffs' family which land shares boundary with L. A. School, Adeje but the size of the land is incorrectly represented on the plaintiffs' Plan. The correct size is H

represented on the defendant's Plan and verged Green.

(ii) On 14/6/68 one member of the plaintiffs' family by name Orherekeraye Edigbor sold the land in dispute to the defendant and issued him with a receipt which shall be relied on at the trial. The said Mr. Edigbor sold in his own right as the exclusive owner of that parcel of land. The said portion of land sold is delineated on the defendant's Plan filed in this suit and verged Pink.

(iii) The portion of the land verged BROWN in the defendant's Plan was also sold to the defendant's mother by one Chief Agbi Goba the Head of the Okoro Family at the time of purchase which was affected in the early sixties. In 1973, the 30th of June to be precise, the 3rd plaintiff who was the Secretary of the Okoro Family reduced the purchase agreement into writing which agreement the defendant shall rely on at the trial. This agreement surfaced as the result of an agitation by some extended members of Avwiakparu family and to pacify them, the 3rd plaintiff was commissioned by them to prepare the said agreement to supersede the earlier one also prepared by him.

(iv) The resultant effect of these transactions is that both the defendant and his mother became owners in fee simple for value of the parcels verged PINK and BROWN on the defendant's Plan and the one verged GREEN by Gift to the defendant's step father."

On the state of the pleadings, it is clear that the radical title to the disputed portions of land was in the plaintiffs. Both in his pleadings and in his evidence, the defendant admitted that the plaintiffs owned the land in question. But surely this was not the end of the matter. The case of the defendant is that although the land belonged to the plaintiffs' family, he and his mother bought same from the plaintiffs' family. The defendant therefore had the duty to prove that the plaintiffs divested themselves of the title to the land. The question then is this: Did the defendant call sufficient evidence in this regard to satisfy the trial court? I think he conclusively discharged this onus. In his evidence-in-chief he testified thus:-

"I met the plaintiffs first at the time one Chief Agbi sold a piece of land to my mother. Chief Agbi is now dead. At the time this piece of

land was sold to my mother three plaintiffs were present. This piece of land was sold to my mother in 1966. Agreement was made for the sale. After the Chief had died Avwiakparu Family members protested that Okoro family member cannot sell the land alone to my mother. Avwiakparu Family members who protested are Chief Oghoro, Ogedegbe Idisi, Umukoro. My mother wanted peaceful settlement of the matter and the matter was sent to the P.W.5 In the house of P.W. 5 a new agreement was made for the sale of the land. The 3rd plaintiff prepared the agreement."

This agreement was admitted in evidence as exhibit 'E'.

The defendant continued his evidence as follows:-

"I know Orherekeraye Edigbor. This man is dead now. This man sold a piece of land to me at Adjeje. This was in 1968. I paid for the piece of land and the man wrote an agreement form."

This agreement was received in evidence as exhibit 'F'.

When cross-examined the defendant testified thus:-

"On the making of Exhibit E, the first agreement to my mother was recovered from her by the people. 3rd plaintiff is a Secretary to Avwiakparu Family. At the time on the 30/6/93 John Akpome was the Head of the Okoro Family. The 1st plaintiff is next to John Akpome. The 2nd plaintiff is next to the 1st plaintiff. The family gathered together when the Exhibit E was being prepared. The plaintiffs did not sign Exhibit E. John Akpome from Okoro family signed as Secretary. John Akpome is also the Secretary to Avwiakparu family. John Akpome was acting for both Okoro family and Avwiakparu family."

The learned trial judge believed the evidence of the defendant that he and his mother bought the piece of land in question from the Okoro family. Consequently he made the following findings:-

"From the state of the pleadings and the evidence adduced before me I am satisfied that the defendant bought and his mother also bought the piece of land which form the subject matter of this action. The evidence surrounding Exhibit E is that the 3rd plaintiff who drew up the agreement both as a Secretary to Avwiakparu family and as a descendant of Okoro family acted for both Okoro family and Avwiakparu fam-

ily. *The plaintiffs claim in this action before me is founded on the trespass as contained in paragraph 9 of the Statement of Claim. In meeting this averment the defendant pleaded that he entered on to the said land and (sic) as a trespasser but as a buyer though not from the plaintiffs directly. This he had substantiated by the production of Exhibit E & F which I believe form the totality of the evidence adduced, he had entered the land in dispute and as a ground of defence to that allegation by the plaintiffs that he had trespassed. I am satisfied that the defendant's entry onto plaintiffs' land is justified and warranted."*

These findings are clearly supported by the evidence before the learned trial judge. I am of the opinion that the trial Judge clearly comprehended the entire case and came to a conclusion which I find amply supported by the evidence. In such a situation it is not the function of an appellate court to disturb the findings of the lower court. See Lengbe v. Imale (1959) W.N.L.R. 325.

Regrettably the court below reversed the findings of the learned trial judge and ordered a retrial. It said:-
"In view of the grave questions of law raised in the appellant's brief on these matters, it will not be proper to make a pronouncement thereon as it seems to me that the matters ought to be considered and decided first during the retrial of the case by the lower court."

The questions for determination between the parties were effectively resolved by the trial court. No issue was left unresolved. In the circumstances, the order of retrial was unnecessary.

For these reasons and for the fuller reasons given by my learned brother, Ogwuegbu, J.S.C. I also would allow this appeal and set aside the judgment of the lower court. I affirm the decision of the trial court delivered on 2 May, 1984. Since the respondent did not file any brief of argument I also make no order as to costs.

H