

SUPREME COURT OF NIGERIA

16TH JULY, 1999. SC. 98/1990

**CORAM:- A. B. WALI, M. E. OGUNDARE, O. ACHIKE, A. O.
EJIWUNMI, E. O. AYoola, JJSC.**

1. CHIEF WALTER AKPAN APPELLANTS
2. CHIEF AARON PAUL
3. OKON UDO EKPE
4. JONES AKPA (DECEASED)

AND

1. CHIEF EDO EKONG UMOH (DECEASED).
2. DAVIDSON ABA EKONG & 12 ORS. RESPONDENTS

ACTIONS - Consolidation - Order of consolidation of two suits- Made by the trial court on the application of the appellants - Because the parties and subject matter were the same in both suits - Contention by the appellants that the suits should have been heard separately - Is erroneous.

ACTIONS - Delay - Miscarriage of justice - Delay per se does not lead to a judgment being vitiated - Unless the delay occasioned a miscarriage of justice.

JUDGMENTS - Declaration of title - Identity of land - The learned trial judge is in error - To tie the declaration of title made to two plans in different suits - But this error is a mere slip that can be corrected by the appellate court.

FACTS

In the High court holden at Eket, the plaintiff/appellant in suit No. HEK/6/75 sued the defendants/respondents for declaration of title to a piece of land known as Afaha Ubium land situate in Eket Division, damages for trespass and a perpetual injunction. The respondents on their part filed suit No. HEK/10/75 against the appellants. The appellants by way of application, moved the trial court to consolidate the two suits to wit-

HEK/6/75 and HEK /10/75 for the purpose of convenience and speedy trial. This was after parties had filed and exchanged pleadings. The 3rd plaintiff/appellant deposed in his affidavit in support of the application for consolidation of the two suits that the subject matter of the two suits is the same piece or parcel of land and that the parties in the two suits are the same who sued in representative capacities. Based on this and other evidence in support of the application, the two suits were consolidated and tried together. The trial of the matter commenced on 26/5/77 when the 1st witness of the appellants started to give evidence but the case was not brought to conclusion until 23/9/82 when the judgment of the court was delivered. At the conclusion of the trial, the trial judge gave judgment in favour of the defendants/respondents as proved in HEK/10/75 and dismissed the plaintiffs/appellants case in HEK/6/75. The appellants appeal to the Court of Appeal was dismissed. They have now further appeal to the Supreme Court. The appeal was determined on three issues.

ISSUES FOR DETERMINATION

1. Whether the Court of Appeal was right in upholding the order for consolidation of the suits made by the trial court when on the evidence the identities of the land in dispute in the various suits were not proved to be identical.

2. Did the Court of Appeal properly determine the issue of inordinate delay at the trial and the consequent miscarriage of justice raised before it and if it did not whether the Appellants have suffered a miscarriage of justice thereby to warrant a reversal of the decisions of the lower courts?

3. Whether the Respondents adduced sufficient credible evidence to entitle them to judgment for title, damages for trespass and injunction.

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

Actions - Consolidation

1. As earlier mentioned in this judgment, the application for consolidation

was made by the Appellants who claimed in an affidavit by one of them that the subject-matter of the two suits " is the same piece or parcel of land" and that the parties in the two suits are the same who sued in representative capacities. They now complain, after losing, that the trial Judge should have revoked the order for consolidation and heard the suits separately. Their reason for this contention is that the identities of the lands involved in the two cases are not the same. It has not been shown that trial Judge, at any stage of the trial, expressed satisfaction that justice would best be served by taking the suits separately. Nor was he ever invited to so hold. On the contrary, the consolidated suits were fought throughout by the parties on the premise that the parties and subject matter were the same in both suits. I do not see how the authorities of Obiekwueife & Ors. v. Unumma & Anor. (1957) 2 FSC 70; Attah & Ors. v. Nnacho & Ors. (1965) NMLR 28 and Enigwe v. Akaigwe (1992) 2 NWLR 505, 537 cited by learned counsel for the Appellants are of any assistance to them as the identity of the land in dispute was never an issue between the parties at the trial. (pp. 2327 G/2328 H)

Actions - Delay

2. Delay per se, however, does not lead to a judgment being vitiated; the delay must occasion a miscarriage of justice to result in such a conclusion. This point was dealt with at length by this court in a recent case-Chief Osigwe Egbo & Ors. v. Chief Titus Agbara & Ors. (1997) 1 NWLR 293 at p. 316 B & E-F where Iguh, JSC observed:

"For the complaint to succeed, it has to be further established that the delay occasioned a miscarriage of justice in that the trial Judge did not take a proper advantage of having seen or heard the witnesses testify or that he had lost his impressions of the trial due to such inordinate delay." In the case on hand, Appellants have not shown that the learned trial Judge erred in any way except as to his numbering of witnesses. The learned trial Judge numbered PW7 as PW8. He realized this error and corrected it in his judgment. I cannot see how this slip could be said to occasion a miscarriage of justice. The learned trial Judge painstakingly reviewed the evidence of all witnesses that testified before

him, including the addresses of learned counsel for the parties, he evaluated the evidence in a manner that not even the Appellants have attempted to fault, he made vital findings of fact which have not been impugned before us. I do not in the circumstance, see any justification for concluding that he was at no time master of the case before him or that he in any way lost the advantage of having seen or heard the witnesses.
(p. 2330 G/2331 H)

Judgments - Declaration of title

3. The learned trial Judge in entering judgment in favour of the Respondents tied the declaration of title made to "Exhibits D and E". The Respondents, in paragraph 8 as of their statement of claim tied their claim to title to Plan No. ESA/656 (LD) which is Exhibit E. Exhibit D is Respondents' plan in Suit HEK/4/75 in which they were defendants. The learned trial Judge was, therefore, in error to tie his judgment to Exhibits D and E. But this error, in my respectful view, is a mere slip that can be corrected by this court. I, therefore, amend the declaration granted to read:
"In view of the foregoing, I declare that the parcels of land known and called Edissong, Owok Otuno, Esa Ikot Ekpo and Atarut shown in survey plan filed by the defendants in Suit No. HEK/10/75 which is on record as Exhibit E, constitute the property of the defendants, the people of Nung Oku Ekanem in the former Eket Local Government Area. (p. 2335 A)

NOTABLE POINTS OF INTEREST

OGUNDARE JSC

1. Inordinate delay in the determination of suits

This notwithstanding, I can only repeat here the remarks of my learned brother Iguh JSC in a situation not too dissimilar to the present case. In Chief Osigwe Egbo & Ors. v. Chief Titus Agbara & Ors. (supra) at page 315 D-F he said:

"We have on several occasions in the past, also, expressed the disapproval of this court in the exhibition, on the part of trial courts, of such inordinate and inexcusable delay in the determination of cases once

they commence the hearing of evidence in such matters. This is because trial courts must at all times bear in mind that human recollections being what they are, may loose (sic) their strength with the passage of time and that justice delayed is as bad as justice denied and may even, under certain circumstances, be worse. See: Lawal v. Chief Yakubu Dawodu & Anor. (1972) 1 All NLR 270 per Coker JSC. The inordinate delay of seven years which this case was subjected to from the commencement of the hearing of evidence in the trial court to the delivery of judgment is, in my view, totally inexcusable, unwarranted, unjustifiable and, if I may say with respect, almost amounted to a reckless action on the part of all concerned. Trial courts are once again admonished in the strongest possible terms against undue and/or inordinate delay in the determination of suits once the actual hearing of such suits has commenced." (p. 2332 C)

ACHIKE JSC

2. Reversal of an order of consolidation - Proper course to adopt

What remains incontrovertible is that it was at the request of the Appellants that the two suits were consolidate in the premise that the subject matter of the two suits related to the same piece or parcel of land. And the reason advanced for the reversal of the order of consolidation is that they (the Appellants) have since realized, to their discomfiture, that the identities of the parcels of land in dispute are different, that is to say, that the suits involve two separate pieces of land. To accede to the Appellants their contention for de-consolidation will, at this belated moment, tantamount to shutting one's eyes to the injustice of the Appellants' approbating and reprobating with impunity. This will occasion incalculable damage, particularly to the evidence of the Appellants' star-witness, PW1 who had testified under cross-examination to the effect that they did not file a plan in the second suit because the area in dispute in that suit was not in dispute, more so, as he had earlier testified that the land in the second suit refers to the same subject matter as in the earlier suit. The appropriate course open to the Appellants would have been for their learned counsel to have sought to reverse the order of consolidation at the trial on realizing at any stage that the much-talked sameness of the subject

matter was insupportable. (p. 2337 G)

REPRESENTATION

A. J. Offiah (Mrs.), for the Appellants

B E. O. Sofunde, SAN (G. N. O. Osakwe with him), for the respondents

CASES REFERRED TO

Obiekwueife v. Unumma (1957) 2 FSC 70;

Attah v. Nnacho (1965) NMLR 28

C Enigwe v. Akaigwe (1992) 2 NWLR 505, 537

Chief Egbo v. Chief Agbara (1997) 1 NWLR 293 at p. 316B & E-F

Baridam v. The State [1994] 1 NWLR (Pt. 320) 250

Ejikeme v. Okonkwo [1994] 8 NWLR (Pt.362) 266

D Chief Akpor v. Iguoriguo & Ors. (1978) 2 SC. 115 at p. 128

LEAD JUDGMENT BY OGUNDARE JSC

This appeal is form the judgment of the Court of Appeal (Enugu
E Division) given on the 30th day of June 1987 wherein the appeal of the
Appellants to that court was dismissed.

The Appellants are plaintiffs in Suit No. HEK/6/75 and they sued
the Defendants for a declaration of title to a piece of land known as
F Afaha Ubium land situate in Eket Division, one thousand four hundred
Naira (N1,400.00) damages for trespass allegedly committed by the Re-
spondents, as Defendants in that suit, in December 1966 and a perpetual
injunction restraining the latter, their people etc. from committing further
acts of trespass on the said land. The respondents on their part also
G instituted suit No. HEK/10/75 in the District Court Grade A against the
appellants claiming also a declaration that they "are the titular owners" of
the piece or parcel of land set out, described and otherwise delineated in
their plan ESA/656 (LD) drawn by Mr. E. S. Akpan and dated 5th of July
H 1974, twenty thousand Naira (N20,000.00) special and general damages
for trespass allegedly committed by the appellants and perpetual injunc-
tion. I must observe that the suit numbers were not the original suit
numbers of these actions but were given these numbers on the two ac-

tions coming before the Eket Judicial Division of the High Court of the now defunct South Eastern State of Nigeria. The respondents' action in the District Court Grade A had earlier been transferred to the High Court.

Pleadings were ordered, filed and exchanged in respect of each case. On the application of the appellants, as defendants in suit No. HEK/ 10/75, the two suits were by order of the trial High Court consolidated for hearing and determination with the appellants becoming plaintiffs and the respondents becoming the defendants. In paragraphs 8-10 and 13 of the affidavit in support of the Appellants application for consolidation the 3rd appellant Okon Uko Ekpe had deposed as hereunder:-

"8. That the subject matter of the two suits is the same piece or parcel of land.

9. That the parties in the above suit No. HEK/10/75 are the same as the parties in suit No. HEK/6/75.

10. That both parties in the two suits sue or are sued in the same right, as representing themselves and their respective village communities."

13. That for a fair, just and speedy determination of the rights of the parties hereto suits No. HEK/6/75 and HEK/10/75 should be consolidated."

The trial of the consolidated suits came before Ndoma-Egba J. (as he then was) and after a protracted trial the learned trial judge on 23rd September 1982 dismissed the appellants' case, that is, HEK/6/75 and found in favour of the respondents their claims in suit HEK/10/75 and adjudged as follows:-

"In view of the foregoing , I declare that the parcels of land known and called Edissong, Owok Otuno, Esa Ikot Ekpo and Atarut shown in survey plans filed by the defendants in this consolidated case which are on record as Exhibits D and E, constitute the property of the defendants, the people of Nung Oku Ekanem in the former Eket Local Government Area.

The plaintiffs (in this consolidated case), the people of Afaha Ubium, did commit acts of trespass and interfered with the said parcels of land, Edissong, Owok Otuno, Esa Ikot Ekpo, all of which were in the

lawful possession of the defendants at the time averred by the defendants in this consolidated case and also find that the plaintiffs did interfere with the enjoyment of the defendants of the said parcels of land as averred by the defendants. The plaintiffs in this consolidated case shall pay to the defendants the sum of N2,000.00 damages for the trespass aforesaid. The claim for special damages was not specifically proved and is therefore rejected.

The plaintiffs by themselves, their servants are hereby restrained from any further interference with the defendants' land as hereby declared."

It was against that judgment that the Appellants unsuccessfully appealed to the Court of Appeal. They have now further appealed to this court, with leave of the court below, on seven original and one additional grounds of appeal.

The parties filed and exchanged their respective briefs of argument and with leave of this court, amended same. In their amended Brief of Argument the Appellants have set out 3 issues for determination covering grounds 2, 3, 4, 5, 6, 8 and 9. At the oral hearing of the appeal the learned counsel abandoned grounds 1 & 7 which were accordingly struck out. The 3 issues set out in the Appellants brief are as follows:

"1. Whether the Court of Appeal was right in upholding the order for consolidation of the suits made by the trial court when on the evidence the identities of the land in dispute in the various suits were not proved to be identical (Ground 4).

2. Did the Court of Appeal properly determine the issue of inordinate delay at the trial and the consequent miscarriage of justice raised before it (Ground 8).

3. Whether the Respondents adduced sufficient credible evidence to entitle them to judgment for title, damages for trespass and injunction. (Grounds 2, 3, 5, 6 and 9)."

The formulation of these issues was criticized by the Respondents in their own (Respondents') brief and reformulated same. The three issues as formulated are as hereunder:

"1. Whether the Court of Appeal was right not to have reversed

the order of the learned trial judge consolidating the two suits.

2. *Did the Court of Appeal properly determine the issue of inordinate delay at the trial and the consequent miscarriage of justice raised before it and if it did not whether the Appellants have suffered a miscarriage of justice thereby to warrant a reversal of the decisions of the lower courts?* B

3. *Whether the Respondents adduced sufficient credible evidence to entitle them to judgment for title, damages for trespass and injunction."*

I have considered the criticisms and I think they are well placed. Having regard, however, to the wording of ground 4 of the grounds of appeal on which Issue 1 is based and the arguments advanced in the appellants brief, I would retain Issue 1 as framed by the Appellants but would adopt Issue 2 as framed by the Respondents. Both parties agreed on the wording of Issue 3. Consequently this appeal will be considered by me on the following questions: D

1. Whether the Court of Appeal was right in upholding the order for consolidation of the suits made by the trial court when on the evidence the identities of the land in dispute in the various suits were not proved to be identical. E

2. Did the Court of Appeal properly determine the issue of inordinate delay at the trial and the consequent miscarriage of justice raised before it and if it did not whether the Appellants have suffered a miscarriage of justice thereby to warrant a reversal of the decisions of the lower courts? F

3. Whether the Respondents adduced sufficient credible evidence to entitle them to judgment for title, damages for trespass and injunction. G

QUESTION 1:

As earlier mentioned in this judgment, the application for consolidation was made by the Appellants who claimed in an affidavit by one of them that the subject-matter of the two suits " is the same piece or parcel of land" and that the parties in the two suits are the same who sued in representative capacities. They now com-

plain, after losing, that the trial Judge should have revoked the order for consolidation and heard the suits separately. Their reason for this contention is that the identities of the lands involved in the two cases are not the same.

B I think this argument is puerile. Pleadings had been completed and plans filed in the two suits when they averred in their affidavit that-

"8. *That the subject matter of the two suits is the same piece of parcel of land.*" (Underlining is mine for emphasis)

C In addition, the 3rd Appellant as PW1, admitted that the subject mater in the two suits are the same. He testified in cross examination thus:

"I did not file a plan with the statement of defence in Suit No. HEK/10/75 because Suit C/1/67 (i.e. HEK/4/75) refers to the same subject matter in dispute. (words in brackets are mine)

D To further questions, he answered:

"We did not file a new plan in HEK/10/75. I examined the plan. The area in dispute is not in issue." (underlining is mine)

Again, he said:

E "I told the court that I made one plan in connection with this case. I did not brother to make another plan because it was in the same piece of land which was the cause of action in both suits."

Appellants' learned counsel in his final address at the trial submitted as follows:

F "Says the area in dispute had been identified by parties. Says the disputed land is not in issue although it is not the whole land area shown in Exhibit B, D and E. Refers to Exhibit B, the area verged green. Submits that the plaintiffs, are claiming a portion of land described 'Afaha Ubium land', one portion of which is called 'Ndon Ikot Nte'. The other portion is Owok Udu. Submits that there is sufficient evidence by the PW1 as to the area in dispute."

H I cannot, in the light of all these, see how the Appellants can now, argue that the lands in dispute in the two suits are not identical. **It has not been shown that trial Judge, at any stage of the trial, expressed satisfaction that justice would best be served by taking the suits separately. Nor was he ever invited to so hold. On the contrary,**

the consolidated suits were fought throughout by the parties on the premise that the parties and subject matter were the same in both suits. I do not see how the authorities of Obiekwueife & Ors. v. Unumma & Anor. (1957) 2 FSC 70; Attah & Ors. v. Nnacho & Ors. (1965) NMLR 28 and Enigwe v. Akaigwe (1992) 2 NWLR 505, 537 cited by learned counsel for the Appellants are of any assistance to them as the identity of the land in dispute was never an issue between the parties at the trial. B

I resolve Question 1 against the Appellants.

QUESTION 2

 C

Trial in this matter commenced on 26/5/77 when the 1st witness for the Appellants (as plaintiffs) started to give evidence. The first six witnesses testified between 26/5/77 and 29/8/78 when further hearing was adjourned sine die for undisclosed reason or reasons. Trial resumed D before that same Judge on 14/3/79 and on 26/7/79 Appellants closed their case. Defence opened on 8/8/79 and concluded on 26/2/80. Learned counsel for the parties addressed the Court between 17/6/80 and 23/6/82 when the case was adjourned for judgment. Judgment was delivered on E 23/9/82.

It was on the above facts that the Appellants in their appeal to the Court below raised the following ground of appeal, among others:

"The judgment of the trial court is wholly against the weight of evidence and in particular the learned trial Judge owing to the inordinate delay and/or lapse of time between the time some of the witnesses testified, especially witnesses for the Appellants, and the completion of evidence and delivery of judgment had become a complete stranger to the facts of the case and was not in a position to properly evaluate the evidence or form a proper view of the credibility of the witnesses. And have lost much of the advantage which he may otherwise be supposed to have derived from seeing and hearing the witnesses and this consequently occasioned a miscarriage of justice." F G

The particulars are omitted. In their Appellants Brief, they raised among the six questions formulated, the following question: H

"6. Whether the long delay in the hearing of the case, long

intervals of adjournments and address of counsel had affected the Judge's proper appraisal and evaluation of evidence and the judgment as a whole."

In its judgment, the court below, per Ogundare JCA considered the facts in the light of section 258(1) of the constitution of the Federal Republic of Nigeria, 1979 and came to the conclusion that -

"In this case the final addresses ended on 23/6/82, the three calendar months for the appeal (sic) therefore, ends on 23/9/82 the day the judgment was delivered, that is 24/6/82 to 24/9/82 less one day, 23/9/82. It is therefore, within the prescribed time and valid."

The Appellants have now complained in this court that the court below misconceived their complaint about inordinate delay and therefore, it failed to properly determine the complaint. I think this complaint is well taken. The complaint before the court below and on which argument was addressed was not inordinate delay between the commencement of trial in May 1977 and its conclusion by delivery of judgment in September 1982. The Respondents concede as much but contend that the delay notwithstanding, there was no miscarriage of justice. They argue further that in the circumstances of the case, there was no inordinate delay.

I have given careful consideration to the record and the submissions of learned counsel for the parties both in the Briefs and in oral arguments. There is no doubt that there was a long delay in the trial in the High Court. This delay was partly due to the length of the evidence of some of the witnesses and the long opening and closing addresses of learned counsel for the parties. The parties also contributed to the delay by their applications for adjournment. There is no explanation for the adjournment *sine die* granted by the trial court as a stage in the proceedings even though trial resumed six months later.

Delay per se, however, does not lead to a judgment being vitiated; the delay must occasion a miscarriage of justice to result in such a conclusion. This point was dealt with at length by this court in a recent case- Chief Osigwe Egbo & Ors. v. Chief Titus Agbara & Ors. (1997) 1 NWLR 293 at p. 316B & E-F where Iguh, JSC observed:

"For the complaint to succeed, it has to be further established that the delay occasioned a miscarriage of justice in that the trial Judge did not take a proper advantage of having seen or heard the witnesses testify or that he had lost his impressions of the trial due to such inordinate delay."

After quoting from the judgment of Idigbe JSC in Chief Akpor v. Iguoriguo & Ors. (1978) 2 SC. 115 at p. 128, Iguh JSC went on to say:

"It is, therefore, not in every case where inordinate delay is established that the appellate court must necessarily set aside the decision of the trial court. An appellant, to succeed, must go further to show, from the record of proceedings, that the trial Judge had lost his impressions of the trial or had not taken a proper advantage of having seen or heard the witnesses testify as a result of the delay complained of."

Adio JSC in his own judgment in the case, observed at pages 320-321 of the report:

"On the question whether there was prolonged or inordinate delay in the hearing and determination of the case and, if so, whether it vitiated the trial, the legal effect depends on the circumstances of each particular case. For example, the trial will be vitiated if the learned trial Judge is no longer in a position to properly articulate the evidence adduced before him and make full use of his advantage in having seen and observed the demeanour and the credibility of the witnesses who testified before him. If that is the case, then the prolonged or undue delay is capable of occasioning a miscarriage of justice and will vitiate the trial. See: Awobiyi & Sons v. Igbalaiye & Bros. (1965) All NLR 163. It will be otherwise if the memory of the learned trial Judge has not been blurred or in anyway been adversely affected and no credibility of the witnesses was involved. In short, a party raising as a ground for attacking the findings of fact of the trial court on the ground that there was a prolonged or undue delay in the trial of the case must show the specific finding or findings of fact which could be faulted as a result of the delay. See Ariori v. Elemo (1983)1 SCNLR 1; and Chukwu v. The State (1992) 1 NWLR (pt. 217)255."

In the case on hand, Appellants have not shown that the

learned trial Judge erred in any way except as to his numbering of witnesses. The learned trial Judge numbered PW7 as PW8. He realized this error and corrected it in his judgment. I cannot see how this slip could be said to occasion a miscarriage of justice. The
 B learned trial Judge painstakingly reviewed the evidence of all witnesses that testified before him, including the addresses of learned counsel for the parties, he evaluated the evidence in a manner that not even the Appellants have attempted to fault, he made vital
 C findings of fact which have not been impugned before us. I do not in the circumstance, see any justification for concluding that he was at no time master of the case before him or that he in any way lost the advantage of having seen or heard the witnesses.

This notwithstanding, I can only repeat here the remarks of my
 D learned brother Iguh JSC in a situation not too dissimilar to the present case. In Chief Osigwe Egbo & Ors. v. Chief Titus Agbara & Ors. (supra) at page 315 D-F he said:

*"We have on several occasions in the past, also, expressed the
 E disapproval of this court in the exhibition, on the part of trial courts, of such inordinate and inexcusable delay in the determination of cases once they commence the hearing of evidence in such matters. This is because trial courts must at all times bear in mind that human recollections being
 F what they are, may loose (sic) their strength with the passage of time and that justice delayed is as bad as justice denied and may even, under certain circumstances, be worse. See: Lawal v. Chief Yakubu Dawodu & Anor. (1972) 1 All NLR 270 per Coker JSC. The inordinate delay of
 G seven years which this case was subjected to from the commencement of the hearing of evidence in the trial court to the delivery of judgment is, in my view, totally inexcusable, unwarranted, unjustifiable and, if I may say with respect, almost amounted to a reckless action on the part of all concerned. Trial courts are once again admonished in the strongest possible
 H terms against undue and/or inordinate delay in the determination of suits once the actual hearing of such suits has commenced."*

Undue delay there was, no doubt but this has not been shown to have occasioned a miscarriage of justice. I, therefore, resolve Question

2 against the Appellants.

QUESTION 3:

The only point the Appellants held on to is that the identity of the land to which title and injunction were tied was not established by the respondents. I think Appellants are on a very weak wicket. I have, B when dealing with question 1, shown the various admissions made by PW1 and by their counsel to the effect that the identity of the land in dispute was itself not in dispute. In paragraph 4 of their statement of claim in HEK/10/75, Respondents (as plaintiffs) pleaded as hereunder:

"4. a. (i) *The Area of land in issue in the above Suit (to be referred to hereinafter as the Area of land simply) is set out described and/or properly delineated in the plan No. ESA/656 made by Mr. E.S. Akpan and dated 5th day of July, 1974, and is the plan verged pink. It is known as and generally called LAND OF NUNG OKU EKANEM or more properly designated NUNG OKU EKANEM VILLAGE LAND simply.* C D

(iii) *A certified True Copy of the said plan No. ESA/656 (LD) is 'A' herewith attached to this STATEMENT OF CLAIM and EXHIBIT E 'A'."* E

4. b. (i) *A PORTION of the AREA OF LAND verged green in the PLAN NO. ESA/656 (LD) aforesaid has been put into issue by the DEFENDANTS (as Plaintiffs) against the PLAINTIFFS (as Defendants) in the Suit No. C/1/67 on the following particulars of claim, to wit:-* F

' i. *A Declaration of title to all that piece or parcel of land being part of the plaintiffs Village - Afaha Ubium, in Eket Division - know as Afaha Ubium land, the area whereof will be particularly delineated in a plan to be made hereafter by the plaintiffs'.* G

ii. *700 damages for trespass in that in and after the month of January, 1966, the defendants and their people, servants, privies and/or agents broke and entered upon the aforesaid land without the leave and consent of the plaintiffs, and there did damage.* H

iii. *A perpetual injunction to restrain the defendants, their people, servants, privies and agents from further acts of trespass on the said land.'*

(ii) In the said Suit No. C/1/67 an order was made for pleadings and plans, copies of which said pleadings and plans were duly filed and exchanged between the parties therein; and the land in dispute between the disputants therein in reference to the plan filed by the plaintiffs therein was described by them in the following terms, to wit:-

'The land in dispute is delineated and shown verged pink on the plan No. UN D/11/69 (sic) filed with the statement of Claim served on the defendants xx Para. 8 of the Statement of Claim 'Dated at Calabar this 5th day of April, 1973 in

C
the self same suit refers."

(iii) And the said land in dispute referred to in the plan No. UN. D/11/69 (sic) aforesaid and therein verged pink is as described in the PLAN No. ESA/656 (LD) dated this 5th day of July, 1974 referred to in D Para. 4(a) (i) above and therein verged green."

In reply, Appellants (as defendants) in the said suit averred thus:

"9. In answer to paragraph 4 (a) (i) of the Statement of Claim the defendants deny that plan No. ESA/656 LD filed by plaintiffs in this E case properly sets out and described the land in dispute. The land in dispute is not land of Nung Oku Ekanem. It is not Nung Oku Ekanem village land simply as alleged by Plaintiffs. Land in dispute is part of Afaha Ubium land.

F 10. Paragraph 4 (a) (ii) of the Statement of Claim is not denied, except that plaintiffs in Suit No. C/1/67 never filed plan No. UND/11/69.

11. In answer to paragraph 4 (b) (i) of the Statement of Claim the defendants say that all that area of land shown edged green on plain-
G tiffs' plan No. ESA/656 LD is part of Afaha Ubium land and in an issue in Suit No. C/1/67.

12. Paragraph 4 (b) (ii) of the Statement of Claim is not denied.

H 13. In answer to paragraph 4 (b) (iii) of the Statement of Claim the defendants say that their plan No. UND/11/67 filed in Suit No. C/1/67 properly describes the land in dispute. Defendants deny filing plan No. UND/11/69."

From the pleadings and evidence, therefore, the identity of the land was a non-issue.

The learned trial Judge in entering judgment in favour of the Respondents tied the declaration of title made to "Exhibits D and E". The Respondents, in paragraph 8 as of their statement of claim tied their claim to title to Plan No. ESA/656 (LD) which is Exhibit E. Exhibit D is Respondents' plan in Suit HEK/4/75 in which they were defendants. The learned trial Judge was, therefore, in error to tie his judgment to Exhibits D and E. But this error, in my respectful view, is a mere slip that can be corrected by this court. I, therefore, amend the declaration granted to read:

"In view of the foregoing, I declare that the parcels of land known and called Edissong, Owok Otuno, Esa Ikot Ekpo and Atarut shown in survey plan filed by the defendants in Suit No. HEK/10/75 which is on record as Exhibit E, constitute the property of the defendants, the people of Nung Oku Ekanem in the former Eket Local Government Area."

There are concurrent findings of the two courts below which have not been shown to be perverse. I see no reason to interfere with them. I, therefore, resolve Question 3 against the Appellants.

In conclusion, I find no substance in this appeal which is completely bereft of any merit. I unhesitatingly dismiss it with N10,000.00 costs to the Respondents.

WALI JSC

I have had the advantage of reading the lead judgment of my learned brother Ogundare, JSC and I agree with his reasoning and conclusion for dismissing the appeal.

My learned brother Ogundare, JSC has given in the lead judgment the back ground and facts involved in this case which need no further repetition by me.

By way of emphasis I only wish to comment on the Issues touching on the consolidation of the two suits by the trial court and the

identity of the pieces or parcels of land in dispute.

It is trite that what is admitted does not require further proof by evidence, whether oral or documentary.

In the present case the Appellants as plaintiffs in the trial court filed Suit No. HEK/6/75 against the Respondents/Defendants in a representative capacity. The Respondents/Defendants on their part filed Suit No. HEK/10/75 against the Appellants in a representative capacity. The appellants by way of application, moved the trial court to consolidate the two suits to wit - HEK/6/75 and HEK/10/75 for the purpose of convenience and speedy trial. This was after parties had filed and exchanged pleadings. On the identity of the subject matter and the parties, the 3rd appellant as 3rd plaintiff deposed in his affidavit in support of the application for consolidation of the two suits as follows:-

"8. That the subject matter of the two suits is the same piece or parcel of land.

9. That the parties in the above suit No. HEK/10/75 are the same as the parties in Suit No. HEK/6/75.

10. That both parties in the two suits sue or are sued in the same right as representing themselves and their respective village communities.

11. That for a fair, just and speedy determination of the rights of the parties hereto Suits No. HEK/6/75 and HEK/10/75 should be consolidated."

Based on this and other evidence in support of the application, the two suits were consolidated and tried together. At the conclusion of the trial, the trial judge gave judgment in favour of the Respondents/Defendants and dismissed the claims by the appellant/plaintiffs. Their appeal to the Court of Appeal was also dismissed.

In the course of the trial the appellants while giving evidence made similar admissions on the identity of the land in dispute. See particularly the evidence of P.W 1 and P.W. 3.

Both the trial court and the Court of Appeal as earlier indicated, gave judgment in favour of the Respondents as proved in HEK/10/75 and dismissed the Appellant's case in HEK/6/75. This judgment was affirmed

by the Court of Appeal. There are concurrent findings of fact by the trial court and the Court of Appeal and I am unable to detect any fault in that to warrant interference. See Lucy Onowan & Anor. v. J.J.I. Iserhien in re Lucy Onowan [1976] 9 - 10 SC 95; Baridam v. The State [1994] 1 NWLR (Pt. 320) 250 and Ejikeme v. Okonkwo [1994] 8 NWLR (Pt.362) B 266.

Except for the minor amendment made by my learned brother Ogundare, JSC to the declaration of title made by the learned trial judge in tying it to Exhibit D and E instead of Exhibit E only, I shall also dismiss this appeal as lacking in merit. The judgment of the lower courts as slightly amended are hereby affirmed. The Respondents are awarded N10,000.00 costs.

ACHIKE JSC

This appeal is the product of two suits, to wit, suit HEK/6/75 and Suit HEK/10/75 which were consolidated at the instance of the Appellants, on their assertion (contained in their affidavit) that the land, the subject matter in dispute in both suits " is the same piece or parcel of land." The decision of the trial court was against the Appellants and they appealed to the Court of Appeal, but the result remained the same; undaunted, they now appealed to this court.

The issues formulated by both parties are identical and address the common issues of (a) consolidation, (b) protracted delay of the trial leading to a miscarriage of justice and (c) whether the evidence adduced was sufficiently credible evidence for the court to found in favour of the Respondents. In the result, I will consider the appeal from the two sets of issue for determination.

Issue 1 questions the refusal of the court below to reverse the order of consolidation of the two suits. What remains incontrovertible is that it was at the request of the Appellants that the two suits were consolidate in the premise that the subject matter of the two suits related to the same piece or parcel of land. And the reason advanced for the reversal of the order of consolidation is that they (the Appellants) have since realized, to

their discomfiture, that the identities of the parcels of land in dispute are different, that is to say, that the suits involve two separate pieces of land. To accede to the Appellants their contention for de-consolidation will, at this belated moment, tantamount to shutting one's eyes to the injustice of the Appellants' approbating and reprobating with impunity. This will occasion incalculable damage, particularly to the evidence of the Appellants' star-witness, PW1 who had testified under cross-examination to the effect that they did not file a plan in the second suit because the area in dispute in that suit was not in dispute, more so, as he had earlier testified that the land in the second suit refers to the same subject matter as in the earlier suit. The appropriate course open to the Appellants would have been for their learned counsel to have sought to reverse the order of consolidation at the trial on realizing at any stage that the much-talked sameness of the subject matter was insupportable.

I am unable to hold that the trial of the two suits under the consolidating order, as requested by the Appellants, occasioned any injustice or miscarriage of justice such as would reverse the verdict of the trial.

E Issue 2

Perhaps, ordinarily, this issue appear to hold sway that the protracted interval of time from when trial commenced on 26/5/77 to the time judgment was delivered on 23/9/82 - some five years and four months - was rather too long for the trial Judge to do justice to the case presented by the parties. Such delays have been described as "undue delay", "inordinate delay", "unpardonable delay" or "reckless delay" etc. No doubt, many epithets can be employed to show the ignominious magnitude of such protracted delay and the attendant consequence that may arise therefrom. In a proper case, this question has not always been the length of delay that is worrisome as to disturb the judgment of the trial Judge. On the contrary, the appellate court invited to reverse the judgment of a trial Judge arising from protracted delay is mindful of the diminution of the quality of the judgment consequent to the said delay, which may be for one year, two years or even more. Such derogation from the quality of the judgment may be identified from the disjointed and incoherent nature of the judgment or the inability of the trial Judge to appraise the quality of

evidence adduced at the trial which may be indicative of the fact that he had lost the impression of whatever was the demeanour and credibility of the witnesses that testified before him and even the nature of the trial itself. Such shortcomings glaringly indicate that the trial and judgment have been adversely affected by inordinate or undue delay sufficient, in B such a degree in showing that the judgment ought not be allowed to stand. These situations are discernible from unending chain of judicial authorities and dicta. Suffice it to mention Chief Akpor v. Iguoriguo (1978) 2 SC 115, at p. 115, Awobiyi & Sons v. Igbalaiye & Bros. (1965) C All NLR 163, Chukwu v The State (1992) 1 NWLR (Pt. 217) 255, and more recently, Chief Osigwe Egbo & Ors v Chief Titus Agbara & Ors (1997) 1 NWLR 293, particularly the judgments of Iguh JSC at p. 316 and Adio JSC at pp 320-321.

Certainly, today, mere inordinate or undue delay will not ipso D facto be a ground to reverse an otherwise well-written judgment. The party complaining of inordinate delay must, in order to overturn the judgment establish clearly, the delay complained of has occasioned a miscarriage of justice. It is manifest that this duty is cast on the Appellant who E alleges inordinate delay. It cannot be otherwise. Has it been satisfactorily demonstrated by the Appellants in this case that the protracted delay has in consequence occasioned a miscarriage of justice? I think not. None has been pointed out by learned Appellants' counsel save the trial F Judge's mistake in the number allocated to the witnesses which the readily corrected on realizing the mistake. By and large, both the review and evaluation of evidences tendered at the trial were impeccably executed. I, myself, am unable to find any fault on the part of the learned trial Judge G showing any prejudicial effect that the delay in this case has occasioned. It will, therefore, be unfair and unjustifiable to disturb the judgment of the learned trial Judge, which was confirmed by the court below on the ground of protracted delay simpliciter without going further to show H convincingly that the protracted delay occasioned a miscarriage of justice.

I, would, in the circumstance resolve Issue 2 against the Appellants.

Issue 3

Both the trial court and the court below are at one with regard to the findings of fact in this appeal. It is firmly settled that this Court will not readily interfere with concurrent findings of fact by both the court of trial and Court of Appeal, unless special circumstances exist to show that such findings are perverse and therefore should be interfered with in order to obviate a miscarriage of justice. See Akpere v Barclays Bank of Nigeria Ltd & Anor (1977) 1 SC 1, Kale v Coker (1982) 12 SC 252, Ojomu v Ajao (1983) 2 SCNLR 156, Omoboriowo v Ajasin (1984) 1 SCNLR 108 and Ejikeme v. Okonkwo (1994) & NWLR (Pt. 362) 266. It is manifest that no special or exceptional circumstances exist to warrant this court to upset the concurrent findings of fact by both the High Court and the Court of Appeal. In the result, third Issue is resolved in favour of the Respondents.

In the final analysis, I find no merit in this appeal. It is for these reasons and the fuller reasons contained in the leading judgment of my learned brother, Ogundare, JSC, including the amendment made by Ogundare, JSC in relation to the declaration granted to the Respondents by the trial Judge that 1, too, would dismiss the appeal with N10,000 costs in Respondents' favour.

F

EJIWUNMI JSC

Having read in draft the judgment delivered by my learned brother, Ogundare, JSC, I too would dismiss the appeal for the reasons given by him. I also abide with the order made as to cost.

G

AYOOLA JSC

I have had the advantage of reading in draft the judgment delivered by my learned brother, Ogundare JSC. For the reasons he gives I too would dismiss the appeal with costs as ordered by him.