

SUPREME COURT OF NIGERIA
24TH SEPTEMBER, 1999. SC. 8/1995
CORAM:- S. M. A. BELGORE, A. I. IGUH, U. A. KALGO,
S. O. UWAIFO, E. O. AYOOLA, JJSC

EBENEZER NWOKORO & 5 ORS. DEFENDANTS/
APPELLANTS

(For themselves and as representing Umumgbeke
and Umuezem Villages of Ugirike Ikeduru, Owerri

AND

TITUS ONUMA & ANOR. PLAINTIFFS/RESPONDENTS

(For themselves and on behalf of
Ndiorji Villages, Ugirike, Ikeduru Owerri)

***APPEALS** - Appellate Court - Duty of - An appellate Court is to see whether issues presented to the trial court - Were properly resolved - It will not allow a party to improve on his case on appeal.*

***APPEALS** - Concurrent finding of fact - Special circumstance - That will impel the Supreme Court - To interfere with concurrent findings*

***APPEALS** - Evidence - Pleadings - Issue - Evidence which is contrary to the issue joined at the trial - Goes to no issue.*

***APPEALS** - Ground - Incompetence - Where no particulars of error were supplied - In a ground of appeal - The ground is incompetent.*

***EVIDENCE** - Witnesses - Contradictions - In the evidence of witnesses called by the same party - How the courts treat such contradictions.*

***LAND LAW** - Evidence - Acts of possession - Inference - Under S. 46 of the Evidence Act - When a court is entitled to draw the inference.*

***PLEADINGS** - General traverse - Use of - When it is convenient and*

permissible - To use general traverse.

PLEADINGS - *Statement of defence - General traverse - Is not an effective denial - Of essential or material allegations.*

FACTS

In the High Court of Imo State holden at Owerri, the plaintiffs/respondents brought a suit against the defendants/appellants for a declaration of title to a parcel of land known as ORIE OFOR; damages for trespass and perpetual injunction. The plaintiffs and defendants belong to Ugirike in Owerri. The plaintiffs claim that the defendants villages of Umumbeke and Umuezem have no access to the stream known as Onuiyi Opara Ojimadu which runs through five (including the plaintiffs' Ndiorji Village) of the eight villages which comprises Ugirike. The said river provides swampy land along the five villages. The land in dispute is situate in the plaintiffs' Ndiorji Village. Sometime in 1967, the Government of the then Eastern Region of Nigeria proposed to the five riparian villages to cultivate rice in the swamp, which rice Government would provide. The Ndiorji village accepted the proposal but the other four rejected it. The plaintiffs' village being of a small population agreed that the defendants' Umumbeke and Umuezem villages and also the village known as Umuamadi should join in the project. The rice harvest was poor. The defendants then suggested the planting of Palm seedling in place of rice. The plaintiffs agreed on condition that they were given some concession or were paid compensation since palm tress are permanent economic crops to which they would lose any other use of their land for a long time. The defendants did not accept this which prompted the plaintiffs to back out of any further joint project. The plaintiffs said they were taking over their land for the usual cultivation to which it had been put. The defendants reacted by forcibly occupying the land and planting oil palm seedling thereon. The plaintiffs protested to the authorities who then warned both parties to keep off the land until after the civil war. After the civil war the defendants went on the land and cut down a number of economic crops, including palm trees and two Uhii

trees. The defendants said the joint venture to cultivate rice was begun in 1966 through a cooperative society formed for that purpose. That the plaintiffs were asked to surrender their own land known as Oru Fine but they refused and backed out of the project. The defendants then formed their own Cooperative Society and started to plant Oil palm seedlings on the land in dispute which they claimed is their own.

The learned trial judge at the conclusion of hearing gave judgment for the plaintiffs in respect of the three reliefs but limited the extent and effect of the first and third reliefs. He made further orders which were not asked for and were not really consequential or incidental to the reliefs claimed. The learned trial judge relied on s. 46 of the Evidence Act to infer that the plaintiffs were the owners of the land in dispute. Dissatisfied, both parties appealed to the Court of Appeal, Port Harcourt division, the plaintiffs against the limitation placed on the first and third reliefs and also as regards the orders made suo motu; the defendants against the judgment as a whole together with the orders made. The Court of Appeal dismissed the defendant's appeal and allowed the plaintiffs' appeal. The defendants have further appealed to the Supreme Court raising three issues but the appeal was determined on two issues as one of the issues raised was adjudged incompetent by the Court.

ISSUES FOR DETERMINATION

"(ii) Whether the plea of acts of possession upon which the plaintiffs rely in this case are consistent with the evidence of their witnesses and, more specifically, whether the court below was correct in holding that the evidence of P.W.1., P.W.2., and P.W.3 were not in conflict.

(iii) Whether the court below was correct in holding that paragraph 13 of the amended statement of claim was not denied and that section 45 of the Evidence Law (sic) was correctly applied by the High Court."

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

Appeals - Ground

1. The third ground of appeal states: "The court below erred in law and B came to wrong conclusion on the facts in failing to observe that the plaintiffs did not prove the acts of trespass as pleaded in their amended statement of claim." No particulars of error were supplied. This ground is therefore incompetent. The issue set down for determination in respect thereof {issue (i)} and the argument proffered ought to be dis- C countenanced: see Osinupebi v Saibu (1982) 7 S.C. 104 at 110-111. (p. 2727 F)

Appeal - Evidence - Pleadings

- D 2. The case of the defendants/appellants on their pleading at the trial is that they are the owners of the land in question on which they planted palm trees and cultivated rice. The issue joined was who owned the land and not whether the defendants conceded ownership to the plaintiffs but E planted oil palm seedlings thereon with their consent. The evidence tending to show that p.w.1 was discredited as to the consent in question goes to no issue, even if he had in fact been effectively so discredited: see Emegokwe v Okadigbo (1973) 4 S.C. 113 at 117. (p. 2730 C)

F ***Evidence - Witness***

3. In the present case, the witnesses were drawing from their memory of events that happened between eight and ten years back at the time they testified. The particular witness (p.w.2) whose evidence was slightly at G variance with that of p.w.1 and p.w.3 was a witness from a neighbouring village. I do not think one should expect that the evidence of all three witnesses as to details should be perfectly the same. If this were not so, it would be rather unnatural. In view of this, the law does not insist that H there must be no contradictions in the evidence of witnesses called by the same party on any issue in contention. What the principle is, of which the courts are well familiar in practice, is that the contradictions by witnesses should not be material to the extent that they cast serious

doubts on the case presented as a whole by that party or as to the reliability of such witnesses: see Enahoro v The Queen (1965) SCNLR 39. In civil cases, even greater latitude is allowed in respect of such contradictions particularly when the witnesses are illiterate, or are obviously unsophisticated. (p. 2732 B)

B

Appeals - Appellate court

4. It has been shown that the contradictions complained of by the appellants cannot possibly affect the case between the parties as fought at the trial court. It must be realized that appellate courts do not try the case of the parties. That is effectively done at the court of first instance. The normal duty of an appellate court is to see whether issues presented to the trial court were properly resolved. In other words, an appellate court will not allow a different case from the one agitated at the trial to be pursued before it by any of the parties but will be concerned only to see whether the right procedure was followed, reasonable findings of fact made and the law correctly applied by the trial court. In the case of Igboke Oroke v Chuku Edet (1964) N.N.L.R. 118 at 119-120 it was observed by Hurley CJ. as follows:

"It is the business of a trial court to decide disputes by trying cases. It is not the business of an appeal court to reopen disputes by trying cases again; an appeal court's duty is to see whether trial courts have used correct procedure to arrive at the right decisions. An appeal court does not inquire into disputes, it inquires into the way in which disputes have been tried and decided. Since a dispute is to be decided by the trial court and not in the appeal court, each party must make the whole of his case in the trial court and call all his witnesses there; he should not be allowed to improve on his case in the appeal court....."

This view was approved by this court in Ajadi v Okenihun (1985) 1 NWLR (pt.33) 484 at 492. That remains the proper position in law that a party is not allowed to improve on his case on appeal or to present a case different from what he placed before the trial court. (p. 2733 A)

Appeals - Concurrent findings

5. There is also the implication of what the appellants urged on us as to the findings of fact made by the two courts below in these matters. They have sought to have those findings reversed. The point must be made that these are concurrent findings. It has been firmly established by a long line of authorities that this court will not interfere with concurrent findings of fact by the two lower courts unless there is a special circumstance shown to impel it to do so. Such special circumstance arises from a clear case that the findings of fact are perverse, or there is an error in procedure or substantive law which has occasioned a miscarriage of justice" see Chinwendu v Mbamali (1980) 3-4 S.C. 31 at 75. The contradictions in the evidence in question are not only insubstantial but are also immaterial as has been pointed out earlier. (p. 2733 G)

Pleadings - Statement of defence

6. An issue was distinctly raised by the plaintiffs as to act of ownership of that portion of the land involved. When that issue is decided it will go towards resolving the larger question as to the extent of the situs of the parties' villages, and consequently as to who could be said to own the land in dispute which is within only one of such villages. As already said, this issue of act of ownership was evasively denied by the defendants, and then a general traverse was made in a separate paragraph. I do not think that cured the inadequacy of the denial of the specific averment in the circumstances of this case. I think the point has been made in this court that a general traverse or denial usually given in one of the paragraphs of a statement of defence, either at the beginning or the end of that statement, is not an effective denial of essential or material allegations: see Balogun v Untied Bank for Africa Ltd (1992) 6 NWLR (pt.247) 336 at 349. (p. 2736 H)

H Pleadings - General traverse

7. General traverse is convenient and permissible when dealing with a long and complicated statement of claim to cover all the allegations which are more or less immaterial and those allegations on which counsel has

no instructions. But it should not be adopted in dealing with the allegations which are the gist of the action. The better approach is that to such allegations, the defendant should plead as precisely as possible: See Odgers on High Court pleading and practice, 23rd edition, page 171, which contains the opinion of the learned author, which I fully endorse, in respect of general traverse. This opinion is essentially in line with the views expressed by Idigbe JSC in Messrs Lewis & Peat (N.R.1) Ltd v Akhimien (1976) 7 S.C. 157 at 163-164 that:

"Nowadays almost every statement of defence contains such a general denial. (See Warner v Sampson (1959) 1 Q.B.287 at 310-311). However, in respect of essential and material allegations such a general denial ought not (to) be adopted; essential allegations should be specifically traversed." (p. 2737 C)

Land law - Evidence

8. Having regard to the situation on the ground, the learned trial judge relied on s.46 (formerly s.45) of the Evidence Act to infer that the plaintiffs were the owners of the land in dispute. It must also be remembered that the learned trial judge had held that the defendants' villages do not extend to the Onu Iyi Opara Ejimadu stream. In other words, the land in dispute was completely hedged in to the exclusion of any reasonable right of access to it available to the defendants. So it follows that in no sense could they successfully maintain a claim to the land in dispute. I think the learned trial judge was entitled to draw the inference under s.46 of the Evidence Act that the plaintiffs being the owners of the old and new settlements where they have shown acts of possession and enjoyment, and the land where those settlements are, being so situated or connected with the land in dispute by locality - are the owners of the land in dispute: see Umeojiako v Ezenamuo (1990) 1 NWLR (pt.126) 253 at 272. (p. 2739 D)

NOTABLE POINTS OF INTEREST

UWAIFO JSC

1. A party must be consistent in litigating his case

The appellants must be seen to be consistent in their part of the case litigated. To quote Oputa JSC in Ajike v Kelani (1985) 3 NWLR (pt.12) 248 at 269:

"A party should be consistent in stating his case and consistent in proving it. He will not be allowed to take one stance in his pleadings; then turn somersault during the trial, then assume nonchalant attitude in the Court of Appeal; only to revert to his case as pleaded in the Supreme Court. Justice is much more than a game of hide and seek. It is an attempt, our human imperfections notwithstanding, to discover the truth." (p. 2730 E)

D

2. Attitude of the courts to inconsistencies in the evidence of witnesses

In the normal course of events, it is to be expected that witnesses may not always speak of the same fact or event with equal and regimented accuracy. This is so particularly when they speak from fairly faded memory in respect of a matter they consider from slightly different perspectives and with unequal emphasis. As said by Bello JSC (later CJN) in Emiator v The State (1975) 9-11 S.C.107 at 111; (1975) 9 NSCC 420 at 422, a case where witnesses gave evidence of events which had happened two years back : "Passage of time fades human memory on matters of details and human observation tends to differ in confused situations....." This is to make due allowance for circumstances where inconsistencies in the evidence of witnesses may arise from a variety of causes when it comes to matters of details. It may well be that such details do not bear much relevance, in any event, to the true nature of the case, having regard to the issues properly involved. (p. 2731 G)

G

H 3. Limitations to the use of general traverse

This is not to say that a general traverse is not useful, convenient and permissible: see Osafile v Odi (1994) 2 NWLR (pt.325) 125 at 137. It is only that it has its limitations, which must be recognized, such that it is

not to be employed to create uncertainty where only specific denial, for example, of multiple allegations or of individual essential allegation, will best serve the ends of pleadings. In referring to Order XIX of the old Rules of Court, 1875 of England which read inter alia: "Every allegation of fact in any pleading..... if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted", Jessel M.R., in Thorp v Holdsworth (1876) 3 Ch. D.637 at 639 observed:

"The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules of Order XIX was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to definite issues, and thereby to diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing." I think this is a proper admonition and it represents the principle of good pleading. It should always be borne in mind when pleading. (p. 2737 G)

4. The word "surrender" in the present case - What it connotes

Efforts were made by the defendants/appellants in oral argument before us, as they also canvassed in the court below, to press that the plaintiffs having agreed to "surrender" the land in dispute for joint use, were no longer in exclusive possession. That argument, of course, presupposes or perhaps concedes that the ownership of the land was in the plaintiffs. The court below met that argument by holding, quite rightly in my view, that "The use of the the word 'surrender' in the sense it was used does not mean that the respondents divested themselves of the ownership of the disputed land." The word "surrender" as used by the plaintiffs has no higher connotation than a "grant of licence" in a contractual sense. If the terms of the contract are not breached or exceeded the licence would not be revoked without reasonable notice. That would not divest the plaintiffs of ownership or exclusive possession of the land but it might provide the defendants with a defence of lawful entry upon the land. But when the later project suggested by the defendants was rejected by the

plaintiffs, the licence came to an end and the defendants became trespassers from then on. (p. 2740 D)

REPRESENTATION

- B T. E. Williams Esq. for the defendants/appellants
 Prince E. T. Nsofor for the plaintiffs/respondents

CASES REFERRED TO

- Osinupebi v. Saibu (1982) 7 S.C. 104 at 110-111
 C Ogunlade v. Adeleye (1992) 8 NWLR (pt. 260) 409 at 419-420
 Emegokwe v. Okadigbo (1973) 4 S.C. 113 at 117
 Enahoro v. The Queen (1965) SCNLR 39
 Oroke v. Edet (1964) N.N.L.R. 118 at 119-120
 D Ajadi v. Okenihun (1985) 1 NWLR (pt.33) 484 at 492
 Chinwendu v. Mbamali (1980) 3-4 S.C. 31 at 75
 Enang v. Adu (1981) 11-12 S.C. 25 at 42
 Mogaji v. Cadbury Nigeria Ltd (1985) 16 NSCC 959 at 995
 E Okonkwo v. Kpajie (1992) 2 NWLR (pt.226) 633 at 658
 Atoyebi v. Governor, Oyo State (1994) 5 NWLR (pt.344) 290 at 300
 Ogoyi v. Umagba (1995) 9 NWLR (pt.149) 283 at 294
 Umeojiako v. Ezenamou (1990) 1 NWLR (pt.126) 253 at 272
 Chukwu v. Nneji (1990) 6 NWLR (pt.156) 363 at 376
 F Osafile v. Odi (1994) 2 NWLR (pt. 325) 125 at 137

STATUTE & RULES REFERRED TO

- High Court Rules, Vol. 4, Laws of Eastern Nigeria, 1963; O. 33 rr. 10 &
 G 11
 Evidence Act, Cap 112 Laws of the Federation of Nigeria, 1990; s. 46

LEAD JUDGMENT BY UWAIFO JSC

- H The plaintiffs (now respondents) are the people of Ndiorji village, one of the eight villages of Ugirike Ikeduru in Owerri. The defendants (now appellants) are of Umuezem and Umumgbeke, two of the said eight villages. The respondents lay claim to a parcel of land known as ORIE

OFOR, now in dispute, which they allege is part of their larger parcel of land called Ala Ndiorji as depicted in their litigation plan No. UND/48/71A (EXHIBIT A). For reasons to be given later, they brought this suit against the appellants for (1) a declaration of title to the said Orie Ofor (2) N200.00 damages for trespass and (3) perpetual injunction.

On 10 July, 1979, the Owerri High Court of Imo State presided over by Ogwuegbu J, gave judgment for the respondents in respect of the three reliefs but limited the extent and effects of the first and third reliefs. He made further orders which were not asked for and were not really consequential or incidental to the reliefs claimed. The judgment awarded reliefs (1) as follows: "The plaintiffs are entitled to the customary right of occupancy of that parcel of land verged yellow in exhibit 'A' tendered by the plaintiffs subject to the right of possession by the defendants of that area of it already cultivated by the said defendants with oil palm trees". As to relief (3), it was "The defendants, their agents and servants are hereby restrained from further trespass to any portion of Orie Ofor land verged yellow in exhibit 'A' not yet cultivated with oil palm trees by the defendants." (Emphasis indicates the limitation on the reliefs sought).

Both parties appealed: the plaintiffs against the limitation placed on the first and third reliefs and also as regards the orders made suo motu; the defendants against the judgment as a whole together with the orders made. On 28 February, 1994, the Court of Appeal, Port Harcourt Division, dismissed the defendants' appeal and allowed the plaintiffs' appeal, making the following orders: "1. The plaintiffs are entitled to the customary right of occupancy of the entire parcel of land verged yellow in exhibit 'A' tendered by the plaintiffs.

2. The defendants, their agents and servants are hereby restrained from further trespass on any portion of Orie Ofor land verged yellow in exhibit 'A'. The award of N200.00 damages was not disturbed.

Let me briefly state the facts of this case at this stage. The plaintiffs and defendants belong to Ugirike in Owerri. The plaintiffs claim that the defendants' villages of Umumgbeke and Umuezem have no access to the stream known as Onuiyi Opara Ojimađu which runs through five

(including the plaintiffs' Ndiorji village) of the eight villages which comprise Ugirike. The said river provides swampy land along the said five villages. The land in dispute called Orie Ofor is situate in the plaintiffs' Ndiorji village.

B Sometime in 1967, the Government of the then Eastern Region of Nigeria proposed to the five riparian villages to cultivate rice in the swamp, which rice Government would provide. The Ndiorji village accepted the proposal but the other four rejected it. The plaintiffs' village being of a small population agreed that the defendants' Umumgbeke and C Umuezem villages and also the villages known as Umuamadi should join in the project. The rice harvest was poor. The defendants then suggested the planting of palm seedlings in place of rice. The plaintiffs agreed on condition that they were given some concession or were paid D compensation since palm trees are permanent economic crops to which they would lose any other use of their land for a long time. The defendants turned this down. The plaintiffs therefore backed out of any further joint project and said they were taking over their land for the usual E cultivation to which it had been put.

The defendants reacted by forcibly occupying the land and planting oil palm seedlings thereon. The plaintiffs protested to the authorities who then warned both parties to keep off the land until after the civil war. F After the civil war the defendants went on the land and cut down a number of economic crops, including palm trees and two uhii trees.

The defendants on the other hand claimed that the stream earlier mentioned runs through all eight villages. They said the joint venture to cultivate rice was begun in 1966 through a cooperative society formed G for that purpose. The plaintiffs were asked to surrender their own land known as Oru Fine but they refused and backed out of the project. The defendants then formed their own cooperative society and started to plant oil palm seedlings on the land in dispute which they say is their own.

H The learned trial judge made the following findings:

(a) that the two villages of the defendants and also Umuamadi village are upland villages with no water front; (b) that a rice project was what was originally agreed; (c) that the plaintiffs pulled out of any joint venture to

plant oil palm seedlings when their demand for compensation for their land they would surrender for this purpose was turned down by the defendants; (d) that the Umuamadi village also pulled out; (f) that after harvesting the rice, the presence of the defendants on the land in dispute was without the consent of the plaintiffs; (g) that the evidence led by the defendants was at variance with the material averments in their amended statement of defence; and (h) that the plaintiffs proved exclusive possession of the land in dispute. The learned trial judge also specifically found that the plaintiffs proved acts of trespass committed by the defendants on the land through the planting of oil palm trees on the land in dispute without the consent of the plaintiffs. The Court of Appeal judgment was rejected by the defendants.

They have now appealed against the judgement. They filed an amended notice of appeal containing five grounds. The first ground is that there was conflict between the evidence of P.W.1, P.W.2 and P.W.3 on the issue of cultivation by the parties of oil palm trees on the land in dispute and that the court below failed to note this. The second ground which appears to arise directly from the first is that the court below was in error when it held that the plaintiffs did not cultivate oil palm before or during the civil war. It seems to me therefore that if there was indeed no material contradiction in the evidence of P.W.1., P.W.2 and P.W.3, the complaints in the said two grounds would not be sustained.

The third ground of appeal states: "The court below erred in law and came to wrong conclusion on the facts in failing to observe that the plaintiffs did not prove the acts of trespass as pleaded in their amended statement of claim." No particulars of error were supplied. This ground is therefore incompetent. The issue set down for determination in respect thereof {issue (i) } and the argument proffered ought to be discountenanced: see Osinupebi v Saibu (1982) 7 S.C. 104 at 110-111; Ogunlade v Adeleye (1992) 8 NWLR (pt. 260) 409 at 419-420; Cross River State Newspapers Corpn. v Oni (1995) 1 H NWLR (pt.371) 270 at 284-285.

The fourth ground of appeal reads: "The court below erred in law in holding that the defendants did not deny paragraph 13 of the

amended statement of claim and that section 45 of the Evidence Act was correctly applied." Two matters are involved in this ground, namely, (a) whether para. 13 of the amended statement of claim was sufficiently denied and (b) whether s.45 of the Evidence Act was correctly applied. I shall endeavour to resolve them separately.

The fifth ground of appeal is that the court below failed to properly evaluate the evidence before the trial court and thereby came to wrong conclusions in relation to the cultivation of palm trees and rice on the land in dispute by all parties concerned, namely, the plaintiffs, the defendants and the Umuamadi village. This ground seems to have some bearing with the first and second grounds of appeal as well as to raise the issue concurrent findings.

The appellants set down three issues for determination. I have already noted that there is no competent ground of appeal to support issue (i) framed by the appellants as follows: "Whether the plaintiffs have succeeded in proving the acts of trespass alleged against the defendants or that they (the said plaintiffs) were in exclusive possession of the land in dispute ." Only the remaining issues (ii) and (iii) will now be considered. They read:-

"(ii) Whether the plea of acts of possession upon which the plaintiffs rely in this case are consistent with the evidence of their witnesses and, more specifically, whether the court below was correct in holding that the evidence of P.W.1., P.W.2., and P.W.3 were not in conflict.

(iii) Whether the court below was correct in holding that paragraph 13 of the amended statement of claim was not denied and that section 45 of the Evidence Law (sic) was correctly applied by the High Court."

I must note that it is very difficult if not impossible to ascertain from the written brief where the argument on each of the above-stated issues begins and where it ends. However, in respect of issue (ii), I believe the main argument is based on the comparison of the evidence of P.W.1 (Titus Onuma), P.W.2 (Lawrence Nwigwe), and P.W.3 (Augustine Iheoma) as against the evidence of d.w.1 (Eugene Unenka), d.w.2 (Vincent Orji) and d.w.4 (John Mbachu) It is all about the planting of oil palm

seedlings.

Titus Onuma (P.W.1) and Augustine Iheoma (P.W.3) gave evidence before the trial judge reasonably in conformity with the plaintiffs' amended statement of claim. That much was conceded in the appellants' brief where it is said that that conformity was to "a limited extent" true in B respect of the said witnesses. In respect of P.W.1, the argument is that in an earlier magistrate's court proceedings in which the plaintiffs were accused of destroying oil palm trees, the witness was recorded as saying: "All the four villages NDIORJI, UMUAMAGBEKE, UMUEZEM and C UMUAMADI jointly planted oil palm seedlings on the land." Before the trial judge, the witness denied saying so and added "my village Ndiorji did not plant the palm seedlings with the defendants." He specifically said later in his evidence: "The palm trees which we destroyed leading to our prosecution in the Magistrate's Court, Owerri were planted by the defen- D dants on our land called Orie Ofor the subject of this action. We destroyed those palm trees because the defendants planted them on our land without our consent. When we objected to defendants making use of our land for the palm project unless we are paid concession, they E proceeded to plant palm seedlings on the land because of their numerical strength."

The purpose of this argument was probably to show that P.W.1 was discredited by what he was alleged to have said in the magistrate's F court; and to press that the appellants were on the land to plant oil palm seedlings with the consent of the respondents so that the issue of trespass could not arise. As put in the appellants' brief: "That testimony is not consistent with the allegation that the seedlings were planted after G forcible entry on the land by the defendants and without the consent of the plaintiffs. In the premises it is the submission of the appellants that the witness, p.w.1, ought to have been treated as a person unworthy of credit on the question as to whether or not the palm trees were planted on the land in dispute, with or without the consent of the plaintiffs." H

I think the appellants, with due respect, are merely clutching on any available straw on this appeal. In the first place, this line of argument was not canvassed in the court below. What was canvassed by the

appellants in that court, which was far and away from the present contention, was a claim to ownership of the land and this was stated in the appellant's brief in that court as follows:

"There was no evidence that defendants' units were not the owners of the portions of onu Miri Opara Ejimadu Swamp where they planted the said raffia palm nor was there evidence that the portions planted up with raffia palms by defendants did not belong to defendants. The only reasonably inference that can be drawn from this evidence is that defendants own lands or portions where they planted raffia palms in the land in dispute i.e along the swamp of Onu Iyi Opara Ejimadu stream which is clearly shown in exhibits 'A' and 'B' to be within the land in dispute."

Furthermore, **the case of the defendants/appellants on their pleading at the trial is that they are the owners of the land in question on which they planted palm trees and cultivated rice. The issue joined was who owned the land and not whether the defendants conceded ownership to the plaintiffs but planted oil palm seedlings thereon with their consent. The evidence tending to show that p.w.1 was discredited as to the consent in question goes to no issue, even if he had in fact been effectively so discredited: see Emegokwe v Okadigbo (1973) 4 S.C. 113 at 117.** The appellants must be seen to be consistent in their part of the case litigated. To quote Oputa JSC in Ajike v Kelani (1985) 3 NWLR (pt.12) 248 at 269:

"A party should be consistent in stating his case and consistent in proving it. He will not be allowed to take one stance in his pleadings; then turn somersault during the trial, then assume nonchalant attitude in the Court of Appeal; only to revert to his case as pleaded in the Supreme Court. Justice is much more than a game of hide and seek. It is an attempt, our human imperfections notwithstanding, to discover the truth."

The appellants, on this same point, quoted in extenso the evidence of p.w.3 The only quarrel they have with that evidence is that the witness alleged that the defendants alone cut down economic trees while planting oil seedlings. It is said it contradicts the evidence of p.w.2. Part of the said evidence of p.w.3 reads as follows:

"The rice was cultivated on the swamp area of Orié Ofor land. The oil palm seedlings were planted by the defendants on the dry area of Orié Ofor land immediately after the swamp area. There were economic trees growing on the dry area such as oil palm, uhii, bread fruit, ofor and other economic trees. These trees were there before the oil palm seedlings were planted. The defendants cut down the economic trees before they started planting the oil palm seedlings on this land. The people of Ndiorji went and uprooted the palm seedlings on the ground that their consent was not obtained before the planting on that land."

This evidence, as that of p.w.1, represents substantially the case of the plaintiffs. The evidence of p.w.2 who hails from Umuduruebo village which is said to have contradicted that p.w.3 is that : "The four villages jointly cleared the land, cut the sticks and trees before planting the oil palm seedlings..... The quarrel between the four villages started when they were planting the oil palm seedlings. I do not know what caused the quarrel..... I know Orié Ofor land. It is within Okatta Ndiorji. Orié Ofor belongs to Ndiorji people - plaintiffs." This evidence cannot detract from the main focus of the plaintiffs' case simply because it alleged that the plaintiffs also took part in what the defendants did. This is because it does not help the defendants' appeal which has fundamentally shifted from the case it tried to make at the trial court and on appeal at the court below. This said evidence makes it clear nevertheless that the land belongs to the plaintiffs. That was an issue joined on the pleadings to be resolved in the litigation between the parties. At the trial, d.w.1, d.w.2, and d.w.3 gave evidence that the defendants own the land but their evidence in some sense was at variance with their pleading. The learned trial judge rejected their case. Whatever contradiction there may be between the evidence of p.w.2 and p.w.3 is entirely immaterial in the circumstances.

In the normal course of events, it is to be expected that witnesses may not always speak of the same fact or event with equal and regimented accuracy. This is so particularly when they speak from fairly faded memory in respect of a matter they consider from slightly different perspectives and with unequal emphasis. As said by Bello JSC (later

CJN) in Emiator v The State (1975) 9-11 S.C.107 at 111; (1975) 9 NSCC 420 at 422, a case where witnesses gave evidence of events which had happened two years back: "Passage of time fades human memory on matters of details and human observation tends to differ in confused situations....." This is to make due allowance for circumstances where inconsistencies in the evidence of witnesses may arise from a variety of causes when it comes to matters of details. It may well be that such details do not bear much relevance, in any event, to the true nature of the case, having regard to the issues properly involved. **In the present case, the witnesses were drawing from their memory of events that happened between eight and ten years back at the time they testified. The particular witness (p.w.2) whose evidence was slightly at variance with that of p.w.1 and p.w.3 was a witness from a neighbouring village. I do not think one should expect that the evidence of all three witnesses as to details should be perfectly the same. If this were not so, it would be rather unnatural. In view of this, the law does not insist that there must be no contradictions in the evidence of witnesses called by the same party on any issue in contention. What the principle is, of which the courts are well familiar in practice, is that the contradictions by witnesses should not be material to the extent that they cast serious doubts on the case presented as a whole by that party or as to the reliability of such witnesses: see Enahoro v The Queen (1965) SCNLR 39.**

In civil cases, even greater latitude is allowed in respect of such contradictions particularly when the witnesses are illiterate, or are obviously unsophisticated. There was a case where a party and her witnesses were known to have lied. The mere fact that they did was not thought sufficient to destroy the case presented by her. In reviewing the case, Davis J. observed as follows:

".....the other part of her case stands on a different footing. It would not, I think, be right to approach it from the point of view that as she and her witnesses have lied about one thing the remainder of their evidence must be equally unreliable. It is not unknown for people, particularly simple and uneducated people such as these are said to be, to

fall into the error of lying in order to improve as already good case."

See Parojcic v Parojcic (1959) 1 ALL ER 1 at pp.5-6.

It has been shown that the contradictions complained of by the appellants cannot possibly affect the case between the parties as fought at the trial court. It must be realized that appellate courts do not try the case of the parties. That is effectively done at the court of first instance. The normal duty of an appellate court is to see whether issues presented to the trial court were properly resolved. In other words, an appellate court will not allow a different case from the one agitated at the trial to be pursued before it by any of the parties but will be concerned only to see whether the right procedure was followed, reasonable findings of fact made and the law correctly applied by the trial court. In the case of Igboke Oroke v Chuku Edet (1964) N.N.L.R. 118 at 119-120 it was observed by Hurley CJ. as follows:

"It is the business of a trial court to decide disputes by trying cases. It is not the business of an appeal court to reopen disputes by trying cases again; an appeal court's duty is to see whether trial courts have used correct procedure to arrive at the right decisions. An appeal court does not inquire into disputes, it inquires into the way in which disputes have been tried and decided. Since a dispute is to be decided by the trial court and not in the appeal court, each party must make the whole of his case in the trial court and call all his witnesses there; he should not be allowed to improve on his case in the appeal court....."

This view was approved by this court in Ajadi v Okenihun (1985) 1 NWLR (pt.33) 484 at 492. That remains the proper position in law that a party is not allowed to improve on his case on appeal or to present a case different from what he placed before the trial court.

There is also the implication of what the appellants urged on us as to the findings of fact made by the two courts below in these matters. They have sought to have those findings reversed. The point must be made that these are concurrent findings. It has been firmly established by a long line of authorities that this court will

not interfere with concurrent findings of fact by the two lower courts unless there is a special circumstance shown to impel it to do so. Such special circumstance arises from a clear case that the findings of fact are perverse, or there is an error in procedure or substantive law which has occasioned a miscarriage of justice" see Chinwendu v Mbamali (1980) 3-4 S.C. 31 at 75; Enang v Adu (1981) 11-12 S.C. 25 at 42; Mogaji v Cadbury Nigeria Ltd (1985) 16 NSCC 959 at 995; Okonkwo v Kpajie (1992) 2 NWLR (pt.226) 633 at 658; Atoyebi v Governor, Oyo State (1994) 5 NWLR (pt.344) 290 at 300; J.A. Obanor & Co. Ltd v Co-op. Bank Ltd (1995) 4 NWLR (pt.388) 128 at 138; Ogoyi v Umagba (1995) 9 NWLR (pt.149) 283 at 294. **The contradictions in the evidence in question are not only insubstantial but are also immaterial as has been pointed out earlier. I hold that issue (ii) raised by the appellants must be answered both as to the first and second arms in the affirmative but add, in respect of the second arm, that it would however be irrelevant whether it was answered in the negative.**

Issue (iii) is also in two parts. The first part is whether the court below was correct in holding that para.13 of the amended statement of claim was not denied. The said para.13 reads:

"13. In the exercise of their right as owners of the Ala Ndiorji verged pink in the plan, inclusive of the area now in dispute, the plaintiffs allowed portions thereof to the Saint Simon's Church, Ugirike and the Sacred Heart School, Ugirike. The portions so allowed or granted to the Church and School are verged green in plan No.UN.D/48/71A filed along with this statement."

This paragraph was not specifically mentioned in the amended statement of defence in denial. All the 22 paragraphs of the amended statement of claim except para.13 above, and also para.19, were mentioned in the amended statement of defence and reacted to.

But there was the general denial pleaded in para.16 as follows: "Save as is hereon (sic) expressly and specifically admitted, the defendants deny each and every material allegation contained in the statement of claim as if the same were herein set out and traversed seriatim and will put the plaintiffs to the strictest proof of each and every such allegation."

There is also the averment in para.9 of the amended statement of defence, the relevant part of which reads:

"The defendants include Umuezem, Umuamadi and Umungbeke (and) are quite large in population and area. The exact extent is shown in the plan E/GA9/72 attached with (sic) this statement of defence and includes the central area of the town centre, stretching up to the bank of Onummiri Opara Ojimadu, Orié Ofor land, Old Nkwo Ugiri-Ike Market, the present Ukwougiri land, Sacred Heart Church and School, and the land in and around these institutions."

A close look at the above-quoted averment in para.9 of the amended statement of defence as compared with the averment in para.13 of the amended statement of claim reveals some correlation as to the area covered by both having regard to the survey plan filed along with the pleading of each party, particularly also the reference to the Church and School. The defendants in their said para.9 clearly lay claim to the area claimed by the plaintiffs in their para.13. So it would appear that issue was joined in respect of who between the two parties owned the land involved. But the plaintiffs' para.13 no doubt goes beyond that. It alleges that the plaintiffs gave out portions of the said land for the building of Saint Simon's Church and the Sacred Heart School. The defendants were silent on this in their said para.9 although they admit therein the existence of such buildings. The general traverse in their para.15 denies whatever was not specifically admitted in the other paragraphs. Such a denial in respect of Saint Simon's Church and the Sacred Heart School seems to gloss over a material issue as to who gave out the land for the construction of those buildings. More specifically it does not say they, the defendants, did so or that it was an act of trespass by the plaintiffs or anybody else who might claim to have done so. So the obvious question arising on the strength of the pleading is, how did the buildings come to be erected there? The plaintiffs claim it was with their authority. It seems to me that that claim has not been sufficiently denied by the defendants. This is because it is material as to act of possession and ownership by the plaintiffs which ought to be specifically denied. It must be regarded as evasive pleading by the defendants as to who permitted the erection of those

buildings, or who can claim the act of possession and ownership.

Order 33, rr.10 & 11 of the High Court Rules, vol. 4, Laws of Eastern Nigeria 1963 applicable to this case [indeed as in most other High Court (Civil Procedure) Rules and of the Rule of the Supreme Court of England], state as follows:

"10. *It shall not be sufficient to deny generally the facts alleged by the statement of claim, but the defendant must deal specifically therewith, either admitting or denying the truth of each allegation of fact seriatim, as the truth of falsehood of each is within knowledge, or (as the case may be) stating that he does not know whether such allegation or allegations is or are true or otherwise.*

11. *When a party denies an allegation of fact he must not do so evasively, but answer the point of substance. And when a matter of fact is alleged with divers circumstances it shall not be sufficient to deny it as alleged along with those circumstances, but a fair and substantial answer must be given.* (Emphasis mine).

The evasiveness of the defendants as regards the averment in para13 of the amended statement of claim to which I have already drawn attention is compounded by the fact that while the plaintiffs' survey plan which accompanied their amended statement of claim indicates various buildings including the said Church and School, and even roads, the defendants' plan which accompanied their amended statement of defence clearly omitted them. Would this not amount to an attempt to mislead? Yet those permanent features really exist, and, in any event, the defendants pleaded the Church and School. As the survey plans attached to those pleadings form part of the averments in the respective pleadings, the defendants' paras.9 and 15 cannot be seen as having sufficiently denied the assertion by the plaintiffs that in the exercise of their right of ownership of the land involved, they gave out portions for the said Church and School.

An issue was distinctly raised by the plaintiffs as to act of ownership of that portion of the land involved. When that issue is decided it will go towards resolving the larger question as to the extent of the situs of the parties' villages, and consequently as to

who could be said to own the land in dispute which is within only one of such villages. As already said, this issue of act of ownership was evasively denied by the defendants, and then a general traverse was made in a separate paragraph. I do not think that cured the inadequacy of the denial of the specific averment in the circumstances of this case. I think the point has been made in this court that a general traverse or denial usually given in one of the paragraphs of a statement of defence, either at the beginning or the end of that statement, is not an effective denial of essential or material allegations: see Balogun v Untied Bank for Africa Ltd (1992) 6 NWLR (pt.247) 336 at 349. General traverse is convenient and permissible when dealing with a long and complicated statement of claim to clover all the allegations which are more or less immaterial and those allegations on which counsel has no instructions. But it should not be adopted in dealing with the allegations which are the gist of the action. The better approach is that to such allegations, the defendant should plead as precisely as possible: See Odgers on High Court pleading and practice, 23rd edition, page 171, which contains the opinion of the learned author, which I fully endorse, in respect of general traverse.

This opinion is essentially in line with the views expressed by Idigbe JSC in Messrs Lewis & Peat (N.R.1) Ltd v Akhimien (1976) 7 S.C. 157 at 163-164 that:

"Nowadays almost every statement of defence contains such a general denial. (See Warner v Sampson (1959) 1 Q.B.287 at 310-311). However, in respect of essential and material allegations such a general denial ought not (to) be adopted; essential allegations should be specifically traversed."

This is not to say that a general traverse is not useful, convenient and permissible: see Osafire v Odi (1994) 2 NWLR (pt.325) 125 at 137. It is only that it has its limitations, which must be recognized, such that it is not to be employed to create uncertainty where only specific denial, for example, of multiple allegations or of individual essential allegation, will best serve the ends of pleadings. In referring to Order XIX of the old

Rules of Court, 1875 of England which read inter alia: "Every allegation of fact in any pleading if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted", Jessel M.R., in Thorp v Holdsworth B (1876) 3 Ch. D.637 at 639 observed:

"The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules of Order XIX was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to definite issues, and thereby to diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing." C

I think this is a proper admonition and it represents the principle of good D pleading. It should always be borne in mind when pleading.

I do not think the complaint of the appellants in regard to the consequences of the inadequate denial of para.13 of the amended statement of claim as decided by the court below is valid. That leads me to the E second part of issue (iii) which is whether the court below was right to hold that s.46 of the Evidence Act was correctly applied by the trial court. In this regard, attention must first be paid to the survey plan produced by the plaintiffs (exhibit A). That plan shows the plaintiffs' old dwelling site on the westerly part thereof. The defendants call it Oru F Fine Land in their own survey plan (exhibit B). There are the several dwelling houses of the plaintiffs as well as roads on the north-westerly part of exhibit A. The defendants failed to indicate them in their exhibit B. But there is no argument that those features, as well as the Church G and School buildings, exist there physically. There is also the land of Umuduruebo village (which is not one of the defendants' villages) which both parties indicated on the northerly part of their survey plans, exhibits A and B respectively. In essence, these prominent features are close to H the Orie Ofor land in dispute. This is particularly revealed in the plaintiffs' survey plan. When that plan is compared with the defendants' plan, even though the concentrated settlement and roads are not shown therein, it is clear that the land in dispute is similarly located. The learned trial

judge indeed found that the land in dispute is the same in both plans.

The learned trial judge rightly found that the area of land containing the concentrated new settlement belongs to the plaintiffs. It is common ground that the area of land containing the old settlement belongs to the plaintiffs. This the defendants clearly conceded in their pleading and evidence. It is plain therefore that the plaintiffs have shown acts of possession and enjoyment of the land covering the old and new settlements. Another village (Umuduruebo) not part of the defendants' villages is in boundary with the land on the northerly part thereof as shown in the survey plan, exhibit A (as well as exhibit B). The remaining boundary of the land in the south-easterly part is the Onu Iyi Opara Ejimadu stream. The land in dispute is peculiarly situated or connected with the old and new settlements of the plaintiffs in the manner depicted in the survey plan, exhibit A, and given in evidence.

Having regard to the situation on the ground, the learned trial judge relied on s.46 (formerly s.45) of the Evidence Act to infer that the plaintiffs were the owners of the land in dispute. The said section reads:

"46. Acts of possession and enjoyment of land must be evidence of ownership or of a right of occupancy not only of the particular piece or quantity of land with reference to which such acts are done, but also of other land so situated or connected therewith by locality or similarity that what is true as to the one piece of land is likely to be true of the other piece of land." (Emphasis mine).

It must also be remembered that the learned trial judge had held that the defendants' villages do not extend to the Onu Iyi Opara Ejimadu stream. In other words, the land in dispute was completely hedged in to the exclusion of any reasonable right of access to it available to the defendants. So it follows that in no sense could they successfully maintain a claim to the land in dispute.

I think the learned trial judge was entitled to draw the inference under s.46 of the Evidence Act that the plaintiffs being the owners of the old and new settlements where they have shown acts of possession and enjoyment, and the land where those settlements

are, being so situated or connected with the land in dispute by locality - are the owners of the land in dispute: see Umeojiako v Ezenamou (1990) 1 NWLR (pt.126) 253 at 272: Chukwu v Nneji (1990) 6 NWLR (pt.156) 363 at 376. I therefore answer issue (iii) in the affirmative.

B Although I have held that issue (i) is not properly supported by any ground of appeal, it is obvious from the way I have resolved issues (ii) and (iii) that issue (i) would in any case be answered in the affirmative.

I must say that the argument proffered in respect of issue (i) which I have said ought to be discountenanced was not particularly clear to me. C Reference was made to para.17 of the amended statement of claim where it was averred that the plaintiffs accepted the proposal for a cooperative farming project and therefore "agreed to surrender the area of Ala Ndiorji verged yellow in the plan for the general development and cultivation D scheme with the defendants." Efforts were made by the defendants/appellants in oral argument before us, as they also canvassed in the court below, to press that the plaintiffs having agreed to "surrender" the land in dispute for joint use, were no longer in exclusive possession. That argument, of course, presupposes or perhaps concedes that the ownership of E the land was in the plaintiffs. The court below met that argument by holding, quite rightly in my view, that "The use of the the word 'surrender' in the sense it was used does not mean that the respondents divested themselves of the ownership of the disputed land." The word "surrender" F as used by the plaintiffs has no higher connotation than a "grant of licence" in a contractual sense. If the terms of the contract are not breached or exceeded the licence would not be revoked without reasonable notice. That would not divest the plaintiffs of ownership or exclusive G possession of the land but it might provide the defendants with a defence of lawful entry upon the land. But when the later project suggested by the defendants was rejected by the plaintiffs, the licence came to an end and the defendants became trespassers from then on.

H I have come to the conclusion that this appeal totally lacks merit despite its very careful presentation. I therefore dismiss it with N10,000.00 costs to the respondents.

BELGORE JSC

I agree that this appeal has no merit. The facts of the case are clear as adumbrated in the lead judgment of my learned brother, Uwaifo J.S.C. The trial court made findings of fact but erred in granting in one of its orders on matters not prayed for. The defendants all along prayed for outright title to the disputed land, not mere possession. Courts must grant what a part prays for and what are antecedent to that prayer and nothing more. By granting what has not been prayed for, a court suo motu gratuitously awarding a remedy unpleaded will be in error. The Court of Appeal was therefore right to have allowed the plaintiff's cross-appeal and to dismiss the defendants' appeal. The appeal of the defendants, as I can surmise, is based entirely on concurrent findings of the two lower courts. Those findings have not been shown to be perverse, unlawful or otherwise based on evidence not before the court. I also dismiss this appeal and make order for N10,000.00 as costs against the appellant in favour of respondents.

IGUH JSC

I have had the opportunity of reading in draft the judgment just delivered by my learned brother, Uwaifo JSC and I am in complete agreement with the reasoning and conclusions therein.

Accordingly I, too, hold that this appeal is devoid of merit and the same is hereby dismissed. I abide by the order as to costs therein made.

KALGO JSC

I have read in advance the judgment just delivered by my learned brother Uwaifo, JSC in this appeal and I am in complete agreement with his reasoning and conclusions. My Lord has exhaustively in my view, dealt with all the issues raised in the appeal. I adopt as mine all his reasonings in the appeal and agree that there is no merit in the appeal. Accordingly, I dismiss the appeal and award N10,000.00 costs in favour

of the respondents.

AYOOLA JSC

I agree that the appellants' appeal is without substance and should be dismissed. I dismiss it for the reasons given by my learned brother, Uwaifo, JSC in his judgment the draft of which I have read. I also agree with his conclusion that the respondents' cross appeal should be allowed and with the reasons he gives.

In the result, I dismiss the appeal and allow the cross appeal. I abide by the orders made by my learned brother Uwaifo JSC on the cross appeal and in regard to costs.

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