

SUPREME COURT OF NIGERIA
24TH SEPTEMBER, 1999. SC. 179/1993
CORAM:- S. M. A. BELGORE, E. O. OGWUEGBU, A. I. IGUH,
A. I. KATSINA-ALU. E. O. AYOOLA, JJSC

JAMES OGUNDELE PLAINTIFF/APPELLANT
AND
DARE JULIUS FASU DEFENDANT/RESPONDENT

CONSTITUTIONAL LAW - Judgment - Prescribed period - For delivery of judgments - Under section 258 of the 1979 Constitution - It is not sufficient to establish a contravention of Constitutional provision - It must be established that miscarriage of justice has been occasioned.

JUDGMENTS - Error - Inspection of locus in quo - Error committed by the trial judge - In referring in his judgment to certain facts - Observed by him in the inspection - Of which there was no evidence on record - Circumstance when it would not vitiate the decision.

JUDGMENTS - Prescribed period - Miscarriage of justice - That is relevant in regard to section 258 (4) of the 1979 Constitution - Is miscarriage of justice suffered by the party complaining - By reason of contravention of that section.

PRACTICE & PROCEDURE - Address - Locus in quo - Where the inspection took place before the parties addressed the court - Appellant's complaint - That they were deprived of their right to address the court after the inspection - Is not correct.

FACTS

In the High Court of Ondo State the plaintiff/appellant claimed against the defendant/respondent damages for trespass committed by the respondent on the appellant's family land and an order of perpetual injunction restraining the respondent from further acts of trespass on the

land. It was common ground that the parties had their respective farm-lands from the same grantor who was their common ancestor, and that they had a common boundary. Learned trial judge conducted an inspection of the locus in quo with the parties and their counsel as well as some of the witnesses. Neither of the parties applied to call further evidence in respect of any aspect of whatever that transpired at the inspection after the proceedings were adjourned back to the court room for continuation of hearing. The final addresses of their learned counsel were delivered after the inspection of the locus by the trial court.

Evidence and addresses were concluded in the case on 7th March 1989, the trial judge delivered his judgment on 10th July, 1989, that is outside the three months limit prescribed by the 1979 Constitution for delivery of judgments. Having considered the evidence adduced by both parties the learned trial judge came to the conclusion that the appellant was not in exclusive possession of the land in dispute and dismissed the appellant's claim. In the course of his judgment, the judge made reference to certain facts which he personally observed during the visit to the locus in quo. Aggrieved by the decision, the appellant appealed to the Court of Appeal which dismissed his appeal. He has further appealed to the Supreme Court raising two issues

ISSUES FOR DETERMINATION

1. *Whether there was violations, as alleged by the appellant, of "section 258 of the 1979 Constitution " and the consequences of such violation?)*

2. *Whether the court below was justified in law in dismissing the plaintiff's appeal, having held that the learned trial Judge, was in error in the reference in his judgment to certain facts which he personally observed during the court's visit to the locus in quo without any supporting evidence thereof contrary to the provisions of section 77 (d) (ii) of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990.*

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

Constitutional law - Judgment

1. Although section 258(1) of the 1979 Constitution provided that every court established under the Constitution shall deliver its decision in writing not later than 3 months after the conclusion of evidence and final addresses, a new subsection had been introduced by Decree No. 17, of 1985 which provided that the decision of a court shall not be set aside or treated as a nullity on the ground of the provisions, inter alia, of section 258(1) "unless the court exercising jurisdiction by way of appeal from or review of that decision is satisfied that the party complaining has suffered a miscarriage of justice by reason thereof". It is clear that for a party who establishes that a judgment has been delivered outside the period set by the Constitution for delivery of judgments to have such judgment set aside on the ground that it has been delivered outside such period, it is not sufficient to establish a contravention of the Constitutional provision. He must also establish that a miscarriage of justice has been occasioned in regard to him by reason of the contravention. (p.2699A)

Judgments - Prescribed period

2. On this appeal, it has not been shown that the court of Appeal was wrong in holding that the appellant has not shown what miscarriage of justice was occasioned by delivery of the judgment a month after the prescribed period. The appellant had tried to show that an alleged irregularity in the course of the trial i.e. in the visit to the locus in quo, had occasioned a miscarriage of justice. It is clear that the miscarriage of justice that is relevant in regard to section 258 (4) of the 1979 Constitution (as amended) (and, I dare say, section 294 (5) of the 1999 Constitution) is miscarriage of justice suffered by the party complaining by reason of contravention of that section, and not a miscarriage of justice that may have occurred by reason of an irregularity in the course of the proceedings. I hold that the appellant's first ground of appeal and the second issue on this appeal based thereon are misconceived and without substance. (p. 2699 E)

Judgments - Error

3. The Court of Appeal having held that the trial judge erred in his reference in the judgment to certain facts which he personally observed during the visit to the locus in quo, the limited question that arises on this appeal is as to the consequence of that error. The authorities are now clear that such error as is held committed by the trial judge, in referring in his judgment to certain facts observed by him in the inspection on which there was no evidence on record, would not vitiate the decision in so far as conclusions drawn from those observations did not materially affect the judge's decision. The law is well put in Ejidiike & Ors v. Obiora 13 WACA 270 cited with approval by this court in Olubode & Ors. v. Salami (1985) 1 NSCC 392, 401 as follows:

"Although the judge may have erred in referring in his judgment to certain facts observed by him in the inspection, of which there was no evidence on record and had drawn certain conclusions therefrom, this court was not satisfied that these conclusions materially affect his decision, or that if he had not made such observation he could have come to a different conclusion." (p. 2700 G)

Practice & Procedure - Address

4. In this case, the inspection took place before the parties addressed the court. Counsel for the respondent referred to the inspection in the course of his address at trial without any objection or response from the appellant's counsel. Counsel for the appellant was thus not correct when he submitted on this appeal that the appellant and his Counsel were deprived of their right to address the court after inspection of the locus in quo. (p.2701 H)

NOTABLE POINTS OF INTEREST

AYOOLA JSC

1. *On the need to be precise in the formulation of issues*

I have quoted the issue as formulated extensively because, surprisingly, it was formulated in a brief of argument under the signature of a Senior Advocate of Nigeria who by virtue of his status in the legal profession

would be expected to regard it a duty to this court to be careful and precise in his formulation of issues. In this case, it is difficult to comprehend what the learned Senior Advocate meant by "the Statutory Rights or provisions of the plaintiff contained in section 76 (d) (ii) of the Evidence Act," when that section prescribed no rights. Furthermore, the case of Ifezue v. Mbadugha (wrongly referred to as Ifezue v. Livinus) had nothing to do with inspection of locus in quo but, rather, related to judgments delivered outside the Constitutional period, and was delivered before the 1979 Constitution was amended. (p. 2700 D)

2. Visit to locus in quo - Effect on the commencement of time prescribed in s. 258 of the 1979 Constitution

On this appeal, the appellant's counsel, rather than show that the Court of Appeal was wrong in its conclusion that the error made by the trial judge did not affect his decision, side-tracked that issue and referred to the case of Chukwuogor v. Obuora (1987) 2 NSCC 1063 which is hardly relevant to this case. That was a case which dealt with the effect of an inspection on the commencement of time within which the court should deliver its judgment pursuant to the Constitution. The only proposition of law that can be extracted from that case is that the effect of the decision of a trial judge to visit the locus in quo may be to postpone the commencement of the period prescribed by section 258(1) of the 1979 Constitution to the date of the inspection or, as the case may be, of a subsequent address following the inspection, if any. That proposition has no relevance to this appeal. (p. 2701 E)

OGWUEGBU JSC

3. Relevance of personal observation of trial judge on a visit to locus

There is no doubt that a trial judge can neither substitute the result of his personal observation at the locus in quo for evidence given on oath nor reach conclusions upon things he observed on the inspection in the absence of testimony on oath to the existence of those facts which he had observed. Where his decision is materially affected by such conclusions, the decision may be set aside on appeal. In this proceeding, the

judgment can stand inspite of the errors committed by the trial judge. See Ejidiye & Ors. v. Obiora 13 W.A.C.A 270 and Olubode & Ors. v Salami (1989) 1 NSCC 392 at 401. (p. 2705 D)

B IGUHHJSC

4. The main purpose of a view of the locus in quo by the court

In this regard, it ought to be borne in mind that a view, essentially, is for the main purpose of enabling the court to understand more fully the questions that have been raised, to follow the evidence, and to *apply such* evidence in the suit. A trial court is not entitled to substitute a view in place of the evidence before the court. It is only such evidence before the court and not impressions from a visit to the locus that determines the concrete facts upon which a trial court arrives at its decision in a given case. As lord Alverstone, C.J. admirably explained this proposition of law in London General Omnibus Co. ltd. v Lavell (1901) 1 Ch. 135 at 138-

" It is quite true that by rule 4 of Order L; it is provided that the Judge may inspect any property or thing concerning which any question may arise in the action; but I have never heard it said, and, speaking for myself, I should be very sorry to endorse the idea that the Judge is entitled to put a view in the place of evidence. A view, as I have always understood, is for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence, and to apply the evidence". (p. 2707 C)

G *5. Two broad procedures for a visit to the locus in quo - Issue of oral evidence after the visit*

It seems to me clear that the said section 77(d) (ii) of the Evidence Act lays down, inter alia, two broad procedures for a visit by a trial court to the locus in quo. Such trial court may either adjourn to the locus for further continuation of hearing of the case as prescribed by law until it adjourns back to the court room or it may simply move to the locus and make an inspection of the subject matter and return to the court room for evidence, if any, of what transpired at the inspection to be taken. It

would appear from the record of proceedings that the learned trial Judge, opted for the second procedure. Accordingly on the 24th November, 1988 the court moved to the locus in quo, carried out an inspection of the land in dispute and adjourned further proceedings to 6th January, 1989. Both parties were represented by counsel before the court of trial and it was not until the 2nd February, 1989 that the final addresses of learned counsel commenced in the suit.

I think I ought to stress that it does not seem to me mandatory under the aforementioned second procedure in the matter of a trial court's visit to a locus in quo that viva voce evidence of what transpired at the inspection must necessarily be adduced on the return of the tribunal to the court room before the proceedings in respect of such inspection may be considered valid and in accordance with the law. As stipulated under section 77 (d) (ii) of the Evidence Act, it suffices if the trial court shall carry out the inspection and afterwards receive evidence, if any, of what transpired at such inspection. It is, therefore, only if either or both of the parties or, indeed, the trial court desired to adduce evidence in respect of whatever that transpired during the inspection that such evidence would need to be given before the court. Where, however, neither of the parties desired to call any evidence after an inspection, that fact alone cannot vitiate the validity of such inspection or any judgement based thereunder.

Without doubt, the desirability of recording as a matter of evidence the full and detailed results of an inspection of a locus in quo with the parties and their counsel cannot be over-emphasized. But it seems to me to be going much too far to suggest that it is necessary in each and every case that the court needs record more than the fact of an inspection or that the proceedings in respect of an inspection of a locus in quo by a court is necessarily defective unless parties and their witnesses are invited to testify on what they saw during the inspection. See Kofi Badoo and others v. Ohene Ampung and others, *supra*, and Chief Aaron Nwizuk and others v. Chief Warriito Eneyok and others (1953) 14 W.A.C.A. 354. (p. 2709 E)

REPRESENTATION

Parties absent, not represented by Counsel

CASES REFERRED TO

- B Ejidike v. Obiora 13 WACA 270 cited with approval by this court in
Olubode v. Salami (1985) 1 NSCC 392, 401
Chukwuogor v. Obuora (1987) 2 NSCC 1063
London General Omnibus Co. Ltd. v Lavell (1901) 1 Ch. 135 at 138-
Nwizuk v. Eneyok (1953) 14 W.A.C.A. 354.
C Dza v. Komla (1956) 1 W.A.L.R. 145 at 146
Badoo v. Ampung (1949) 12 W.A.C.A. 439
Ejudike v. Obiora (1951) 13 W.A.C.A. 270
Kodjo v. Bonsie (1957) 1 WLR 1223
D

STATUTES REFERRED TO

Constitution of the Federal Republic of Nigeria 1979, as amended; s. 258
Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990; s. 77

E (1) (ii)

Decree No. 17 of 1985

LEAD JUDGMENT BY AYOOLA JSC

- F The appellant whose claim (as plaintiff) against the respondent (as
defendant) for damages for trespass on land claimed to be the appellant's
family land and an order of perpetual injunction restraining the respon-
dent from further acts of trespass on the land, was dismissed by the High
Court of Ondo State, and whose appeal from the decision of that court
G was dismissed by the Court of Appeal, has brought a further appeal to
this court.

Ojuolape, J, who heard the case at the High Court was of the
opinion, on the pleadings, that it was common ground that the parties had
H their respective farmlands from the same grantor who was their com-
mon ancestor, that they had a common boundary and that the main issue
for determination in the case was: "Where lies the common boundary
between the two parties?". After which the subsidiary issue would arise

whether the respondent had crossed that boundary. Having considered the evidence adduced by both parties, the learned trial judge came to the conclusion that the appellant's story that the land in dispute belonged to his family was not true having regard to the totality of the evidence. He came to this conclusion after setting out the principle that should guide B him when parties rely on conflicting traditional history as set out in Kodjo v. Bonsie (1957) 1 WLR 1223. In accordance with that principle, he tested the traditional history by reference to the facts in recent years as established by evidence. It was clear from the judgment of the trial judge C that the evidence he relied on was the oral evidence of the witnesses who testified. It has not been suggested on this appeal that he was wrong in believing or disbelieving any of the witnesses.

In the course of his judgment, the judge in several places made mention of an inspection of the land that he conducted "With the parties D and their counsel as well as some of the witnesses". Extracts from the judgement show that (1) The inspection covered about four hours during which the judge and the parties, their counsel and some of the witnesses went round various location on the land in dispute. (2) The court ob- E served that: "the ancient footpath which runs through exhibit' A' is the one along the yellow line and which represents the common boundary between the plaintiff's land and that of the defendant. The defendant's family land is on the Western side of the yellow line while that of the F plaintiff is on the Eastern side of the yellow line". (3) The court observed: the defendant's family members' farms were found scattered all over the area B."

The trial judge held that the appellant was not in exclusive pos- G session of the land in dispute and dismissed the appellant's claim. On the appellant's and appeal to the Court of Appeal, several issues were canvassed by counsel on his behalf. At the end of the day, that court was of the view that the two substantial issues in the case were whether there were violations, as alleged by the appellant, of "section 254 (sic) of the H 1979 Constitution " and of section 77 (d) (ii) of the Evidence Act.

The first issue identified by the Court of Appeal arose because the trial judge delivered his judgment outside the three months limit pre-

scribed by the 1979 Constitution for delivery of judgments. The fact was undisputed that although evidence and addresses were concluded in the case on 7th March, 1989 judgment was not delivered until 10th July, 1989, that is to say, four months and a few days after the conclusion of evidence and addresses. The second issue arose because the judge did not invite parties and witnesses to testify on what they saw during the visit to the locus in quo.

Ogundere, JCA who delivered the leading judgment of the Court below with which Adio, JCA (as he then was) and Akpabio JCA agreed, dismissed those issues, he being of the opinion, as to the former, that no miscarriage of justice had been occasioned and, as to the latter that whatever error had occurred did not affect the trial judge's conclusion. In the event, the Court of Appeal dismissed the appellant's appeal. The appellant appealed.

On this further appeal from the decision of the Court of Appeal, heard pursuant to 0.6 r 8 of the Supreme Court Rules as having been argued by the parties, the appellant persisted in the complaints which he had raised, on the briefs filed, albeit without profit, in the court below. The two grounds of appeal raised by his notice of appeal complained of errors in law respectively as follows: First, that the Court of Appeal erred in law in "dismissing the appellant's appeal notwithstanding the violation of section 257(1) (sic) of the 1979 Constitution as amended by the Constitution (Suspension and Modification) Amendment Act No.17 of 1989 sub-section 4 of section 258 and section 76 (ii) of the Evidence Act.", and secondly, that the court of Appeal erred in law in dismissing the appeal after it had held that the trial judge had erred in making references to certain facts which he personally observed during the visit to the locus in quo. It was given as one of the particulars of error that a miscarriage of justice had been occasioned in that the appellant was "denied the right to give evidence to testify and address Court on this relevant issue i.e visit to locus in quo after inspection."

It is pertinent to observe, with some dismay, that the particulars of error given in regard to the first ground of appeal related to the alleged irregularity occasioned by the inspection of the land. There was no at-

tack on the opinion held by the Court of Appeal that "the appellant did not show what miscarriage of justice was occasioned by the one month lateness in the delivery of the judgment of the lower Court in excess of the three months Constitutional time."

Although section 258(1) of the 1979 Constitution provided that every court established under the Constitution shall deliver its decision in writing not later than 3 months after the conclusion of evidence and final addresses, a new subsection had been introduced by Decree No. 17, of 1985 which provided that the decision of a court shall not be set aside or treated as a nullity on the ground of the provisions, inter alia, of section 258(1) "unless the court exercising jurisdiction by way of appeal from or review of that decision is satisfied that the party complaining has suffered a miscarriage of justice by reason thereof".

It is clear that for a party who establishes that a judgment has been delivered outside the period set by the Constitution for delivery of judgments to have such judgment set aside on the ground that it has been delivered outside such period, it is not sufficient to establish a contravention of the Constitutional provision. He must also establish that a miscarriage of justice has been occasioned in regard to him by reason of the contravention.

On this appeal, it has not been shown that the court of Appeal was wrong in holding that the appellant has not shown what miscarriage of justice was occasioned by delivery of the judgment a month after the prescribed period. The appellant had tried to show that an alleged irregularity in the course of the trial i.e. in the visit to the locus in quo, had occasioned a miscarriage of justice. It is clear that the miscarriage of justice that is relevant in regard to section 258 (4) of the 1979 Constitution (as amended) (and, I dare say, section 294 (5) of the 1999 Constitution) is miscarriage of justice suffered by the party complaining by reason of contravention of that section, and not a miscarriage of justice that may have occurred by reason of an irregularity in the course of the proceedings. I hold that the appellant's first ground of appeal and the

second issue on this appeal based thereon are misconceived and without substance.

"Whether the Court of Appeal was justified in dismissing Plaintiff/Appellant's appeal having held as follows:

B *'Admittedly, the learned trial Judge erred in his reference in the judgment to certain facts which he personally observed during the visit to the Locus in Quo' contrary to section 76(d), (ii) of the Evidence Act Cap. 112 Laws of the Federation, 1990 having regard to the Statutory Right or Provisions (sic) of the plaintiff contained in section 76(d) (ii) of the Evidence Act' and the Supreme Court Judgment in Ifezue v. Livinus & Anors (1984) 5 SC 70, at 89 and Chukwuozor v. Obiora, 1987 N.S.C.C. part 11 vol 18 at page 1063 at 1071 and at page 1063 and 1064, held in (1) & (2)."*

D I have quoted the issue as formulated extensively because, surprisingly, it was formulated in a brief of argument under the signature of a Senior Advocate of Nigeria who by virtue of his status in the legal profession would be expected to regard it a duty to this court to be
E careful and precise in his formulation of issues. In this case, it is difficult to comprehend what the learned Senior Advocate meant by "the Statutory Rights or provisions of the plaintiff contained in section 76 (d) (ii) of the Evidence Act," when that section prescribed no rights. Furthermore,
F the case of Ifezue v. Mbadugha (wrongly referred to as Ifezue v. Livinus) had nothing to do with inspection of locus in quo but, rather, related to judgments delivered outside the Constitutional period, and was delivered before the 1979 Constitution was amended.

G Notwithstanding the lack of precision and accuracy in the formulation of the first issue, the issue is considered on its merits. **The Court of Appeal having held that the trial judge erred in his reference in the judgment to certain facts which he personally observed during the visit to the locus in quo, the limited question that arises**
H **on this appeal is as to the consequence of that error.** The appellant contends that it should lead to the upholding of his appeal by the Court of Appeal and, I presume, the setting aside of the judgment of the trial judge.

However, the opinion of the Court below was that the observa-

tions which came at the end of the trial judge's "in depth appraisal of the evidence in the case did not materially affect his decision, which rested primarily on the failure to call necessary evidence in proof of his claim. Without the said observation the decision would still be the same."

The authorities are now clear that such error as is held committed by the trial judge, in referring in his judgment to certain facts observed by him in the inspection on which there was no evidence on record, would not vitiate the decision in so far as conclusions drawn from those observations did not materially affect the judge's decision. The law is well put in Ejidike & Ors v. Obiora 13 WACA 270 cited with approval by this court in Olubode & Ors. v. Salami (1985) 1 NSCC 392, 401 as follows:

"Although the judge may have erred in referring in his judgment to certain facts observed by him in the inspection, of which there was no evidence on record and had drawn certain conclusions therefrom, this court was not satisfied that these conclusions materially affect his decision, or that if he had not made such observation he could have come to a different conclusion."

On this appeal, the appellant's counsel, rather than show that the Court of Appeal was wrong in its conclusion that the error made by the trial judge did not affect his decision, side-tracked that issue and referred to the case of Chukwuogor v. Obuora (1987) 2 NSCC 1063 which is hardly relevant to this case. That was a case which dealt with the effect of an inspection on the commencement of time within which the court should deliver its judgment pursuant to the Constitution. The only proposition of law that can be extracted from that case is that the effect of the decision of a trial judge to visit the locus in quo may be to postpone the commencement of the period prescribed by section 258(1) of the 1979 Constitution to the date of the inspection or, as the case may be, of a subsequent address following the inspection, if any. That proposition has no relevance to this appeal.

In this case, the inspection took place before the parties addressed the court. Counsel for the respondent referred to the inspection in the course of his address at trial without any objection

or response from the appellant's counsel. Counsel for the appellant was thus not correct when he submitted on this appeal that the appellant and his Counsel were deprived of their right to address the court after inspection of the locus in quo.

B Whichever way one looks at it, this appeal is utterly devoid of merit. In the result, I would dismiss it. The appeal is accordingly dismissed with N10,000 costs to the respondent.

C BELGORE JSC

It is clear from the judgment of the trial High Court based on the pleadings and evidence of the parties that the counsel addressed on the visit to locus in quo. The contention of the appellant that the parties were not allowed to address on the visit is therefore unfounded. The facts relied upon by the trial judge on possession, recent position of the parties on the land and where the boundary between them lies are very clear. The Court of Appeal found no evidence of any miscarriage of justice in the delivery of judgment after three months of addresses by parties. At any rate, the visit to locus in quo may be regarded as re-opening of an issue in the trial and time started to run after the visit.

It is an uphill task for the appellant to ask this Court to interfere with the concurrent findings of fact by the lower courts. There is no evidence of wrong conclusion on the evidence in the Court; there is no contradiction on printed record about the findings of the trial court. There was no contradiction between what was pleaded and the evidence in Court so that the findings are not perverse or against the law. I therefore come to the same conclusion with my learned brother, Ayoola, JSC., that this appeal has no merit. For the fuller reasons contained in the lead judgment and what I have stated above, I dismiss this appeal with N10,000.00 costs to the respondent.

H

OGWUEGBU.JSC

I had a preview of the judgment just delivered by my learned brother Ayoola, JSC and I agree with him that the appeal lacks merit and should be dismissed.

This appeal is concerned with section 258 of the Constitution of the Federal Republic of Nigeria, 1979 which was amended by the Constitution (Suspension and Modification) Act Cap. 64 Laws of the Federation of Nigeria, 1990 by the introduction of sub-sections 4 and 5 to the said section 258 in the Second Schedule of the Amendment Act and section 77(d) (ii) of the Evidence Act Cap. 112, Laws of the Federation of Nigeria, 1990, namely, that the court below erred in law in: (i) dismissing the plaintiff/appellant's appeal in the face of the breach of section 258 of the 1979 Constitution as amended and (ii) dismissing the appeal after holding that the learned trial judge erred in law in making references to facts which he personally observed during the visit to the Locus in quo in his judgment.

Before dealing with the two complaints of the appellant, it is necessary to keep in view the constitutional and statutory provisions upon which his arguments are based.

Section 258 of the 1979 Constitution provides as follows in its sub-section (1):

"Every court established under this Constitution shall deliver its decision in writing not later than three months after the conclusion of evidence and final addresses, and furnish all parties to the cause or matter determined with duly authenticated copies of the decision on the date of the delivery thereof."

Sub- sections 4 and 5 of section 258 are contained in the second Sched- G
ule of the Amendment Act and they read:

"(4) The decision of a court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of this section unless the court exercising jurisdiction by way of appeal from or review of that decision is satisfied that the party complaining of such non-compliance has suffered a miscarriage of justice by reason thereof.

(5) xxx."

(*Underlining is for emphasis*).

Section 77 (d) (ii) provides as follows:-

"77. Oral evidence must, in all cases whatever, be direct-

(a) xxx

B (b) xxx

(c) xxx

(d) xxx

provided that-

(i) xxx

(ii) *If oral evidence refers to the existence or condition of any material thing other than a document, the court, if it thinks fit, require the production of such material thing for its inspection, or may inspect or may order or permit a jury to inspect any movable or immovable property, the inspection of which may be material to the proper determination of the question in dispute and in the case of such inspection being ordered or permitted, the court shall either be adjourned to the place where the subject-matter of the said inspection may be and the proceedings shall continue at that place until the court further adjourns back to its original place of sitting or to some other place of sitting, or the court shall attend and make an inspection of the subject - matter only, evidence, if any, of what transpired there being given in court afterwards; in either case the accused, if any, shall be present."*

It is clear from the record of appeal that the learned trial judge delivered his judgment more than three months after the conclusion of evidence and final addresses contrary to the provisions of section 258 (1) of the 1979 Constitution. However, the Constitution (Suspension and Modification) Act introduced sub-section 4 to section 258. It provides that the judgment will not be set aside or treated as a nullity on the ground of non-compliance with section 258 (1) unless the court exercising jurisdiction by way of appeal from or review of that decision is satisfied that the appellant suffered a miscarriage of justice by reason of such non-compliance.

The burden is on the party complaining (plaintiff /appellant in this appeal) to satisfy the court that the non-compliance with section 258

(1) of the constitution occasioned a miscarriage of justice. It is not enough for him to allege that the judgment was delivered outside the period of three months prescribed by the Constitution. He must go further to prove that such non-compliance led to a failure of justice. This he failed to do and having failed to do so, I must resolve Issue 2 against him. B

On Issue 1, it was argued on behalf of the appellant that the reference made by the learned trial judge in his judgment on the visit to the locus in quo was in contravention of section 77(d) (ii) of the Evidence Act and that the court below recognized and acknowledged this violation when it stated as follows: C

Admittedly, the learned trial judge erred in his reference in the judgment to certain facts which he personally observed during the visit to the locus in quo....."

It was further contented that on the above finding, the court below could not have subsequently held that the reference made by the learned trial judge did not materially affect his decision. D

There is no doubt that a trial judge can neither substitute the result of his personal observation at the locus in quo for evidence given on oath nor reach conclusions upon things he observed on the inspection in the absence of testimony on oath to the existence of those facts which he had observed. Where his decision is materially affected by such conclusions, the decision may be set aside on appeal. In this proceeding, the judgment can stand in spite of the errors committed by the trial judge. F
See Ejidiye & Ors. v. Obiora 13 W.A.C.A 270 and Olubode & Ors. v. Salami (1989) 1 NSCC 392 at 401.

After a painstaking evaluation of the evidence, the learned trial judge found as follows:- G

"Having gone through the evidence of both the plaintiff and the defendant, I have come to the conclusion that the evidence before me does not support the plaintiff's story that his ancestors told him that the land in dispute belonged to his family. His story therefore that the land in dispute belonged to his family is therefore, not true having regard to the totality of the evidence adduced before me..... Form the totality of the evidence before me however, I have come to the H

conclusion that the plaintiff has failed to prove that the defendant has trespassed on his land. Infact, the preponderance of evidence adduced before me shows that it is the plaintiff that trespassed on the defendant's family land. The plaintiff's claim is dismissed."

B Before coming to the above conclusion, the learned trial Judge made various unassailable findings of fact which support his conclusion. In the circumstances, it cannot be seriously argued that the observations on the inspection made by the learned trial judge materially affected the decision.

C The court to Appeal was perfectly right when it dismissed the plaintiff's appeal. For these and the fuller reasons stated by Ayoola, JSC with which I am in total agreement, I hereby dismiss the appeal and affirm the decisions of the courts below. Since both parties were absent
D and not represented by counsel at the hearing of the, I make no order as to costs.

E **IGUH JSC**

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Ayoola, J.S.C. and I agree entirely that this appeal is without substance and should be dismissed.

F I desire, however, to say a few words of my own in view of the legal nature of the issues raised in the appeal for the resolution of this court.

G The first question raises the issue whether the court below was justified in law in dismissing the plaintiff's appeal, having held that the learned trial Judge, was in error in the reference in his judgment to certain facts which he personally observed during the court's visit to the locus in quo without any supporting evidence thereof contrary to the provisions of section 77 (d) (ii) of the Evidence Act, Cap. 112, Laws of
H the Federation of Nigeria, 1990.

In the first place, it is beyond argument that a trial Judge may, if he thinks fit, inspect any property, immovable, the inspection of which may be material to the proper determination of a question in dispute be-

fore the court. The law is however well settled that a trial court must arrive at its judgment not on the impression from its visit to the locus in quo but upon its impressions from the totality of the legal evidence adduced before the court. See Dza v. Komla (1956) 1 W.A.L.R. 145 at 146, Kofi Badoo and others v. Ohene Ampung and others (1949) 12 B W.A.C.A. 439 Agbafuna Ejidike and others v. Christopher Obiora (1951) 13 W.A.C.A. 270 etc. In all cases, therefore, in which a visit to the locus in quo is made by the court, the trial Judge should be careful to avoid placing himself in the position of a witness and arriving at conclusions based entirely upon his personal observations at such locus and of which there is no evidence upon the record. C

In this regard, it ought to be borne in mind that a view, essentially, is for the main purpose of enabling the court to understand more fully the questions that have been raised, to follow the evidence, and to D *apply such* evidence in the suit. A trial court is not entitled to substitute a view in place of the evidence before the court. It is only such evidence before the court and not impressions from a visit to the locus that determines the concrete facts upon which a trial court arrives at its decision in E a given case. As lord Alverstone, C.J. admirably explained this proposition of law in London General Omnibus Co. Ltd. v Lavell (1901) 1 Ch. 135 at 138-

"It is quite true that by rule 4 of Order L; it is provided that the F Judge may inspect any property or thing concerning which any question may arise in the action; but I have never heard it said, and, speaking for myself, I should be very sorry to endorse the idea that the Judge is entitled to put a view in the place of evidence. A view, as I have always G understood, is for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence, and to apply the evidence".

So, too, in Agbafuna Ejidike and others v. Christopher Obiora (supra) at 274, Verity, Ag. P. delivering the judgment of the West African H Court of Appeal and dealing with what a trial Judge may do where there exists a conflict of evidence as to physical facts observed thus -

"When there is conflicting evidence as to physical facts, I have

no doubt that he (meaning the trial Judge) may use his own observations to resolve the conflict, but I do not think it is open to him to substitute the result of his own observation for the sworn testimony, nor to reach conclusions upon something he has observed in the absence of any testimony on oath to the existence of the facts he has observed. Should he do so he would, in my view, be usurping the position of the witnesses and, if his decision is materially affected by conclusions drawn from facts of which there is no evidence upon the record, this may result in the reversal of his judgment or the order of a new trial". (Words in brackets supplied for clarity).

In the present case, the court referred to the farm huts indicated on area "B" in the plan, Exhibit "A" and formed the impression that they were recently built and/or erected by the plaintiff/appellant at the commencement of the dispute. There can be no doubt that the said conclusion was reached by the learned trial Judge from his observations at the locus in quo as there was no evidence before the court on the issue of the age of the farm huts. In my view, the learned trial Judge was in definite error by referring in his judgment to the alleged fact observed by him on inspection as regards the age of the said farm huts when there was no evidence whatever on record in support of such a speculative conclusion. The crucial question, however, is whether this finding materially affected the decision which the learned trial Judge arrived at on the main issues before him or that if he had not made such an observation, his judgment would have been any different. I think not. However, I will later in this judgment dispose of this issue.

The appellant has also raised the issue of non-compliance by the trial court with the provisions of section 77 (d) (ii) of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990. The contention of appellant's learned counsel is that failure by the trial court to invite the parties and their witnesses to testify on their return to the court room as to what they saw during the visit to the locus in quo was fatal to its judgment.

Section 77(d) (ii) of the Evidence Act provides as follows -
"77. Oral evidence must, in all cases whatever, be direct -

- (a)
- (b)
- (c)
- (d)

Provided that -

B

- (i)

(ii) *If oral evidence refers to the existence or condition of any material thing other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection, or may inspect or may order or permit a jury to inspect any movable or immovable property, the inspection of which may be material to the proper determination of the question in dispute and, in the case of such inspection being ordered or permitted, the court shall either be adjourned to the place where the subject matter of the said inspection may be and the proceedings shall continue at that place until the court further adjourns back to its original place of sitting or to some other place of sitting, or the court shall attend and make an inspection, of the subject matter only, evidence, if any, of what transpired there being given in court afterwards; in either case the accused, if any, shall be present"* (Underlining supplied for emphasis) C D E

It seems to me clear that the said section 77(d) (ii) of the Evidence Act lays down, inter alia, two broad procedures for a visit by a trial court to the locus in quo. Such trial court may either adjourn to the locus for further continuation of hearing of the case as prescribed by law until it adjourns back to the court room or it may simply move to the locus and make an inspection of the subject matter and return to the court room for evidence, if any, of what transpired at the inspection to be taken. It would appear from the record of proceedings that the learned trial Judge, opted for the second procedure. Accordingly on the 24th November, 1988 the court moved to the locus in quo, carried out an inspection of the land in dispute and adjourned further proceedings to 6th January, 1989. Both parties were represented by counsel before the court of trial and it was not until the 2nd February, 1989 that the final addresses of learned counsel commenced in the suit. F G H

I think I ought to stress that it does not seem to me mandatory under the aforementioned second procedure in the matter of a trial court's visit to a locus in quo that viva voce evidence of what transpired at the inspection must necessarily be adduced on the return of the tribunal to the court room before the proceedings in respect of such inspection may be considered valid and in accordance with the law. As stipulated under section 77 (d) (ii) of the Evidence Act, it suffices if the trial court shall carry out the inspection and afterwards receive evidence, if any, of what transpired at such inspection. It is, therefore, only if either or both of the parties or, indeed, the trial court desired to adduce evidence in respect of whatever that transpired during the inspection that such evidence would need to be given before the court. Where, however, neither of the parties desired to call any evidence after an inspection, that fact alone cannot vitiate the validity of such inspection or any judgement based thereunder. Without doubt, the desirability of recording as a matter of evidence the full and detailed results of an inspection of a locus in quo with the parties and their counsel cannot be over-emphasized. But it seems to me to be going much too far to suggest that it is necessary in each and every case that the court needs record more than the fact of an inspection or that the proceedings in respect of an inspection of a locus in quo by a court is necessarily defective unless parties and their witnesses are invited to testify on what they saw during the inspection. See Kofi Badoo and others v. Ohene Ampung and others, supra, and Chief Aaron Nwizuk and others v. Chief Warriito Eneyok and others (1953) 14 W.A.C.A. 354.

In the present case neither the appellant nor the respondent applied to call further evidence in respect of any aspect of whatever that transpired at the inspection after the proceedings were adjourned back to the court room for continuation of hearing. The final addresses of their learned counsel were delivered after the inspection of the locus by the trial court. Both parties, therefore, had ample opportunity to address the court on whatever observations and references that they considered desirable as a result of the court's visit to the locus in quo. It is also correct that at no time whether before, during or after the said addresses of counsel did the appellant raise any complaint, whether directly or indi-

rectly, on the procedure adopted by the court in its visit to the locus. Further, there is no suggestion that failure by the trial court to invite the parties and their witnesses to testify on what they saw during the visit to the locus in quo in any way occasioned a substantial miscarriage of justice. It therefore seems to me plain that the alleged failure by the trial court to invite the parties and their witnesses to testify as aforesaid can by no stretch of the imagination be regarded as any matter of great moment.

Turning now to the question of whether the learned trial Judge's speculation as to the age of the appellant's farm huts on the land in dispute without any supporting evidence thereof materially affected the decision he arrived at in the case, it is evident that the answer must be in the negative. In my view, the judgment of the trial court would still have been the same in the absence of any finding as to the age of the farm huts. This is because the main reason for the court's decision is that the plaintiff / appellant failed to establish evidence of traditional history upon which he mainly relied in the action. Said the learned trial Judge -

"Having gone through the evidence of both the plaintiff and the defendant, I have come to the conclusion that the evidence before me does not support the plaintiff's story that his ancestor told him that land in dispute belonged to his family. His story therefore that the in dispute belonged to his family is, therefore, not true having regard to the totality of the evidence adduced before me."

A little later in his judgment, the learned trial judge added -

"From the totality of the evidence before me, the plaintiff has no exclusive possession to the land in dispute. (See Oluwi v. Eniola (1967) N.M.L.R. page 339). The plaintiff has not, from the evidence before me, succeeded in adducing evidence to show an ascertainable area of land allegedly trespassed by the defendant to entitle the plaintiff to an order of injunction, assuming the defendant allegedly trespassed on any portion of his land"

He concluded -

"..... I have come to the conclusion that the plaintiff has failed to prove that the defendant has trespassed on his land. In fact, the

preponderance of evidence adduced before me shows that it is the plaintiff that trespassed on the defendant's family land. The plaintiff, to my mind, is not a witness of truth. He lied as to the boundary between his family land and that of the defendant. He lied about the boundarymen on the western side of exhibit 'A'. He has an insatiable propensity for grabbing other people's land as shown by exhibit 'A'. His name appears in more than twenty places alone on a piece of land he claimed to be his family land and the names of other family members appear in about five places. He is not a witness of truth. The defendant on the other hand has led evidence in line with his statement of defence which I believe is his family's claim to the land in dispute. I believe his evidence. He is a witness of truth; and so are his witnesses. Upon the whole, I find that the plaintiff has not proved his case on preponderance of evidence. The plaintiff's claim is therefore dismissed."

It is my view, therefore, that quite apart from the trial court's speculation on the issue of the age of the appellant's farm huts on the land in dispute, the plaintiff's action, having regard to the various other findings of the court, was bound to fail. Issue 1 must therefore be resolved against the appellant.

Dealing now with issue 2, it cannot be disputed that the judgment of the trial court was delivered just over four months after the conclusion of evidence and final addresses in the case. Section 258 (1) of the constitution of the Federal Republic of Nigeria, 1979 provides as follows -

"Every court established under this constitution shall deliver its decision in writing not later than three months after the conclusion of evidence and final addresses, and furnish all parties to the cause or matter determined with duly authenticated copies of the decision within seven days of the delivery thereof"

It is plain from the above section of the 1979 Constitution that the first limb thereof which stipulates a period of not more than three months after final addresses in a case within which every court established under the 1979 constitution shall deliver its decision in writing must be construed as mandatory and failure to comply therewith must

invalidate such a judgment delivered outside the given period. See Chief Dominic Ifezue v. Livinus Mbadugha and Another (1984) 5 S.C. 79, Anachuna Anyaoke and others v. Dr. Felix Adi and others (1985) 1 N.W.L.R. (part 2) 342. This remained the position of the law until the constitution (Suspension and Modification) Act No.17 of 1985, Cap. 64, B laws of the Federation of Nigeria 1990 was enacted. By the said Act No.17 of 1985, section 258 of the 1979 Constitution was amended by the introduction, inter alia, of new sub-sections (4) and (5) thereto.

Section 258 (4) of the 1979 Constitution as amended provides C thus -

"The decision of a court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of this section unless the court exercising jurisdiction by way of appeal from a review of that decision is satisfied that that party complaining of such D non-compliance has suffered a miscarriage of justice by reason thereof". (Underlining supplied for emphasis)

It is clear that by the introduction of sub-section (4) to section 258 of the 1979 Constitution, the non-delivery by all courts established under the E Constitution of their decision in writing within a period of three months after the conclusion of evidence and final addresses in a cause or matter does not per se now render such a decision or judgment invalid and null and void. It shall only be treated as a nullity where an appellate court in F the exercise of its jurisdiction over such a decision is satisfied that the party complaining of such non-compliance has suffered a miscarriage of justice by reason thereof.

In the present case, the appellant who has complained of failure G by the trial court to deliver its judgment within three months of final addresses in the suit neither alleged nor established that he had suffered any miscarriage of justice by virtue of the non-compliance with section 258(1) of the 1979 Constitution. On the finding of the learned trial Judge H which was affirmed by the court below, the appellant failed to prove his case as required by law. In my view, the appellant has been unable to establish that he suffered any miscarriage of justice by reason of the trial court's non-compliance with the provisions of section 258(1) of the 1979

Constitution. In the circumstance, issue 2 must be resolved against the appellant.

It is for the above and the more elaborate reasons contained in the leading judgment of my learned brother, Ayoola, J.S.C. that I, too, dismiss this appeal and affirm the decision of the court below. I abide by the order as to costs therein made.

KATSINA -ALU JSC

I have had the advantage of reading in draft the judgment delivered by my learned brother, Ayoola, JSC in this appeal. I agree with it and would dismiss the appeal for the reasons which he has given. I also abide by the order for costs.