

**SUPREME COURT OF NIGERIA**  
14TH JANUARY, 2000. SC. 13/1993  
**CORAM:- A. B. WALI, U. MOHAMMED, O. ACHIKE,**  
**U. A. KALGO, E. O. AYOOLA, JJSC**

GBADAMOSI SANUSI OLORUNFEMI & 5 ORS. .... APPELLANTS  
(For themselves and on behalf of Olorunfemi,  
deceased family of Egan village)

AND

CHIEF RAFIU EYINLE ASHO & 2 ORS. .... RESPONDENTS  
(For themselves and on behalf of other  
members of Akesan Community)

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***EVIDENCE*** - Witnesses - Ambiguous or unintelligible statement of a witness - When found to be mistaken - Court should consider the extent to which the mistake affects the weight of his evidence generally - Such evidence should not be used as damaging by itself.

***LAND LAW*** - Partition - Used in respect of family land - May connote allotment as in the present case - And not that the land has ceased to be family property.

***LAND LAW*** - Trespass - Upon the finding that defendants were owners in possession - Plaintiffs are liable in damages for trespass - And an order of injunction.

***PLEADINGS*** - Reasonable cause of action - Since evidence has been adduced - The important question is whether the pleadings justify a verdict for the party - And not whether it disclosed a reasonable cause of action.

**FACTS**

Before the Lagos High Court the plaintiffs/respondents filed an action against the defendants/appellants claiming damages for trespass and injunction in respect of the land in dispute. The defendants counter

claimed against the plaintiffs for a declaration of customary right of occupancy, damages for trespass and injunction. Plaintiffs sought to establish that their ancestors have been in exclusive possession of the land hundreds of years ago. The land was litigated upon in 1918 and the suit ended in their favour. The defendants averred that plaintiffs' ancestors were customary tenants of their ancestors. That plaintiffs had extended their farming activities beyond the area conceded to them by trespassing on the land in dispute, thereby leading to the counter claim. The trial court held that the 1918 action neither constituted *res judicata* nor ground for issue estoppel. It held that the plaintiffs have failed to prove their case and that the defendants proved their counter claim.

The trial court being of the view that the defendants' case was that the plaintiffs were their customary tenants held that possession of the plaintiffs was lawful and that they could not be liable in trespass. An injunction was however granted against the plaintiffs. The plaintiffs appealed to the Court of appeal against the whole decision while the defendants appealed against the part dismissing their claim for damages for trespass. The Court of Appeal dismissed the plaintiffs' appeal on dismissal of their claim but allowed it in regard to the order for injunction made by the High Court. It dismissed the defendants' cross appeal in its entirety. Being dissatisfied, the defendants have appealed and the plaintiffs have cross appealed to the Supreme Court.

#### **ISSUES FOR DETERMINATION**

*1. Whether the Court of Appeal was wrong in confirming the erroneous view of the trial judge that the defendants' case was predicated on a Customary tenancy of the plaintiffs and using the evidence of the 7th defence witness to justify such confirmation.*

*2. Whether the counterclaim was misconceived and incompetent.*

**HELD** (Unanimously allowing the defendants' appeal and dismissing the plaintiffs' cross appeal per lead judgment of **AYOOLA JSC**)

#### ***Pleadings - Reasonable cause of action***

1. However, after all the evidence in the case has been adduced, the important question should really cease to be whether or not the pleading

disclosed a reasonable cause of action, but whether what has been proved in line with the essential averments in the pleadings justified a verdict for the party. A party is not obliged to lead evidence in proof of every averment in his pleadings. Although he is bound by his pleadings, he is at liberty to abandon such averments as he considers unnecessary to his case or which he is unable to prove. Thus, in this case, what is material is whether the defendants have proved the title they claimed on the evidence properly admitted, and not whether the action would have been defeated in limine on their pleading. It not being suggested by the plaintiffs that the trial judge was wrong in finding that on the evidence adduced in support of the defendants' counterclaim, the defendants have proved their case or that evidence has been admitted of facts not pleaded, the point now raised by the cross-appeal is belated and has no decisive significance on the merits of the case or the decision of the High Court.

(p. 57 B)

#### ***Partition - Used in respect of family land***

2. Besides, although the term "partition" used in a pleading may be presumed to be used in the legal context, the fact cannot be ignored as was observed in *Ayeni & Ors v. Sowemimo* [1982] N.S.C.C. 104, 111, that the term "partition", among the Yorubas, tended to have acquired the flavour of local colloquialism such as to make it sometimes necessary, when the term is used, for the court to be put on inquiry as to the sense in which it was used in the proceedings. Where the term "partition" has been used in the pleading without details of facts as would justify the conclusion that what had taken place was effective in determining family ownership of the property, it would be unsafe to hold, without further enquiry, that the mere use of the word connoted a determination of family ownership, particularly, where there is a disagreement whether, in the context in which the term was used, it was intended to convey allotment or determinative division of family property. Be that as it may, it is improbable that the defendants who claimed that the property was family property would have used the word "partition" to connote that it had ceased to be family property rather than allocation of the land for use of family members. A careful reading

of the pleadings of the defendants shows a rather imprecise use of the term "partition" by the defendants' counsel, just as he has used the word "give" rather loosely in relation to the descendants of Olorunfemi in paragraph 47 of the statement of defence and counterclaim, as well as in relation to tenants of the defendants' family in paragraph 43. (p. 57 G)

### ***Evidence - Witnesses***

3. When the statement of a witness is unintelligible or ambiguous, the court should not proceed to attach weight to such statement without first trying to understand, if it can, what the witness was saying. When such statement, when understood, is patently mistaken what the court should do is to deny it of weight and to consider the extent to which the mistake of the witness affects the weight of his evidence generally. Such evidence should not be used as damaging by itself, to the case of the party calling the witness. In this case, it is clear from the rest of the evidence of the 7th defence witness that the land which he said was granted to Ikuyeye and which he said was about 50 acres was in all probability the land litigated upon in the 1918 action, which was clearly not the land in dispute in this case as found by the trial judge and affirmed by the Court of Appeal. (p. 60 G)

### ***Land law - Trespass***

4. In my judgment, the Court of Appeal was wrong in the view it held that the passage it quoted from the evidence of the defendants' seventh witness was damaging to the case of the defendants, and to have used that portion of the evidence to justify the conclusion of the trial judge that the defendants' case was predicated on a customary tenancy of the plaintiffs. The trial judge should have found the plaintiffs liable in trespass upon the finding that the defendants were owners of the land and, therefore, in possession of the land. The plaintiffs did not deny by their defence to the counterclaim the acts of trespass averred by the defendants in their counterclaim. By restraining the plaintiffs from committing "further acts of trespass" on the land edged red on exhibit 5, the trial judge had impliedly found that they had committed acts of trespass. In the result, he should have awarded damages as assessed by him. The Court of Appeal

was clearly in error in affirming the decision of the High Court whereby the trial judge refused to find the plaintiffs liable in trespass. It was also in error in setting aside the order of injunction which I hold was rightly made by the trial judge. (p. 61 F)

## **NOTABLE POINTS OF INTEREST**

### **AYOOLA JSC**

#### ***1. Partition of family property - Various implications***

There is no doubt that one of the methods by which family property can be determined is partition by which property which belonged to the family is split up into ownership of the constituent members of the family. The property may be, but is not invariably, divided among individual members of the family so as to vest absolute ownership in individual members. The division may be among constituent branches of the family. Where the division is among constituent branches of the family, a new family ownership is created in as many places as the property is divided, each branch becoming the owner of the portion partitioned to it. Partition must be by the general consent of the family. (See Kadiri Balogun v. Tijani Balogun 9 WACA 78). The head of the family cannot on his own partition family property without the consent of joint owners of the property joining in the voluntary partition of the property. Although partition could be by deed, in customary law oral partition, is valid: Taiwo v. Taiwo 1 NSCC 46,50. Partition is to be distinguished from allotment. Allotment does not determine the family ownership of the land so as to make the allottee an absolute owner. It can be effected by the head of the family alone. (See generally, Majekodunmi v. Tijani 11 NLR 74, Onisiwo & Ors v. Gbangboye & Ors 7 WACA 69). Partition which does not make provision for all the constituent branches of the family is void. Whether there was partition or allotment is a question of fact. The mere use of the word "partition" may not settle the issue where there is an issue whether or not family property is determined. (p. 55 A)

### **ACHIKE JSC**

#### ***2. Whether an act amounts to partition of family land***

Whether an act amounts to partition of the family land or simply means an allotment of a portion thereof to a member of the family is a matter of fact which can only be arrived at from the evidence before the court.

Thus where averment in a party's pleadings alleges that there has been partition, without more, it cannot assist in the characterization of the grant of land in terms of whether it is a partition or allotment because pleadings not backed up by evidence goes to no issue. See Asanya v State (1991) 3 NWLR (pt.180) 422. In the absence of evidence in the clearest form showing that the grant was a partition in the strict legal sense as contended by the respondents/cross-appellants rather than in the loose sense amounting to allotment or allocation, the court would be obliged to hold against the party who asserted that there was a partition of the family land but failed to establish so by evidence. (p. 65 A)

#### D REPRESENTATION

O. Ayanlaja SAN, with Miss I. M. F. Ladejobi for the appellants  
Tani A. Molajo for the respondent

#### E CASES REFERRED TO

Balogun v. Balogun 9 WACA 78

Majekodunmi v. Tijani 11 NLR 74

Onisiwo v. Gbangboye 7 WACA 69

F Asanya v State (1991) 3 NWLR (pt.180) 422

Dosunmu v. Adodo (1961) L.L.R. 149, at 150

Adegbite v. Ogunfaolu (1990) 4 NWLR (pt 146) 578

Egbunike v. African Continental Bank Ltd [1995] 2 NWLR (pt 375) 34

Asanya v State (1991) 3 NWLR (pt.180) 422

G Onwugbofor v Okoye (1999) 1 NWLR (Pt.424) 252

Ayeni v Sowemimo (1982) 5 SC 60

Adimora v Ajufo (1989) 3 NWLR (Pt. 80) 1

Emegokwue v Okadigbo (1973) NWLR 192

#### H LEAD JUDGMENT BY AYOOLA JSC

This judgment relates to an appeal and a cross-appeal from the

decision of the Court of Appeal (Kolawole, Tobi and Ubeazonu, JJ.C.A.). The respondents ("the plaintiffs") sued the appellants ("the defendants") in the High Court of Lagos State claiming damages for trespass allegedly committed by the defendants on land at Akesan village sometime in December 1983 and injunction. The defendants, on their own, counterclaimed against the plaintiffs for a declaration of customary right of occupancy to the land in dispute, damages for trespass and injunction. The High Court (Onalaja.J., as he then was) after taking evidence on the claim and the counterclaim, dismissed the plaintiffs' claim in its entirety. He granted the declaration sought by the defendants and restrained the plaintiffs from further acts of trespass on the land claimed by the defendants. He rejected the defendants' claim for damages for trespass. The plaintiffs appealed to the Court of Appeal from the whole decision of the High Court while the defendants appealed from that part of the decision dismissing their claim for damages for trespass. The Court of Appeal dismissed the plaintiffs' appeal from the dismissed of their claim but allowed it in regard to the order for injunction made by the High Court on the defendants' counterclaim. It dismissed the cross-appeal in its entirety.

The plaintiffs' case in the High Court was that the ancestors of the "people of Akesan", on whose behalf they have sued in a representative capacity, came from Oyo hundreds of years ago, settled and farmed on land known as Akesan and that they, as their ancestors before then, had been in exclusive possession of the land. Sometime in 1918. One Olorunfemi Oje and one Ashade sued one Eyinle Asho as representative of Akesan people for trespass on the area marked "red" on a plan (exhibit 3 in the present suit) prepared for use in the 1918 suit (suit No. 23 of 1918), and lost. The present action was brought because, sometime in December 1983, the defendants entered the land litigated upon in 1918 and damaged the plaintiffs' crops thereon.

By their statement of defence and counterclaim, the defendants averred that the plaintiffs' ancestors were customary tenants of their ancestors but that they had attempted to extend their farming activities beyond the area conceded to them by trespassing on the land in dispute, thereby leading to the counterclaim. They pleaded title by settlement by

their ancestors and numerous and positive acts of ownership extending over a long period of time.

Onalaja, J. (as he then was) who tried the case, had no difficulty in holding that the 1918 action neither constituted *res judicata* nor ground for issue estoppel. He found that there was neither identity of subject matter nor of parties. He held that the plaintiffs have failed to prove their case; and, that the defendants proved their counterclaim on the evidence which he accepted. However, being of the view that the defendants' case was that the plaintiffs were their customary tenants, he held that the possession of the plaintiffs was lawful and, consequently, that they could not be liable in trespass. As earlier observed, he nevertheless granted an injunction against the plaintiffs, as he put it, to "protect the defendant/counter claimants and save them from future litigations." It is pertinent to note that the exact terms of the injunction were to restrain the plaintiffs "from committing further acts of trespass on all that piece or parcel of land which is more particularly described in the survey plan ..... admitted as EXHIBIT 5 in this action and therein verged "RED".

On the appeal and cross-appeal to the Court of Appeal, the three issues identified by that court as of decisive importance were:

"1. Whether the question or issue of estoppel *per rem judicatam* is properly raised in the court below.

2. If the answer to the first question is in the affirmative, whether the plea of estoppel *per rem judicatam* is available to the plaintiffs/appellants i.e. whether the appellants ought to succeed on the plea.

3. On the counter-claim, whether the plaintiffs/appellants are customary tenants of the defendants respondents in respect of the area in dispute i.e. area verged pink in exhibit 5.

4. Subject to the answer in 3 above, whether the plaintiffs/appellants are liable to the defendants/respondents in damages and injunction."

The Court of Appeal held that the plea of *res judicata* was properly raised but that it did not avail the plaintiffs by reason of absence of identity of subject-matter, cause of action and parties. That court having so held, it is evident that the conclusion that rightly followed then was a dismissal of the plaintiffs' appeal. In regard to the counterclaim to which the two

remaining issues related, the Court of Appeal, by the leading judgment delivered by Ubaezonu, JCA, correctly identified the crux of the matter when the learned justice of the Court of Appeal said:

*"The respondents' case is that the appellants left the area verged Green in exhibit 5 which was granted to them and which they occupy as customary tenants broke and entered another portion (verged Red in Exhibit 5) which was not granted to them and committed diverse acts of damage therein. If this is the correct position, the respondents' cross-appeal shall succeed and they shall get damages for trespass. If on the other hand the appellants did not go outside the area in respect of which the respondents alleged that they are customary tenants, then their own appeal will succeed, and the order for injunction shall be lifted."*

The Court of Appeal adverted to the evidence of the seventh defence witness who said:

*"Alawe Akesan granted land to one Ikuyeye to farm land (sic: and?) he was the first person to approach him for the grant of the farmland for farming. It is the land now in dispute that he gave Ikuyeye was about 50 acres. It is the land in dispute that is about 50 acres. The land granted to Ikuyeye by Alawe Akesan upon which Ikuyeye was paying tribute as a customary tenant yearly was a grant as a customary tenant."*

The Court of Appeal being of the view that piece of evidence had inflicted an irreparable damage on the defendants' case in so far as claim in trespass was concerned, concluded that the High Court was right in holding that the plaintiffs could not have been liable in trespass, but was wrong in restraining the plaintiffs from entering the land.

The issues in these appeal and cross-appeal from the decision of the Court of Appeal now fall within a narrow compass, since the plaintiffs are not challenging the opinion of the Court of Appeal that the plea of estoppel was rightly rejected by the trial court. On this appeal, the defendants are the appellants and cross-respondents while the plaintiffs are the respondents and cross-appellants, but it is convenient to continue to refer to them, respectively, as defendants and plaintiffs.

The substance of the defendants' appeal is that Court of Appeal was wrong in confirming the erroneous view of the trial judge that the

defendants' case was predicated on a customary tenancy of the plaintiffs and in using the evidence of the seventh defence witness to justify such confirmation. The plaintiffs, for their part, by their cross-appeal took the solitary and entirely fresh point, not taken in the court below but permitted to be canvassed on this cross-appeal consequent upon leave granted to that effect, that the counterclaim was misconceived and incompetent. Since if the cross-appeal succeeds, the counterclaim would be struck out and the defendants' appeal would have become a mere academic exercise, it is expedient to consider the cross-appeal first.

The substance of the argument of counsel on behalf of the plaintiffs on the cross-appeal is that the defendants having averred in their statement of defence and counterclaim that the land in dispute was partitioned, the Akesan family on whose behalf the defendants had counterclaimed for declaration of customary right of occupancy, had divested themselves of title and interest in the land to sustain any standing to sue or obtain the relief sought. It was submitted that: "as the appellants are not proper claimants, their counterclaim is not properly constituted and the court of trial had no jurisdiction to entertain it and it ought to have been struck out".

Counsel for the defendants argued that the use of the word "Partition" in the defendants' pleadings was understood and was intended to mean "allotment" in the context in which it was used. It was argued that the plaintiffs had allowed the case to go to trial without challenging the competence of the suit as constituted and that, in any case, the action was properly constituted.

The issue raised in the cross-appeal arose because the defendants had stated in their amended statement of defence and counterclaim (para.47) that: "After the death of Olorunfemi and Ashade the land in dispute was partitioned as follows among their descendants", and had proceeded to describe what was given to whom. An example of such averment reads thus: "Sedu Olorunfemi was given the land previously occupied by Abdulahi."

There is no doubt that one of the methods by which family property can be determined is partition by which property which belonged to the family is split up into ownership of the constituent members of

the family. The property may be, but is not invariably, divided among individual members of the family so as to vest absolute ownership in individual members. The division may be among constituent branches of the family. Where the division is among constituent branches of the family, a new family ownership is created in as many places as the property is divided, each branch becoming the owner of the portion partitioned to it. Partition must be by the general consent of the family. (See Kadiri Balogun v. Tijani Balogun 9 WACA 78). The head of the family cannot on his own partition family property without the consent of joint owners of the property joining in the voluntary partition of the property. Although partition could be by deed, in customary law oral partition, is valid: Taiwo v. Taiwo 1 NSCC 46,50. Partition is to be distinguished from allotment. Allotment does not determine the family ownership of the land so as to make the allottee an absolute owner. It can be effected by the head of the family alone. (See generally, Majekodunmi v. Tijani 11 NLR 74, Onisiwo & Ors v. Gbangboye & Ors 7 WACA 69). Partition which does not make provision for all the constituent branches of the family is void. Whether there was partition or allotment is a question of fact. The mere use of the word "partition" may not settle the issue where there is an issue whether or not family property is determined. In Dosunmu & Ors v. Adodo (1961) L.L.R. 149, at 150, Sir De Lestang C. J. (Lagos) said.

*"That being so, the principal question for decision in this appeal is whether the allocation of the plots by the head of the family was a partition of the property between the branches or whether it was a grant of occupational rights only. This is primarily question of fact to be decided on the evidence....."*

The significance of these general principles is that where details of partition are not given in the pleadings and the fact of determinative partition is not common ground, the mere use of the term "partition" may not be conclusive of the fact that family ownership has been determined.

In this matter, there is also the procedural aspect. The mere averments of fact in a party's pleading without evidence is not proof of such facts if it is not admitted: Adegbite v. Ogunfaolu (1990) 4 NWLR (pt 146) 578; Egbunike & Anor v. African Continental Bank Ltd [1995] 2 NWLR (pt 375) 34. A party may apply for any pleading to be struck out

on the ground that it discloses no reasonable cause or answer. However, if by an amendment the statement of claim will disclose a cause of action, the court will grant an amendment if sought. These principles have some bearing on the issue now under consideration, as will be seen presently.

B In the present case, although the plaintiffs by their amended statement of defence to counterclaim averred that:

"*The defendants having entered appearance to the plaintiffs' claim in a representative capacity cannot continue to defend and counter claim against the plaintiffs upon their averments in paragraph 47 of the*  
C *Statement of defence and the counterclaimed i.e. that the land in dispute has been partitioned among their members as descendants of Olorunfemi Oje and Ashade, on the ground that once partition has been pleaded, the land in dispute ceases to be family property, wherefore the plaintiffs aver that the defendants' counter-claim be dismissed.*",

D they did not move the trial court to strike out the defendants' pleadings as not disclosing a reasonable cause of action.

At the trial, the defendants did not give any evidence of a partition. The respondent did not supply the omission either. In short, there was  
E no evidence of any partition of the subject-matter of the counterclaim. Indeed, at the trial, Chief Ogunsiji, then counsel for the respondents, in his final address, had submitted that the "defendants were trespassers on our land. No evidence of partition so court to disregard any pleading about partition." In the face of the submission quoted above, the argument before  
F us by counsel for the respondent that : "The point being made here was raised in the High Court by the respondent's reply and Amended defence to Counterclaim, but it escaped debate and considerations in the courts below," cannot be entirely accurate.

G In all probability, had the fresh point now taken on this cross-appeal been taken as a preliminary point at the trial, before evidence was taken and concluded, as a ground for striking out the statement of counterclaim in limine, the defendants would have been at liberty to apply to the court for leave to amend their pleadings to clarify the averment.  
H **However, after all the evidence in the case has been adduced, the important question should really cease to be whether or not the pleading**

disclosed a reasonable cause of action, but whether what has been proved in line with the essential averments in the pleadings justified a verdict for the party. A party is not obliged to lead evidence in proof of every averment in his pleadings. Although he is bound by his pleadings, he is at liberty to abandon such averments as he considers  
B unnecessary to his case or which he is unable to prove. Thus, in this case, what is material is whether the defendants have proved the title they claimed on the evidence properly admitted, and not whether the action would have been defeated in limine on their pleading. It not  
C being suggested by the plaintiffs that the trial judge was wrong in finding that on the evidence adduced in support of the defendants' counterclaim, the defendants have proved their case or that evidence has been admitted of facts not pleaded, the point now raised by the cross-appeal is belated and has no decisive significance on the merits  
D of the case or the decision of the High Court.

Besides, although the term "partition" used in a pleading may be presumed to be used in the legal context, the fact cannot be ignored as was observed in *Ayeni & Ors v. Sowemimo* [1982] N.S.C.C.   
E 104, 111, that the term "partition", among the Yorubas, tended to have acquired the flavour of local colloquialism such as to make it sometimes necessary, when the term is used, for the court to be put on inquiry as to the sense in which it was used in the proceedings. Where  
F the term "partition" has been used in the pleading without details of facts as would justify the conclusion that what had taken place was effective in determining family ownership of the property, it would be unsafe to hold, without further enquiry, that the mere use of the word connoted a determination of family ownership, particularly,  
G where there is a disagreement whether, in the context in which the term was used, it was intended to convey allotment or determinative division of family property. Having regard to the stage in which the issue in the cross-appeal was raised, on this further appeal from the decision of the High Court, and the invitation of counsel for the plaintiffs  
H at the trial that the High Court should disregard the averments relating to partition, it cannot be said that any meaningful enquiry can now be made as to what the word was intended to connote. **Be that as it may, it is**

improbable that the defendants who claimed that the property was family property would have used the word "partition" to connote that it had ceased to be family property rather than allocation of the land for use of family members. A careful reading of the pleadings of the defendants shows a rather imprecise use of the term "partition" by the defendants' counsel, just as he has used the word "give" rather loosely in relation to the descendants of Olorunfemi in paragraph 47 of the statement of defence and counterclaim, as well as in relation to tenants of the defendants' family in paragraph 43. Furthermore, the evidence of Amusa Olorunfemi, the 1st defence witness, was that "the defendants' family were in possession of the land and were farming on the land." He described the crops on the land destroyed by the plaintiffs as crops of the defendants' family. The surveyor who prepared a comprehensive plan of the land in dispute for the defendants, the 4th defence witness, testified that four elders of the defendants' family showed him the area farmed by the defendants and area occupied by the plaintiffs' ancestors. He prepared a comprehensive plan (exhibit 5) showing the total area settled upon by the defendants' ancestors (596.880 acres), the areas occupied by tenants of the family and by family members being portions of that total area. What is significant is that the areas farmed upon by family members of the defendants' family mentioned in paragraph 47 were shown on exhibit 5. It is clear from the plan that there was substantial family land left after the alleged "partition". The fact that the "partition" averred in the defendants' pleadings left a substantial portion of the land described as the defendants' land, shown on exhibit 5, untouched by the alleged "partition" and still remained family property, is a strong indicator that when the defendants' counsel at the trial used the word "partition" in the pleadings, he was doing so, in all probability, imprecisely and loosely, as a term to describe allocation of land to members of the family. Ordinarily, partition of family property would encompass the entirety of the property of the family.

After a careful consideration of the facts on record and the submission of counsel, the impression cannot be resisted that by relying on the solitary ground canvassed in the cross-appeal, the plaintiffs were clutching at straws in a last ditch, but futile, effort to upset the judgment of the trial court on the counterclaim. As can be seen, for the reasons which I have

given, that effort has not succeeded. Superficially attractive and ingenious as the arguments advanced in support of the cross-appeal may appear to be, it is evident, upon a consideration of all aspects of the matter, that the cross-appeal is without substance and should be dismissed.

I now turn to the defendants' appeal in which the only issue is whether the court below was right in the view it held that the evidence of the 7th defence witness was damaging to the case of the defendants. The piece of evidence has earlier been quoted in this judgment. The area claimed by the defendants, subject-matter of the counter-claim, is verged "red" on exhibit 5. That area covered 345.722 acres. The area litigated upon in the 1918 action which was shown on exhibit 5 verged "brown" covered 49.277 acres. It is contiguous to the area claimed by the defendants. The trial judge found the defendants in possession of the land they claimed. It is clear, both from the pleadings and the evidence in support of the counterclaim, that the dispute which led to the counterclaim was the attempt by the plaintiffs to extend their farming activities beyond the area conceded to them as customary tenants. It was not part of the defendants' case that the plaintiff have their permission to be in possession of any part of the area verged "red" on exhibit 5. It was thus a clear misconception of the defendants' case for the trial judge to hold that the defendants predicated their case on the plaintiffs being their customary tenants. It may well be added that the plaintiffs did not for once admit that they were customary tenants either. The Court of Appeal correctly appreciated the issues when it stated that the defendants conceded that the plaintiffs were customary tenants in respect of the area verged "green" on exhibit 5 and that the decisive issue was whether they went beyond that area. It was in this context that that court proceeded to find the evidence of the 7th defence witness damaging to the case of the appellants.

The evidence of the seventh defence witness which the Court of Appeal found damaging had been quoted. It is manifest that that portion of the evidence was almost incomprehensible. The witness was recorded as saying; "It is land now in dispute that he gave to Ikuyeye was about 50 acres. It is the land in dispute that was about 50 acres." The land in dispute was not 50 acres. Indeed, the trial judge was clear in his view that the land in dispute in the counterclaim was the area verged "red" on

the plan exhibit 5, as which, as has been seen, covered 345.722 acres. When, therefore, the witness stated that the land in dispute was about 50 acres, the Court of Appeal should have been put on enquiry whether the witness was not mistaken in what he described as the land in dispute and as to the real purport of his evidence which read together could amount to no more than that 50 acres was conceded to the respondents as tenants. No one would deny that the statement of the witness as recorded that; "It is the land now in dispute that he gave to Ikuyeye was about 50 acres," hardly made any sense or that, at best, it is very ambiguous unless some additions are made to the statement.

**When the statement of a witness is unintelligible or ambiguous, the court should not proceed to attach weight to such statement without first trying to understand, if it can, what the witness was saying. When such statement, when understood, is patently mistaken what the court should do is to deny it of weight and to consider the extent to which the mistake of the witness affects the weight of his evidence generally. Such evidence should not be used as damaging by itself, to the case of the party calling the witness. In this case, it is clear from the rest of the evidence of the 7th defence witness that the land which he said was granted to Ikuyeye and which he said was about 50 acres was in all probability the land litigated upon in the 1918 action, which was clearly not the land in dispute in this case as found by the trial judge and affirmed by the Court of Appeal.** The witness said:

*"Akinola the child of Ikuyeye inherited the land as a customary tenant, and paid tribute until his death. After the death of Akinola his son Erinle Aso inherited that land but Erinle Aso refused to pay rent, this led to an action by Olorunfemi Oje against Erinle Aso in court. The action was dismissed. The land litigated upon then was by the side of Akesan. The land litigated upon in 1918 is a different land upon which we are now farming."*

It is also clear from the rest of his evidence that it was because the plaintiffs went upon that land upon which the defendants were farming, which is different from the land litigated upon in 1918, that the defendants counterclaimed. Had the Court of Appeal considered the totality of the

evidence of the witness, it would not have readily relied on an unintelligible portion of his evidence to find material damaging to the defendants' case.

**In my judgment, the Court of Appeal was wrong in the view it held that the passage it quoted from the evidence of the defendants' seventh witness was damaging to the case of the defendants, and to have used that portion of the evidence to justify the conclusion of the trial judge that the defendants' case was predicated on a customary tenancy of the plaintiffs. The trial judge should have found the plaintiffs liable in trespass upon the finding that the defendants were owners of the land and, therefore, in possession of the land. The plaintiffs did not deny by their defence to the counterclaim the acts of trespass averred by the defendants in their counterclaim. By restraining the plaintiffs from committing "further acts of trespass" on the land edged red on exhibit 5, the trial judge had impliedly found that they had committed acts of trespass. In the result, he should have awarded damages as assessed by him. The Court of Appeal was clearly in error in affirming the decision of the High Court whereby the trial judge refused to find the plaintiffs liable in trespass. It was also in error in setting aside the order of injunction which I hold was rightly made by the trial judge.**

In the result, for these reasons, I would allow the appeal of the defendants and set aside that part of the judgment of the Court below affirming the decision of the High Court whereby the defendants' counterclaim for damages for trespass was dismissed and also setting aside the order of injunction made against the plaintiffs. I find the plaintiffs liable in trespass and award against them damages for trespass in the sum of N2000. I restore the order of injunction made by the High Court. The plaintiffs' cross-appeal is dismissed. The defendants are entitled to the costs of the appeal and cross-appeal assessed at N10,000.

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WALI JSC

I have read in advance, the lead judgment of my learned brother

Ayoola JSC, and I agree with his reasoning and conclusion for allowing the main appeal and dismissing the cross appeal. For these same reasons, I also hereby allow the defendants' appeal and set aside the part of the Court of Appeal judgment wherein it affirmed the judgment of the trial court dismissing the defendants' counter-claim for trespass and I enter judgment in their favour against the plaintiffs in that regard. The order of injunction made by the trial court which was also set aside by the Court of Appeal is hereby restored. The defendants are awarded N2,000.00 damages against the Plaintiffs for trespass.

The cross-appeal by the plaintiffs is hereby dismissed. The defendants are awarded N10,000.00 costs in this appeal.

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#### MOHAMMED JSC

I entirely agree with the opinion of my learned brother, Ayoola JSC, in the judgment just read. For the reasons given in that judgment which I adopt as mine and have nothing more useful to add, I would also allow the appeal and set aside the decision of the court below in which the High Court dismissed the counter claim of the defendants for damages for trespass.

There is evidence to show that the plaintiffs committed trespass in the land in dispute. I award N2000 damages for the trespass. I also restore the order of injunction made by the High Court. The plaintiffs cross-appeal is dismissed. The defendants are entitled to the costs of this appeal and I award them N10,000.00

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#### ACHIKE JSC

I have had the privilege of the preview of the leading judgment of my learned brother, Ayoola, JSC. I am in full agreement with him that the appeal has merit and the same is allowed while the cross-appeal lacks merit and is accordingly dismissed. The cross-appeal however raised a fine point of considerable judicial importance that deserves my saying a

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word or two, if only to emphasize the discussion centered on whether the land in dispute had in fact been "partitioned", and if so, the effect of such exercise on the entire appeal..

The crux of the argument by Mr. Tani Molajo, learned counsel for the plaintiffs/cross-appellants is that the defendants having positively averred in their Statement of Defence and Counter-claim that the land in dispute had been partitioned, the Akesan family on whose behalf the defendants/cross-respondents had counter-claimed for declaration of customary right of occupancy had divested themselves of title and interest in the land to restrain standing to maintain the action and obtain the relief sought. Briefly put, their learned counsel submits that, "as the appellants are not proper claimants, their counter-claim is not properly constituted and the court of trial had no jurisdiction to entertain it and ought to have been struck out. The submission is quite attractive.

O. Ayanlaja S.A.N., Esq, arguing in opposition, submitted that the word "partition" used in the defendants' pleadings, particularly in paragraph 47 of the Statement of Defence and Counter-claim, meant and was intended to mean "allotment" in the context in which it was used. Furthermore, counsel submitted that that must be so and that accounts why the plaintiffs had allowed the case proceed to trial without any challenge to the competence of the suit as constituted and that, in any case, the action was properly constituted.

The cross-appeal is predicated on the fact that in paragraph 47 of the defendants' Statement of Claim and Counter-Claim, they had averred that "After the death of Olorunfemi and Ashade the land on dispute was partitioned as follows among their descendants:", and the averment went on to show what each descendant got, for examples,

"1. *Sedu Olorunfemi was given the land previously occupied by Abudulai.*

2. *Amusa Olorunfemi was given the land previously occupied by Dada Abioro.*

3. ....etc. , running to sub-paragraph 21."

The real question in this appeal is whether the term "partition" was used herein in the strict sense of the term or not. The averments in relation to the term "partition" as used in the pleadings do not readily lend

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themselves to easy understanding nor do they fully explain the sense in which the term was employed. The term "partition" may be used in its technical and strict sense to mean where property formerly belonging to a family is shared or divided among the constituent members of that family whereby each member of such family is conveyed with, and retains exclusive, ownership of the portion of the family land granted to him. In this sense, family ownership of such property is automatically brought to an end. On the other hand, a member of a family may be granted or "allotted" a portion of family property for limited or occupational use in the sense that the allottee qua user does not become an absolute owner of the portion allotted to him no matter the period of use. Invariably, while allotment can be made by the head of the family alone, partition on the other hand is brought about by the consensus of all members of the family. See Kadiri Balogun v Tijani Balogun 9 WACA 78 and Majekodunmi v Tijiani 11 NLR 74.

Whether an act amounts to partition of the family land or simply means an allotment of a portion thereof to a member of the family is a matter of fact which can only be arrived at from the evidence before the court. Thus where averment in a party's pleadings alleges that there has been partition, without more, it cannot assist in the characterization of the grant of land in terms of whether it is a partition or allotment because pleadings not backed up by evidence goes to no issue. See Asanya v State (1991) 3 NWLR (pt.180) 422 and Onwugbofor v Okoye (1999) 1 NWLR (Pt.424) 252. In the case in hand, save for their elaborate pleadings, particularly in paragraphs 47 48 and 50 of the Amended Statement of Defence and Counter-Claim, no effort was made to actualize the facts as averred by testifying to it in order to translate those material facts to evidence. The result was that despite the pleadings no evidence whatsoever of partition was led at the trial court to concretize the claim that what was once family land had in fact been partitioned, when that assertion was not positively shown to have been admitted. In the absence of evidence in the clearest form showing that the grant was a partition in the strict legal sense as contended by the respondents/cross-appellants rather than in the loose sense amounting to allotment or allocation, the court would be

obliged to hold against the party who asserted that there was a partition of the family land but failed to establish so by evidence. Thus in Emmanuel Taiwo Ayeni & 3 ors v Williams Abiodun Sowemimo (1982) 5 SC 60 the Supreme Court, per Udoma, JSC held that in the circumstances, therefore it seems clearly incorrect to assert with confidence as has been done before this court, that the word "partition" pleaded in paragraph 13 of the statement of Claim was used in its strict sense ..... the evidence led does not go any way proximate to establishing the essential ingredients of a legal partition". The position in this case is worst then that in Sowemimo case because, as we have earlier noted herein, except for the averment in some paragraphs of the defence Statement of Claim and Counter-claim, no scintilla of evidence was led in proof of the alleged partition.

In the case in hand, quite apart from the copious averments in the pleadings about the alleged partition, there is little or no evidence on the record to support the alleged partition. To support the case of partition evidence would naturally be expected to establish how and when the said exercise in partition was executed, and undoubtedly a survey plan of the family property as partitioned would be prominently displayed to buttress the alleged partition. In other words, evidence of partition as averred was completely absent. The tenor of the averment in paragraph 47 of the Amended Statement of Defence and Counter-claim seems to convey the impression of various allotments to some members of the family and in the absence of any positive evidence of partition, the court is powerless to elevate the mere averments in the parties' pleadings to the status of evidence. See Adimora v Ajufo (1989) 3 NWLR (Pt. 80) 1 and Emegokwue v Okadigbo (1973) NWLR 192.

Despite the mere averments in the defence pleadings on partition, it is pertinent to observe that Exhibit 5 still showed some land that appeared not to have been tempered with despite the alleged partition. This appears to give credence to, and confirm, the loose sense in which the term "partition" was understood by the parties to mean no more than that portions of the family land were allocated to some members of the family rather than the strict sense in which the defendants would have wished it to be understood. Clearly, in the absence of positive evidence showing

that all the members of the family carried out a division exercise of the family property in terms of partition in the technical sense of that word, the challenge to the defendants' capacity to represent any other members of the family is a futile exercise.

B The result is that the cross-appeal must fail as lacking in substance.

In the result, for all I have said, and for the more detailed reasons set out in the leading judgment, I would allow the appeal and set aside the cross-appeal. The appellants are entitled to damages for trespass which I fix at N2,000.00 and also award them N10,000.00 costs in this appeal.

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### KALGO JSC

D I have read in advance the judgment just delivered by my learned brother Ayoola, JSC and I entirely agree with the reasoning and conclusions reached therein. My learned brother has painstakingly dealt with all the issues that have been raised in the appeal particularly the question of partition of the land in dispute which was raised in the cross-appeal by the respondents. I fully agree with the lead judgment that although the E appellants talked about partitioning the land in dispute in paragraph 47 of their counterclaim, it appears to me that it was more of an "allotment" to the members of the family to use than a downright partition. In any case, no evidence of such partition was called or adduced at the trial and F there is nothing in the rest of the evidence to suggest or infer partition of the land in dispute. It is my respectful view that the appellants used the word "partition" loosely in their counterclaim, since a partition in law means permanent division of the land, not only for use of the members of the family concerned, but also complete ownership as well. And an G allotment only for use as indicated in this case cannot be presumed to be absolute transfer of ownership. See ANYANBUNSI V UGWUNZE (1995) 6 NWLR (pt.401) 255.

H On the whole, I agree that there is merit in the appeal, and no merit in the cross-appeal. I accordingly allow the appeal, set aside the decision of the Court of Appeal affirming the refusal of the trial court to order damages for trespass in favour of the appellants, and refusing to

order injunction against the respondents for trespass. The appellants are entitled to damages for trespass on part of their land not subject to customary tenancy and I award them N2,000.00 against the respondents. I dismiss the cross-appeal and award the sum of N10,000.00 in favour of the appellants as costs of this appeal.

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