

SUPREME COURT OF NIGERIA

21ST JANUARY, 2000. SC. 223/1994

**CORAM:- S. M. A. BELGORE, I. L. KUTIGI, U. MOHAMMED,
S. O. UWAIFO, A. O. EJIWUNMI, JJSC**

1. ANDU MAKINDE (HEAD OF FAMILY)
 2. CHIEF GBADEBO AJIBOSE (AJANA OF OTTA)
 3. CHIEF IMAM AMODU LASISI
 4. CHIEF ABUDU LASISI (BALE OF MUPIN)
 5. AMINU DADALALUDE
 6. YEKINI OLALUDE APPELLANTS/
 7. RABIU OLALUDE APPLICANTS
 8. MOMODU SALAMI
 9. CHIEF BASHIRU TAIWO ABUDU
 10. SAIBU ABATAN
- (For themselves and as head and representatives
of Idota family of Otta)

AND

1. DAWUDAAKINWALE
 2. GBADEBO AKINWALE
 3. ALHAJI MURAINO BASANYA (DECEASED)
 4. FATAYI BASANYA RESPONDENTS
 5. KELANIALAGBABASANYA
 6. EMMANUEL AKINREMI (DECEASED)
 7. RAMONI OLAPEJI
- (For themselves and as head and representatives
of Agangbo Arikun family of Otta)
8. AZEEZ AKIODE
 9. JOEL OLOWONISEBI (DECEASED)
 10. LAMIDI OGUNTEMI
 11. OLUFEMIAJIBOSE AINA OKUN
- (For themselves and as head and representatives of
Ijagona family of Otta)

COURTS - *Finding of fact - Unless perverse or based on inadmissible evidence - The appellate Court should not interfere.*

LAND LAW - *Customary tenancy - Lack of certainty of exact Customary dues being paid is irrelevant - Once the homage in times past has been proved.*

LAND LAW - *Forfeiture - Claim of title by tenants which they fail to prove - Grounds forfeiture of their rights as tenants.*

LAND LAW - *Trespass - Title - Where found to belong to plaintiffs - Grants to various persons by defendants - Are clear indications of areas trespassed upon.*

LAND LAW - *Traditional history evidence - Usual lapse therein - Would not justify disturbance of trial court's clear finding of fact.*

FACTS

The plaintiffs/appellants filed an action against the two distinct sets of defendants/respondents claiming inter alia, declaration of title according to Yoruba Customary Law and Practice, forfeiture, possession and damages for trespass against the defendants. The plaintiffs established their title to the land in dispute. One of their witnesses in giving evidence of where they descended from had a mix up as to which person was father or son. The exact customary dues by the defendants as their customary tenants was not clear from the evidence. The defendants denied being plaintiffs' tenants and maintained that the land in dispute belonged to them. They did not plead against forfeiture.

The trial court found that the plaintiffs had established title to the property in dispute. It only granted 2 out of the 6 reliefs claimed by the plaintiffs, i.e. declaration of title and injunction were granted to the plaintiffs. Both parties appealed to the Court of Appeal which allowed the defendants' appeal and dismissed the plaintiffs' claim. Being dissatisfied, the plaintiffs have further appealed to the Supreme Court.

ISSUE FOR DETERMINATION

Whether the Court of Appeal was right in dismissing appellants' cross appeal simply because the nature of the customary dues and to whom they were payable were not established.

HELD (Unanimously allowing the appeal per lead judgment of **BELGORE JSC**)

Traditional history evidence

1. Upon all the evidence before trial Court, I believe the Court of Appeal was in grave error. Whichever way it was, the plaintiffs claim to descend from the two ---- whether Aso or Odede was the father or son. Such lapses are not unusual in traditional history where we have absence of written records and parties depend on oral accounts passed from generation to generation. The case perhaps would have been different if PW2 did not mention Aso or Odede but other names entirely different. **FALSA DEMOSTATIO NON NOCET, CUM DE CORPORE CONSTAT.** {Ogbuokwelu vs Umeanafunkwa (1994) 4 NWLR (pt.341) 676,682. The evidence of the plaintiff, but for slight shift by PW2, has been consistent and trial Court believed their traditional history. It is therefore an error by Court of Appeal to disturb this clear finding of fact on traditional history by trial court {Owoade vs Omitola (1988) 2 NWLR (pt.77) 413,416, 425. (p. 159 D)}

Finding of fact

2. There is no serious material conflict in the traditional history of the plaintiff to lead to vitiating the case of the plaintiffs. Unless finding of fact are perverse, or based on inadmissible evidence, or based on no evidence before Court or based on unreasonable conclusions; the appellate court should not interfere. {Ahmed vs The State (1988) 9 NWLR (pt 566) 389. (p. 159 G)}

Land law - Customary tenancy

3. The lack of certainty of Ishakole being paid is irrelevant once the homage in times past had been proved by the plaintiffs. The type of

Ishakole was not the big issue at trial court, it was the question of clear evidence of traditional history plus what is now obtained that was important. At any rate, so many landlords perhaps heeded the advice of Alake and dispensed with Ishakole; a traditional tenancy can exist without Ishakole, in some cases [Lawani vs Adeniyi (1964) 3 NSCC 231, 233]. (p. 160 D)

Trespass - Title

4. The grants to various persons by the defendants in Exhibits 1-17 are clear indications of the areas trespassed upon once it is clear the title is in the plaintiffs. (Dabup vs Kolo (1993) 9 NWLR (pt 317) 254; Ugbo vs Aburime (1994) NWLR (pt 360) 1,31. The injunction granted by trial court is clearly in order and supported by evidence including the defence. (p. 161 B)

Forfeiture - Claim of title by tenants

5. It is clear the plaintiffs'/Appellants' claimed forfeiture at trial court and defendants/respondents never pleaded against forfeiture as they claimed outright title which they failed to prove. Rather, there was very clear evidence that the title is in the plaintiffs. In land cases where the tenants turn round not only to dispute the overlordship of the title holders but went out of their way to claim title they forfeit their right as tenants and their possession of the land. I therefore allow this appeal. I restore first the judgment of trial court and in addition enter a verdict of granting all the claims of the plaintiffs in trial court as prayed in the plaintiffs' appeal in Court of Appeal. (p. 161 F)

NOTABLE POINTS OF INTEREST

UWAIFO JSC

1. *Evidence - Contradiction - Does not amount to putting up a different case*

A party is not deemed to put up a different case from the one pleaded just because in adducing evidence in support of the crux of his case, he is seen to have contradicted himself in some aspects, for instance, in rela-

tion to the order in which some averments were pleaded. If that contradiction is not material, the court will not, in assessing the evidence let it affect its worth. (p. 165 D)

2. Forfeiture - When to be ordered

The respondents did not seek relief against forfeiture. Rather they persisted in their adverse claim of title to the land and continued to deny the appellants' overlordship. In a situation like that, once it is found that a customary tenant has committed an act of misbehaviour which entails forfeiture, as in the present case, and there is no relief sought against forfeiture, forfeiture becomes a matter of law for the court. The court has no discretion in the matter in such circumstances: see Erinle v Adelaja (1969) 1 NMLR 132; (1969) NSCC (vol.6) 212. The learned trial judge should have ordered forfeiture but did not. The appeal against the failure to so order should have succeeded in the lower court had the proper conclusions been reached by it. (p. 169 A)

REPRESENTATION

Professor A. B. Kasunmu SAN, with Miss O. M. Lewis and Miss O. K. Kasunmu for the appellants
Chief Adetunji Fadayiro SAN, with R. N. Olekibe Esq. for the respondents

CASES REFERRED TO

Ogbuokwelu vs Umeanafunkwa (1994) 4 NWLR (pt.341) 676,682
Owoade vs Omitola (1988) 2 NWLR (pt.77) 413,416, 425
Lawani vs Adeniyi (1964) 3 NSCC 231, 233
Ahmed vs The State (1988) 9 NWLR (pt 566) 389
Dabup vs Kolo (1993) 9 NWLR (pt 317) 254
Ugbo vs Aburime (1994) NWLR (pt 360) 1,31
Erinle v Adelaja (1969) 1 NMLR 132; (1969) NSCC (vol.6) 212

LEAD JUDGMENT BY BELGORE JSC

The appellants were the plaintiffs at the trial court and they are representatives of Idota family of Otta. They brought their action against two distinct families of Agangbo represented by 1st -7th defendants/ B respondents, and Ijagona represented by 8th - 11th respondents. The plaintiffs claimed as follows:-

"1. A declaration of title according to Yoruba Customary Law and Practice for an estate of inheritance to that piece or parcel of land C situated at Mupin Village, Otta District, Ogun State of Nigeria which land is bounded on the East or left by the farmlands of Lasisi Agangbo and Philips Adalemo of Igangbo; on the West by farmland of Adisa Iyesi and Alhaji Bisiriyu Sule Iyesi at Iyesi village; on the North by the farm- D land of Abu Ogadina at Igbojo Quarters and on the South by Omirinde's farmland in ijigbo (hereinafter referred to and called "the said land" and a plan thereof had been filed in the course of this proceeding). The Defendants wrongfully and unlawfully prevented the plaintiffs Survey or from carrying on or continuing the survey of the said land at the outset E of this proceeding.

2. A declaration that the Defendants had incurred forfeiture on the grounds of misbehaviour in respect of the parcels or portion of land held of the plaintiffs as Customary Tenants at Mupin Village more particularly shown on Surveyor A.B. Apatira's Plan No. AB. 9766 dated 7th F October, 1976.

A Declaration that the sale of any parcels of land in the afore- said Mupin Village made by the Defendants or any of them or by any persons purporting to derive title from them without the authority as G represented by the plaintiffs is null and void and of no legal effect.

4. Possession of the said land.

5. N1,000.00 damages for trespass to the area outside their grants namely parcels "A" and "B" in Exhibit "20".

H 6. An injunction to restrain the Defendants, their servants and/ or agents from committing further acts of trespass on the said land.

The plaintiffs aver that they have at all materials times been in peaceful and undisturbed possession of the said land until the Defen-

dants came to commit the acts of trespass complained about. The Defendants Nos. 1 to 7 are now trespassing on the Eastern side of the plaintiffs' land while the Defendants Nos. 8 to 11 are trespassing on the Western side thereof. The Defendants prevented and obstructed the plaintiffs employed Surveyor while carrying on the survey of the land. Unless restrained, the Defendants have threatened and will continue further acts of trespass on the said land. Trial judge, Sofolahan J. after hearing all the evidence before him based on the parties' pleadings came to the conclusion that:

".....It is clear from the findings that the plaintiffs are the true owners of the entire land edged red whilst the defendants are their customary tenants as shown in the area edged 'green' and 'blue' respectively (in Exhibit 20).

".....and I accept the evidence of the plaintiffs on Isibo as the one who permanently settled on the land of his ancestors. The traditional evidence of the plaintiffs have been satisfactorily coupled with their acts of ownership and exercise of right."

After granting declaration of title as sought by the plaintiffs he also granted injunction against the defendants from further acts of trespass on the land in dispute. He however refused to grant other prayers. This judgment led to the parties appealing to the Court of Appeal. It must be pointed out, however, that the learned trial judge though held the plaintiffs (now appellants) as the true owners of the land and that the defendants were their customary tenants, he was not sure of their mode of acknowledging overlordship to the plaintiffs by payment of 'Ishakole' -- was it by cash or crops or both? What was in evidence was that around 1919 when Oba Adedapo Ademole ascended the throne as Alake of Egbas he advised landowners to forsake taking "Ishakole" insofar as the tenants never misbehaved. But for certainty, learned trial judge found title for the plaintiffs.

It is however of utmost importance not to overlook the stand of the defendants at the trial court. Simply put, they were claiming title to the disputed areas of the land in dispute. The 8th, 9th and 10th defendants claimed by descent from one Ajibode Ajagonna who "migrated from

Oyo about 200 years ago and settled" on the land in this dispute. They claimed that by virtue of their title to the land they granted parcels of the land to various persons, including "Raimi" (Baale Aiyetoro) Bayimi Williams, Joseph Babatunde, Murano Olabode, Oba Akesan Olabode, Oshao, Lasisi's father, Adoni Agba and others. They further claimed that in the exercise of their right of ownership they settled Aiyetoro Village, way (now extinct) for tenants including Raimi (Baale Aiyetoro), Kekere Igbira, Aminu Igbira, Shittu Aiyetoro and others.

It is therefore clear that the battle fought at the trial court was far from that of tenants in possession between the defendants and plaintiffs, but that of challenge by defendants of the title of the plaintiffs (now appellants). They, defendants, denied being tenants. The 1st - 7th defendants claim to have a common boundary with 8th, 9th and 10th defendants; they are of Iyesi family and in plaintiffs plans, Exhibit 20, they are on south-western side of the plan outside the area verged red. However in their own plan, Exhibit 21, these defendants merged the area verged blue in Exhibit 20 with their land. The 8th - 10th defendants also claim the entire area of the North to North-East of the Exhibit 21 (meaning the area verged green in exhibit 20) and more into the area outside it encroaching into substantial part of Exhibit 20 in dispute towards the area verged blue. Further it is clear in their pleadings and evidence in court that from 1976 the defendants were alienating portions of the land outside green and blue areas into remaining portions of Exhibit 20 to strangers whose names are prominent on Exhibit 21, e.g J Babatunde, Osho, Buraimo, Ajibode, Y. Onaleye, Olabode, Pba Akesan etc. These grants formed the basis of Exhibits 1-17 at trial court. It is noteworthy that all these alienations or grants were going on when this case had commenced at trial court.

Learned trial judge, after a thorough review of the evidence based on the pleadings before him, found that the plaintiffs were indeed the overlords of the defendants and granted them title and also injunction as claimed. But other prayers as enumerated earlier in this judgment were refused. Learned trial judge held that the defendants, having been in possession of enclaves verged greed and blue within the larger area verged

red, should not be deprived of their possession. Thus the injunction granted must be for their trespass into the larger area verged red from the two enclaves verged green and blue respectively, within it. Whilst Exhibit 20 did not indicate the areas of encroachment by the defendants, Exhibit 21 clearly indicates them as explained earlier in this judgment. B

The two parties, that is to say, the plaintiffs and the defendants, being dissatisfied with decision of trial court appealed to Court of Appeal. The Court of Appeal, Ibadan Division, set aside the victory of the plaintiffs, allowed defendants' appeal and entered a verdict of dismissal of plaintiffs' claim. Thus the plaintiffs lost the title and injunction granted them. C
Court of Appeal held that the evidence of plaintiffs on traditional history was contradictory. The claim of plaintiffs and their witnesses (except PW2) was that the ancestor was Odede who begat Aso; the PW2 however tilted this by testifying that Aso was the father of Odede. This contradiction, the Court of Appeal held, was material enough to vitiate the case of the plaintiffs on traditional history. D
Upon all the evidence before trial Court, I believe the Court of Appeal was in grave error. Whichever way it was, the plaintiffs claim to descend from the two E
---- Whether Aso or Odede was the father or son. Such lapses are not unusual in traditional history where we have absence of written records and parties depend on oral accounts passed from generation to generation. The case perhaps would have been different if F
PW2 did not mention Aso or Odede but other names entirely different. FALSA DEMOSTATIO NON NOCET, CUM DE CORPORE CONSTAT. {Ogbuokwelu vs Umeanafunkwa (1994) 4 NWLR (pt.341) 676,682. The evidence of the plaintiff, but for slight shift by PW2, G
has been consistent and trial Court believed their traditional history. It is therefore an error by Court of Appeal to disturb this clear finding of fact on traditional history by trial court {Owoade vs Omitola (1988) 2 NWLR (pt.77) 413,416, 425. There is no serious material conflict in the traditional history of the plaintiff to lead to H
vitiatng the case of the plaintiffs. Unless finding of fact are perverse, or based on inadmissible evidence, or based on no evidence before Court or based on unreasonable conclusions; the appellate

court should not interfere. {Ahmed vs The State (1988) 9 NWLR (pt 566) 389; Agbomeji vs Bakare (1988) 9 NWLR (pt 564)1; Osho vs Ape (1998) 8 NWLR (pt 562) 492 are some of the recent decisions on this].

B Court of Appeal also held that failure to prove exact nature of
tribute (Ishakole) was enough to negate the claim of the plaintiffs to title.
Ishakole, the tribute paid to overlord by tenants put on land in Yoruba
native law and Custom varies from locality to locality; even there can be
variations among the same ethnic group. ISHAKOLE could be in kind
C like farm produce the tenants propagate and recently when Europeans
introduced money, money was being paid or paid along with farm pro-
duce like yams, corn etc. The evidence before trial court was that Alake
of Egbas, Oba Adedapo Ademola, on ascending the throne around 1919
D advised the overlords to dispense with Ishakole insofar as the tenants
were loyal and admit their overlordship. Trial court was satisfied that the
defendants were tenants in the areas verged green and blue respectively
in the land in the dispute verged red. **The lack of certainty of Ishakole
being paid is irrelevant once the homage in times past had been
E proved by the plaintiffs. The type of Ishakole was not the big issue
at trial court, it was the question of clear evidence of traditional
history plus what is now obtained that was important. At any rate,
so many landlords perhaps heeded the advice of Alake and dispensed
F with Ishakole; a traditional tenancy can exist without Ishakole, in
some cases [Lawani vs Adeniyi (1964) 3 NSCC 231, 233].**

Upon the entire evidence before trial court, based on the plead-
ings by all the parties it is clear that the defendants broke out of their
G enclaves verged blue and green respectively and encroached on the re-
maining land within the larger portion verged red. The red verge em-
braced both enclaves verged blue and green. Exhibit 20 of the plaintiffs
indicates the two areas verged green to the South-West and blue to the
H North-East, all within the area of disputed land verged red. But Exhibit
21 of the defendants clearly indicates the encroachments which are re-
cent by the defendants who were claiming title to the entire land in dis-
pute. Exhibit 21 never marked out the areas that Exhibit 20 shows in

green and blue verges as indicated above because the defendants were claiming title to the entire land. Trial Judge therefore came to the right conclusion that the plan of plaintiffs never indicated the areas trespassed upon; but certainly the defendants by their posture indicated the areas they broke into and to whom they granted portions. He restrained the defendants from trespassing into the area verged red outside their areas verged blue and green in which they were tenants. **The grants to various persons by the defendants in Exhibits 1-17 are clear indications of the areas trespassed upon once it is clear the title is in the plaintiffs. (Dabup vs Kolo (1993) 9 NWLR (pt 317) 254; Ugbo vs Aburime (1994) NWLR (pt 360 1,31. The injunction granted by trial court is clearly in order and supported by evidence including the defence.**

Court of Appeal also made big issues of the evidence of PW8 who was to tender a document. The copy of the document was earlier admitted as evidence through PW3, a beneficiary of plaintiffs' family on the same hand. The PW8' claimed he had nothing to do with the plaintiffs' family; he refused to tender a document whose copy was already in evidence. The court below also held that trial Court never adverted to the the fact that Ishakole was abolished in 1930 by Alake of Egbaland and that at any rate that matter was never pleaded. With great respect, paragraphs 23b of "Further and Better Amended Statement of Defence of 8th, 10th and 11th Defendants pleaded this fact.

In the final analysis, I find, on the above reasons, that this appeal has great merit and I am allowing it. **It is clear the plaintiffs'/Appellants' claimed forfeiture at trial court and defendants/respondents never pleaded against forfeiture as they claimed outright title which they failed to prove. Rather, there was very clear evidence that the title is in the plaintiffs. In land cases where the tenants turn round not only to dispute the overlordship of the title holders but went out of their way to claim title they forfeit their right as tenants and their possession of the land. I therefore allow this appeal. I restore first the judgment of trial court and in addition enter a verdict of granting all the claims of the plaintiffs in trial court as prayed in the plaintiffs' appeal in Court of Appeal. Thus, I allow the**

present plaintiffs/appellants' appeal in Court of Appeal. I dismiss the present defendants/respondents' appeal at Court of Appeal.

I award N10,000.00 as costs against each set of defendants in favour of plaintiffs/appellants.

B _____

KUTIGI JSC

C I read before now the judgment just delivered by my learned brother Belgore, JSC, I agree with the conclusion that the appeal has merit. It is accordingly allowed. The judgment of the Court Appeal is consequently set aside while the one delivered by the learned trial judge of the High Court is restored. I award costs of N10,000.00 in favour of the Appellants.

D _____

MOHAMMED JSC

E I agree that this appeal has succeeded. I have had the advantage of reading the judgment of my learned brother, Belgore J.S.C., and for the reasons disclosed therein the appeal ought to be allowed. Accordingly, I allow the appeal, set aside the judgment of the court below and restore the judgment of the High Court. I also award N10,000.00 as F Costs in favour of the plaintiffs/appellants and against each set of the respondents.

UWAIFO JSC

G I have had the opportunity to read in advance the judgment of my learned brother Belgore JSC. I fully agree with his reasoning and conclusions. I intend to add a few words of my own in support of that judgment.

H The appellants claimed in their suit filed in 1973 for a number of reliefs including a declaration of title to a piece of land according to Yoruba customary law and practice, a declaration that the sale of any parcel of land s by the respondents out of that piece of land is null and void, injunc-

tion to restrain from further acts of trespass, forfeiture as customary tenants of part of the appellants' land on grounds of misbehaviour, possession and damages. The respondents did not seek relief against forfeiture but fought the case on the basis that the appellants were not their overlords.

I think it is important to emphasize that the appellants copiously pleaded their genealogy, naming all relevant ancestors, in support of their traditional history. In tracing the 3rd appellant's line, they began with Odede and then Aso, Oyeyinka, Oyebowale, *Isipo* (Isinapo), Odunran, Salami Dosunmu and Chief Amodu Salami (3rd appellant). Next, they traced 4th appellant's line. This they did by pleading that *Isipo* (mentioned above) had four children including Idowu Agidiagba who begat Aina Abudu (among others) who begat Chief Abudu lasisi the Bale of Mupin (4th appellant).

The star witness in regard to the traditional history was Amodu Salami - a Chief Imam. He was over 70 year old when he testified. He gave a rather lengthy evidence both in examination-in-chief and in cross-examination, but the cross-examination was quite long. He said in evidence-in-chief as recorded: "I know all the plaintiffs in this case. They belong to Isinpo grand children (sic) of Odede. It is the same as Idota Odo family." Later he said: *"I have heard of one Odede as our great grand-father (ancestor). Aso is Odede's father. Odede begat Oyeyinka who begat Oyebowale. Oyebowale begat Isipo who begat..... 4 children including Taiwo pamba and Idowu Agidiagba..... I know the land in dispute. The original owner of the land is Aso - farming on the land and his son Odede after which they always return to stay at Otta. Of all Odede's children, it was Isipo who first settled on the land where he had all his children."*

It was obvious throughout the length and breadth of the other parts of this witness's evidence that he had the traditional history within his grips. But as regards Odede and Aso as pleaded, he was mixed up. As earlier indicated, the pleading was that Odede begat Aso. The witness in his evidence juxtaposed the order by saying Aso was Odede's father. The learned trial judge realized that this was a technical error. The defen-

dants had submitted before him that that error destroyed the traditional history relied on by the plaintiffs (now appellants). The learned trial judge did not find that acceptable. He said:

"I have to review the evidence as a whole and decide on the balance of probabilities. Having regard to the voluminous evidence before me, I cannot, because of a single juxtaposition conclude that the traditional evidence (sic) propounded by the plaintiffs has failed entirely and therefore dismiss their case. This is a traditional evidence of long years (or over or about two centuries ago); genuine errors are not unlikely to occur. I have to refer to the age of the 2nd p.w. and his behaviour during rigours of cross-examination which did not shake him to the point of deviating from vital facts in his evidence-in-chief. I believe that Odede Aso in that lineal descent up to Isinpo....."

I have no doubt in my mind that the learned trial judge was perfectly entitled to come to the conclusion that the error in the evidence of the witness in question (p.w.2) as regards Odede and Aso did not materially affect the traditional history relied on by the appellants. That certainly is a fair and realistic conclusion in the circumstances of that traditional history. The thrust of that history is the existence of those ancestors pleaded through whom was the devolution of the land. What is required in the pleading of traditional history is first, the origin of the ownership claim to the land in dispute (i.e. settlement thereof and what constituted that) and, then, averments showing a chain of the devolution of the land through successive ancestors without leaving any unexplained or unexplainable gaps in the line of the successors: see Owoade v Omitola (1988) 2 NWRL (pt.77) 413 at 424-425; Uchendu v Ogoni (1999) 5 NWLR (pt. 603) 337 at 353.

It follows that when the issue of traditional history is properly pleaded, the evidence in support of it will have to be considered, in the first instance, just like any evidence adduced in proof of any other issue pleaded in a civil case. In the exercise of assessing such evidence, the court will not consider it improbable simply because there are some minor inconsistencies in it vis-a-vis the facts pleaded. It is any evidence so materially at variance with the pleading in the sense that they both cannot

be reconciled (or which has notable internal conflicts) that the court will justifiably reject. This is because a party is bound by his pleading, and evidence which is at variance with any averment in the pleading is contrary to that aspect of the case related thereto as structured in the pleading. The evidence, to use the now familiar phrase, is then said to go to no issue raised or joined on the pleadings. It must be rejected: See Ogboda v Odulugba (1971) 1 NLR 68 SC at 12-73; Emegokwue v Okadigbo (1973) 4 S.C. 113 at 117; Umukoro v Nigerian Ports Authority (1997) 4 NWLR (pt. 502) 656 at 666; Allied Bank (Nig) Ltd v Akubueze (1997) 6 NWLR (pt. 509) 374 at 396. As a corollary, all the authorities are to the effect that it is not open to a party to a case to depart from his pleadings and put up a different case from that pleaded. B C

A party is not deemed to put up a different case from the one pleaded just because in adducing evidence in support of the crux of his case, he is seen to have contradicted himself in some aspects, for instance, in relation to the order in which some averments were pleaded. If that contradiction is not material, the court will not, in assessing the evidence let it affect its worth. Take for example this very case. It is not that Odede and Aso, who were pleaded among a long line of ancestors of the appellants, were shown not to have existed. The averment was that Odede begat Aso. But in evidence, the witness who testified on the point in a juxtaposition said Aso begat Odede. All other numerous ancestors were named in the order they were pleaded. No other fact was available either in cross-examination or as adduced by other witnesses for the appellants or the respondents to show that that witness was unreliable. That singular evidence on that point cannot be other than a result of a slip by a man over 70 years of age. Even if there had been more than that singular slip of similar juxtaposition, it could hardly, in my view, be fairly argued that the learned trial judge who had the advantage of seeing and hearing the witness testify could not come to the conclusion that those slips were immaterial. I think the lower court was in error to have seen that slip as material enough to destroy the traditional history of the appellants. D E F G H

The other aspect in which the lower court completely took a

different view from that held by the learned trial judge was the effect of the appellants not having 'satisfactorily' established the payment of Ishakole as pleaded to show that the respondents were the appellants' customary tenants. It is true that the learned trial judge said: "One other thorny point that requires a specific finding is the plaintiffs' allegation that the defendants were paying tributes as grantees, but the evidence of the plaintiffs' witnesses in this respect did not agree with their pleadings. For instance, paragraph 22B spoke of 12 yams, palm oil and one gin while Exhibit 5 spoke of 30 shillings, while some of the witnesses spoke of 5 or 10 shillings. Some people of palm oil and yams. From all these, one cannot really determine the and nature of tributes that were actually paid and to whom. That is, the plaintiffs have failed in this regard in view of the divergence of their evidence." He eventually held that because there was evidence from both parties that the payment of Ishakole had been discontinued since 1930, the evidence on Ishakole was no longer of any moment.

The lower court held the view, technically rightly, that the issue that the payment of Ishakole was abolished not having been pleaded by the appellants the evidence given in respect of it by them should have been discountenanced. But it must not be forgotten that the respondents pleaded that fact and led evidence on it through d.w.4 (Isaac Falana). That influenced the learned trial judge's finding on, and acceptance of, that fact. The lower court further held that whether the respondents paid Ishakole or not was important for the learned trial judge to reach a conclusion as to title and on the allegation that the respondents were customary tenants of the appellants. That would ordinarily be so but I do not think, with due respect, that in the circumstances of this case the payment of Ishakole was destined to play a crucial role in the appellants' case that they are owners of the land. In explaining what I mean, I shall ask: suppose the traditional history relied on by the appellants had been accepted by the lower court, would their failure to prove the nature of Ishakole have been fatal to their case? Again, the traditional history having been rejected by that court, suppose there was evidence meticulously proving the nature of Ishakole paid, how would that have altered the fate

of the appellants' case which was inevitably doomed by that rejection of the traditional history?

I am afraid, the lower court having rejected the traditional history ought to have realized that the failure to prove the payment of Ishakole became of no moment. I concede, of course, that that was not why the learned trial judge reached the same conclusion on the effect of the failure to prove the nature of the Ishakole. It is, however, the right conclusion. It would also be right even when, on the other hand, it was taken that the traditional history had been proved. Once the traditional history was proved, the proof of or failure to prove the Ishakole would not affect the fact of ownership of the land as claimed by the appellants. It is not helpful to consider the failure to prove the said Ishakole as having an adverse effect on the proof of the traditional history. That would, I think, be a faulty analysis which would lead to a conclusion difficult to justify. What it all boils down to is that the lower court placed undue emphasis on the issue of the payment of Ishakole as an aspect in the determination of the issue of title.

I think because having held that the traditional history was not proved in the manner I have shown earlier, the lower Court then came to the conclusion that the respondents' possession of the land in dispute could be justified in law by reliance on s.145 of the Evidence Act which provides that:

"When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner."

If the traditional history had truly broken down, the appellants' case would have been destroyed. But in the circumstances of the present case, s. 145 is wholly inapplicable, in my view, because the appellants have indeed succeeded in proving their title through their traditional history which was sufficiently supported by the evidence accepted by the lower court. The inference of the respondents' possession of the land in dispute would be that it is trespassory. The appellants would securely rely on their title and regard the respondents as trespassers.

That inference is valid only in regard to the portion of land which

the appellants alleged was not the subject of a customary tenancy. This is because although the evidence shows that the payment of Ishakole in support of the customary tenancy was rejected, that has not really ruled out the existence of customary tenancy in this case. I say this on the
 B grounds, first, the appellants who have now been shown to be the owners of the land in dispute, conceded customary tenantry to the respondents and it is a concession they would normally have been entitled to take advantage of in the circumstances in which they have found themselves were they minded to take steps to preserve the tenancy. Second,
 C it is not unknown that there can be customary tenancy without the payment of tribute: See Lawani v Adeniyi (1864) NSCC (vol.3) 231 at 233. As long as the landowners accept or permit the use and occupation or possession of their land not upon absolute grant although without spelling
 D out the terms of the tribute, nor for a temporary use as licensees, a customary tenancy is thereby impliedly created. Such a customary tenancy is liable to forfeiture when the tenant commits any offence that can lead to forfeiture or that is incompatible with the customary tenancy
 E such as the denial of the overlordship of the landowners.

The learned trial judge was therefore right to have found in favour of the appellants as owners in respect of the entire land verged red in the survey plan, exhibit 21. He also held that areas verged green and blue
 F were under the customary tenancy of the respondents. But he did not make an order of forfeiture thereof claimed as one of the reliefs sought by the appellants. The evidence is clear that the respondents denied the overlordship of the appellants. It is well recognized that it is a most
 G serious act of misbehaviour by a customary tenant to deny the title of the true overlords to the land which he is a tenant of. It is a misbehaviour which is a firmground for forfeiture of that tenancy and is said to be so as a widely accepted system: See Dokubo v Bob-Manuel (1967) 1 All
 H NLR 113 at 121 per coker JSC. See also Erinle v Adelaja (1969) 1 NWLR 132; Taiwo v Akinwunmi (1975) 4 SC 143; Louis Oniah v Chief J.I.G. Onyia (1989) 1 NWLR (pt.99) 514; Odunsi v Bamgbada (1995) 1 NWLR (pt.374) 641; Onwugbufo v Okoye (1996) 1 NWLR (pt.424) 252.

The respondents did not seek relief against forfeiture. Rather

they persisted in their adverse claim of title to the land and continued to deny the appellants' overlordship. In a situation like that, once it is found that a customary tenant has committed an act of misbehaviour which entails forfeiture, as in the present case, and there is no relief sought against forfeiture, forfeiture becomes a matter of law for the court. The court has no discretion in the matter in such circumstances: see Erinle v Adelaja (1969) 1 NMLR 132; (1969) NSCC (vol.6) 212. The learned trial judge should have ordered forfeiture but did not. The appeal against the failure to so order should have succeeded in the lower court had the proper conclusions been reached by it.

For the reasons I have given and the further reasons by my learned brother Belgore JSC in his leading judgment, I too allow this appeal, set aside the judgment of the Court of Appeal together with the costs awarded and restore the judgment and orders made by the learned trial judge. In addition, the claim for forfeiture by the appellants against the respondents wholly succeeds and I accordingly order forfeiture. I award N10,000.00 costs in favour of the appellants.

EJIWUNMI JSC

I was privileged to have read in advance the judgment just delivered by my learned brother, Belgore, JSC wherein, he allowed the appeal. I agree for the reasons given in the said judgment that the appeal be allowed.

It would appear from the pleadings and the evidence led at the trial that the appellants have been in undisturbed possession of the disputed land for a long time until the respondents committed the acts of trespass which compelled the appellants to commence this action. They therefore claimed thus:-

"1. A declaration of title according to Yoruba Customary law and Practice for an estate of inheritance to that piece or parcel of land situated at Mupin Village. Otta District, Ogun State of Nigeria which land is bounded on the East or left by the farmlands of Lasisi Agangbo and Philips Adalemo of Igangbo; On the West by farmland of Adisa

Iyesi and Alhaji Bisiriyu Sule Iyesi at Iyesi Village; on the North by the farmland of Abu Ogadina at Igbojo Quarters and on the South by Omirinde' farmland in Ijigbo (hereinafter referred to and called "the said land" and a plan thereof had been filed in the course of this proceeding). The Defendants wrongfully and unlawfully prevented the plaintiffs Survey or from carrying on or continuing the survey of the said land at the outset of this proceeding.

2. A declaration that the Defendants had incurred forfeiture on the grounds of misbehaviour in respect of the parcels or portion of land held of the plaintiffs as Customary Tenants at Mupin Village more particularly shown on Surveyor A.B. Apatira's plan No. AB. 9766 dated 7th October, 1976.

3. A declaration that the sale of any parcels of land in the aforesaid Mupin Village made by the Defendants or any of them or by any persons purporting to derive title from them without the authority as represented by the plaintiffs is null and void and of no legal effect.

4. Possession of the said land.

5. N1,000.00 damages for trespass to the area outside their grants namely parcel "A" and "B" in Exhibit "20".

6. An injunction to restrain the Defendants, their servants and/or agents from committing further acts of trespass on the said land."

The case that was made against the respondents is that Respondents Nos. 1-7 are now trespassing on the Eastern side of the appellants' land while the Respondents Nos. 8-11 are trespassing on the Western side thereof. Their acts of trespasses, they claimed were made manifest when the Surveyor acting for the appellants was disturbed and obstructed by the respondents while surveying the land.

The learned trial Judge following a very careful review of the evidence before him, and in accordance with the pleadings found that the appellants were indeed the overlords of the respondents, and he therefore granted them title and also injunction *as claimed*. But, he refused the other prayers for forfeiture, possession of the land encroached upon and an order declaring null and void, the sale of any of the parcels of land in the aforesaid Mupin Village made by the respondents. The court below

to which both parties appeals to, overturned the judgment of the trial court, by dismissing the judgment of that court in its entirety.

In this court, the appellants with leave, filed an Amended Notice of Appeal consisting of five grounds. The grounds so formulated formed the basis of the issues identified for the determination of this appeal. I B do not consider it necessary to dwell upon all the issues so identified except that which related to refusal of the court below to make an order of forfeiture against the respondents. This is because those other issues have been sufficiently considered in the leading judgment of my learned C brother Belgore, JSC.

With regard to the issue concerning the failure of the court below to order forfeiture against the respondents, I wish to take the liberty to refer to the appellants' ground of appeal on this point set out in their ground four. It reads: D

"The learned Justices of the Court of Appeal erred in law when after agreeing with the basic submissions of the plaintiffs/Appellants that relief against forfeiture was not available to the Defendants as it was not claimed they still went ahead to dismiss the appellants cross-appeal on E that issue on the ground that the Defendants were not Customary Tenants of the Plaintiffs simply because the nature of the Customary dues and to whom these were payable were not established.

PARTICULARS OF ERROR F

1. The absence of what was being paid and to whom it was being paid is not inconsistent with a finding that it was the plaintiffs who in fact put the Defendants on the land.

2. The findings the Justices of the Court of Appeal would have been proper if the Defendants were fighting the case on the basis of an G absolute grant by the plaintiffs which in fact was not the case herein.

In the amended appellants brief the argument proffered for the appellants is that the court was wrong to have overturned the decision of the learned trial Judge that the Respondents were the customary tenants H of the appellants because they had not shown the nature of the Ishakole that was paid to them by the respondents. It is therefore submitted for the appellants that the Court below could not rightly have come to the

conclusion that the Respondents were not customary tenants of the appellants having regard to the decision of this Court in Lawani v Adeniyi (1964) NSCC 231 at 233 where it was held that a customary tenancy can exist without the payment of tribute.

B It is my humble view that the argument for the appellants on this issue cannot be faulted. Moreover it is evidence from the pleadings of the parties in this case and the evidence led thereon that beside the inchoate nature of evidence concerning Ishakole, the finding of the learned trial judge that the Appellants were the overlords of the Respondents remained unassailed. As it is also evident that it was established that the Respondents did trespass upon the land of their overlords, the appellants, the appellants were right to have asked for an order of forfeiture, and which they ought to have been granted.

D In this regard it is very pertinent to refer to the general principles of law governing the claim for and relief from forfeiture. In Onyia v Oniah & Ors (1989) Vol. 20 (pt.1) pg. 319 Karibi Whyte JSC at page 332, identified the principles thus:-

E *"It is well settled that forfeiture is the usual mode for determining a customary tenancy. The real basis of the misconduct or misbehaviour which renders the tenancy liable to forfeiture is the challenge to the title of the overlord. This may be by alienation of part of the land, under claim of ownership, refusal to pay the tribute due or indeed, direct denial of overlord's title by setting up a rival title in the customary tenant himself, as in the instant case. Although it has been held in Alada v Aborishada (1960) 5 F.S.C. 167 that the non-payment of rent or tribute is not necessarily inconsistent with the ownership of the overlord, the circumstances and the reasons for the refusal to pay tribute may determine whether there is a denial of the title of the overlord.*

H The generally accepted view is that despite the established misconduct of the customary tenant forfeiture is not as of course or automatic. The dictum of de L'estrand, CJ., in Coker v Jinadu (1958) L.L.R. 77 sums it up admirably when he said:-

"There is no such thing as automatic forfeiture; misbehaviour does not automatically involve forfeiture; it merely makes the culprit

liable to forfeiture at the will of the landlord."

Hence the overlord must take the necessary steps to enforce his right of forfeiture for the misconduct in the courts - See Lawani V Tadeyo (1944) 10 WACA 37,39. The forfeiture claimed must also be pleaded. Similarly, it is vital to plead the claim for relief from forfeiture contrary to the submission of counsel to the defendants/respondents. Failure to plead either is fatal to the claim. However, where a grantor claims for recovery of possession and pleads the grounds upon which the right to recovery is based, the action is not incompetent because forfeiture was not specifically claimed. As was said in Dabiri V Gbajumo (1961) 1 All NLR 225 :-

"The mere absence of the technical word 'forfeiture' from the pleadings cannot be fatal in the circumstances where, as it is here, the nature of the claim is abundantly clear, and it is in this respect that this case on appeal is to be distinguished from Lawani v. Tadeyo."

In the case in hand, it is my humble view that the Appellants clearly sought by their pleadings for an order of forfeiture against the Respondents, and they duly also, established their reasons for asking for this order. The Respondents did not seek for a waiver against the order. It follows therefore that the Court below was in error for not granting the order of forfeiture sought for by the appellants.

There is also a little matter which I thought deserve some comments. In the appellants amended brief of argument, it was argued that the court below was wrong to have faulted the trial for taking into consideration the evidence before it that Ishakole had been abolished in 1930 by the then Alake of Egbaland. The trial judge was faulted because they were of the view that the evidence was upon a fact not pleaded. But it is contended for the Appellants that the relevant facts were pleaded in paragraph 23(b) of the 2nd Further and Better Amended Statement of Defence of the 8th, 10th and 11th Defendants. It was then argued for the appellants that there is no rule of evidence that confines plaintiff to lead evidence only on the pleadings filed by it.

This submission, has raised very neatly the principle with regard to the bindingness of pleadings. It is no doubt settled that parties are

bound by their pleadings. If they are so bound can it really be argued that a party who had pleaded certain facts could fairly complain that it had suffered any embarrassment or was taken by surprise, if evidence were led on such pleadings by the other party. I think not. The view I have so
B taken cannot obviously be the final word on the matter. This is because the question ought to be the subject to full argument by counsel for a definitive opinion.

Be that as it may, this appeal is, in any event, meritorious. I will
C therefore allow this appeal in its entirety, and also make an order of forfeiture against the respondents. In the result, I allow this appeal for the above reasons and the fuller reasons given in the leading judgment of my brother Belgore, JSC. I also abide with the order made as to costs.

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