

**SUPREME COURT OF NIGERIA**  
18TH FEBRUARY, 2000. SC. 33/1994  
**CORAM:- A. B. WALI, M. E. OGUNDARE, S. U. ONU,**  
**A. I. IGUH, E. O. AYoola**

DEACON J. K. OSHATOBA & ANOR. .... APPELLANTS  
AND  
CHIEF JOHNSON OLUJITAN & ANOR. .... RESPONDENTS

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***APPEALS** - Finding of fact of trial Court - Will not be interfered with - as circumstances for such interference do not exist.*

***APPEALS** - Grounds of appeal - Issue not covered by any ground - And for which no leave was obtained - Will be struck out.*

***APPEALS** - Issues raised - Are to be argued and not grounds of appeal - The lower court adequately considered issue 2 raised by the appellants.*

***JURISDICTION** - Issue of - Not raised before the lower Court - It should have no business with it - As Court is to confine itself to issues raised by the parties.*

***JURISDICTION** - Lack of - Renders the proceedings a nullity - Issue of jurisdiction - May be raised at any stage - And may be raised by the court suo motu.*

***JURISDICTION** - Supreme Court - Fresh issue of jurisdiction - Must be raised properly - Before the Court may rightly entertain the point.*

**FACTS**

Before the Upper Area Court Lokoja, the plaintiffs/respondents filed an action against the defendants/appellants claiming ownership of the piece of parcel of land in dispute. Both parties testified on their behalf and called witnesses. Plaintiffs claimed that they are the landlords of the

defendants who had trespassed on the other lands of the plaintiffs not granted to them. The defendants denied the plaintiffs' claim. The trial Upper Area Court inspected the locus in quo and in its judgment found in favour of the plaintiffs.

The defendants appealed to the appellate division of the Kwara State High Court which in allowing the appeal made an order of non suit. Both parties appealed to the Court of Appeal which allowed the plaintiffs' appeal in full and that of the defendants in part. It restored the judgment of the trial Upper Area Court. Being dissatisfied, the defendants have further appealed to the Supreme Court.

**ISSUES FOR DETERMINATION**

*"(i) Whether the Upper Area Court has jurisdiction to adjudicate on an inter-tribal boundary dispute.*

*(ii) Whether the lower court was right in dismissing the appellants' cross-appeal at all and without considering grounds 1 and 3 of same.*

*(iii) Considering the totality of the evidence adduced before the trial Upper Area Court and the proceedings before the Appellate High Court, whether the lower court was right by reversing the judgment of the High Court and restoring that of the trial Upper Area Court."*

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

***Jurisdiction - Lack of***

1. Without doubt, where a case is heard and judgment is delivered by a court without jurisdiction, the proceedings will be a nullity. See Timitimi v. Chief Amabebe 14 W.A.C.A. 374 at 377, Equally true is the fact that the issue of jurisdiction may be raised at any stage of a proceeding up to the final determination of an appeal even by the highest court of the land. A trial court and, indeed, an appellate court may raise it suo motu at any stage of a proceeding, but must invite the parties to address it on the issue before it takes its decision thereupon. See Osadebay v. Attorney - General, Bendel State (1991) 1 N.W.L.R. (p. 387 G)

***Jurisdiction - Issue of***

2. It is thus clear both from the above stated grounds of appeal and the issues raised therefrom that before the Court of Appeal, the appellants did not raise or pursue the issue of the jurisdiction of the trial Upper Area Court to entertain the respondents' action. That issue having not been pursued by the appellants before the Court of Appeal, it seems to me plain that that court, unless being an issue of jurisdiction, it was prepared to raise it suo motu, had no business whatsoever to deal with it. See Florence Olusanya v. Olufemi Olusanya (1983) 3 S.C. 41 at 56/57. This is because it is a fundamental principle of the determination of disputes between parties that judgment must be confined to the issues raised by the parties and it is not competent for the court to make a case for either or both of the parties and then proceed to give judgment on the case so formulated contrary to the case of the parties. See Adeniji and others v. Adeniji and others (1972) 1 All N.L.R. (Part 1) 278. (p. 390 B)

***Jurisdiction - Supreme Court***

3. There can be no doubt that the question of jurisdiction, being radically fundamental, can be raised at any stage of a proceeding and even for the first time in a court of last resort, such as the Supreme Court. See Management Enterprises Ltd and Another v. Jonathan Otusanya (1987) 2 N.W.L.R. (part 55) 179. Such an issue must, however, be properly raised before the court may rightly entertain the point. This is because an appellate court will not generally allow a fresh point to be taken before it if such a point was not pronounced upon by the court below. (p. 391 E)

***Grounds of appeal***

4. It suffices to state, firstly, that an appellate court can only hear and decide on issues raised on the grounds of appeal filed before it and an issue not covered by any ground of appeal is incompetent and will be struck out. See Management Enterprises Ltd & Anor v. Jonathan Otusanya, (supra). In the present case, it is evident that the issue of jurisdiction now sought to be argued by the appellants was neither raised nor covered by any of the three grounds of appeal filed before this court.

In the second place, the same issue of jurisdiction not having been raised by the appellants in the court below, it is plain that it cannot now be canvassed in this court without leave. (p. 392 B)

**B Appeals - Issues raised - Are to be argued**

5. I think I ought to stress in the first place that it is the issues distilled from an appellants' grounds of appeal that may be argued in the Court of Appeal or the Supreme Court and not the grounds of appeal. See Western Steel Works Ltd v. Iron and Steel Workers Union of Nigeria (1987) 1 N.W.L.R. (part 49) 284 at 304. It is clear to me that the court adequately considered issue 2 raised by the appellants before it arrived at the conclusion, rightly in my view that the appropriate order was that of judgment for the respondents. Issue 2 is therefore resolved against the appellants. (pp. 394 D/396 G)

**Findings of fact of trial court**

6. Findings of fact of the trial Upper Area Court were not established to be perverse or otherwise faulty. It is trite law that an appellate court will not ordinarily interfere with the findings of fact of a trial court except in circumstances such as where the trial court has not made a proper use of the opportunity of seeing and hearing the witnesses or where it has drawn wrong conclusions from accepted credible evidence or has taken an erroneous view of the evidence adduced before it or its findings of fact are perverse and do not flow from the evidence accepted by it. See Okpiri v. Jonah (1961) All N.L.R. 102 at 104 - 105, Woluchem v. Gudi (1981) 5 S.C. 291, Odofin v. Ayoola (1984) 11 S.C. 72 etc. No such circumstance has been established in the present proceedings and I fully endorse the reversal of the judgment of the appellate High Court by the Court of Appeal and the restoration of the decision of the Upper Area Court in the suit. (p. 397 C)

## NOTABLE POINT OF INTEREST

### IGUHJSC

#### *1. Issue of jurisdiction - Would not have availed the appellants*

I find it necessary, however, to point out that even if the leave of this court was obtained by the appellants to raise the question of the jurisdiction of the trial Upper Area Court to entertain this action, I would have had no difficulty in resolving the issue against them. In this regard the point must be made that the form of an action in a Native tribunal must not be stressed where the issue involved is clear. It is the substance of such a claim that is the determinant factor. (393 A) B  
C

### REPRESENTATION

O. Mudiaga Odje Esq for the appellants.

Respondents absent - not represented. D

### CASES REFERRED TO

Timitimi v. Amabebe 14 W.A.C.A. 374 at 377

Osadebay v. Attorney - General, Bendel State (1991) 1 N.W.L.R. (Part E 169) 525

P.E. Ltd v. Leventis Trading Co. Ltd (1992) 5 N.W.L.R. (Part 244) 675

Adegoke v. Adibi (1992) 5 N.W.L.R. (Part 242) 410 at 420

Adeniji v. Adeniji (1972) 1 All N.L.R. (Part 1) 278 F

Nigerian Housing Development Society Ltd v. Yaya (1977) 2 S.C. 57

Commissioner for Works, Benue State v. Devcon Development Consultants Ltd (1988) 3 N.W.L.R. (Part 83) 407

Okesuji v. Lawal (1991) 1 N.W.L.R. (Part 170) 661

Management Enterprises Ltd v. Otusanya (1987) 2 N.W.L.R. (part 55) 179 G

London Chartered Bank of Australia v. White (1897) 4 A. C. 413, Kabaka's

### STATUTE & RULES REFERRED TO

Kwara State Area Courts Law 1967 s. 48 (2)

Supreme Court Rules O.6 r. 8(6), O.2 r.11 (1) H

**LEAD JUDGMENT BY IGUH JSC**

This is an appeal against the judgment of the Court of Appeal, Kaduna Division which had on the 20th day of April, 1992 allowed the appeal of the plaintiffs from the decision of the Appellate Division of the High Court of Justice, Kwara State, Holden at Okene.

The plaintiffs for themselves and as representing the people of Iffe had at the Divisional Area Court, Kabba instituted an action against the defendants for themselves and on behalf of the people of Ekinrin, claiming ownership of the piece or parcel of land situate between the Osoun River and the other lands of the plaintiffs. The suit was subsequently transferred to the Upper Area Court, Lokoja by the Inspector of Area Courts, acting under powers conferred on him by virtue of the provisions of section 48(2) of the Kwara State Area Courts law, 1967.

At the subsequent trial, both parties testified on their own behalf and called witnesses.

It is not in dispute that the plaintiffs and the defendants, the Iffe and Ekinrin people, respectively, are two different communities in the Ijumu Local Government Area of the then Kwara State. The defendants are the representatives of the Ekinrin Community whilst the plaintiffs prosecuted this action for and on behalf of the Iffe Community. Both communities laid claim to ownership of the land in dispute. Each side claimed that the land in dispute was founded by its ancestors and led copious evidence in this regard. The plaintiffs, in particular, claimed that they are the landlords of the defendants and that the defendants had encroached and trespassed on the other lands of the plaintiffs not granted to the said defendants. This piece of evidence was denied by the defendants.

At the close of evidence, the trial Upper Area Court inspected the locus in quo and made copious notes in respect therefore. Thereafter, it proceeded to evaluate all the evidence adduced before the Court and preferred the testimony of the plaintiffs to that of the defendants. Said the Upper Area Court -

*"We are satisfied with the case of the plaintiffs that they gave lands to both Ekinrin and Egbeda and that Ekinrin, because they have*

*been long where they now stand are trespassing where they were not given. This should not be allowed without the express permission of their landlords. We therefore find for the plaintiffs and hand down the following order.*

**ORDER:**

*We order that Ekinrin Community should desist from parading themselves as the owners of the land from Ogbokoewe down to Osoun to Oyi and Obaru River Onopa down to the old sand heap which they said is the old boundary between Ekinrin and Ikoyi. We also order that they should recognize Ogu and Oye families of Iffe as their landlords.*

*We finally order that Ekinrin should confine herself to the area given them by their landlords."*

Dissatisfied with the said judgment, the defendants lodged an appeal against the same to the Appellate Division of the High Court of Justice, Kwara State, holden at Okene. That court, in a unanimous judgment, allowed the appeal, set aside the decision and orders of the trial court and concluded as follows -

*"For this and other reasons canvassed in this judgment, we think that the investigation of the claims of the parties by the trial court including the ascertainment of the rights of other prospective interested persons who are likely to be affected by the outcome of this case was perfunctory as it ignored some material aspects of the adjudication of the matter in dispute. Consequently this appeal is bound to succeed and it is allowed. We set aside the judgment of the Upper Area Court in suit No. UAC/CVL/30/84 given on 10/6/85 in the dispute between the parties before us....."*

*We feel that the proper order to make in the peculiar circumstances of this case is one of a non-suit and we order accordingly."*

Aggrieved by this decision of the Appellate High Court both parties lodged appeals to the Court of Appeal, Kaduna Division, which court, in a unanimous decision, allowed the appeal of the plaintiffs in full and that of the defendants in part. It accordingly set aside the decision and orders of the Appellate High Court and restored the judgment of the trial Upper Area Court. The defendants were dissatisfied with this decision of the Court

of Appeal hence the present appeal to this court. I shall hereinafter refer to the plaintiffs and the defendants in this judgment as the respondents and appellants respectively.

Three grounds of appeal were filed by the appellants against this decision of the court below. It is unnecessary to reproduce them in this judgment. It suffices to state that the appellants, pursuant to the rules of this court filed their brief of argument in which three issues were identified for the determination of this court. These are as follows -

"(i) *Whether the Upper Area Court has jurisdiction to adjudicate on an inter-tribal boundary dispute.*

(ii) *Whether the lower court was right in dismissing the appellants' cross-appeal at all and without considering grounds 1 and 3 of same.*

(iii) *Considering the totality of the evidence adduced before the trial Upper Area Court and the proceedings before the Appellate High Court, whether the lower court was right by reversing the judgment of the High Court and restoring that of the trial Upper Area Court."*

The respondents, for their part, did not identify any issues in this appeal for the resolution of the court. They will therefore be taken to have adopted the same issues formulated on behalf of the appellants in the appeal. See Ajibade v. Pedro (1992) 5 N.W.L.R. (Part 241) 257 at 267.

At the oral hearing of the appeal before us on the 23rd day of November, 1999, learned Counsel for the appellants, O. Mudiaga Odje Esq, adopted the appellants's brief of argument and proffered oral arguments in further elucidation of the submissions therein contained. Both the respondents and learned counsel, J.O. Ijaodola Esq, who settled their brief of argument were absent in court although served with hearing notice in respect of the appeal. Accordingly, the court proceeded with the hearing of the appeal pursuant to the provisions of Order 2 Rule 11 (1) and Order 6 Rule 8 (6) of the Rules of this court.

The main contention of learned counsel for the appellants in respect of issue 1 is that the trial Upper Area Court had no jurisdiction to entertain the suit as it related to an intertribal boundary dispute. Ques-

tioned by the court as to whether he could raise before this court, without leave, an issue the appellants had abandoned in the court below, learned counsel frankly conceded that he could not. With regard to issue 2, learned counsel contended that the court below was in error to have dismissed the appellants's cross-appeal without considering grounds 1 B and 3 of their grounds of appeal. On issue 3, it was his submission that considering the totality of the evidence before the court and the surrounding circumstances of the case, the respondents' case ought to have been dismissed outright as against the order of non-suit therein entered C by the Appellate High Court. He urged the court to allow the appeal and dismiss the respondents' claims.

Learned counsel for the respondents, J. O. Ijaodola Esq, in his brief of argument, had submitted that the trial Upper Area Court had ample jurisdiction to entertain the suit since the case was clearly a claim D in respect of title to an identifiable piece or parcel of land and not an inter-tribal boundary dispute. It was argued in respect of issue 2 that the court below adequately considered all the issues formulated before it in the appeal and had no need to deal with any grounds of appeal. Learned E counsel finally contended with regard to issue 3 that the trial Upper Area Court having properly considered and accepted the respondents' version of their claim to ownership of the land in dispute and rejected the appellants' claims thereto, the Court of Appeal was right to have set aside the F decision of the Appellate High Court and to restore the decision of the trial Upper Area Court.

The crucial question for consideration under issue 1 is whether or not the appellants can now raise the issue of want of jurisdiction on G the part of the trial Upper Area Court to entertain the respondents' action as contended by the appellants.

**Without doubt, where a case is heard and judgment is delivered by a court without jurisdiction, the proceedings will be a nullity. See Timitimi v. Chief Amabebe 14 W.A.C.A. 374 at 377, H Mustapha v. Governor of Lagos State (1987) 5 S.C. N.J. 143 Tukur v. Government of Gongola State (1987) 4 N.W.L.R. (Part 117) 517. Equally true is the fact that the issue of jurisdiction may be raised at any**

stage of a proceeding up to the final determination of an appeal even by the highest court of the land. A trial court and, indeed, an appellate court may raise it it suo motu at any stage of a proceeding, but must invite the parties to address it on the issue before it takes its decision thereupon. See Osadebay v. Attorney - General, Bendel State (1991) 1 N.W.L.R. (Part 169) 525, P.E. Ltd v. Leventis Trading Co. Ltd (1992) 5 N.W.L.R. (Part 244) 675, Adegoke v. Adibi (1992) 5 N.W.L.R. (Part 242) 410 at 420, Okesuji v. Lawal (1991) 1 N.W.L.R. (Part 170) 661 etc.

Having so stated, it is now necessary to determine whether or not the appellants in the present proceeding can properly raise the issue of jurisdiction before this court,

It ought to be noted at this stage that following the award of title to the land in dispute to the respondents by the trial Upper Area Court, the appellants, as they were entitled to do, lodged an appeal against this judgment to the Appellate Division of the High Court of Justice, Kwara State. Ground I of their additional grounds of appeal was framed as follows -

*"The entire proceedings before the Upper Area Court, Lokoja are a nullity in that the said court has no jurisdiction to entertain an inter - tribal boundary dispute."*

The issue was accordingly argued by both parties before the Appellate High Court which in a considered decision ruled against the appellants. It held that the respondents' action was one for title to land simpliciter and not an inter- tribal boundary dispute and that the trial Upper Area Court therefore had ample jurisdiction to entertain the action. The Appellate High Court concluded thus -

*"It has been held that the test of whether a dispute over land is one of inter - tribal boundaries or one over title to land is whether the plaintiff's claim is over part of all the area of the land in dispute. Where it is over all the area, there is nothing to be disputed about the boundaries of the parties and the dispute is simply one relating to title to land..... We agree with learned counsel for the respondents ..... that this case is one of land dispute. This point is borne out by the way the plaintiffs/respondents formulated their claims. Therefore,*

*this ground of appeal fails."*

Although the appellants generally cross-appealed to the Court of Appeal against the entire judgment at the Appellate High Court, no complaint whatsoever was raised by them on the decision of the said Appellate High Court to the effect that the trial Upper Area Court had jurisdiction to entertain the action. The five grounds of appeal, without their particulars, filed by the appellants as cross-appellants before the court of Appeal were as follows -

*"1. They learned justices of the High Court erred and misdirected themselves in law by non-suiting the appellants/respondents (the respondents before them) instead of dismissing their claim after allowing the cross-appellants' additional ground of appeal No. 3 which attacked the evidence of Professor Obayemi.*

*2. The learned Justices erred and misdirected themselves in law by non-suiting the appellants (respondents before them) when such an order was not available before or exercisable by the trial Upper Area Court.*

*3. In the ALTERNATIVE to ground 2 supra, the learned Justices erred and misdirected themselves in law by non-suiting the appellants (respondents before them) instead of dismissing their case when they (appellants) had failed in toto to prove their case before the trial court.*

*4. In further ALTERNATIVE to grounds 2 and 3 supra, the learned Justices of the lower court misdirected themselves in law by non-suiting the appellants (respondents before them and Plaintiffs before the trial court) When counsel for the parties were not called upon to address them (learned Justices) on the issue.*

*The learned JUSTICES of the lower court erred in law and in fact by holding that the "investigation" before the trial court was inconclusive and therefore ordering a retrial in view of what they called "third party's interest"*

Two issues were raised by the appellants in their cross-appellants' brief of argument before the Court of Appeal as arising in both the respondents' main appeal and their cross- appellant's appeal for determination. These were set out as follows -

"1. *Whether the lower court was right in holding that the trial or the investigation before the trial Upper Area Court was inconclusive.*

2. *Having regard to the circumstances of this case, the relevant laws and/or the rules of court, whether the lower Court was right in non-suiting the plaintiffs instead of dismissing their case."*

It is thus clear both from the above stated grounds of appeal and the issues raised therefrom that before the Court of Appeal, the appellants did not raise or pursue the issue of the jurisdiction of the trial Upper Area Court to entertain the respondents' action. That issue having not been pursued by the appellants before the Court of Appeal, it seems to me plain that that court, unless being an issue of jurisdiction, it was prepared to raise it suo motu, had no business whatsoever to deal with it. See Florence Olusanya v. Olufemi Olusanya (1983) 3 S.C. 41 at 56/57, Ochonma v. Unosi (1965) N.M.L.R. 321 at 323. This is because it is a fundamental principle of the determination of disputes between parties that judgment must be confined to the issues raised by the parties and it is not competent for the court to make a case for either or both of the parties and then proceed to give judgment on the case so formulated contrary to the case of the parties. See Adeniji and others v. Adeniji and others (1972) 1 All N.L.R. (Part 1) 278, Nigerian Housing Development Society Ltd v. Yaya Mumuni (1977) 2 S.C. 57, Commissioner for Works, Benue State & Anor v. Devcon Development Consultants Ltd and Another (1988) 3 N.W.L.R. (Part 83) 407. But as I have already observed the appellants were dissatisfied with the whole decision of Court of Appeal and lodged an appeal against the same to this court.

Three grounds of appeal were filed in this court by the appellants against the said decision of the Court of Appeal. These, without their particulars, are as follows -

"1. *The Court below erred in law and thereby came to a wrong decision when it held as follows: -*

*"The investigation or the trial before the Upper Area Court was conducted in accordance with the Rules and procedure applicable in that*

*court. Both parties presented their case, called witnesses, tendered documents and the court visited the locus in quo. The evidence was appraised and the trial court reached its decision on the facts placed before it. The minor discrepancies between the claims put forward by the parties have been cured by the provisions of order 11 Rule 2 (3) of the Area Court (Civil Procedure) Rules, 1971 for Kwara State, the apparent dissonance between the evidence of 1st and 2nd appellants notwithstanding."* B

*2. The lower Court erred in law in allowing the respondents' appeal inspite of the fact that the respondents did not prove their case based on the preponderance of evidence.* C

*3. The judgment of the lower Court is against the weight of evidence."*

The three issues formulated by the said appellants as arising in this appeal for the determination of the court have already been reproduced earlier on in this judgment. I need stress that issue I poses the question whether the trial Upper Area Court had jurisdiction to adjudicate on the respondents' action which the appellants claimed was an inter-tribal boundary dispute and which issue they did not raise in the court below and was therefore neither argued nor considered by that court. D E

**There can be no doubt that the question of jurisdiction, being radically fundamental, can be raised at any stage of a proceeding and even for the first time in a court of last resort, such as the Supreme Court. See Management Enterprises Ltd and Another v. Jonathan Otusanya (1987) 2 N.W.L.R. (part 55) 179. Such an issue must, however, be properly raised before the court may rightly entertain the point. This is because an appellate court will not generally allow a fresh point to be taken before it if such a point was not pronounced upon by the court below. See London Chartered Bank of Australia v. White (1897) 4 A . C. 413, Kabaka's Government and another v. Attorney - General of Uganda and Anor (1965) 3 W.L.R. 512 or 1966 A.C. 1. In the same vein, an appellant will not generally be allowed to raise on appeal a question which was not raised, tried or considered by the court below although where the question involves a substantial point of law, substantive or procedural, and it is plain that no further evidence** F G H

needs be adduced which would affect the decision, the court will allow the question to be raised and the points taken to prevent an obvious miscarriage of justice. See Attorney - General of Oyo State v. Fairlakes Hotels Ltd (1988) 5 N.W.L.R. (part 92) 1 at 29, John Bankole and others v. Mojidi Pelu and others (1991) 8 N.W.L.R. (Part 211) 523. There are of course exceptions and qualifications to this broad proposition of law. With these exceptions and/or qualifications, this judgment is not concerned. **It suffices to state, firstly, that an appellate court can only hear and decide on issues raised on the grounds of appeal filed before it and an issue nor covered by any ground of appeal is incompetent and will be struck out.** See Management Enterprises Ltd & Anor v. Jonathan Otusanya, (supra), Attorney -General, Anambra State v. Onuselogu Enterprises Ltd (1987) 4 N.W.L.R. (Part 66) 547, Adelaja v. Fanoiki and Another (1990) 2 N.W.L.R. (Part 131) 137 at 148.

**In the present case, it is evident that the issue of jurisdiction now sought to be argued by the appellants was neither raised not covered by any of the three grounds of appeal filed before this court. In the second place, the same issue of jurisdiction not having been raised by the appellants in the court below, it is plain that it cannot now be canvassed in this court without leave.** I think that learned counsel for the appellants was quite right when he conceded that the issue of jurisdiction could not now be raised before this court in this appeal without leave. This leave was neither sought nor obtained by the appellants.

It is trite law that failure to obtain the leave of court, where necessary, to file a particular ground of appeal upon which an issue is raised for the resolution of the court renders both such grounds of appeal and the issue so formulated therefrom incompetent. See ajibade v. Pedro (1992) 5 N.W.L.R. (Part 241) 257 at 262, Arowolo v. Adimula (1991) 8 N.W.L.R. (part 212) 753, Metal Construction etc v. Migliore (1990) 1 N.W.L.R. (Part 126) 299. In the present appeal, the issue of jurisdiction sought to be argued is neither covered by any of the three grounds of appeal filed in these proceedings nor was the leave of court obtained to

raise it. In my view, therefore, the issue is incompetent and must be struck out.

I find it necessary, however, to point out that even if the leave of this court was obtained by the appellants to raise the question of the jurisdiction of the trial Upper Area Court to entertain this action, I would have had no difficulty in resolving the issue against them. In this regard the point must be made that the form of an action in a Native tribunal must not be stressed where the issue involved is clear. It is the substance of such a claim that is the determinant factor. Proceedings in such courts have to be carefully scrutinized to ascertain the subject matter of the case and the issues raised therein. In this regard, it is permissible to study the claim, the findings and even the evidence given in such a case to ascertain what the real issues were. See Richard Ezeanya and others v. Gabriel Okeke and others (1995) 4 N.W.L.R. (Part 388) 142, Chukwunta v. Chukwu 14 W.A.C.A 341, Nwosu v. Udejaja (1990) 1 N.W.L.R. (Part 125) 188, R. V. Lt Governor, Eastern Region, Ex Parte Chiagbana 2 F. S. C. . 46, Kwamin Akyin v. Essie Egymah 3 W.A.C.A. 65.

A close study of the proceedings before the trial Upper Area Court does clearly disclose that what was in issue before that court is straight forward claim of title to or ownership of a particular piece or parcel of land, the identity of which was well described in the evidence of the parties. The claim, as formulated by the respondents, clearly indicated the "cause of action" to be "Land Dispute". As earlier mentioned, each of the two parties claimed title to the said land by virtue of their original ownership and possession thereof. More specifically, the respondents claimed that they are the landlords of the appellants, that the appellants had no land of their own in the area, that the appellants begged the respondents' ancestors for land on which to settle and were obliged and that the said appellants subsequently started to encroach and trespass on the respondents' other lands not granted to them hence the present action.

The forgoing case of the respondents was fully considered and accepted by the trial Upper Area Court. On the other hand, the appellants' claim as the original owners of the land in dispute from time imme-

morial was equally fully considered and rejected by the trial court. It seems to me clear that both in form and in substance, the dispute between the parties was simply that of ownership of the piece or parcel of land in dispute. It cannot, therefore, be seriously contended that the trial  
 B Upper Area Court had no jurisdiction to entertain the respondents' claim of ownership to the land in dispute nor, equally, can it be argued that the claim before the trial Upper Area Court was an inter-tribal boundary dispute as submitted on behalf of the appellants. In my view, the trial Upper  
 C Area Court had ample jurisdiction to entertain the respondents' action. But for all the reasons that I have given above, it is clear to me that issue I as raised by the appellants is incompetent and the same is hereby struck out.

There is next issue 2 which questions whether the court below  
 D was right in dismissing the appellants' cross-appeal without considering grounds 1 and 3 of their grounds of appeal.

**I think I ought to stress in the first place that it is the issues distilled from an appellants' grounds of appeal that may be  
 E argued in the Court of Appeal or the Supreme Court and not the grounds of appeal. See Western Steel Works Ltd v. Iron and Steel Workers Union of Nigeria (1987) 1 N.W.L.R. (part 49) 284 at 304, Adelaja v. Fanoiki (1990) 2 N.W.L.R. (Part 131) 137 at 148, Anie v. Uzorka (1993) 8 N.W.L.R. (part 309) 1 at 17, Jimoh Odubeko v. Victor Fowler and Another (1993) 7 N.W.L.R. (Part 308) 637 at 653.**  
 F

In the second place, it is beyond argument that issue 2 of the appellants' brief of argument in the court below was distilled directly from grounds 1 and 3 of their grounds of appeal before that court. For  
 G easy of reference, that issue is couched thus -

*"Having regard to the circumstances of this case, the relevant laws and/or the rules of court, whether the lower Court (meaning the Appellate High Court) was right in non-suiting the plaintiffs instead of  
 H dismissing their case"* (words in brackets supplied for clarity) It is pertinent to observe that the appellants' foregoing issue 2 practically raises the same question as formulated by the court below under issue 2 which it framed as follows -

*"Whether, if the High Court was right in interfering with such a finding, the High Court was correct in non-suiting the appellants' case instead of dismissing the same, or whether the decision of the trial court should be confirmed".*

A close study of the judgment of the Court of Appeal does clearly disclose that the above issue was abundantly considered by that court at the end of which it arrived at the conclusion that the order of non-suit made by the Appellate High Court was misconceived. It was its finding that the respondents, having proved their ownership of the land in dispute by admissible evidence before the Upper Area Court and its findings were not faulted in any way, the plain duty of the Appellate High Court was to enter judgment for the respondents in favour of their claim. The Court of Appeal after an exhaustive consideration of the issue had this to say, namely -

*"The judgment of the High Court was simply based upon what they termed the inconclusiveness of the trial before the Upper Area Court, and with respect, I have shown above that they were wrong. But it is their assumption of the inconclusiveness of the trial that led the Justices to non-suiting the Appellants. .... In the appeal before us, both the Appellants and the Respondents are also one in that the Judges of the High Court on appeal are wrong to have non-suited the claim, but while the Appellants contend that the judgment of the trial court should be affirmed, the Respondents contend that the claims of the Appellants be dismissed."*

The court below then queried -

*"But based upon the grounds of the appeal, the arguments of counsel and record of proceedings, what would be the proper order to make under the circumstances of the case?"*

It proffered an answer thus-

*"I have held that the Appellants have succeeded in their two grounds of appeal. The question now to be considered is whether the Appellants have proved their claims on the balance of probabilities as adjudged by the trial court or whether the Appellants have failed to prove their case on the evidence adduced by them. This now, is only*

concerned with the grounds of the cross appeal dealing with the proof of the case.

The trial court found for the Appellants. The court particularly accepted the evidence of PW5 and based its judgment on his evidence amongst other evidence. It made findings of fact that the land in dispute was owned by the Appellants, that the Appellants settled the Respondents on part of the land and that the Respondents apparently not being satisfied with the area given them are now encroaching and trespassing on other lands given to third party. The Appellate High Court did not directly deal with the issue. It did not decide that the findings of the trial court were perverse nor supported by the evidence adduced at the trial..... Clearly, there was evidence which the trial court accepted before deciding the case in favour of the Appellants. The Respondents have not convinced me that the decision of the High Court was based on its finding that the trial court's judgment was perverse. Indeed, apart from some remarks made against the 5PW, the High Court did not reject the other evidence led for the Appellants."

It then concluded -

"In my view, the High Court ought to have confirmed the decision of the trial court and I so decree.

In the result the appeal of the Appellants/cross -Respondents succeeds and the cross-appeal also partially succeeds. I accordingly set aside the decision of the High Court delivered on the 20th day of March, 1986 non-suited the Appellants/cross Respondents. In its stead, I restore the judgment of the trial Upper Area Court delivered on 10/6/85. The Appellants/cross Respondents are entitled to their costs in the court below which I assess at N450.00 costs and I make no order as to costs in this court."

**It is clear to me that the court adequately considered issue 2 raised by the appellants before it arrived at the conclusion, rightly in my view that the appropriate order was that of judgment for the respondents. Issue 2 is therefore resolved against the appellants.**

Issue 3 is closely connected with issue 2. The main question here is whether on the totality of the evidence adduced before the Upper

Area Court, the court below was right in reversing the decision of the Appellate High Court and restoring that of the Upper Area Court. As I have already observed, both parties laid claim to ownership of the land in dispute and tendered evidence in support thereof. The respondents in particular claimed that they are the landlords of the appellants and that the said appellants had exceeded the area of land they were given and trespassed on other lands of the respondents not granted to them hence this action. The respondents' evidence was accepted as established by the trial Upper Area Court, and that of the appellants was rejected as unreliable. **These findings of fact of the trial Upper Area Court were not established to be perverse or otherwise faulty. It is trite law that an appellate court will not ordinarily interfere with the findings of fact of a trial court except in circumstances such as where the trial court has not made a proper use of the opportunity of seeing and hearing the witnesses or where it has drawn wrong conclusions from accepted credible evidence or has taken an erroneous view of the evidence adduced before it or its findings of fact are perverse and do not flow from the evidence accepted by it. See Okpiri v. Jonah (1961) All N.L.R. 102 at 104 - 105, Woluchem v. Gudi (1981) 5 S.C. 291, Odofin v. Ayoola (1984) 11 S.C. 72 etc. No such circumstance has been established in the present proceedings and I fully endorse the reversal of the judgment of the appellate High Court by the Court of Appeal and the restoration of the decision of the Upper Area Court in the suit.** Issue 3 is accordingly resolved against the appellants.

In the final result, this appeal fails and it is hereby dismissed with costs to the respondents against the appellants which I assess and fix at N10,000.00.

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**WALI JSC**

I am privileged to have read before now, the lead judgment of my learned brother Iguh, JSC and I agree with his reasoning and conclusion for dismissing the appeal. I adopt same as mine.

For those same reasons proffered in the lead judgment, I also hereby dismiss this appeal and affirm the judgment and orders of the Court of Appeal. I abide by the order as to costs made in the lead judgment.

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### OGUNDARE JSC

I have read in advance the judgment of my learned brother Iguh JSC just delivered. I agree entirely with his reasonings and conclusions.

C Issue (1) ought not to have been raised by the appellants in their written brief as it does not arise out of any of the three grounds of appeal filed and relied on by them in their Notice of Appeal. Neither was the question of lack of jurisdiction on the part of the trial Upper Area Court D raised in the Court below. The issue was raised in the appellate High Court and decided there. The appellants seemed satisfied with the High Court decision on it, hence they did not pursue it in the Court of Appeal. I cannot see how they can now reopen the issue in this Court without E leave. And as leave of this Court has not been sought nor obtained to raise the issue, Issue (1) is incompetent and is accordingly struck out by me.

This appeal has no merit and I dismiss it. I affirm the judgment F of the Court below and abide by the order for costs made by my learned brother Iguh, JSC.

### ONU JSC

G Having had a preview of the judgment of my learned brother Iguh, J.S.C. just delivered, I am in entire agreement with him that this appeal lacks merit and must perforce fail. A brief comment, I think will do, to put the matter beyond argument as follows:-

H On issue (1) which asks whether the Upper Area Court has jurisdiction to adjudicate on an inter-tribal boundary, the appellants having conceded that the matter no longer arises because it was a land dispute simpliciter, (See Aransiola Onijan of Ijan v. Alapaa Oyeniyi & Anor. (1968)

NNLR.22 at page 25), it becomes a non-issue. It is accordingly struck out.

In relation to issue (ii) which poses the question whether the Lower Court (Court of Appeal) was right in dismissing the appellant's cross-appeal at all and without considering grounds I and 3 of same, this must of necessity be answered in the positive for reasons that firstly, it being now settled that our superior appellate Courts are to decide formulated issues and in the instant case, the issues raised covered all the grounds of appeal, the authorities cited in appellant's brief not being relevant are inapposite and so are ruled out as being non-sequitur.

On the third and final issue proffered by the appellants' namely, issue (iii), to the effect that the appellants are palpably wrong in submitting that the evidence of PW.5 and Exhibit P1 formed the fulcrum of the respondent's case, it will suffice to advert to the oral testimonies of PW1, PW 2, PW 3, and PW.4 which are more than enough to sustain the respondent's case. See the cases of Abeke Onafowakan v. The State (1987) 7 SCNJ 38; (1986) 2 NWLR (Part 23) 496; Adelumola v. The State (1988) 3 SCNJ 68; (1988) 1 NWLR (Part 73) 683 and Oguonzee v. The State (1998) 5 NWLR (part 551) 521, for the proposition that the number of witnesses required to prove a case is not fixed and in as much as the respondent's case was pivoted on right of first settlement, the number of witnesses to establish a case on the balance of probability imposes on yardstick. Be it noted that Exhibit P1 was not believed as being genuine by the trial Upper Area Court which held inter alia that "1st plaintiff tendered Exhibit P1. Exhibit P1 is not a genuine document and is not reliable as it is dated 24th May, 1962 and titled Agreement between the people of Iffe and Egbeda Egga of Ijumu, Kwara State, Federal Republic of Nigeria. We know that States were created in Nigeria in 1966 (sic) and even then there was no State called Kwara at that time, until 1968 it was Central West therefore the agreement was drawn later than 1962. It must be pointed out that P.W.5 was not a key witness for the respondents. Thus, if his evidence in favour of the respondents is deducted from their (respondent's) evidence their claim was still sustainable. Besides, the concession made by the former respondent's Counsel

Pa Sawyerr that P.W.5 was a rambler was at best unsubstantiated. When it is noted that the trial Upper Area Court disbelieved the appellants' case, the totality of their case was baseless. See Nwanga Nwuzoke v. The State (1988) 2 SCNJ 344; (1988) 1 NWLR (part 72) 529, since  
B unbelieved evidence cannot be basis of defence. On the other hand the respondents' case was believed." The Lower Court was therefore right, in my view, to have allowed the respondents' appeal and to have dismissed the appellants' cross-appeal.

C It is for the above reasons and the fuller ones contained in the leading judgment of my learned brother Iguh, JSC. that I too dismiss this appeal and make the same consequential orders inclusive of those for costs as contained therein.

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**AYOOLA JSC**

I have read in advance the judgment just delivered by my learned brother, Iguh, JSC. I entirely agree with his conclusion and the well  
E articulated reasons he gives for reaching that conclusion. For the reasons he gives, I too would dismiss the appeal with N10,000.00 costs to the respondents.

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