

SUPREME COURT OF NIGERIA
7TH APRIL, 2000. SC. 96/1994
CORAM:- A. G. KARIBI-WHYTE, M. E. OGUNDARE,
A. I. IGUH, S. O. UWAIFO, E. O. AYoola, JJSC

LAWANI ALLI & ANOR PLAINTIFFS/APPELLANTS
(For themselves and on behalf of
Oroye Family)

AND

CHIEF GBADAMOSI ABASI DEFENDANTS
ALESINLOYE & 4 ORS.
(For themselves and on behalf of Alesinloye family)

ACTIONS - Land law - Previous proceeding - That is not between same parties - Is usually inadmissible - But such non inter partes previous judgment - Is admissible in proof of acts of possession - And can operate as estoppel by conduct or standing by.

APPEALS - Findings of fact - Were wrongfully disturbed by the Court of Appeal - As there was no basis for doing so.

COURTS - Suo motu raising of issue - That was not covered by any ground of appeal - Was wrongful and occasioned a miscarriage of justice - The issue so raised will be struck out.

EVIDENCE - Exhibits - Admissions and findings on them - That were supported by oral evidence - Will not vitiate the judgment - Even if such admissions were wrongful.

LAND LAW - Damages and perpetual injunction - Awarded by the trial court - Was proper - And the Court of Appeal was wrong in interfering therewith.

LAND LAW - Traditional history - Conflict therein - Leads to testing the

history by recent facts.

LAND LAW - Title - Traditional evidence - Party relying on it - Is bound to plead and prove the grantor's title.

LAND LAW - Title - Appeal - Grantor's title - Appellants pleaded and proved their grantor's title - Court of Appeal erred in finding against them on this ground.

LAND LAW - Title - Grantor's title - Where acquired by settlement - Plaintiff need not establish any acquisition by their predecessor's grantor.

LAND LAW - Title - Grantor's title - Evidence towards establishing it - Must not come from the grantor's family - As a party is only bound to call relevant evidence - But not bound to call a particular witness.

LAND LAW - Title - Evidence of traditional historical fact - Must not only be given by members of the immediate family of the land owners - In order to be admissible.

LAND LAW - Traditional evidence and acts of possession - Not seriously challenged under cross examination - Was rightly accepted - And there are recent facts of acts of possession - Which support the traditional evidence.

FACTS

Before the High Court Ibadan, the plaintiffs/appellants filed an action against the defendants/respondents claiming declaration of title, N20,000.00 Damages for trespass and order of injunction against the defendants in respect of the land in dispute. Plaintiffs testified that the land was acquired and owned by Opeagbe a great warrior in Ibadan over 200 years ago by way of first settlement on the land. About 150 years ago Opeagbe granted the land to Oroye (plaintiffs' ancestor) by way of an absolute gift in accordance with customary law. Plaintiffs have ever

since continued to be in possession of the land. 1st - 5th defendants denied plaintiffs' claim. They gave a different evidence of traditional history tracing their title to one Bankole Alesinloye.

After a careful review of the entire evidence, the trial Court found in favour of the plaintiffs. He awarded the sum of N12,000.00 in their favour being special and general damages. The defendants' appeal to the Court of Appeal was allowed. Being dissatisfied, the plaintiffs have now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"1. Was the Court below not wrong in law when it held that Exhibit "A" was inadmissible as evidence against the proprietary interest of Ladejo Adeleke and or the Alesinloye family and that the Alesinloye family was not estopped by conduct or by standing by?"

2. Whether the Court below was not wrong in law when after expunging Exhibit "A" from the Record, it held that the Appellants did not discharge the burden of proving a grant of the land in dispute to their ancestor without applying the principles in AJAYI VS. FISHER (1956) 1 FSC 90 and without properly of sufficiently considering the other relevant evidence and or calling on the Counsel to address it. Etc, see p.1125

HELD (Unanimously allowing the appeal per Lead Judgment of **IGUH JSC**, Uwaifo JSC adopting a different approach)

Traditional history - Conflict therein

1. It is manifest that this is a case of a conflict in the traditional history of the parties. The law is settled that where there is a conflict in traditional history, the demeanour of witnesses is of little guide to the truth of the matter as it must be recognized that in the course of transmission from generation to generation of the traditional history, mistakes may occur without any dishonest motives whatever. In such a case, the traditional history is to be tested by recent facts established by evidence with a view to determining which of the conflicting versions is more probable. See Kojo II v. Bonsie (1957) 1 W. L. R. 1223 at 1227. (p. 1133 H)

Traditional evidence - Party relying on it

2. The law is equally well settled that it is not sufficient for a party who relies for proof of title to land on traditional evidence, as in the present case, to merely prove that he or his predecessor in title had owned and B possessed the land from time immemorial. Such a party is bound to plead such facts as -

- (1) who founded the land
- (2) How the land was founded and
- C (3) Particulars of the intervening owners through whom he claims.

See Akinloye v. Eyiola (1968) N. W. L. R. 92 . The onus in the present case is therefore on the appellants not only to establish the grant from Opeagbe to them but also to satisfy the court on their grantor's title to the D land in dispute. (p. 1134 B)

Title - Appeal - Grantor's title

3. I have already emphasized that the appellants led enough evidence of E Opeagbe's possession of and settlement on the land in dispute on his acquisition thereof. Copious evidence was also led by them on their numerous and various acts of possession on the land right from the time Opeagbe granted it to them. More significantly, is their testimony with F regard to established recent facts which on the state of the law was decisive in the determination of which of the conflicting traditional evidence of the parties is credible. With profound respect to the Court of Appeal, it is grossly incorrect to suggest that the appellants neither pleaded nor led evidence of the acquisition of the land in dispute by Opeagbe. G This was clearly averred in paragraph 5 of the Statement of Claim reproduced earlier on in this judgment. Evidence in respect thereof was also led by the appellants in proof of the same averment. I think the court below was in definite error when it faulted the decision of the trial court H on that ground. (pp. 1135 F/1139 A)

Grantor's title - Where acquired

4. I think, with profound respect, that the Court of Appeal, in the first

instance, would appear to have misconceived the appellants' case before the trial court. The case for the appellants was never that their predecessor in title, Opeagbe, was granted the land in dispute by any body but that he acquired the same by settlement in accordance with customary law. The appellants did not, therefore, need to plead or lead evidence to establish any acquisition by their predecessor's grantor in respect of the land in dispute as no such grantor was either alleged or existed. (p. 1139 E)

Grantor's title - Evidence towards establishing it

5. The Court of Appeal would appear to be in error when it held that in the absence of evidence from members of the Opeagbe family, the appellants would be unable to establish the acquisition of the land in dispute by settlement by Opeagbe through whom they claimed.¹ In this regard, it ought to be stressed that the requirement of law from a party to a suit is to call relevant evidence in proof of his case and not that he is bound to call a particular witness if he can prove his case otherwise. See Chief Tawaliu Bello v. Kassim (1969) N. S. C. C. 288. (p. 1139 G)

Title - Evidence of traditional historical fact

6. It would not matter who testifies to a traditional historical fact, so long as he is able adequately to satisfy the court on the credibility and reliability of his means of knowledge together with his suitability and qualification to testify on the tradition in issue. I find it difficult to accept the suggestion of the court below that evidence of tradition, to be acceptable

¹ See also p. 1139 G. Uwaifo JSC in concurring with the lead judgment does not seem to agree with this point, see p. 1165 A. He is rather of the opinion that it is only a member of a community who may give evidence of the traditional history of that community. A look at p. 1166 A suggests that the main issue is the credibility of the witness. So that even if a witness who is a member of the community fails to connect the evidence from "time immemorial to the present time by a systematic reference to succeeding generations" his evidence will be of no use. It would seem therefore that any witness who can satisfy this standard should be able to give evidence of traditional history even where he is not a member of that community as is the majority judgment of the SC in this case.

or indeed, admissible, must only be given by members of the immediate family or community of the land owners. No authority in support of that proposition has been brought to my knowledge and I myself have been unable to find one. Speaking for myself, I cannot accept that proposition as well founded. I should perhaps add that without doubt, evidence of tradition may be more easily established if it comes from members of the family or community concerned. This does not however mean that all evidence of traditional history must in all cases and as a matter of law be rejected or declared inadmissible unless they came from members of the land owning family or community. I think that traditional evidence, even where it does not emanate from the immediate members of the family or community concerned is clearly admissible in land matters under section 45 of the Evidence Act. The weight to be attached to it, however, is quite a different matter which, as rightly observed in the case of Lajide Akuru v. Olubadan-in-Council, (supra) must be left to the experience and wisdom of the trial Judge. The vital issue to be borne in mind at all times is that evidence of traditional history, particularly where there is a conflict of the same between the parties to a dispute is not assessed from the demeanour or credibility of the witnesses. It must be tested by other evidence of recent facts established by evidence. See Kojo II v. Bonsie (supra). (p. 1141 F)

Traditional evidence and acts of possession

7. I think the trial court was right in accepting the traditional evidence of the appellants on the point, particularly when this evidence was hardly seriously challenged under cross-examination. This traditional evidence, subjected to the prescribed acid test, was found to be fully consistent with the recent facts established by evidence before the trial court. These recent facts include evidence which was accepted by the trial court that the land in dispute had for a period of over 150 years from the time Opeagbe granted the same to Oroye been in the undisputed possession and control of the appellants as owners thereof. This fact alone lends full support to the traditional evidence in issue. But there are additionally Exhibits F and J which were admissible in evidence in proof of the appel-

lants' acts of possession in respect of the land in dispute. They, too, copiously support the traditional evidence in issue. In the face of all the above circumstances, I can find no reason to fault the trial court in accepting the appellant's evidence of traditional history as established.

(p. 1143 C)

B

Appeals - Findings of facts

8. It is an elementary principle of law that an appellate court will not ordinarily interfere with the findings of fact made by the trial court which are supported by evidence except in circumstances such as where the trial court has not made a proper use of the opportunity of seeing and hearing the witnesses at the trial or where it has drawn wrong conclusions from accepted credible evidence or has taken an erroneous view of the evidence or the findings of fact are perverse in the sense that they do not flow from the evidence accepted by it. See Woluchem v. Gudi (1981) 5 S.C. 291 at 295 and 326, Okpiri v. Jonah (1961) All N. L. R. 102 at 104 etc. None of the circumstances enumerated above exists in the present case to warrant any interference by the Court of Appeal of the said findings of the trial court. I think the court below, with respect, was in grave error, when it disturbed these findings of the trial court on basis which, in my view, are entirely groundless. (p. 1144 D)

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Courts - Sua motu raising of issue

9. In the present case, the court of Appeal, quite wrongly, waded into the arena of the dispute between the parties and formulated an issue on the admissibility of Exhibit A, an issue not raised by either of the parties, declared the document inadmissible in evidence and proceeded to expunge it from records. Worse still is the fact that the said court below, again quite in error, raised the said issue notwithstanding the fact that it was not covered by any of the grounds of appeal filed by the respondents, as appellants in that court, before it. Finally, although that court raised the said issue sua motu in its judgment and based its judgment mainly on the point, it failed to give the parties any opportunity whatsoever to be heard on the point so raised sua motu by it. It is plain to me

that each and every one of the foregoing procedure adopted by the Court of Appeal in the determination of this appeal constituted serious errors of law which clearly occasioned a miscarriage of justice and cannot be allowed to stand. In my view the issue as to the admissibility of Exhibit B A upon which the court below heavily relied in allowing the appeal before it is incompetent and is hereby struck out. (p. 1148 F)

Exhibits - Admissions and findings on them

C 10. Apart from the admissions and findings in Exhibits A, F, and J, there is abundant oral evidence which the trial court accepted and which conclusively established the appellants' claims. It cannot, therefore, be suggested that without the admissions and findings in question, the decision of the trial Judge would have been otherwise. In my view, even if the acceptance of the admissions and findings in issue were to be wrongful, and I do not so hold, no miscarriage of justice was thereby occasioned as this could not be said to have reasonably affected the decision of the court. (p. 1150 F)

E

Actions - Land law - Previous proceedings

11. Without doubt, proceeding in a former action between one party to a present action and a stranger is generally inadmissible in evidence. See F Owoniya v. Omotosho (1961) 1 All N.L.R. (Part 2) 304. It should however be mentioned that previous judgments not inter partes, such as Exhibits F and J, are clearly admissible in evidence in proof of acts of possession which constituted a part of the appellants' case in this action. See G Ababio 11 v. Ohene Akyin 2 W. A. C. A. 380. So, too, even where a proceeding is res inter alios acta, it can still operate as estoppel by conduct or standing by if there is cogent and accepted evidence, as in the present case, that the parties knew of the previous battle but stood by and failed to intervene. See H Ndukwe Okafor and others v. Agwu Obiwo (1978) 10 S. C 115. (p. 1151 A)

Land law - Damages and perpetual injunction

12. On the question of the award of damages and perpetual injunction,

there can be no doubt that there is ample evidence on record to sustain the judgment of the trial court on both issues. It is the finding of the learned trial Judge that the appellants at all material times were the owners in possession of the land in dispute when the respondents unlawfully went on the land, bulldozed it and destroyed both the appellants' economic crops and beacons thereon. The court was also satisfied from the totality of the evidence adduced before it that an order for perpetual injunction should be made against the respondents, their agents and/or servants. I can find no reason on the part of the court below for interfering with the above findings of the trial court and the awards made thereupon and the same are hereby affirmed. (p. 1151 D)

NOTABLE POINTS OF INTEREST

KARIBI-WHYTE

1. Wrongful rejection of Exh. A by the Court of Appeal

The evidence before the learned trial Judge who admitted Exhibit A was that Ladejo Adeleke Aleshinloye represented his family, the Aleshinloye family when he testified in Suit No. 1/165/77; that the land in dispute belonged to the Oroye family. He is now deceased. His evidence that the land disputed belongs to Oroye family is without doubt against the proprietary interest of his family in the land dispute. There is no doubt the evidence admitted falls within the provisions of S. 33 (1) (c) of the Evidence Act. The Court below chose to expunge the evidence on the grounds of allegation of divided loyalty on the part of the witness and the fact that any such testimony exceeded the mandate to testify only as a boundary man. It was held that Ladejo Adeleke Aleshinloye could not have had peculiar knowledge of the history of the settlement of the land. There is no justification for any of the reasons relied upon for expunging Exh. A. The issues of divided loyalty was not established against the witness. That a witness is a boundaryman does not render his evidence on other relevant issues in the litigation inadmissible. (p. 1153 A)

UWAIFO JSC

2. *Who may give evidence of traditional history*

It seems to me therefore that it is a member of a family who may give the traditional history of that family and similarly it is a member of a community who may give the traditional history of that community. The emphasis is on traditional history, which S. 45 limits to land. In such land matters, it must be pleaded (a) who founded the land; (b) in what manner the land was founded and the circumstances leading to it; (c) the names or particulars of the successive owners or trustees through whom the land devolved from the founder to a living descendant (or descendants) who most likely will give the oral history: see Akinloye v. Eyiola; (p. 1165 A)

3. *What a witness on traditional history must connect*

It appears to me that evidence of traditional history which by nature is hearsay upon hearsay over time beyond living memory will not be allowed to be shot through the void of ages, so to speak, by a witness who cannot connect it from time in history or time immemorial to the present time by a systematic reference to succeeding generations. Hence, as said in Mogaji v. Cadbury Nig. Ltd. at p. 431 and Ogunleye v. Oni (1990) 2 NWLR (pt. 135) 745 at 783, the origin of the grantor's title based on tradition has to be averred on the pleading and proved by evidence in accordance with the custom of a particular family or community unless title has been admitted. (p. 1166 A)

REPRESENTATION

A. Isola Gbenla Esq. for the appellants.
R. A. Sarumi Esq., with him, Mr. A.A. Yesufu for the respondents.

CASES REFERRED TO

Ojiegbe v. Okwaranya (1962) 1 All N. L. R. (part 4) 605 at 609 - 610
Ezewani v. Onwordi (1986) 6 S. C. 402 at 450
Idundun v. Okumagba (1976) 9 and 10 S.C 277 at 246 - 250
Atanda v. Ajani (1989) 3 N. W. L. R. (Part 111) 511

Alade v. Awo (1975) 4 S.C. 215 at 228

Nwosu v. Udeala (1990) 1 N. W. L. R. (Part 125) 188

Idundun v. Okumagba (1976) 9-10 S.C. 227

Kojo II v. Bonsie (1957) 1 W. L. R. 1223 at 1227

Akinloye v. Eyiola (1968) N. W. L. R. 92

B

Olujinle v. Adeogbo (1988) 2 N. W. L. R. (part 75) 238

Adejumo v. Ayantegbe (1989) 3 N. W. L. R. (Part 110) 417

LEAD JUDGMENT BY IGUH JSC

C

By a writ of summons issued on the 11th day of December, 1987 in the Ibadan Judicial Division of the High Court of Justice, Oyo State, the plaintiffs, for themselves and on behalf of the Oroye family, instituted an action jointly and severally against the 1st to the 5th defendants as representatives of the Alesinloye family and the 6th to the 9th defendants claiming as follows:-

"(a) Declaration of Title to a Statutory Right of Occupancy over all that piece or parcel of land situate, lying and being at Igbo-Ori-Oke vie Express Road, Ibadan, the Survey Plan of which is filed with this Statement of Claim.

(b) The sum of N20,000.00 (Twenty Thousand Naira) being special and general damages for continuing acts of trespass committed and still being committed by the defendants on the land in dispute.

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(c) An order of injunction restraining the defendants, their servants, agents, privies or any person claiming through or under them from committing further acts of trespass on the said land in dispute."

Pleadings were ordered in the suit and were duly settled, filed and exchanged.

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

The case, as presented by the plaintiffs, briefly, is that the land in dispute was originally acquired and owned by Opeagbe, a great warrior in Ibadan over 200 years ago. This original acquisition and ownership of the land in dispute by Opeagbe was by way of first settlement in accordance with the customary law and usage of the people. Opeagbe settled

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on the land in dispute until about 150 years ago when he granted the land to the plaintiffs' ancestor, Oroye, another warrior under him, by way of an absolute gift in accordance with customary law. Consequently, Oroye took physical possession of the land as soon as Opeagbe made the grant thereof to him and made maximum use thereof by way of erecting huts on the land, cultivating food crops such as yams and planting various economic trees to wit, orange, coffee, Kolanut and oil palm trees thereon. On Oroye's death, his children and their descendants, that is to say, the plaintiffs, continued to use the land in dispute, inter alia, for farming. They also exercised various acts of ownership and possession over the same, including the prosecution and defending of actions in respect thereof. They tendered Exhibits F and J which are decisions concerning two cases in respect of which they obtained judgments against third parties over the land in dispute. The plaintiffs tendered Exhibit A, the evidence of Oladejo Adeleke Alesinloye, a member of the 1st - 5th defendants' family in favour of the plaintiffs' Oroye family in suit No. 1/165/77 in respect of the land in dispute. They also relied on a confirmation of a customary grant by the Opeagbe family by virtue of a deed made on the 8th day of November, 1972 and registered as No. 55 at Page 55 in Volume 1427 at the Registry of Deeds kept in the land Registry at Ibadan. This said, deed, Exhibit C, was executed as mere documentary evidence only of the grant to Oroye family by the Opeagbe family.

The 1st - 5th defendants, on the other hand, resisted the claim of the plaintiffs as owners of the land in dispute. It was their case that their ancestor, Bankole Alesinloye, another warrior and Balogun of Ibadan, about the year 1820 acquired a large piece or parcel of land of which the land in dispute formed a part by settlement under customary law and thereby became the absolute owner thereof. They claimed that the defendants' ancestor, Bankole Alesinloye, and his family made grants of various portions of the land thus acquired to various families which included the plaintiff's Oroye family. The customary grant by the Alesinloye family to Dosunmu, the then head of the plaintiffs' Oroye family, was made sometime between 1925 and 1929 during the reign of Foko. They denied that Oroye acquired the land in dispute from Opeagbe whom, they

claimed, did not own any parcel of land in the neighbourhood. They claimed that members of the Alesinloye family exercised acts of ownership on the land in dispute by farming thereon after its acquisition by settlement by the said Bankole Alesinloye.

At the conclusion of hearing, the learned trial Judge, Oloko, J. B after a careful review of the entire evidence found for the plaintiffs and pronounced thus -

"The sum total of the above findings is that the plaintiffs must succeed in the first leg of their claim, to wit:

Declaration of Title to a Statutory right of Occupancy over all that piece or parcel of land situate, lying and being at Igbo-Ori-Oke via Express Road, Ibadan and as shown in Survey Plan No. LL 9684 dated 22/4/85"

On the issue of trespass and perpetual injunction, the learned D trial Judge observed -

"As for the general claim for trespass, I accept the evidence of the plaintiffs, particularly the 4th P. W. that the defendants, excepting the 7th defendant, went on the land in dispute, Bulldozed it, and destroyed both the economic crops and Oroye Layout beacons

Plaintiffs are claiming N11,600.00 as costs of the 58 plots of the Layout destroyed by the defendants. This is borne out by Exhibits L & L1. I accept their evidence. I also award N400.00 as general damages F for trespass.

I am satisfied from the totality of the evidence adduced in this case that an order for perpetual injunction should be made against the defendants and/or their agents."

He then decreed in favour of the plaintiffs against the defendants G as follows -

"In sum, the judgment of the Court will be as follows:

(a) Declaration of Title to a statutory Right of Occupancy over all that piece or parcel of land situate lying and being at Igbo-Ori-Oke H Via Express Road, Ibadan shown on Survey Plan No. LL 9684 dated 22/4/85.

(b) The sum of N12,000.00 (Twelve thousand naira) is awarded

against the defendants being special and general damages for continuous acts of trespass committed and still being committed by the defendants on the land in dispute.

(c) *An Order of Perpetual Injunction restraining the defendants, their agents, servants, privies or any person claiming through or under them from committing further acts of trespass on the said land in dispute."*

Being dissatisfied with the said judgment, the defendants lodged an appeal against the same to the Court of Appeal, Ibadan Division, which court in a unanimous decision on the 14th day of April, 1992 allowed the appeal, set aside the decision and orders of the trial court and dismissed the plaintiffs' claims.

Two main grounds were relied upon by the court below for allowing the defendants' appeal. The first ground revolved around Exhibit A which constituted a part of the evidence adduced by the plaintiffs in proof of their claim. It was the view of that Exhibit A was inadmissible in evidence and it consequently ordered that the same be expunged from the records. I think I ought to mention that one or two other issues were raised and canvassed by the parties with regard to certain aspects of the contents of Exhibit A in respect of which the court below accordingly ruled upon. I will have cause in the course of this judgment to comment on these issues.

The second ground upon which the court below allowed the defendants' appeal is that the plaintiffs failed to adduce evidence of how Opeagbe, the plaintiffs' predecessor in title acquired ownership of the land in dispute to enable him to make a customary grant of the same to the plaintiffs. It is mainly on the foregoing two grounds that the court below dismissed the plaintiffs' claims in their entirety.

Aggrieved by this decision of the Court of Appeal, the plaintiffs have now appealed to this court. I shall hereinafter refer to the plaintiffs and the defendants in this judgment as the appellants and the respondents respectively.

Five grounds of appeal were filed by the appellants against this decision of the Court of Appeal. It is unnecessary to reproduce them in

this judgment. It suffices to state that the parties pursuant to the Rules of this court filed and exchanged their written briefs of argument.

The five issues distilled from the appellants' grounds of appeal set out on their behalf for the determination of this court are as follows:-

"1. Was the Court below not wrong in law when it held that Exhibit "A" was inadmissible as evidence against the proprietary interest of Ladejo Adeleke and or the Alesinloye family and that the Alesinloye family was not estopped by conduct or by standing by?" B

2. Whether the Court below was not wrong in law when after expunging Exhibit "A" from the Record, it held that the Appellants did not discharge the burden of proving a grant of the land in dispute to their ancestor their ancestor without applying the principles in AJAYI VS. FISHER (1956) 1 FSC 90 and without properly of sufficiently considering the other relevant evidence and or calling on the Counsel to address it. C D

3. Whether the Court below was not wrong in law when it declared a material part of the evidence given by P.W. 4 as "hearsay" and thereafter held that Ladejo Adeleke Alesinloye unilaterally put himself up as a witness to assist his Kith and Kin, the Oroye family. E

4. Whether the Court below did not misconstrue the Appellants' case and thereby misdirected itself in law and caused a miscarriage of justice when it held that for the Appellants to prove a grant of the land in dispute to their ancestor, it was necessary for them to call members of Opeagbe family to adduce evidence as to how Opeagbe divested the original owners of title to the land in dispute. F

5. Whether after expunging Exhibit "A" from the Record, the Court below did not fall to advert its mind to the other material evidence on Record before holding that the Appellants did not prove a grant to their ancestor". G

The respondents, for their part, submitted four issues in their brief of argument as arising in this appeal for determination. These issues are framed thus: -

"1. Whether the Court of Appeal was right in holding that there was no evidence as to Ladejo Adeleke's source of authority to give evi-

dence for Oroye family in Suit No. 1/165/77.

2. Whether the Court of Appeal was right in holding that Exhibit A was inadmissibly and consequently expunged it from the Records.

3. Whether after expunging Exhibit 'A' from the Records, the Court of Appeal did advert its mind to the other material evidence in the case before holding that the Appellants did not prove a grant to their ancestor, and whether there were pieces of evidence left which should be enough to prove grant.

4. Whether the Court of Appeal misconstrued the case of the Appellants because the Court said"..... It is therefore necessary for them to adduce evidence of how Opeagbe divested the original owners of the land of title and title came to e vested in them".

I have closely examined the two sets of issues identified by learned counsel in their respective briefs of argument. In my view, the questions raised by the appellants, not only cover those formulated by the respondents, they appear to me enough for the determination of this appeal. I will accordingly adopt the set of issues identified by the appellants for my consideration of this appeal.

At the oral hearing of the appeal, both learned counsel for the parties adopted their respective briefs of argument and proffered additional submission in amplification thereof.

The main thrust of the submission of Alhaji Isola-Gbenla on behalf of the appellants with regard to the document, Exhibit A, is that its contents in parts constitute admissions by a witness, now dead, against the proprietary interest of the respondent under sections 19, 20 (1), 23 and 26 of the Evidence Act. He contended that the document having satisfied the conditions set out under section 33 (c) of the Evidence Act was therefore properly admitted in evidence. In this regard, learned counsel called in aid the decision of this court in Anyaegebu Ojiegbe v. Gabriel Okwaranya & ors. (1962) 1 All N. L. R. (part 4) 605 at 609 - 610. He stressed that it is not in dispute that Exhibit A, the evidence of the late Ladejo Adeleke Alesinloye in suit No. 2/165/77 between the appellants and one Alhaji A. S. Adebolu, was in respect of the land now in dispute. In it, the said Ladejo Alesinloye admitted that the land in dispute belonged

to the appellant's Oroye family. He further admitted that the evidence of traditional history pleaded and testified to by the appellants to the effect that the land in dispute originally belonged to Opeagbe who in accordance with customary law granted the same to his war lieu-tenant, Oroye, is well founded. He also admitted that he testified in Exhibit A as the representative of his Alesinloye family. On the observation by the Court of Appeal that Ladejo had dual interest or loyalty to misrepresent matters, learned counsel described this as totally misconceived and unfounded as this material fact was not pleaded by the respondents but was merely suggested by learned counsel in his final address before the court. He submitted that no legal evidence was led before the trial court to establish that ladejo is related to Oroye family or that he had proprietary interest in the Oroye family landed property. Alternatively, he stressed that the mere fact that an individual is related to a member of a family cannot ipso facto establish the individual's membership of such family. Learned counsel finally contended that the court below having raised the issue of the admissibility of Exhibit A suo motu ought to have given both counsel the opportunity to be heard on the issue. This the court below failed to do.

On issues 2 and 5, it was contended that apart from the admissions in Exhibit A, there was categorical and unequivocal oral evidence by the appellants to the effect that the land in dispute was originally acquired by first settlement by Opeagbe some 200 years ago but that he subsequently made a grant of the same under customary law to Oroye, the appellants' predecessor in title. This evidence was fully considered and accepted by the trial court as reliable. Learned counsel then submitted that the court below, after it had wrongly expunged Exhibit A from the records, was in further error when it failed to consider the appellants' copious oral evidence in respect of their title to the land in dispute. He stressed that had the court below fully and properly considered the entire case of the appellants, it would have come to the conclusion that there was ample evidence that Opeagbe acquired the land in dispute by first settlement and that he took effective possession of the same by farming thereon before he granted it to Oroye.

Turning to issues 3 and 4 learned counsel, contended that the

court below was in error when it described the evidence of P.W. 4, Alhaji Lasisi Olasupo Alli, the appellants' principal witness, on how the land in dispute was originally acquired by first settlement as hearsay. He submitted that a witness, once sworn to give evidence, is not barred from
B testifying to any relevant facts within his knowledge whether such evidence relates to traditional history or otherwise. He contended that the court below was therefore in error when it held that P.W. 4 was incompetent to testify on the acquisition of the land in dispute by Opeagbe and its subsequent grant to Oroye. He reminded the court that on the evidence,
C both Opeagbe and Oroye were great warriors in Ibadan who fought side by side and made joint conquests. Both families having enjoyed a common entity as war lords, with Oroye serving under Opeagbe, and having carried out their war exploits in collaboration with each other, it
D would not be a matter of surprise that the traditional history concerning the acquisition of the land in dispute by Opeagbe was within the knowledge of members of the Oroye family. Learned counsel contended that what the law requires a party to do is to call evidence in proof of his case
E and not to call a particular witness if he can prove his case otherwise. In his view, the appellants on the evidence led and accepted by the trial court, fully discharged the onus of proof on them in proof of their title to the land without necessarily calling on members of the Opeagbe family to
F testify. He finally submitted that the court below disregarded the findings and conclusions of the trial court without any justification and without any reference to the pleadings and the evidence. Learned counsel urged this court to resolve the issues under consideration in favour of the appellants, allow the appeal, reverse the decision of the court below and
G restore the judgment of the trial court.

Learned counsel for the respondents, Alhaji R. A. Sarumi argued with regard to issue 1 which deals with the admissibility of Exhibit A that the document did not comply with the provisions of section 33 (c) of the
H Evidence Act. He adopted the reasoning of the court below to the effect that Exhibit A was evidence given by a witness in a previous trial and may only be used in a subsequent trial to impeach the credit of the maker if he said something different from what he had earlier deposed to. He

concluded by stating that Oladejo Adeleke, the maker, was not a witness in the present case and that Exhibit A ought never to have been admitted in the present proceedings. On issues 2, 3, 4 and 5, the respondents submitted that on the strength of the pleadings, it was incumbent on the appellants to call evidence to establish the title of their grantors to the piece or parcel of land in dispute. It was argued that the appellants' acquisition of the land through a grant from Opeagbe cannot be sustained unless they can show that Opeagbe had good or valid title thereto. Learned counsel for the respondents then submitted that the appellants neither pleaded nor led evidence to establish how their predecessors acquired the land in dispute. It was further contended that the appellants should have called the descendants of Opeagbe or co-warriors of Opeagbe or other war lieutenants of Opeagbe who knew or had heard of such settlement to give evidence to establish how the latter acquired the land in dispute. This they failed to do. He drew the attention of the court to the decision of this court in Obi Ezewani v. Obi Onwordi and others (1986) 6 S. C. 402 at 450 and stressed that findings in other cases, such as Exhibits A & , should not be exported from those cases into another case to supplement any deficiency in the second case. In his view, the appellants failed to prove the grant of the land in dispute. He further argued that the court below was right when it held that there was no evidence on how Opeagbe acquired title to the land in dispute. He considered the evidence of P.W. 4, Oladejo Adeleke Alesinloye, on the issue of the acquisition of the land in dispute by Opeagbe as hearsay. He urged the court to dismiss the appeal.

It seems to me convenient to consider issues 2, 3, 4 and 5 together. Basically they relate to whether or not the court below was right in law when it held that title to land in dispute was not established by the appellants. It gave two main reasons for arriving at this conclusion. The first is that the appellants were unable to establish the title of the Opeagbe family, their predecessors in title, to the land in dispute, the second is that the appellants also failed to prove the grant to Oroye of the land in dispute by the great warrior, Opeagbe.

In support of their root of title to the land in dispute, the appel-

lants pleaded in paragraphs 3 - 8 of their Statement of Claim as follows:

-
 "3. The parcel of land claimed by the plaintiffs situate at Igbo-Ori-Oke or Ajawele and about 5 kilometers to Mapo Hall, Ibadan, is
 B verged "RED" while the area trespassed upon and cause of dispute is
 verged "Yellow" on Survey Plan No. LL. 9684 of 22nd April, 1985 filed
 with this statement of claim.

4. The said area of land claimed by the Plaintiffs is bounded by
 C the parcels of land belonging Aranimogun Atagba Akintola, Abidigugu
 and Akano families and by Oniponrin Stream flanked by Alesinloye fam-
 ily land.

5. The plaintiffs aver that the said land was originally acquired
 by settlement according to Native Law and Custom by Opeagbe, a War-
 D rior in Ibadan over 200 years ago.

6. The parcel of land claimed and in dispute belongs to the en-
 tire members of Oroye family made up of about 300 members both males
 and females.

E 7. The plaintiffs ancestor was Oroye, a warrior under Opeagbe
 who granted the entire land claimed and in dispute to the said Oroye as
 an absolute gift according to Native Law and Custom about 150 years
 ago.

F 8. The said Oroye took possession of the land and continued to
 cultivate it, planting kola trees, oil palms, yams, plaintain without let or
 hindrance while he also erected two huts on the land".

The respondents, for their part, joined issues with the appellants
 on the question of their root of title as pleaded above.

G They pleaded thus -

"4. The defendants aver that Bankole Aleshinloye, a warrior
 and Balogun of Ibadan about 1820, the ancestor of the Defendants, of
 Isale-jebu, Ibadan, acquired the land by settlement the large piece of or
 H parcel of land stretching from Ile-Tuntun, that is Oloro Ajawele, to
 Adaramagbo on the right and left of Olojuoro Road, under the native
 law and custom about 180 years ago and thereby came the absolute owner
 thereof.

5. *The said Aleshinloye farmed on the land and had a village on his land at a spot close to Owode market, and also did all other acts of ownership on his land in his life time.*

On the death of Bankole Aleshinloye, his land came Aleshinloye family land.

B

7. *The said Bankole Aleshinloye and his family successively made absolute grants of portions of the land to others who include, Balarojowu, Abidikugu, Akano, Oroye family, and other.*

8. *The said Aleshinloye family land included the land now verged 'Red' on the Defendants' plan, the area of express Road verged 'Purple' on the Plaintiffs' plan, and the built up area on the plaintiffs' plan, thereon verged 'Green', and part of the land sold to S. B. Adewumi and the land stretching therefrom up to Adaramagbo on Olojuoro road.*

C

9. *The Defendants aver that during the reign of Foko (1925 - 1929), Dosunmu (Babalawo), the then Mogaji of Oroye family begged for the grant of area market 'Purple' and 'Green' on the Plaintiffs' plan for himself and Oroye family for farming purpose from Okunola Abasi (the Mogaji of Aleshinloye family) through Aminu, the 2nd Defendant, Tafa Owoade, and Moga Akano.*

D

10. *The Defendants further state that it was in the reign of Foko that the area marked 'purple' and 'Green' on the Plaintiffs' plan was granted to Dosunmu for their family and not that any Oroye acquired any land in that area by grant from Opeagbe.*

F

11. *The Defendants further state that Opeagbe did not acquire land in between Aleshinloye's land. Opeagbe's land is beyond Akintola's land shown on the Plaintiffs' plan."*

It is thus crystal clear that the respondents did not accept the appellants' version of their root of title.

G

It is not in doubt that once a party pleads and traces his root of title in an action for a declaration of title to land action to a particular person or source and this averment, as in the present case, is challenged, that party, to succeed, as a plaintiff in the suit must not only establish his title to such land, he must also satisfy the court as to the title of the person or source from whom he claims. He cannot totally ignore the

H

validity of his grantor's title where this has been challenged and concentrate only on his own title to such land as he would not have acquired a valid title to such land if, in fact, his grantor at all material times had no title thereto. See Mogaji and others v. Cadbury Fry (Export) Ltd (1985) 2 N. W. L. R. (Part 7) 393. Accordingly, the appellants to succeed in the present case must not only establish their title to the land in dispute; they must go further to satisfy the court on the validity of Opeagbe's title, that is to say, on how Opeagbe derived his title to the land in dispute.

Now, the law is well settled that there exists five recognized methods by which ownership of land may be established. These, briefly, comprise as follows -

(i) Proof by traditional history or traditional evidence.

(ii) Proof by grant or the production of document of title

(iii) Proof by acts of ownership extending over a sufficient length of time, numerous and positive enough as to warrant the inference that the persons exercising such acts are the true owners of the land.

(iv) Proof by acts of long possession; and

(v) Proof by possession of connected or adjacent land in circumstances rendering it probable that the owner of such land would in addition be the owner of the land in dispute.

See Idundun and others v. Okumagba (1976) 9 and 10 S.C 277 at 246 - 250, Atanda v. Ajani (1989) 3 N. W. L. R. (Part 111) 511, Anyanwu v. Mbara (1992) 5 N. W. L. R. (Part 242) 381 etc.

From the state of the pleadings and the evidence before the court, it is quite clear that the appellants relied, firstly, on traditional history with regard to the acquisition of the land in dispute by Opeagbe and, secondly, on subsequent customary grant of the land by Opeagbe to their ancestor, Oroye. The appellants' case, as pleaded and testified to before the trial court, is that Opeagbe, a great warrior in Ibadan acquired the land in dispute by first settlement some 200 years ago and thus became the first owner thereof under customary law. He settled and remained in effective possession of the land until some 150 years ago when he made an absolute grant of the same under customary law to his co-warrior and war lieutenant, Oroye, who at all material times served under him.

Oroye, and after him, his descendants, have remained in effective occupation and possession of the land. P.W. 4, Alhaji Lasisi Olasupo Alli, a star witness of the appellants in this case testified in part as follows:-

"The land in dispute is owned by OROYE family. OPEAGBE family was the original owner of the land about 200 years ago. Opeagbe was a great warrior in Ibadan and he settled on it over 200 years ago. Oroye was another great warrior in Ibadan but he served under OPEAGBE. About 150 years ago the land in dispute was granted to OROYE by OPEAGBE. OPEAGBE put OROYE on the land and the latter took possession.

OROYE was cultivating the land, planting kolanuts, palm trees, yams etc. OROYE also erected two huts on the land. He was never disturbed on the land in dispute. Oroye is dead. He died over 100 years ago. He was survived by his children. They are Alli, Gbadamosi, Akande, Ladele, Dosumu and others. Oroye's children also inherited the land and continued cultivation thereon planting Cocoa, Pineapples, Orange, Kolanut trees, Coffee, etc."

The respondents resisted the appellants' claim and testified as to their version of traditional history in respect of the land in dispute. Their version is that their ancestor, Bankole Alesinloye, another warrior and Balogun of Ibadan, around the year 1820 acquired by first settlement, a large piece or parcel of land of which the land in dispute forms a part. Their ancestor made grants of portions of this land to various persons inclusive of the Oroye family. It is apparent from the case as presented by the parties that there is a definite conflict in the traditional evidence of the parties.

The first point I desire to make is that evidence of traditional history, where this is found to be cogent and accepted by the court, can support a claim for declaration of title to land. See F. M. Alade v. Lawrence Awo (1975) 4 S.C. 215 at 228, Olujebo of Ijebu v. Oso (1972) 5 S.C. 143 at 151, Nwosu v. Udeala (1990) 1 N. W. L. R. (Part 125) 188, Idundun v. Okumagba and others (1976) 9-10 S.C. 227. In the present claim, however, **it is manifest that this is a case of a conflict in the traditional history of the parties. The law is settled that where there is**

a conflict in traditional history, the demeanour of witnesses is of little guide to the truth of the matter as it must be recognized that in the course of transmission from generation to generation of the traditional history, mistakes may occur without any dishonest motives whatever. In such a case, the traditional history is to be tested by recent facts established by evidence with a view to determining which of the conflicting versions is more probable. See Kojo II v. Bonsie (1957) 1 W. L. R. 1223 at 1227.

In the second place, the law is equally well settled that it is not sufficient for a party who relies for proof of title to land on traditional evidence, as in the present case, to merely prove that he or his predecessor in title had owned and possessed the land from time immemorial. Such a party is bound to plead such facts as -

- (1) who founded the land
- (2) How the land was founded and
- (3) Particulars of the intervening owners through whom he claims.

See Akinloye v. Eyiola (1968) N. W. L. R. 92 Olujinle v. Adeogbo (1988) 2 N. W. L. R. (part 75) 238, Adejumo v. Ayantegbe (1989) 3 N. W. L. R. (Part 110) 417, Anyanwu v. Mbara (1992) 5 N.W. L. R. (Part 242) 386 at 399. The onus in the present case is therefore on the appellants not only to establish the grant from Opeagbe to them but also to satisfy the court on their grantor's title to the land in dispute.

On Opeagbe's title to the land in dispute, the appellants pleaded and testified to the facts that it was the said Opeagbe who first founded or acquired the land, that he acquired it by first settlement about 200 years ago, that he remained in exclusive possession thereof until some 150 years ago when he made a grant of the same to Oroye, his war lieutenant, with whom he had always jointly fought together and that the said Oroye, and after him his descendants, that is to say, the appellants, have remained the owners in possession of the land until this day.

The appellants in their effort to satisfy the trial court on Opeagbe's acquisition of or title to the land in dispute under customary law led

evidence on the aforementioned conditions pertaining to proof of ownership of land by traditional evidence. Evidence was led that it was Opeagbe who founded the land, that he founded it by first settlement and that it was Opeagbe himself who made a grant thereof to Oroye, the appellants' ancestor. It is clear to me that the appellants not only pleaded but adduced sufficient evidence to prove Opeagbe's title to the land in dispute, a title which he acquired under customary law by way of first occupation thereof. B

The appellants also led oral evidence of the customary grant of the land to their ancestor, Oroye. Both evidence of Opeagbe's title and his grant of the land were testified to by P. W. 4, a witness whose evidence the trial court accepted as reliable. Although the respondents submitted that there was no evidence of any acts of possession or ownership by the appellants on the land, this is neither borne out from the pleadings nor from evidence of the appellants. At all events the appellants to prove their title to the land in dispute did not rely on acts of long possession and/or ownership of which by themselves also constitute another way by which title to land may be proved. See Idundun v. Okumagba (supra). All the law requires a plaintiff who relies on grant or original settlement to do in proof of his title to land is simply to establish such grant or first settlement to the satisfaction of the trial court and this he can do whether or not this is accompanied by the exercise of domination over the land in dispute, an exercise which on its own may be sufficient to establish title to land. See Chief Odofin v. Ayoola (1984) 11 S.C 72 at 105 and Kuma v. Kuma 5 W. A. C. A. 4. D E F

I have already emphasized that the appellants led enough evidence of Opeagbe's possession of and settlement on the land in dispute on his acquisition thereof. Copious evidence was also led by them on their numerous and various acts of possession on the land right from the time Opeagbe granted it to them. More significantly, is their testimony with regard to established recent facts which on the state of the law was decisive in the determination of which of the conflicting traditional evidence of the parties is credible. G H

In this regard, P.W. 4 further testified thus:-

"In 1954, my family instructed Chief J. O. Lanionu (deceased) to carry out the survey of the entire land belonging to OROYE family. He carried out this assignment in the presence of our boundarymen. He produced PLAN NO. L/LA 157 attached to Exhibit 'C'. Nobody challenged our family throughout the survey exercise.

In 1972, the family decided to raise a loan from the bank using the family land which is now in dispute as Mortgage. We got Exhibit 'C' from OPEAGBE family in response to the request from the bank. In 1975, the express road was being constructed and Government acquired part of the land because the express road passed through it. Our crops were enumerated. 2nd plaintiff represented the family then. A certificate of enumeration was issued.

D CROP ENUMERATION CERTIFICATE - EXHIBIT 'E'.

In 1976, one Ilesanmi entered the land in dispute and started to bulldoze our crop. We challenged him and reported him to the Police at Idiare. Ilesanmi claims that he bought the land from OPEAGBE family. As a result of his recalcitrant attitude we put Ilesanmi to court in Suit 1/307/76. We got judgment against Ilesanmi. This is the certified true copy of the judgment.

CERTIFIED TRUE COPY OF THE JUDGMENT IN SUIT NO. 1/307/76 delivered on 20/6/80 by YINKA AYOOLA, J. - EXHIBIT "F" I drew the Plan of the case. This is the Plan No. LL 8115 dated 1/8/77 - EXHIBIT "G". In 1977, I got instructions from the family to layout the land in dispute. Oroye family comprises about 300 people both male and female. I carried out the layout and made a Plan. Here is the Plan. **LAYOUT PLANT OF THE LAND IN DISPUTE. PLAN NO. LL 8257 date 31/10/77 - EXHIBIT "H"**. While I was preparing the plan in respect of Suit 1/307/76 one Adebolu now deceased saw me on the land, challenged me and sued me for trespass on this same land in dispute. He further disclosed that Akano family sold the land to him.

The Suit No. is 1/165/77. I defended the action on behalf of OROYE FAMILY. We obtained judgment against Adebolu. This is the certified true copy, of the judgment. **CERTIFIED TRUE COPY OF**

THE JUDGMENT IN SUIT NO. 1/165/77 delivered on 20/11/78 by LAJIDE, J. - EXHIBIT 'J'. I prepared a litigation plan for Suit 1/165/77. Here is the Plan. PLAN NO. LL 8284 dated 13/10/77 - EXHIBIT 'K'.

I know one Ladejo Adeleke Alesinloye. During the pending of Suit 1/165/77 my family approached Alesinloye family to come and give evidence as our boundaryman. Ladejo Adeleke was instructed by Alesinloye to come and give the evidence. He came to give evidence.

COURT:- Witness confirmed that Exhibit 'A' is the certified true copy of the evidence given by Ladejo Alesinloye."

I need stress that the evidence of the appellants and, indeed, the case presented by them were thoroughly considered and fully accepted by the trial court. Said the learned trial Judge:-

"Apart from the evidence of the Plaintiffs, which I accept, coupled with the evidence of some of the witnesses of the defendants that LADEJO ADELEKE used to represent the defendants in land matters in Court, the reasonable inference one can draw from the role of LADEJO ADELEKE as shown in Exhibit 'A' is that Alesinloye family was only reciprocating the good gesture shown by OROYE family in the '1964' case above. In sum, I hold that Ladejo Adeleke Alesinloye was representing the Alesinloye family in the evidence he gave in Suit No. 1/165/77 - Exhibit 'J' as shown in Exhibit 'A'."

On the appellant's claim, in respect of grant of the land in dispute to them by Opeagbe under customary law as against the respondents' claim of ownership of the said land and grant of part thereof by their ancestor, Alesinloye, to the appellants, the learned trial Judge found thus:-

"Let me state at this juncture that I accept and prefer the evidence of grant given by the Plaintiffs, particularly the evidence of the 4th P.W. to that adduced by the defendants. I reject the evidence of the defendants relating to the grant of the land in dispute by Alesinloye family to the Plaintiff. It is settled law that where a party relies on and pleads a grant as his root of title, he is under a duty to prove such grant to the satisfaction of the trial court. I hold that the Plaintiffs have

proved their grant of the land in dispute, that is, grant from OPEAGBE family to the satisfaction of the court. Even the subsequent events after the grant as claimed by the Defendants do not support their case." (Underlining Supplied)

B Turning to the respondents' alleged claim that they were in possession of the land in dispute, the learned trial Judge dismissed the same as incorrect and unsubstantiated. He said:-

C *"I reject in its entirety any evidence led by the 1st - 5th defendants to create the impression that at certain time or the other, some people carried out any form of operation, be it in the form of extracting gravel or processing palm oil or garri on the land in dispute."*

He then concluded:-

D *"The sum total of the above findings is that the Plaintiffs must succeed in the first leg of their claim, to wit:*

E *"Declaration of Title to a Statutory right of Occupancy over all that piece or parcel of land situate lying and being at Igbo-Ori-Oke via Express Road, Ibadan and as shown on Survey Plan No. LL 9684 dated 22/4/85."*

It is on the foregoing findings of the trial court that the learned trial Judge made a declaration of title to a statutory right of occupancy over the land in dispute in favour of the appellants.

F The Court of Appeal in allowing the appeal by the respondents faulted this decision of the learned trial court on three main grounds. The first ground was that the appellants failed to plead or give evidence of the acquisition of the land in dispute by their grantor. Said the court below per the leading judgment of Salami, J. C. A. with which Ogwuegbu, J. C. G A., as he then was, and Muhammad, J. C. A. concurred :-

H *The parties having so joined issue the respondents had to call evidence to show how their grantor acquired the parcel of land. The respondents' acquisition of the land through grant from Opeagbe cannot be sustained unless they can show that Opeagbe had good or valid title. It is, therefore, necessary for them to adduce evidence of how Opeagbe divested the original owners of the land of title and how title came to be vested in them. The respondents neither pleaded nor led evidence show-*

ing or establishing the acquisition by their predecessor's grantor."

With profound respect to the Court of Appeal, it is grossly incorrect to suggest that the appellants neither pleaded nor led evidence of the acquisition of the land in dispute by Opeagbe. This was clearly averred in paragraph 5 of the Statement of Claim reproduced earlier on in this judgment. Evidence in respect thereof was also led by the appellants in proof of the same averment. I think the court below was in definite error when it faulted the decision of the trial court on that ground.

The second ground upon which the court below allowed the respondents appeal was that no member of the Opeagbe family was called to testify on how the land was first acquired. The court stated thus:-

"The respondents neither pleaded nor led evidence showing or establishing the acquisition by their predecessor's grantor. This evidence whether through conquest or deforestation of virgin land may probably be within the knowledge of members of Opeagbe's family who were never called to testify."

I think, with profound respect, that the Court of Appeal, in the first instance, would appear to have misconceived the appellants' case before the trial court. The case for the appellants was never that their predecessor in title, Opeagbe, was granted the land in dispute by any body but that he acquired the same by settlement in accordance with customary law. The appellants did not, therefore, need to plead or lead evidence to establish any acquisition by their predecessor's grantor in respect of the land in dispute as no such grantor was either alleged or existed.

In the second place, and again with respect, the Court of Appeal would appear to be in error when it held that in the absence of evidence from members of the Opeagbe family, the appellants would be unable to establish the acquisition of the land in dispute by settlement by Opeagbe through whom they claimed. In this regard, it ought to be stressed that the requirement of law from a party to a suit is to call relevant evidence in proof of his case and not that he is bound to call a particular witness if he can prove his case other-

wise. See Chief Tawaliu Bello v. Kassim (1969) N. S. C. C. 288.

It is not in dispute from the pleadings in the present case that the appellants relied on traditional history in proof of the title of their grantor to the land in dispute and the subsequent customary grant, of the same B by Opeagbe to Oroye, their ancestor. Section 45 of the Evidence Act provides as follows:-

"Where the title to or interest in family or communal land is in issue, oral evidence of family or communal tradition concerning such title or interest is relevant". It is the clear oral evidence of tradition or C traditional history in respect of title to or interest in family or communal land is relevant and therefore admissible in proof of title or interest to such land. This rule, although without foundation in the English common law, has been described as a convenient and common-sense rule D under the prevailing circumstances of this country developed, no doubt, as a result of the practice of the courts in admitting such evidence. See Law and Practice Relating to Evidence in Nigeria, 1980 Edition, Article 7.04 at page 102. Expounding on the admissibility of this class of evidence, the West African Court of Appeal in The commissioner of Lands v. Kadiri Adagun (1937) 3 W. A. C. A. 206 observed as follows:-

"It is the undoubted practice in this country to accept as admissible in cases as to title to family land, evidence of the tradition of the F family ownership. Literacy among the people of this country does not go back very far, and the oral tradition is generally the only evidence available as to ownership of land earlier than the memory of living witnesses. The weight to be given to traditional evidence is of course another matter, depending on how far it is supported by other evidence of living G people of facts within their own knowledge. These facts are generally regarded as the acid test of the truth or otherwise of the traditional story. In this case, there was evidence enough, if believed, to prove that this land in question has been for, at any rate, seventy years in the undisputed H possession or control of the Olorogun family as owners. That fact, if proved, supports the traditional evidence In these circumstances I see no reason to hold that the learned Judge was wrong in accepting and believing that evidence."

Attention must also be drawn to the fact that although evidence of traditional history, as clearly admissible in law as it is, the weight to be attached to it is quite a different matter. As this was put by de Comarmond, Ag. C. J., Nigeria in Lajide Akuru v. Olubadab-in-Council (1954) 14 W. A. C. A. 523.

"It need hardly be pointed out that the weight to be attached to traditional evidence is a matter which is left to the experience and wisdom of the (trial) Judge" (Word in bracket supplied)

Reverting now to the present case, it must be conceded that it cannot be out of place if a member of the Opeagbe family was called to testify on the traditional evidence in issue. This, however, is by no means the only way of establishing such a historical fact. In my view, evidence of traditional history in land matters which is nothing short of evidence of a historical fact transmitted from generation to generation in respect of a family or communal land may, in appropriate cases, be given by any witnesses who by virtue of their peculiar and special relationship and circumstances and, before them, their ancestors, with the land owning family or community, are in a position and knowledgeable enough to testify on the traditional evidence in question. Such witnesses may include those who by virtue of the intimate and age-long close association, interaction and/or relationship from time immemorial between their family or community and those of the land owners in issue are clearly knowledgeable and in as good a position, if not even better than the land owners, to give cogent and relevant traditional evidence in respect of ownership of such land. Speaking for myself, **it would not matter who testifies to a traditional historical fact, so long as he is able adequately to satisfy the court on the credibility and reliability of his means of knowledge together with his suitability and qualification to testify on the tradition in issue. I find it difficult to accept the suggestion of the court below that evidence of tradition, to be acceptable or indeed, admissible, must only be given by members of the immediate family or community of the land owners. No authority in support of that proposition has been brought to my knowledge and I myself have been unable to find one. Speaking for myself, I can-**

not accept that proposition as well founded

I should perhaps add that without doubt, evidence of tradition may be more easily established if it comes from members of the family or community concerned. This does not however mean that all evidence of traditional history must in all cases and as a matter of law be rejected or declared inadmissible unless they came from members of the land owning family or community. I think that traditional evidence, even where it does not emanate from the immediate members of the family or community concerned is clearly admissible in land matters under section 45 of the Evidence Act. The weight to be attached to it, however, is quite a different matter which, as rightly observed in the case of Lajide Akuru v. Olubadan-in-Council, (supra) must be left to the experience and wisdom of the trial Judge. The vital issue to be borne in mind at all times is that evidence of traditional history, particularly where there is a conflict of the same between the parties to a dispute is not assessed from the demeanour or credibility of the witnesses. It must be tested by other evidence of recent facts established by evidence. See Kojo II v. Bonsie (supra).

In fairness to learned counsel for the respondents, it does appear from the respondents' brief of argument that he conceded it cannot be right to state, as the court below did, that evidence of traditional history as to how the appellants' grantor acquired the land in dispute must necessarily come from members of the Opeagbe family to be admissible or acceptable. His position was made clear in paragraph 7.04 of the respondents' brief of argument where it was stated as follows:-

"7. 04. *One cannot compel a litigant to call a particular witness, but surely if Opeagbe had settled on that land before granting the land to Oroye, I submit that evidence ought to have been called from descendants of Opeagbe or co-warriors of Opeagbe or other war lieutenants of Opeagbe who know or had heard about such settlement to give evidence.*" (Underlings supplied for emphasis)

I agree entirely with the above submission of learned counsel and entertain no doubt that proof of the traditional history as to how

Opeagbe first acquired the land in dispute may rightly come from the descendants of Opeagbe, from those of his co-warriors or from those of his other war lieutenants who know and are in a position to give satisfactory evidence to that effect.

In the present case it is not in dispute that the appellants are the descendants of Oroye who at all material times was a co-warrior and lieutenant of the said Opeagbe during the latter's exploits. Both warriors, Opeagbe and Oroye, at all material times fought together over the ages in their joint exploits. In my view, the descendants of Oroye, that is to say, the appellants, are in as good a position as those of Opeagbe to give evidence of traditional history on the issue of the acquisition of the land by first settlement by Opeagbe. **I think the trial court was right in accepting the traditional evidence of the appellants on the point, particularly when this evidence was hardly seriously challenged under cross-examination.** This traditional evidence, subjected to the prescribed acid test, was found to be fully consistent with the recent facts established by evidence before the trial court. These recent facts include evidence which was accepted by the trial court that the land in dispute had for a period of over 150 years from the time Opeagbe granted the same to Oroye been in the undisputed possession and control of the appellants as owners thereof. This fact alone lends full support to the traditional evidence in issue. But there are additionally Exhibits F and J which were admissible in evidence in proof of the appellants' acts of possession in respect of the land in dispute. They, too, copiously support the traditional evidence in issue. In the face of all the above circumstances, I can find no reason to fault the trial court in accepting the appellant's evidence of traditional history as established.

It is now recognized that the fact of first settlement upon land seems to be one of the oldest methods of acquiring title to land. As I have already observed, if traditional evidence, and this includes evidence of first settlement, is satisfactorily placed before the court and is accepted, title to the land can be declared on such evidence of tradition alone. See Chief Odofin v. Ayoola (1984) 11 S.C. 72 at 144 where this

court per Oputa, J. S. C. put the matter as follows:-

"First settlement seems to be the oldest method of acquiring title to land. If the traditional evidence of such first settlement is accepted, title can be declared purely on such traditional evidence."

B See too Stool of Abinabina v. Chief Kojo Enyimadu 12 W. A. C. A. 171 at 174 (P.C.), Oluole v. Olofa (1968) N. M. L. R. 462 etc. And I ask myself what the original acquisition of land by settlement under customary law really means? This, in my view, means no more than first occupation or original settlement on land for whatever purpose. In the present case, the learned trial Judge was satisfied with and accepted the appellants' evidence on acquisition by first settlement on the land in dispute by Opeagbe. He was also satisfied that Opeagbe, on the evidence before him, granted the same land under customary law to Oroye I think the learned trial Judge was entitled on these findings which are fully supported by the evidence before the court to make an award of title to the land in dispute in favour of the appellants.

It is an elementary principle of law that an appellate court will not ordinarily interfere with the findings of fact made by the trial court which are supported by evidence except in circumstances such as where the trial court has not made a proper use of the opportunity of seeing and hearing the witnesses at the trial or where it has drawn wrong conclusions from accepted credible evidence or has taken an erroneous view of the evidence or the findings of fact are perverse in the sense that they do not flow from the evidence accepted by it. See Woluchem v. Gudi (1981) 5 S.C. 291 at 295 and 326, Okpiri v. Jonah (1961) All N. L. R. 102 at 104 etc. None of the circumstances enumerated above exists in the present case to warrant any interference by the Court of Appeal of the said findings of the trial court. I think the court below, with respect, was in grave error, when it disturbed these findings of the trial court on basis which, in my view, are entirely groundless.

Turning now to issue I which deals with the admissibility of the document, Exhibit A and upon which the court below heavily relied in allowing the respondents' appeal, it will be necessary to determine whether

that issue was competently before that court. In this regard, 12 grounds of appeal were filed by the respondents, as appellants in that court, against the decision of the court below. The appellants, as respondents, in that court filed no cross-appeal.

The twelve complaints raised by the appellants before the court B below in their of grounds of appeal, without their particulars, are as follows:-

1. The learned trial Judge erred in law and on the facts in giving Judgment for the Plaintiffs for a Declaration for Statutory Right of Oc- C
cupancy in respect of the land in dispute, when the Plaintiffs failed to prove grant from Opeagbe, which was the source of their title.

2. The learned trial judge having agreed that the Judgments in Exhibit 'F' and 'J' are res inter alios acta as far as Alesinloye family is D
concerned, erred in law in holding in this case, that:

- (i) the original owner of the land in dispute was Opeagbe;
- (ii) Opeagbe granted the land in dispute to Oroye, and;
- (iii) the Oroye family are in possession.

3. The learned trial Judge erred in law in formulating wrong E
issue for himself to determine the case by saying: "who granted the land in dispute to the Plaintiffs' Oroye family?. Is it Opeagbe or Alesinloye family?".

4. The learned trial judge erred in law in relying on the contents F
of Exhibit 'A' as proof of the facts stated therein , and using same as binding on Alesinloye family;

5. The learned trial Judge erred in law in rejecting evidence of grant by Alesinloye family to Balarojowu and Abidikugu, when the Plain- G
tiffs did not join issue with the Defendants on the point and the evidence led in support thereof was uncontradicted.

6. The learned trial Judge erred in law and on the facts in reject- H
ing the evidence led for the 1st to 5th Defendants that sometime ago, the 3rd D. W., RAFATU AKINJOBI, extracted gravel from the land in dis-
pute, when the evidence and probabilities in the case was to that effect.

7. The learned trial Judge erred in law and on the facts in holding that the contents of Exhibit 'N' support the contention that Alesinloye

family did not know the land in dispute or, in the alternative, the extent of their land in that area;

8. The learned trial Judge erred in law and on the facts in believing the Plaintiffs that they made a layout of the land in dispute in 1977 and incurred expenses of N11,600.00 and therefore awarded N11,600.00 special damages against the Defendants, when on the evidence in the case, the claim ought to be rejected.

9. The learned trial Judge erred in law and on the facts in holding that the Defendants on their plan, Exhibit "Q", did not know the extent of the land of their alleged grantee, Akano family, and that there is no land between Oroye family land (that is, the land in dispute) and Akano family land.

10. The learned trial Judge erred in law in failing to consider the case of the defence adequately in that the Judge merely highlighted the weaknesses in the defence and did not consider the substance of the defence case, while he did not consider the weaknesses in the Plaintiffs' case.

11. The Judgment is against the weight of evidence.

12. The Court erred in law in awarding N3,000.00 costs which in the circumstances of this case is excessive and against the Defendants.

A close study of the above grounds of appeal discloses in the clearest possible terms that not one of them raised any question concerning the admissibility of the document, Exhibit A. The only ground that dealt with Exhibit A is ground 4 which, however, did not question its admissibility in evidence but was merely concerned with the weight attached to its contents by the trial Court.

It is instructive to observe that the said respondents, as appellants in the court below, raised 9 issues from their grounds of appeal for the determination of the court below. These issues were formulated H thus:-

"(i) Whether the issue formulated by the Court was proper.

(ii) Whether the Plaintiffs proved grant as pleaded notwithstanding the findings in Exhibits 'F' and 'J'.

(iii) *Whether the Aleshinloye family were estopped by the contents of Exhibit 'A'.*

(iv) *Whether the Court could reject the evidence of grant by Aleshinloye to Abidikugu and Balarojowu.*

(v) *Whether the trial Court could reject the evidence of extrac- B
tion of gravel on the land in dispute adduced for the Defendants.*

(vi) *Whether the contents of Exhibit 'N' support the contention that the Defendants did not know the land in dispute or the extent of their land in the area.*

(vii) *Whether the area in Exhibit 'M' was proved to belong to C
Akane family.*

(viii) *Whether the Court ought to have awarded N16,000.00 Spe- D
cial damages, N400 General damages and N3,000.00 costs in the cir-
cumstances of this case.*

(ix) *Whether the case of the defence was adequately considered and whether the case was against the weight of evidence."*

It seems to me clear that one of the above issues concerned the admissibility of Exhibit A in evidence. However, notwithstanding the fact that neither in the respondents' grounds of appeal nor in the issues formulated by them before the court below did they question the admissibility of Exhibit A, the Court of Appeal devoted more than half of its judgment to a consideration of this issue. In the final result, the court declared the document inadmissible in evidence and accordingly expunged it from the records. With profound respect to the Court of Appeal, it was grossly in error to have adopted this course of procedure and as a result of which it was able to allow the respondents' appeal before it

This is because, in the first place, it is a basic principle of the law in the determination of disputes between parties in a court of pleadings that judgment must be confined to the issues raised by such parties. It is not competent for a court suo motu 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 before it. See Commissioner for Works, Benue State & another v. Devcon Development Consultants Ltd and An- H
other (1988) 3 N.W.L.R. (Part 83) 407, Nigerian Housing Development

Society Ltd v. Yaya Mumuni (1977) 2 S.C. 57, Adeniji and others v. Adeniji and others (1972) 1 All N.L.R. (Part 1) 278. In particular, it should be plain to an appellate court that when an issue is not placed before it, it has no business whatsoever to deal with it. See too Florence B Olusanya v. Olufemi Olusanya (1983) 3 S.C 41 at 56 - 57.

In the second place, an appellate court can hear and decide on issues raised on the grounds of appeal filed before it and an issue not covered by any of the grounds of appeal is incompetent and will be struck out. See Management Enterprises v. Otusanya (1987) 2 N. W. L. R. (Part 55) 179.

In the third places, it is wrong to found a decision of a court of law on any ground in respect of which it has neither received argument form or on behalf of the parties before it nor even raised by or for the parties or either of them. See Shitta- Bey v. Federal Public Service Commission (1981) 1 S.C. 40, Sande v. Abdullahi (1989) 7 SCNJ 216, Chief Ebba v. Chief Ogodo and Another (1984) 4 S.C. 817 at 112.

In the fourth place, even when a court raised a point suo motu, the parties must be given an opportunity to be heard on the point, particularly the party that may suffer a loss as result of the point raised suo motu. See Odiase v. Agho (1972) 1 All N. L. R. (Part 1) 170, Ajao v. Ashiru (1973) 11 S.C 23, Atanda v. Lakanwi (1974) 3 S.C 109, Adegoke v. Adibi (1992) 5 N.W.L.R. (Part 242) 410 at 420.

In the present case, the court of Appeal, quite wrongly, waded into the arena of the dispute between the parties and formulated an issue on the admissibility of Exhibit A, an issue not raised by either of the parties, declared the document inadmissible in evidence and proceeded to expunge it from records. Worse still is the fact that the said court below, again quite in error, raised the said issue notwithstanding the fact that it was not covered by any of the grounds of appeal filed by the respondents, as appellants in that court, before it. Finally, although that court raised the said issue suo motu in its judgment and based its judgment mainly on the point, it failed to give the parties any opportunity whatsoever to be heard on the point so raised suo motu by it. It is plain to me that

each and every one of the foregoing procedure adopted by the Court of Appeal in the determination of this appeal constituted serious errors of law which clearly occasioned a miscarriage of justice and cannot be allowed to stand. In my view the issue as to the admissibility of Exhibit A upon which the court below heavily relied in allowing the appeal before it is incompetent and is hereby struck out. B

There is next the question of whether the court below was right in law in that having expunged Exhibit A from the record of proceedings, it held without any sufficient consideration of other relevant and material oral evidence on record that the appellants did not prove the grant of the land in dispute by Opeagbe to their ancestor. I have earlier on in this judgment dealt with the oral evidence of the appellants in support of their claims apart from the documentary evidence, Exhibit A. I did come to the conclusion that upon such oral evidence alone, the trial court was entitled to enter judgment for the appellants and that it was an error in law for the Court of Appeal to interfere with the findings of the trial court from this oral evidence. C D

I think I ought to observe that although the court below attacked the admissions against interest made by Ladejo Adeleke Alesinloye as a representative of the respondents in the said Exhibit A, I find it unnecessary in this judgment to wade into whether or not those admissions constituted legal evidence before the trial court. The same goes with the evidence and judgments in Exhibits F and J. This is because, apart from the admissions in Exhibit A and the findings in Exhibits F and J, there is ample oral evidence on record to sustain the judgment of the learned trial Judge. In the circumstance, a consideration of such an issue may, to some extent, be regarded as academic. E F G

The law is firmly settled that where a question before the court is entirely academic, speculative or hypothetical, the appellate court in accordance, with the well established principle of this court must decline to decide the point. See Nkwocha v. Governor of Anambra State (1984) 6 S.C 302, Governor of Kaduna State v. Dada (1986) 4 N. W. L. R. (Part 38) 687, Richard Ezeanya & Ors v. Gabriel Okeke and others (1995) 4 N. W. L. R. (Part 388) 142. I will therefore decline to go into the ques- H

tions of whether the admissions in Exhibit A constitute legal evidence and whether the findings in Exhibits F and J operate as estoppel against the respondents.

I should, however, add that even if I were able to find that the admissions in Exhibit A and the findings in Exhibits F and J ought not to have been accepted by the trial court as additional reasons for granting the appellants' claims, and I do so hold, I still have sustained the judgment of the trial court. This is because, it is not every mistake or error in a judgment that will result in an appeal being allowed. It is only where the error is substantial in that it has occasioned a miscarriage of justice that the appellate court is bound to interfere. See Onajobi v. Olanipekun (1985) 4 S.C. (Part 2) 156 at 163, Oje v. Babalola (1991) 4 N. W. L. R. (part 185) 267 at 282, Azuetonwa Ike v. Ugboaja (1993) 6 N. W. L. R. (Part 301) 539, Abiodun Amaroti v. Madam Agbeke (1991) 6 S.C.N.J. 54 at 64. In the same vein, wrongful admission of evidence shall not of itself constitute a ground for the reversal of a judgment where it appears on appeal that such evidence cannot reasonably be held to have affected the decision and that such decision would have been the same if such evidence had not been admitted. See Ezeoke v. Nwagbo (1988) 1 N. W. L. R. (Part 72) 616 at 630, Umeojiako v. Ezenamuo (1990) 1 N. W. L. R. (Part 126) 253 at 270, Monier Construction Co. Ltd v. Azubuike (1990) 3 N.W.L.R. (Part 136) 74 at 88 and Idundun and Others v. Daniel Okumagba (1976) 9 & 10 S.C. 227.

Apart from the admissions and findings in Exhibits A, F, and J, there is abundant oral evidence which the trial court accepted and which conclusively established the appellants' claims. It cannot, therefore, be suggested that without the admissions and findings in question, the decision of the trial Judge would have been otherwise. In my view, even if the acceptance of the admissions and findings in issue were to be wrongful, and I do not so hold, no miscarriage of justice was thereby occasioned as this could not be said to have reasonably affected the decision of the court.

There was finally the submission of learned counsel for the respondents that Exhibits F and J constituted res inter alios acta and that

they could not, therefore, be used to sustain the plea of estoppel. **Without doubt, proceeding in a former action between one party to a present action and a stranger is generally inadmissible in evidence. See Owoniye v. Omotosho (1961) 1 All N.L.R. (Part 2) 304.** It should however be mentioned that previous judgments not inter partes, such as Exhibits F and J, are clearly admissible in evidence in proof of acts of possession which constituted a part of the appellants' case in this action. See Ababio 11 v. Ohene Akyin 2 W. A. C. A. 380. So, too, even where a proceeding is res inter alios acta, it can still operate as estoppel by conduct or standing by if there is cogent and accepted evidence, as in the present case, that the parties knew of the previous battle but stood by and failed to intervene. See Ndukwe Okafor and others v. Agwu Obiwo (1978) 10 S. C 115. But, as I have already observed, there are other ample evidence in this case upon which the appellants' claims are easily sustainable. I need not therefore dwell at length with the said Exhibits F. and J.

On the question of the award of damages and perpetual injunction, there can be no doubt that there is ample evidence on record to sustain the judgment of the trial court on both issues. It is the finding of the learned trial Judge that the appellants at all material times were the owners in possession of the land in dispute when the respondents unlawfully went on the land, bulldozed it and destroyed both the appellants' economic crops and beacons thereon. The court was also satisfied from the totality of the evidence adduced before it that an order for perpetual injunction should be made against the respondents, their agents and/or servants. I can find no reason on the part of the court below for interfering with the above findings of the trial court and the awards made thereupon and the same are hereby affirmed.

The conclusion I therefore reach is that all five issues formulated by the appellants in this appeal must be and are hereby resolved against the respondents. This appeal accordingly succeeds and it is hereby allowed. The judgment and orders of the court below are set aside and those of the trial court are hereby restored. There will be costs to the

appellants against the respondents which I assess and fix at N10,000.00 in this court and N1,000.00 in the court below.

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KARIBI-WHYTE JSC

I have read the leading judgment of my learned brother Iguh, JSC just delivered. I agree with him. I also will and hereby allow the appeal. I wish however, to comment briefly on one of the principal issues determined in this appeal, namely the inadmissibility of Exh. A.

C

The Court below expunged from the record Exhibit A, relied upon by the trial Judge as evidence against interest by the Plaintiffs. This is the evidence of Ladejo Adeleke Aleshinloye in suit No. 1/165/77 - where he had testified as a boundary man that the land in dispute belonged to the

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Oroye family. The witness is a member of the Aleshinloye and was testifying on its behalf. It is important to observe that the admissibility vel non of this evidence was not raised by the parties before the court below. The Court below decided on its own without inviting parties to

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argue the point. This it should not have done. - Adegoke v. Adibi (1992) 5 NWLR. 410 at p. 520. It devoted a considerable portion of its judgment to the determination, whether the evidence of Ladejo Adeleke Aleshinloye was admissible. It held it was inadmissible and expunged it

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from the record of proceedings. It should have been obvious to the Court below, that it had no business deciding a matter not placed before it - See Olusanya v. Olusanya (1983) 3 S.C.. 41, 56-57. Chief Ebba v. Chief Ogodo (1984) 4 S.C.. 87 at 112. That notwithstanding, their Lordships of the Court below would seem to have misunderstood the provisions of Section 33 (1) (c) of the Evidence Act.

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The issue of the admissibility of Exhibit A is clearly governed by Section 33 (1) (c) of the Evidence Act which provides as follows -

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"33 (1) Statements, written or verbal, or relevant facts made by a person who is dead are themselves relevant facts in the following cases

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(c) when the statement is against the pecuniary or proprietary interest of the person making it and the said person had peculiar means

of knowing the matter and had no interest to misrepresent it."

The evidence before the learned trial Judge who admitted Exhibit A was that Ladejo Adeleke Aleshinloye represented his family, the Aleshinloye family when he testified in Suit No. 1/165/77; that the land in dispute belonged to the Oroye family. He is now deceased. His evidence that the land disputed belongs to Oroye family is without doubt against the proprietary interest of his family in the land dispute. There is no doubt the evidence admitted falls within the provisions of S. 33 (1) (c) of the Evidence Act..

The Court below chose to expunge the evidence on the grounds of allegation of divided loyalty on the part of the witness and the fact that any such testimony exceeded the mandate to testify only as a boundary man. It was held that Ladejo Adeleke Aleshinloye could not have had peculiar knowledge of the history of the settlement of the land.

There is no justification for any of the reasons relied upon for expunging Exh. A. The issues of divided loyalty was not established against the witness. That a witness is a boundaryman does not render his evidence on other relevant issues in the litigation inadmissible. There is clearly nothing to disqualify Ladejo Adeleke Aleshinloye from having peculiar means of knowing the matter relating to the settlement of the land in dispute. - See SSNL v. Eyeafe (1976) 9-10 S.C.. 135. In determining the admissibility of evidence, it is the relevance of the evidence that is important and not how it was obtained - See Karuma v. R. (1955) AC. 197. The evidence in Exh. A is clearly relevant and therefore admissible.

Exhibit A contains admissions within Section 20 (1) of the Evidence Act, thereby estopping the Respondents from denying the ownership of the Appellants to the land in dispute within the provisions of section 26 of the Evidence Act.

In my view, the use made of Exhibit A by the trial Judge is correct and unimpeachable.

It is difficult to fault the finding of the learned trial Judge that it was Opeagbe who settled on the land in dispute and not Aleshinloye, and that Opeagbe granted the land to Oroye. There is no doubt that the

learned trial judge posed the right question that on the pleadings, the case could be resolved by the answer to the question - who granted land to Oroye - Is it Opeagbe or Aleshinloye.

It is obvious from the crucial finding that they are supported by the evidence before him. The Court below was clearly in error to have interfered with the findings.

I do not consider the contention of the court below over proof of Opeagbe's title relevant. The title in issue is not that of Opeagbe. An examination of the pleadings show that the issue to be resolved must be who settled on the land, Opeagbe or Aleshinloye? The learned trial Judge having found on the evidence in favour of Opeagbe that is the end of Opeagbe's title. The pleading is that Opeagbe acquired the land by settlement. The issue of original owners or settlement does not therefore arise.

I abide by the consequential orders made in the leading judgment including the order as to costs.

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OGUNDARE JSC

I have been privileged to read in advance the judgment of my learned brother Iguh JSC just delivered. I agree entirely with his reasonings and conclusions reached by him on the issues placed before this Court. I only need to add a few remarks.

For the reasons given by my Lord Iguh JSC the Court below was clearly in error to expunge from the record Exhibit A, the evidence of Ladejo Adeleke Aleshinloye in Suit 1/165/77. The admissibility of Exhibit A was never questioned in the appeal before the Court below. The Court just decided to go on an adventure of its own and devoted a considerable length of the lead judgment to the issue. And had that Court adverted its mind to the provisions of section 33 (1) (c) of the Evidence Act it could not even have come to the conclusion that the document was inadmissible. Section 33 (1) (c) provides:

"33. (1) Statements, written or verbal, or relevant facts made by a person who is dead are themselves relevant facts in the following cases

(c) When the statement is against the pecuniary or proprietary interest of the person making it and the said person had peculiar means of knowing the matter and had no interest to misrepresent it;"

There was ample evidence, accepted by the learned trial Judge, that Ladejo Adeleke Aleshinloye represented his family - the Aleshinloye family (Respondents in this appeal) when he testified in Suit 1/165/77. He is now dead. His evidence is clearly against the proprietary interest of his family in the land in dispute. I can find no justification for the conclusion reached by the Court below to expunge Exhibit A from the records. C

In my respectful view, the use made of Exhibit A by the trial High court is unimpeachable. Exhibit A contains admissions within the provisions of section 20 (1) of the Evidence Act that estopped the Respondents under section 26 of the Act from now denying the ownership of the Appellants to the land in dispute. Exhibit A only goes to strengthen the case of the Appellants which, without the document, is still strong enough to sustain the judgment of the trial High Court. D

A word or two on Exhibits F and J, - that is the judgments in favour of the Appellants in Suit 1/307/76 where the Appellants successfully asserted their right to the land in dispute against one Ilesanmi and suit 1/165/77 where the Appellants defended their right, again successfully, to the land in an action instituted against them by one Adetolu. Exhibits F and J were tendered by the Appellants in proof of acts of their ownership to the land. These are acts in recent times that a court must take into consideration in resolving the conflict in traditional evidence of the parties. The trial High Court, in my respectful view, made right use of these documents in the instant case and the conclusion it reached in favour of the Appellants cannot be faulted either. F G

I think the learned trial Judge did justice to the case before him. On the pleadings and evidence of the parties he was right to say that the case boiled down to the question: who granted land to Oroye - Opeagbe or Aleshinloye? On the evidence which he accepted, he found it was Opeagbe who settled on the land in dispute, and not Aleshinloye, and it was the former who granted the land to Oroye. As those crucial findings H

are adequately supported by the credible evidence before him, I think it is erroneous of the Court below to interfere with those findings. That Court's fuss over proof of Opeagbe's title ignored the pleadings of the parties which are aimed at narrowing down issues in controversy. Both B claimed settlement of the land. Appellants say it was settled on by Opeagbe; Respondents say it was Aleshinloye who settled on it. Both were warriors in Ibadan. The question to resolve then must be who settled on the land Opeagbe or Aleshinloye? The learned trial Judge on the credible evidence before him settled it in favour of Opeagbe. That to C my mind is the end of Aleshinloye's title. To say that there must be proof of how Opeagbe acquired title from the original owners of the land is a misconception of the pleading that Opeagbe settled on the land. The pleading is not that he acquired it by conquest or grant but by settlement. D There can, therefore, be no question of original owners. He became owner by settlement.

In conclusion, I too allow this appeal and abide by the consequential orders made by my learned brother Iguh, JSC, including the E order as to costs.

UWAIFO JSC

F The reliefs sought by the plaintiffs (now appellants) against the defendants (now respondents) are for (a) a declaration to a statutory right of occupancy (b) N20,000.00 special and general damages for trespass and (c) an injunction to restrain against further trespass as detailed in the leading judgment of Iguh JSC. It may be noted here that the actual G respondents are the 1st - 5th representing the Alesinloye family. It must therefore be borne in mind that the real contest was between the Oroye family (represented by the 1st & 2nd appellants) and the Alesinloye family. The 6th and 9th respondents say they bought land from Alesinloye H family, while the 7th respondent says he never even went on the land much less claim any interest in it. The 8th respondent did not defend ant suit. On 22 January, 1988, the learned trial judge (Oloko, J.) in a considered judgment awarded the reliefs sought by the appellants in the follow-

ing terms:

"(a) Declaration of Title to a Statutory Right of Occupancy over all that piece or parcel of land situate lying and being at Igbo-Ori-Oke via Express Road, Ibadan shown on Survey Plan No. L L 9684 dated 22/4/85.

(b) The sum of N12,000 (twelve thousand naira) awarded against the defendants being special and general damages for continuous acts of trespass committed and still being committed by the defendants on the land in dispute.

(c) An Order of Perpetual injunction restraining the defendants, their agents, servants, privies or any person claiming through or under them for committing further acts of trespass on the said land in dispute."

The appeal of the respondents against that judgment was allowed by the Court of Appeal on 14 April, 1992 in a judgment in which no doubt a lot of reasoning was shown by Salami JCA.

In the present appeal from the Court of Appeal to this court, several issues for determination were raised by each of the appellants and the respondents. The appellants raised 5 issues while the respondents raised 4. The two sets of issues have been fully reproduced in leading judgment of Iguh JSC. It appears to me that the two sets of issues almost cover the contentions. I shall however take from them those issues I consider relevant for reaching a decision in this appeal (i.e. issues 1 and 4 by appellants; and issue 1 by the respondents) and set them out seriatim as follows:

"(a) Was the court below not wrong in law when it held that exhibit 'A' was inadmissible as evidence against the proprietary interest of Ladejo Adeleke and or Alesinloye family and that Alesinloye family was not estopped by conduct or by standing by?

(b) Whether the court below did not misconstrue the appellants' case and thereby misdirected itself in law and caused a miscarriage of justice when it held that for the appellants to prove a grant of the land in dispute to their ancestor, it was necessary for them to call members of Opeagbe family to adduce evidence as to how Opeagbe divested the original owners of title to the land in dispute.

(c) *Whether the Court of Appeal was right in holding that there was no evidence as to Ladejo Adeleke's source of authority to give evidence for Oroye family in suit No. 1/165/77."*

As I said, I have had to consider this appeal from the above recited issues B and upon perusing the record of appeal closely.

I had initially and for a long while hesitated to come to a different judgment from that of the Court of Appeal. The actual basis of the Court of Appeal judgment is that it was not established by the present appellants C how one Opeagbe, whom they claimed to have granted the land in dispute to Oroye, their ancestor, acquired the land himself. In other words, that his root of title was not proved. As put per Salami JCA:

"The respondents pleaded that the land in dispute formed a portion of a large expanse of land settled upon by Opeagbe who made a D grant to Oroye their own ancestor contrary to the appellant's pleading that Bankole Aleshinloye, Balogun of Ibadan and great Warrior settled on the land and made grants of portions thereof to several families including Oroye, the respondents' ancestor. The parties having so joined E issue the respondents had to call evidence to show how their grantor acquired the parcel of land. The respondents' acquisition of the and through grant from Opeagbe cannot be sustained unless they can show that Opeagbe had good or valid title. It is, therefore, necessary for them F to adduce evidence of how Opeagbe divested the original owners of the land of title and title came to be vested in them. The respondents neither pleaded nor led evidence showing or establishing the acquisition by their predecessor's grantor. This evidence whether through conquest or defor- Gestation of virgin land may probably be within the knowledge of members of Opeagbe's family who were never called to testify. The traditional evidence contained in exhibit A did not disclose how the respondents in the present appeal came to be vested with title to the land in dispute."

H It is hardly necessary for me to say that looking at the passage stated above on its own from the said judgment, the reasoning cannot be faulted. It encapsulates to a large extent the principles laid down by this court in such authorities as Kareem v. Ogunde (1972) 1 All NLR (pt. 1)

173 at 175; Sunday Piaro v. Tenalo (1976) 12 S.C. 31 at 41; Mogaji v. Cadbury Nigeria Ltd. (1985) 5 NWLR (Pt. 7) 393; Owoade v. Omitola (1988) 2 NWLR (pt. 77) 413 at 424-425; Anyanwu v. Mbara (1992) 5 NWLR (Pt. 242) 386 at 399; and Uchendu v. Ogboni (1999) 5 NWLR (pt. 603) 337 at 353.

The learned Justice of the Court of Appeal later observed that the trial judge gave undue weight to exhibit A which features in one of the issues set out above to hold that it was binding on Alesinloye family. He then went on to give reasons why it was not proper to do so. First, that Ladejo Adeleke Alesinloye whose evidence is contained in the said exhibit was alleged to have dual loyalty both to Oroye family and Alesinloye family and that the learned trial judge did not make a finding on that. Second, that the respondents persistently denied being aware of suit No. 1/165/77 where that evidence was given by the said witness therein (Ladejo) and that "a reasonable inference can be drawn that Ladejo Adeleke deliberately went to court to give evidence favourable" to the appellants to the detriment of the respondents. He added that as a member *per se* of Alesinloye family, Ladejo Adeleke had no peculiar means of knowing how Opeagbe granted land to the appellants' ancestor. Thirdly, which I think is part of the second reason, that there was no satisfactory evidence that Ladejo was instructed by Alesinloye family to testify in suit No. 1/165/77. Fourth, that assuming he was so instructed, he could only competently testify to the effect that Alesinloye family was in boundary with Oroye family but he could not impute Alesinloye family with the knowledge of the mode of acquisition by Oroye family from Opeagbe. Finally, Ladejo's evidence could not bind nor operate as estoppel against Alesinloye, Ladejo not being the head of Alesinloye family.

I think from the passage quoted from the judgment of Salami JCA, the focus was more on whether the root of title of Opeagbe himself was proved. That is to say, whether there is admissible evidence that he acquired land at all. An aspect of the argument about exhibit A is about whether, I think, it can constitute part of such evidence. This takes me first to the pleadings. In their statement of claim the appellants averred in the following paragraphs that:

"3. *The parcel of land claimed by the plaintiffs situate at Igbo-Ori-Oke or Ajawale and about 5 kilometers to Mapo Hall, Ibadan is verged 'RED' while the area trespassed upon and cause of dispute is verged 'Yellow' on Survey Plan No. L L. 9684 of 22nd April, 1985 filed with this statement of claim.*

4. *The said area of land claimed by the plaintiffs is bounded by the parcels of land belonging to Aranimogun Atagba Akinola, Abidigugu and Akano families and by oniponrin stream flanked by Alesinloye family land.*

5. *The plaintiffs aver that the said land was originally acquired by settlement according to Native Law and Custom by Opeagbe, Warrior in Ibadan over 200 years ago.*

6. *The parcel of land claimed and in dispute belongs to the entire members of Oroye family made up of about 300 members both Males and females.*

7. *The plaintiffs' ancestor was Oroye, a Warrior under Opeagbe who granted the entire land claimed and in dispute to the said Oroye as an absolute gift according to Native Law and Custom about 150 years ago.*

8. *The said Oroye took possession of the land and continue (sic) to cultivate it, planting Kola trees, Oil Palms, Yams, Plantain without let or hindrance while he also erected two huts on the land."*

It was then pleaded that Oroye died over a hundred years ago. The genealogy of Oroye was also pleaded, he having been survived by his children Dosunmu and Alli among others. Alli begat Lawani Alli (1st appellant) and Dosunmu begat Oduola Aremu (2nd appellant).

The respondents denied the above reproduced paras. 3. to 8 in their statement of defence, para. 3. So issue was joined on those facts pleaded by the appellants which they would be required to prove by evidence in order to succeed in their claim. The respondents themselves went on to plead how their ancestor, Bankole Alesinloye, a warrior and the Balogun of Ibadan acquired the land in dispute by settlement about 1820. That would be some 166 years at the time of pleading. They further pleaded that they granted some land to Oroye family through the

request made on behalf of that family by Dosunmu.

The relevant evidence led by the appellants through P. W. 4, Alhaji Lasisi Olasupo Alli, who may be regarded as their star witness, is as follows:

"The land in dispute is owned by Oroye family. Opeagbe family B was the original owner of the land about 200 years ago. Opeagbe was a great warrior in Ibadan and he settled on it over 200 years ago. Oroye was another great warrior in Ibadan but he served under Opeagbe. Opeagbe put Oroye on the land and the latter took possession. Oroye C was cultivating the land, Planting Kolanuts, palm trees, yams etc. Oroye also erected two huts on the land. He was never disturbed on the land in dispute. Oroye is dead. He died over 100 years ago. He was survived by his children. They are Alli, Gbadamosi, Akande, Ladele, Dosunmu and D others. Oroye's children also inherited the land and continued cultivation thereon planting cocoa, pineapples, orange, kolanut trees, coffee, etc. Dosunmu was the father of Ganiyu Ajagbe. Gbadamosi is survived by Amusa Aremu. Alli is survived by 1st plaintiff and myself. The people mentioned above also cultivate the land in dispute." E

I have shown that the genealogy of Oroye which will support traditional history as regards the devolution of any land owned by him was properly pleaded. Evidence was also led as reproduced above. So the appellants presented evidence of history up to Oroye as regards the F land in dispute which a court could consider on the basis of such authorities as:

Akinloye v. Eyiola (1965) NMLR 92 at 95; Owoade v. Omitola (Supra) at pp. 424-425; Uchendu v. Ogboni (supra) at 353. G

Let me now say that the respondents did not plead devolution in the form of their genealogy right from Alesinloye (Aleshinloye) down to the respondents (or the living descendants) by naming relevant successive descendants in their order. All they pleaded in their statement of defence is contained in paras. 4, 5 and 6 as follows: H

"4. The defendants aver that Bankole Aleshinloye, a warrior and Balogun of Ibadan about 1820, the ancestor of the defendants, of Isale-jebu, Ibadan, acquired the land by settlement (on) the large piece

or parcel of land stretching from Ile-Tuntun, that is Oloro Ajawele, to Adaramagbo on the right and left of Olojuoro Roar, under the native law and custom 180 (sic) years ago and thereby became the absolute owner thereof.

B 5. *The said Aleshinloye farmed on the land and had a village on his land at a spot close to Owoade market, and also did all other acts of ownership on his land in his life time.*

6. *On the death of Bankole Aleshinloye, his land became Aleshinloye family land."*

C This pleading by the respondents did not aver successive descendants and therefore would not qualify to support their traditional history. This means if the appellants can be seen to have proved their traditional history covering the period of Opeagbe, their traditional evidence would stand alone and if accepted would be enough to prove their title to (and possession of) the land in dispute.

However, the appellants could not possibly lead evidence as to how Opeagbe settled on the land in dispute. This is because in order to be able to do so, they must plead the relevant descendants through whom the land would have devolved. The evidence given by P.W. 4 that Opeagbe settled on the land over 200 years ago has no value, and indeed being hearsay upon hearsay can only be allowed to be given upon the established principles in support only of a properly pleaded traditional history. As is well-known such hearsay evidence is allowed by s. 45 (formerly s. 44) of the Evidence Act on the ground that it is a story handed down from mouth to mouth over the ages. The section reads:

G *"Where the title to or interest in family or communal land is in issue, oral evidence of family or communal tradition concerning such title or interest is relevant."*

H The oral tradition is generally the only evidence available to establish such title to or interest in land dating from time beyond the memory of living witnesses. For this oral evidence to be possible (and probable) there ought to be a basis for its having been so handed down. That is why the law on the subject has been developed to require the pleading of names of descendants or successors without leaving unexplained or em-

barrassing gaps to show by whom the oral history could have come all through at different stages in the family or communal tradition. I therefore say categorically that the witness (P. W. 4) who purported to give evidence of what happened over 200 years ago (as if he was a living witness at the time!) was not capable of doing so on the state of the pleadings and there is no way that aspect of his evidence that Opeagbe acquired the land in dispute by settlement could be admitted, let alone used as a basis to assess the traditional history of that settlement.

The respondents have argued that the evidence of P.W. 4 that the land in dispute was acquired by settlement over 200 years was not worth anything. I find it necessary to say that the said P.W. 4 was not even in a position to give evidence of the traditional history of Opeagbe family. I think this is bound to be so since he does not belong to that family and can hardly be qualified to give that evidence or be accepted to have had the opportunity to know Opeagbe family successive descendants through whom the oral history of that family would have been transmitted from mouth to mouth to reach him. It is difficult for me to contemplate how a stranger to a family can give an acceptably traditional history of that family unless by research effort in which a member of that family who has had the advantage of knowing or being told that history narrates that history to such a stranger. Certainly, for such a stranger to give that evidence it is still necessary to give the source of information or better still to plead the successive descendants of that family up to the member who made the history available to him, and the narration in court must be inclusive of all the relevant circumstances. If the stranger recorded the history in a book, it is well known how such a book of authority may be used in court. If the source of information is unreliable or not a systematic analysis of available information, the book loses authority and acceptability.

This phenomenon of oral traditional history of a community from mouth to mouth is epitomized in the novel Arrow of God by Chinua Achebe, 2nd edn. pages 41-42 where it is recorded inter alia:

"One day as Nwaka sat with Ezedimili in his Obi drinking palm wine and talking about the affairs of Umuaro (Umaro is a clan of vil-

lages) *their conversation turned, as it often did, on Ezeulu. 'Has anybody even asked why the head of the priest of Ulu is removed from the body at death and hung up in the shrine?' Asked Ezedimili rather abruptly Nwaka had no answer to it. He knew that when an Ezeulu or an*
 B *Ezedimili died their heads were separated from their body and placed in their shrine. But no one had ever told him why this happened*

'It is a good story, but I do not think that I have ever told anyone before. I heard it from the mouth of the last Ezidemili just before he died.' He paused and drank a little from his horn. *'This palm wine has*
 C *water in it. Every boy in Umuaro knows that Ulu was made by our fathers long ago. But Idemili was there at the beginning of this. Nobody made it. Do you know the meaning of Idemili?'*

Nwaka shook his head slightly because of the horn at his lips.
 D *'Idemili means Pillar of Water. As the pillar of this house holds the roof so does Idemili hold up the Raincloud in the sky so that it does not fall down. Idemili belongs to the sky and that, is why I, his priest, cannot sit on bare earth.'*

E *Nwaka nodded his head ... Every boy in Umuaro knew that Ezidemili did not sit on bare earth.*

'And that is why when I die I am not buried in the earth, because the earth and the sky are two different things. But why is the priest of
 F *Ulu buried in the same way? Ulu has no quarrel with earth; when our fathers made it they did not say that his priest should not touch the earth. But the first Ezeulu was an envious man like the present one; it was he himself who asked his people to bury him with the ancient and awesome ritual accorded to the priest of Idemili. Another day when the present*
 G *priest begins to talk about things he does not know, ask him about this.'*

Nwaka nodded again in admiration and flipped his fingers".

[Parenthesis by me]

H Traditional history specifically about land ownership is recorded on pages 15-16 of the book. It is interesting and instructive. That was how in similar or otherwise appropriate circumstances the history of tradition was passed down. That is why in our legal system it is necessary to plead the names of those who were likely to have passed down

the history orally at least to give some semblance of probability.

It seems to me therefore that it is a member of a family who may give the traditional history of that family and similarly it is a member of a community who may give the traditional history of that community. The emphasis is on traditional history, which S. 45 limits to land. In such land matters, it must be pleaded (a) who founded the land; (b) in what manner the land was founded and the circumstances leading to it; (c) the names or particulars of the successive owners or trustees through whom the land devolved from the founder to a living descendant (or descendants) who most likely will give the oral history: see Akinloye v. Eyiola; Sunday Piaro v. Tenalo; Owoade v. Omitola; Mogaji v. Cadbury Nigeria Ltd. already cited and such like authorities.

The traditional evidence of first settlement on or the founding of land will not be admissible let alone accepted and acted upon without the necessary pleading as indicated above: See Akinloye v. Eyiola (supra) where this court said *inter alia* at p. 95 per Coker JSC:

"At the trial the defendants, without objection, gave evidence to the effect that the land originally belonged to one Akingbile who was the first settler thereon; that Akingbile was an elder brother of Agba-Akin Ayanwale; that he was succeeded on the land by his son Akinfunmi who in turn was succeeded by Akintoro who was succeeded by Omotosho, the father of the 2nd defendant. It was also given in evidence on behalf of the defendants that after the death of Omotosho, one Raji Ajani, an uncle of the 2nd defendant, succeeded Omotosho and that in any case after the death of Akintoro, Raji Ajani and Omotosho shared the land of Akingbile between themselves and that the portion sold to the 1st defendant was part of Omotosho's share. The defendants also gave evidence that since the time of Akingbile they had always farmed the land, not as stated by the plaintiffs with the permission of the plaintiffs but in their own right as the true owners The defendants did not plead the names or the histories of the several ancestors mentioned by them or on their behalf in evidence. Such evidence should not have been allowed without an amendment of the pleadings."

It is clear that traditional history must be pleaded as stated above.

That is the way such history will be allowed to be proved. It appears to me that evidence of traditional history which by nature is hearsay upon hearsay over time beyond living memory will not be allowed to be shot through the void of ages, so to speak, by a witness who cannot connect
 B it from time in history or time immemorial to the present time by a systematic reference to succeeding generations. Hence, as said in Mogji v. Cadbury Nig. Ltd. at p. 431 and Ogunleye v. Oni (1990) 2 NWLR (pt. 135) 745 at 783, the origin of the grantor's title based on tradition has to
 C be averred on the pleading and proved by evidence in accordance with the custom of a particular family or community unless title has been admitted.

Having said all that, however, an examination of the statement of defence of the respondents shows that they do not deny Opeagbe as
 D having had land, (probably) by settlement. Paras. 9, 10 and 11 thereof read as follows:

*"10. The defendants aver that during the reign of Foko (1925 - 1929), Dosunmu (Babalawo) the then Mogaji of Oroye family begged
 E for the grant of area marked 'purple' and 'green on the plaintiffs' plan for himself and Oroye family for farming purposes from Okunola Abasi (the Mogaji of Aleshinloye family) through Aminu, the 2nd defendant, Tafa Owoade, and Mogaji Akano.*

*10. The defendants further state that it was in the reign of Foko
 F that the area marked 'purple' and 'green' on the plaintiffs' plan was granted to Dosunmu for their family and not that any Oroye acquired any land in that area by grant from Opeagbe.*

*11. The defendants further state that Opeagbe did not acquire
 G land in between Aleshinloye's land. Opeagbe's land is beyond Akintola's land shown on the plaintiffs' plan."*

There is evidence from D.W. 2, Suara Abasi, a member of Aleshinloye, in which he said: "I have heard of Opeagbe before. Opeagbe's
 H land is distinct from the land in dispute. It is at Olomi. Akintola's land forms boundary with Oroye's land."

This piece of evidence along with para. 11 of the statement of defence of the respondents seems to concede that Opeagbe is a land-owning family.

It would appear from this that it is unnecessary to insist on proof as to how Opeagbe acquired his land. The appellants are entitled to take advantage of this evidence in support of their case which was weak on that issue: See Akinola v. Oluwo (1962) 1 All NLR 224 at 225; (1962) 1 SCNLR 352 at 354.

The real issue which then has to be decided must be where the land in dispute is located. That is to say, where the land granted by Opeagbe to Oroye is to be found. The appellants claim it includes the land in dispute but the respondents say it is distinct and away from it. The appellants further contends that it was from Opeagbe they got the land in dispute hence they traced their root to him. On the other hand the respondents claim that whatever land the appellants have, it was they who granted it to the appellants' family Oroye through Dosunmu, one of Oroye's sons. This is contained in the evidence of D.W. 2, and of D.W. 6, Salawu Ladimeji Bola. In his evidence D.W. 2 said: "I have had (sic: heard) of Oroye family before. Dosunmu Babalawo came to beg for land from Abasi Aleshinloye. Dosunmu Babalawo was granted the land. The land granted to Babalawo is not far from the land in dispute." The evidence of D.W. 6 on the point says, "I learnt that Dosunmu family came to beg for land from our father Olubadan Abasi. Dosunmu was granted land. The express road passed through the land granted to Dosunmu by Abasi Aleshinloye." The said D. W. 6 is the 5th defendant/respondent, a member of Aleshinloye family. These two pieces of evidence can only be reconciled up to the point that it was Dosunmu who made a request for land.

The learned trial judge referred to exhibit A which contains the evidence of Ladejo Adeleke from Aleshinloye family which he gave in suit No. 1/165/77. In that document he is recorded as saying-in evidence-in-chief: "My family, Aleshinloye family has a common boundary with the land in dispute. The land in dispute belongs to Oroye family. At the time I was young I used to accompany my father to our land to assist him to cultivate it. On some occasions during this period I used to go over to the land in dispute to play and dine with people working thereon." This evidence was given when another family was disputing the owner-

ship of this land in dispute with the appellants' family, Oroye.

The question is on whose behalf did Ladejo, the witness, go to give evidence? The appellants say it was at their request to Aleshinloye family to testify for them that Ladejo was sent to represent them. The respondents claim they knew nothing about Ladejo going to give evidence in that capacity. Ladejo himself said cross-examination in that case that he knew the land in dispute had been surveyed before because "at the time of the survey we were invited and two of us from our family responded to the invitation." When P.W. 3 testified in the present he said when the land in dispute was surveyed by his family in 1954, it was done in the presence of their boundary men. He further said when the respondents' family had a dispute in court with one Lasupo Oyadayo in suit No. 1/228/64, the respondents' family requested his family to give evidence of their boundary men, and that his family nominated 1st plaintiff/appellant. The said 1st plaintiff/appellant testified in the present case and confirmed this.

These pieces of evidence and others were before the learned trial judge to consider as to Ladejo's representation of Aleshinloye family. He held inter alia: as follows:

"It is common ground that Ladejo Adeleke Aleshinloye died before the trial of this action. It is also not in dispute that he was one of the witnesses called by Oroye family in suit No. 1/165/77. The Oroye family pleaded and testified that Ladejo Adeleke gave evidence in suit No. 1/165/77 as boundaryman and representative of Aleshinloye family Apart from the evidence of the plaintiffs which I accept coupled with the evidence of some of the witnesses of the defendants that Ladejo Adeleke used to represent the defendants in land matters in court, the reasonable inference one can draw from the role of Ladejo Adeleke as shown in exhibit 'A' is that Aleshinloye family was only reciprocating the good gesture shown by Oroye family in the 1964 case above. In sum, I hold that Ladejo Adeleke Aleshinloye was representing the Aleshinloye family in the evidence he gave in suit No. 1/165/77 - Exhibit 'J' as shown in Exhibit 'A'."

This finding cannot on the whole, in my view, be regarded as perverse.

Now, the respondents never throughout contended that the land referred to in that evidence in suit No. 1/165/77 is not the same as the land in dispute in the present case. Their contention was that Ladejo who gave that evidence did not do so behalf or with the knowledge of Aleshinloye family. The Court of Appeal went further to hold that the document, exhibit A, in which that evidence of Ladejo a member of Aleshinloye family was recorded was inadmissible. It must be remembered that it is evidence given by a person who is now dead relating to the present land in dispute. Of course it is conceded that there was argument as to whether that evidence was one binding on Aleshinloye family. It seems to me that the evidence contained in exhibit A is admissible under s. 33 (c) of the Evidence Act if it is evidence against the proprietary or pecuniary interest of Aleshinloye family; if it was given on behalf of that family; and if for any reason it is not inadmissible. It will then be evidence available for consideration by the trial court. Section 33 (c) states: "Statements, written or verbal, or relevant facts made by a person who is dead are themselves relevant facts in the following cases (c) when the statement is against the pecuniary or proprietary interest if the person making it and the said person had peculiar means of knowing the matter and had no interest to misrepresent it."

I have no doubt that the trial court was entitled to consider that evidence which seems to be against the proprietary interest of the respondents and to accept it in respect of the assertion by the appellants as to the location of the land in dispute to which they lay claim: see Ojiegbe v. Okwaranyia (1962) 1 All NLR 604; (1962) 2 SCNLR 358. It is quite remarkable that in that case, the evidence that was admitted was the evidence given by two witnesses (who had died) in an arbitration proceedings of 1932. The arbitration proceedings were between the respondents' people and a third party. The two witnesses from the appellants' family testified on behalf of the respondents in which they said the land there in dispute belonged to the respondents. Later, that same land became a subject of dispute between the appellants and the respondents. It was held that the evidence against the proprietary interest of the appellants as given at the arbitration was properly received and relied on by the

trial court. I do not think Ladejo could be rightly accused of dual loyalty in the circumstances. He appeared to have usually represented Aleshinloye family in land matters and at the time he gave that evidence it could not be said the present dispute was imminent.

B It then follows that Ladejo's evidence in exhibit A which became evidence led on behalf of the appellants in the present case was part of the evidence the learned trial judge had to consider as to the location of the land acquired through Opeagbe. There is also that aspect of that evidence which says that the land belonged to Opeagbe originally. As it is, this is evidence coming from the Aleshinloye family. This evidence of admission along with the admission in the statement of defence earlier adverted to finally confirms that Opeagbe's root of title is no longer an issue. Therefore any person who proves to have acquired title through D him must have a valid title. As to the location of the land, the appellants claim to be in boundary with the respondents. The respondents' position is that appellants' land is far away from that their land. But Ladejo said that respondents' land is in boundary with appellants' land, Akano land E and others. One cannot reasonably doubt that Ladejo was in a peculiar position to know this, he having been sent by his family to give evidence of boundary. The learned trial judge accepted this evidence and I think that cannot really be faulted as I have already indicated. It follows that F respondents are bound by what Ladejo admitted on their behalf as to boundary and consequently the location of the land in dispute, as well as to Opeagbe's title thereto. It seems to follow that the land in dispute is the one granted Oroye by Opeagbe.

G It is only left for me to reiterate that the respondents did not plead traditional history. The appellants did so and successfully led evidence in support of it, assisted by the admission made by the respondents as already shown. The law is clearly that evidence of traditional history alone relied on by a plaintiff, if cogent and not in competition or H conflict with that of the defendant, can be accepted by the court and may be sufficient to support a claim for title. See Olujebu of Ijebu v. Oso, the Edede of Eda (1972) 5 SC 143 at 151; Alade v. Lawrence Awo (1975) 4 SC 215 at 228; Akhionbare v. Omoregie (1975) 12 SC 11 at 27. Once

traditional history succeeds, there is no need for other evidence of possession. A defendant found to have done acts of possession on the land if not through the permission or authority of the owner, would be regarded as a trespasser and made liable for damages and an order of injunction. B

I believe if the Court of Appeal had seen this case in the light I have stated it, they would have found no cause to disturb the judgment of the trial Court even though that judgment in all honesty was written, in my view, in less than an inspiring style in the manner evidence was treated to reach conclusions, albeit justifiable conclusions. I will answer issues C (a) and (b) in the affirmative and issue (c) in the negative. I accordingly come to the same conclusion as my learned brother Iguh JSC upon the reasons fully given by him, though, with due respect, I have adopted another approach which I have endeavoured to state, that this appeal has D merit. I too allow it, aside the judgment of the lower court and restore the judgment of the trial court. I award costs of N10,000.00 in favour of the appellants. E

AYOOLA JSC

I agree with the judgment just delivered by my learned brother, Iguh, JSC. I do not wish to add anything. I too would allow the appeal F with N10,000 costs to the appellants.

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H