

SUPREME COURT OF NIGERIA

7TH APRIL, 2000. SC.98/1994

**CORAM:- A. G. KARIBI-WHYTE, M. E. OGUNDARE, U. MO-
HAMMED, A. I. KATSINA-ALU, E. O. AYOOLA, JJSC.**

ENGR. BAYO AKINTERINWA

& 4 ORS. DEFENDANTS/APPELLANTS

AND

CORNELIUS OLADUNJOYE PLAINTIFF/RESPONDENT

JUDGMENTS - Relief - Not claimed by a party - A Court has no jurisdiction to grant such a relief.

LAND LAW - Customary law - Sale of land - Requirements for a valid sale of land under customary law.

LAND LAW - Trespass - And Injunction - Claim for - Such claims put the claimant's title in issue.

LAND LAW - Trespass - Possession - Resides in the claimant that establishes a better title.

PRACTICE & PROCEDURE - Pleadings - Essence of pleadings - Is to define accurately the issues between the parties - And to guide the parties not to give evidence outside the facts pleaded.

FACTS

Before the Ondo State High Court, holden at Akure the plaintiff/respondent brought an action against the 1st defendant claiming damages for trespass and injunction. Originally the 1st defendant was the sole defendant. At the staff of the proceedings the 5th defendant was counsel to the 1st defendant. At the hearing however PW1 as head of the Famubo family raised objection against the appearance of the 5th defendant for the 1st defendant because the Famubo Family in an earlier case over a

larger piece of land engaged the 5th defendant as their counsel. The family won. The portion of land now in dispute formed part of the said larger piece of land. The PW1's objection was upheld and consequently the 5th defendant withdrew his appearance for the 1st defendant. Subsequently, however, the 5th defendant, together with the 2nd, 3rd and 4th defendants were joined as defendants following their application.

The case of the plaintiff was that he bought the land in question from the Famubo family of Akure in 1971 for #400 (four hundred pounds). A receipt for this sum dated 15/7/71 was tendered and admitted in evidence as exhibit "A". He called as a witness Joseph Famubo (PW1) the head of Famubo family also known as Arowogbadamu family. He testified that the family sold the land to the plaintiff. He said they showed the plaintiff the land and he went into possession. He denied that his family ever gave land to the defendants. The witness disclosed that the 5th defendant was counsel for his family in the previous land cases. The 5th defendant later got Oba Deji of Akure to convey to him (5th defendant) part of the land he won against the Deji for Famubo family. Thereafter the 5th defendant sold part of the land he acquired to others. The defendants' case as related by the 5th defendant was that the 5th defendant in 1964 approached the then head of the Famubo family one James Omeiye for a portion of the land to be sold to him and his relatives. The family obliged and took him to the land where he marked out the area which he wanted for himself, his wife's brother, Dr. Ogunleye. They were subsequently let into possession of the plots. Conveyances were later executed in their favour separately by the Deji of Akure as the legal trustee of all Akure land.

After hearing both sides to the dispute the trial court entered judgment for the plaintiff. The defendants' appeal to the Court of Appeal, Benin Division was dismissed. The defendants have further appealed to the Supreme Court raising two issues but the appeal was decided on the single issue raised by the plaintiff.

ISSUE FOR DETERMINATION

"Which of plaintiff - respondent and first defendant - appellant has a better claim to the land in dispute?"

HELD (Unanimously dismissing the appeal per lead judgment of **KATSINA-ALU JSC**)

Trespass - And injunction

1. It must be borne in mind that, the plaintiff's claim is for trespass and for an injunction against further trespass. That being so, it follows that he has put his title in issue. See Kponuglo v. Kodadja (1931)2 WACA 24. (p. 764 H)

Trespass - Possession

2. An owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. Possession resides in the claimant that establishes a better title. See Pius Amakor v. Benedict Obiefuna (1974) 3 SC at 82; Ogunbiyi v. Adewunmi (1988) 5 NWLR (pt 93) 215 (p. 765 B)

Customary Law - Sale of land

3. In order to constitute a valid sale of land under customary law, there must be payment of money and delivery of possession of the land sold in the presence witnesses. This custom is of universal application throughout Nigeria - See Egonu v. Egonu (1978)11-12 SC 111; Cole v. Folami (1956) 1 SC 66. In this case, there is evidence that the plaintiff paid #400 to the head of Famubo family Joseph Famubo (PW1) for the land. PW1 through PW4 delivered possession of this land to the plaintiff. All this took place in the presence of witnesses. (p. 765 D)

Pleadings - Essence of

4. It is trite law that parties are bound by their pleadings: See Obimiami Brick & Stone (Nig) v. A.C.B. Ltd. (1992) 3 (NWLR)pt.229)260. The essence of pleadings is to compel the parties to define accurately and precisely the issues upon which the case between them is to be fought to avoid element of surprise by either party. It also guides the parties not to give evidence outside the facts pleaded as evidence on a fact no pleaded goes to no issue - see Onwuka v. Omogui (1992)3 NWLR (Pt.230)393;

Emegokwue v. Okadigbo (1973) 4 SC. 113. (p. 768 D)

Judgments - Relief

5. In the present case, it is not in dispute that the claim of the plaintiff
B was for damages for trespass and injunction. He did not seek a declara-
tion of title to the disputed piece of land. So the declaration of title
granted by the court below was clearly a relief not claimed by the plain-
tiff. I do not think there is any justification for the grant. This is because
C a court has no jurisdiction to give to a party a relief he has not asked for:
see Ugo v. Obiekwe (1989)1 NWLR (Pt.99)514; Awosile v. Sotubo
(1992)5 NWLR (Pt.243)514; Ayanboye v. Balogun (1990)5
NWLR(Pt.151) 392). The plaintiff in this case is clearly not entitled to
the declaration of title not claimed by him. (p. 768 F)
D

NOTABLE POINTS OF INTEREST

KARIBI-WHYTE JSC

1. When the identity of land in dispute need not be proved

E It has always been accepted in our courts in land cases that where the
area of land in dispute is well known to the parties, the question of proof
not being really in dispute, does not arise. In such a situation it cannot be
contended that the area claimed or can the land in dispute be described as
F uncertain - See Etiko v. Aroyewun (1959) 4 FSC.129 Osho v.Ape (1998)8
NWLR.493. In the circumstances of this case the identity of the land in
dispute cannot be described as uncertain since both parties know and
have accepted it as the land in dispute. (p. 779 E)

2. When the evidence of a surveyor is not necessary to prove the identity of land

The contention by Appellant that the evidence of the surveyor who made
the plan is a prerequisite to the determination of the identity of the land in
H dispute is misconceived. There being no difficulty in identifying the land
in dispute, there is no issue properly joined, and a declaration can be
made without basing it on a plan. The evidence of a surveyor if available
is therefore desirable, but not necessary where the proof of the identity

of the land in dispute is unnecessary. - See Arabe v. Asanlu (1980)5-7 SC.78. A plan is therefore not a sine qua non to proof of identity of disputed land. The requirement described as "the acid test" is that the land in dispute must be ascertained with definitive certainty - See Ate-Kwadzo v. Robert Kwasi Adjei (1944)10 WACA.474. It is so in this case. (p. 779 G)

3. *Proof of ownership of land is prima facie proof of possession*

It is a well settled principle of our land law that where there is a dispute as to which of two persons is in possession, the presumption is that the person having title to the land is in lawful possession - See Abotchekponuglo v. Ada Kodaja (1931)2 WACA. 24. It is also the law that proof of ownership is prima facie proof of possession - See England v. Palmer 14 WACA. 659. (p. 780 G)

4. *Claims for trespass and injunction put the title to the land in issue*

It is well settled law that where a plaintiff claims not only damages for trespass but also perpetual injunction, there is the inference that he can establish title to the land and this must be considered. - See Ogunfaolu v. Adegbite (1986) 5 NWLR (pt.43)549; Ajani v. Ladepo (1986) NWLR (pt.28)276. A person in possession of land can maintain an action against any one who cannot show a better title. -See Onyekaonwu v. Ekwubiri (1966)1 All NLR.32. Hence the court below correctly, in my view, agreed with and approved the holding of the learned Chief Judge, that "The law is: where two persons claiming title and possession adversely to each other claim to be in possession, possession resides in him who can establish a better title." See Amakor v. Benedict Obiefuna (1974) 3 SC. 67, 82, also the judgment of Oputa, JSC in Ogunbiyi v. Adewumi (1988)5 NWLR (pt.93) p. 215 at 223" (p. 781 B)

5. *Claim for trespass is not dependent on the claim for declaration of title*

It is important to point out that in a claim for damages for trespass and injunction, it is only necessary to establish that plaintiff was in posses-

sion. The question of the establishment of title becomes necessary where there is a competing claim to possession. The claim for trespass is not dependent on the claim for declaration of title as the issue to be determined on the claim for trespass and that for declaration of title are quite separate and independent issues. - See Oluwi v. Eniola (1967) NWLR.339. (p. 782 C)

6. *Trespass to land is actionable per se*
 C Trespass to land is actionable per se. That is to say it is established without proof of actual damage - See Umunna v. Okwuraiwe (1979) 6-7 SC.1. Damages is awarded on the proof of trespass, which is a legal wrong - See Obiere v. Eku, Baptist Hospital (1978) 6-7 SC.15. Damages claimed as recoverable for legal wrongs owe their existence to the legal wrong. This results in the award of general damages. (p. 782 F)

7. *Judgment must be based on issues joined between the parties*
 E Judgments are based on the issues tried and decided and the right of the parties determined on the claim before the Court. - See Solan v. Olusanya (1975) 6 SC. 55. Where trial is conducted by pleadings, as in the instant case, the judgment thereon must be based on issues joined between the parties - See Metal Construction (W.A.) Ltd. v. Migliore (1979) 6-9 SC. 163. (p. 784 A)

OGUNDARE.JSC

8. *Need for counsel to act honourably*
 G It is very difficult for me to say that the conduct of Mr. M. Olu Bello in this matter is honourable in any way. I can find no justification for his acting against the interest of his former clients in such a blatant manner as his conduct in this case portrays. (p. 787 D)

H REPRESENTATION

A.O. Akanle, for the respondent
 M. Olu Bello for the appellants

CASES REFERRED TO

- Kponuglo v. Kodadja (1931)2 WACA 24
Egonu v. Egonu (1978)11-12 SC 111
Cole v. Folami (1956) 1 SC 66
Obimiami Brick & Stone (Nig) v. A.C.B. Ltd. (1992) 3 NWLR) pt.229) B
260
Onwuka v. Omogui (1992)3 NWLR (Pt. 230) 393
Emegokwue v. Okadigbo (1973)4 SC. 113
Ugo v. Obiekwe (1989)1 NWLR (Pt.99)514 C
Awosile v. Sotubo (1992)5 NWLR (Pt.243)514
Elias vs. Omobere (1982) 5 SC 25
Solomon vs. Mogaji & Ors. (1983) 2 SC.NLR.209
Ekponyong vs. Onyang (1975) 2 SC 71
Chief Ibuluya v. Dikibo & Ors. (1976) 1 All NLR (pt.1) 396. D
Vanderpuye v. Gbadebo (1998) 3 NWLR (pt.541)271

LEAD JUDGMENT BY KATSINA-ALU JSC

This is an appeal by the defendants from the judgment of the E Court of Appeal dated 10 December 1993, whereby the Court of Appeal confirmed with some amendment the decision of the trial Ondo State High Court dated 19 April 1989. The trial court declared the grant of the land in question to the 1st defendant null and void but upheld the grant of F the same piece of land to the plaintiff. He also awarded the plaintiff N1,000.00 as general damages for trespass.

The respondent was the plaintiff in the action. He sued the 1st defendant for the following reliefs:

1. *Ten thousand naira (N10,000.00) being special and general G damages for trespass committed by the defendant on the plaintiff's piece or parcel of land which is situate lying and being at Okuta Elerinla Itamerin in Akure township.*

2. *Injunction restraining the Defendant, his servants, privies H and/or agents from further acts of trespass on the said Plaintiff's land*

Originally the 1st defendant was the sole defendant. At the start of these proceedings the 5th defendant Mr. Olu Bello was counsel to the

1st defendant. At the hearing, however, PW1 Joseph Famubo who was as head of the family raised object against the appearance of the 5th defendant for the 1st defendant for one major reason. The Famubo family in an earlier case over a larger piece of land engaged the 5th respondent as their counsel. The family won. The portion of land now in dispute forms a part of the said larger piece of land. The PW1's objection was upheld and consequently the 5th defendant withdrew his appearance for the 1st defendant.

Subsequently, however, M Olu Bello together with his purported grantors were joined as 2nd, 3rd, 4th and 5th defendants.

Now, the case of the plaintiff was that he bought the land in question from the Famubo family of Akure in 1971 for #400. A receipt for this sum dated 15/7/71 was tendered and admitted in evidence as exhibit 'A'. He called as a witness Joseph Famubo (PW1) the head of Famubo family also known as Arowogbadamu family. He testified that the family sold the land to the plaintiff. He said they showed the plaintiff the land and he went into possession. He denied that his family ever gave land to the defendants. The witness disclosed that the 5th defendant was counsel for his family in the previous land cases in suits Nos. AKA/ICL/67, AK/14A/70 which they won. The 5th defendant later got Oba Deji of Akure to convey to him (5th defendant) part of the land he won against the Deji for Famubo family. Thereafter the 5th defendant sold part of the land he acquired to others.

The defendants' case as related by the 5th defendant is this. The 5th defendant was the Famubo family lawyer for years. He represented the family in court in respect of disputes over the family land. It was a large expanse of land.

It was in 1964 when the 5th defendant approached the then head of the family one James Omeiye for a portion of the land to be sold to him and his relatives. The family obliged and took him to the land where he marked out the area which he wanted for himself, his wife, his wife's brother and Dr. Ogunleye. There were together four plots. The 5th defendant paid a total of #550 to the family. The defendants were subsequently let into possession of the plots. Conveyances were later ex-

ecuted in their favour separately by the Deji of Akure Oba Ademuwagun Adesida as the legal truster of all Akure land. The 5th defendant, Mrs. Bello and Dr. Ogunleye have since developed their plots.

After hearing both sides to the disputes the trial court entered judgment for the plaintiff. The defendant's appeal to the Court of Appeal, Benin Division was dismissed. The defendants have further appealed to this court upon a number of grounds.

In their brief of argument, the defendants raised two issues for determination. These read:

"1. Whether upon the failure of the plaintiff to established a clear and certain identity of the land to which his claim in trespass and injunction relates and his exclusive possession thereof, the Court of Appeal can properly give judgment for the plaintiff as it did in this case."

2. Whether the award by the Court of Appeal to the plaintiff of reliefs not proved by legal and credible evidence and reliefs not claimed by the plaintiff at all neither in his Writ of Summons nor in his Amended Statement of Claim can be sustained in law and on the high judicial authorities."

The plaintiff, on the other hand, raised one issue for determination which reads:-

"Which of plaintiff - respondent and first defendant - appellant has a better claim to the land in dispute?"

It would appear clear that the main question to be resolved in this appeal is which of the two parties has a better claim to the land in dispute? In this regard there are two areas to consider. Firstly, the pleadings of the parties. Secondly, the evidence before the trial court. The pertinent paragraphs in the plaintiff's amended Statement of Claim are 3,4,5,6, and 15. In these paragraphs the plaintiff averred as follows:

3. The land, the subject-matter of the dispute, is a plot of land situate, lying and being at Okuta Elerinla Itamerin, Akure, (township), and sold to the plaintiff by Joseph Famubo on behalf of Famubo family.

4. The said Vendor (Famubo family) sold 537.271 sq meters being a small fraction of the Vendor's land situate lying and being at Okuta Elerinla Itamerin, along Akura/Ilesa Road, Akure. Plaintiff shall

at the trial rely upon judgments got by the said Famubo Family in respect of the said land in dispute viz: AKA/ICL/67, AK/14A/70 and CAW/29/72.

B 6. *The Famubo family issued the plaintiff a receipt dated 15/7/71 for the purchase of the said land. Plaintiff will rely on the receipt at the trial.*

15. *The Famubo Family denied selling the land to the Defendant.*

C For their part, the defendants pleaded in paragraphs 3,4,5,6,7 and 15 of their Amended Statement of Defence as follows:

D 3. *The defendants deny paragraphs 4,5,6,7,8,9,10,11,12,13,14,15,16,17, together with the particulars of claim in page 2 of the plaintiff's Statement of Claim and puts the plaintiff to the strictest proof there of.*

4. *The defendants aver that the piece or parcel of land which is the subject matter of this action is situate, lying and being at Okuta Elerinla in Akure town in Ondo State of Nigeria.*

E 5. *The defendants aver that the said piece of land formed part of a larger portion of land which originally consisted of four plots.*

F 6. *The defendants aver that in the year 1964, the said larger portion of land of which the land in dispute forms part was granted to Dr. A. I. Ogunleye, Mrs. G. I. Bello, Mr. Olu Bello 5th defendant and the defendant severally in plots by the late James Omeiye as beneficial owner acting on behalf of Olisa Arowogbadamu family otherwise known as Famubo family of Akure.*

G 7. *The late James Omeiye was at the time of the grant the eldest member and accredited head of Olisa Arowogbadamu family.*

H 15. *The 1st defendant avers that a deed of conveyance of the said plot dated 4th July, 1972 was executed in favour of the defendant by Oba Ademuwagun Adesida II the Deji of Akure as the legal trustee of all Akure land.*

The plaintiff called evidence in support of his case. The evidence is that the bought the piece of land in question from the Famubo family on 1971 through Joseph Famubo who was the head of the Famubo

family. He paid 400. The said piece of land measured 537.271 sq. Meters.

In support of the grant to the plaintiff, Joseph Famubo testified that he sold the piece of land in question to the plaintiff in 1971 as head of Famubo Family. He also said that the family put the plaintiff into possession. He denied selling the land in dispute to the defendants.

Mr. Bello (5th defendant) on the other hand claimed that James Omeiye who sold the land to him was the head of the family. He said two of the six members who put him in possession were PW1 Joseph Famubo and PW4 Aiku Fanimo. Both of them denied his claim. They gave evidence for the plaintiff. The other four members were dead.

After a review of the evidence, oral and documentary, the learned trial judge held as follows:

In my view it is late in the day for Mr. Bello to deny Joseph Famubo's headship of the Famubo family. In the case of Isaac Ogunkua D against Egun Babalola at the customary court in which Mr. Bello acted for Egun Babalola, and by his advice, four members of the Famubo family were joined as co-defendants, Joseph Famubo in his evidence-in-chief at page 11 of the record described himself as head of Famubo E family. This assertion was not challenged by Mr. Bello nor by any of the other co-defendants. This was on the 27th day of June 1969. Joseph Famubo conceded then that Daniel Ojo was the oldest in the family but could not walk due to old age. James Omeiye who was alleged by Bello F to have been the head of family when Joseph Famubo claimed headship did not protest to the court or to Mr. Bello. James Omeiye gave evidence in the same case at the customary court but did not refer to himself as head of family. Both Adekunle Omeiye and Mr. Bello alleged that portions of land were granted to Funso Olujhungbe, Oyin Olupitan and G others by James Omeiye as head of family before the grant to Mr. Bello. None of the persons named was called to confirm James Omeiye's headship.

Apart from the case in court, the Akure Area Planning Authority H issued the cheque for payment to the Famubo family in the name of Joseph Famubo. Notwithstanding the dishonest attempt to convert the money to his own use, the fact that payment to the Famubo family was

through Joseph Famubo gave him the recognition that Mr. Bello is denying him. I hold therefore that at the time Mr. Bello acquired possession of the land in dispute which he described in the Conveyance exhibit "H" as 1964, James Famubo family. Since Mr. Bello acquired his possession from sources other than head of family the onus devolves on him to prove the legitimacy of his claim.

The learned trial judge continued at p.132 thus:

"All that is needed to prove a grant of land under native law and custom is the formal handing over of the plot to the grantee in the presence of a witness or witnesses. This has been adequately covered by the evidence of Joseph Famubo and PW4 Aiku Fanimo

One more word must be said about alleged sale of land to Mr. Bello. I very much doubt his claim that he bought the land from James Omeiye and the other members of family in 1964. If any oral grant existed, why had the conveyance in respect of the alleged oral grant to be signed by someone other than the grantor? Why in particular by an adverse claimant whose claim had been refused by the court? It was not the case of Mr. Bello that his grantors were dead at the time he prepared his conveyance for the Deji to execute, but that it was traditional before the coming into effect of the Land Use Act for the Deji to sign all conveyances. I reject Mr. Bello's contention that the Deji must sign all conveyances Joseph Famubo as head of the Famubo family joined Ebum Babalola as co-defendant and successfully defended the suit by Ogunkua and the Deji Oba Ademuwagun in a suit instituted by the latter against the former..... Any conveyance of the said land must be executed by the said Joseph Famubo family."

In consequence thereof the learned trial judge declared the grant of the land in dispute to Engineer Akinterinwa null and void but upheld the grant of the said piece of land to the plaintiff.

The appeal to the Court of Appeal was dismissed. The court below was of "the firm view that the learned trial judge was right in holding that the Respondent had proved a better title to the land."

As I indicated already the main question in this appeal is which of the parties has a better title to the land in controversy. **It must be**

borne in mind that, the plaintiff's claim is for trespass and for an injunction against further trespass. That being so, it follows that he has put his title in issue. See Kponuglo v. Kodadja (1931)2 WACA 24. The plaintiff and the 1st defendant say that they are in possession. The position however is that **an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. Possession resides in the claimant that establishes a better title.** See Pius Amakor v. Benedict Obiefuna (1974) 3 SC at 82; Ogunbiyi v. Adewunmi (1988) 5 NWLR (pt 93) 215 C

I shall now consider the plaintiffs case. His case was that the bought the land in question from Famubo through Joseph Famubo (PW1) who was the head of the family. This transaction took place in the presence of PW4 Aiku Fanimo who showed him the land in dispute. He paid #400 for the land. D

In order to constitute a valid sale of land under customary law, there must be payment of money and delivery of possession of the land sold in the presence witnesses. This custom is of universal application throughout Nigeria - See Egonu v. Egonu (1978)11-12 SC 111; Cole v. Folami (1956) 1 SC 66. In this case, there is evidence that the plaintiff paid #400 to the head of Famubo family Joseph Famubo (PW1) for the land. PW1 through PW4 delivered possession of this land to the plaintiff. All this took place in the presence of witnesses. F

I turn now to the case of the defendants. It would appear plan that from the outset the case of the defendants was bound to fail. It really had legs on which to stand. Let me explain. G

The evidence is that the 1st defendant acquired the land in dispute through the 5th defendant. He is the brother-in-law of the 5th defendant. The 5th defendant (Olu Bello) testified in part thus: H

"The land in dispute used to form part of a large tract of land. The property of Olisa Arowogbadamu a.k.a Famubo family of Akure. I was a lawyer to the family, I used to write letter in respect of

the family property and I used to conduct legal proceed arising from disputes over the land for the family. I did this for them in several courts. One of such proceedings was the case of AKA/ICL/67, Isaac Ogunkua vs. Eben Babalola, Joseph Famubo, Daniel Ojo, James Omeiye and Aiku Fanimo. (Exh "C").

Around 1964 I approached the family through the then head and accredited representative of the family for portion of the land to be sold to me and my relations. At the time James Omeiye was the only member of the family farming and physically operating on the land. He and his children owned all the cash crops on the land. The said James Omeiye told me that he would communicate my request to his family. Later I was summoned to the family meeting at Pa James Omeiye's house at Odojoka Akure. I there repeated my request. Pa James Omeiye, plaintiff witness 1 - James Famubo and Tapere Omeiye were asked to take me to the land. The mother of Dr. A.I.A. Ogunleye, my cousin named Madam Felicia Famolayo accompanied me to the site. There I marked out the area which I wanted for myself my wife, my wife's brother and Dr. Ogunleye the place was marked out by the family representatives. I gave money to Tapere Omeiye one of those who accompanied us to clear the area. He did so. Later Pa James Omeiye and Joseph Famubo accompanied me there. Tapere Omeiye was also there. He brought the tape. On measurement the area comprised three plots of 60 x 140 each. Another plot was 100 x 250. They agreed that I should pay for them. I approached my wife and others and we agreed it was to be #100 each for the first three plots and 250 for the big plot retained by me for myself. I paid #550 to the family in two instalments.

It is not in dispute that Mr. Olu Bello was Famubo family lawyer, Joseph Famubo as head of the family joined Ebun Babalola as a co-defendant and successfully defended the suit by Ogunkua and the Deji Oba Ademuwagun - Exhibit 'C'. Mr. Bello was counsel for the Famubo family in that case. Subsequently Mr. Bello said he approached the family for a portion of the land to be sold to him and his relations. But according to him it was one James Omeiye who was the head of the family. He gave evidence to the effect that the family members took him to the land when he marked

out the area which he wanted for himself his wife, his wife's brother (1st defendant) and Dr. Ogunleye. There were four plots in all. He paid a total of #550. The conveyances in respect of these plots were executed by the Deji of Akure to the exclusion of all members of his grantor family.

Mr. Bello claimed that PW1 Joseph Famubo and PW4 Aiku Fanimo were among the family members who put him in possession. Both of them denied his claim. Their evidence was in favour of the plaintiff's case.

The case of the defendants is stranger than fiction. The first significant thing to note is that Mr. Bello was Famubo's family lawyer. He successfully prosecuted the plaintiff's case against the Deji of Akure. Secondly, he excised a portion of the same land to himself, his wife, his brother-in-law and Dr. Ogunleye, and tried so hard to fool everybody into thinking that he bought same from the family. Next he got the Deji of Akure to convey the land he won against the Deji to himself and his relation to the exclusion of members of the family he alleged sold the land to him. It was not his case that all members of the Famubo family were dead. It seems to me that fro Mr. Bello to unashamedly contend this position offends common sense and justice. The astonishing thing is that he has fought this case up to this court. I believe that he does not have conception of the implication of all this. But I say no more.

The learned trial judge was so right in holding that:

"I very much doubt his claim that he bought the land from James Omeiye and the other members of family in 1964. If any oral grant existed, why had the conveyance in respect of the oral grant to be signed by someone other than the grantor? Why in particular by an adverse claimant whose claim had been refused by the court? It was not the case of Mr. Bello that his grantors were dead at the time he prepared his conveyance for the Deji to execute I reject Mr. Bello's contention"

On the state of the evidence, I am satisfied that the sale of the land in dispute to the plaintiff was a valid sale by native law and custom. The learned trial judge rightly, in my view upheld the grant of the land to

the plaintiff Cornelius Oladunjoye. The court below was equally right in affirming the decision of the trial judge.

One last point. I have already indicated that the court below affirmed the decision of the learned trial judge. In the course of doing so, that court declared title in favour of the plaintiff in the following terms:

"In sum, title is hereby declared in favour of the plaintiff in respect of the piece of land at Okuta Elerinla on Ilesha Road, evidence by Exhibit 'B' and sold to the plaintiff, Cornelius Oladunjoye by the Famubo Family."

The defendants have attacked this declaration. It was said that the plaintiff's claim was for trespass and injunction against further trespass. It was pointed out that he did not claim title although his title was put in issue. That being the case, it was submitted, for the defendants, that the Court of Appeal was in error when it granted the plaintiff a remedy that he did not seek.

It is trite law that parties are bound by their pleadings: See Obimiami Brick & Stone (Nig) v. A.C.B. Ltd. (1992) 3 NWLR(pt.229)260. The essence of pleadings is to compel the parties to define accurately and precisely the issues upon which the case between them is to be fought to avoid element of surprise by either party. It also guides the parties not to give evidence outside the facts pleaded as evidence on a fact no pleaded goes to no issue - see Onwuka v. Omogui (1992)3 NWLR (Pt.230)393; Emegokwue v. Okadigbo (1973)4 SC.113.

In the present case, it is not in dispute that the claim of the plaintiff was for damages for trespass and injunction. He did not seek a declaration of title to the disputed piece of land. So the declaration of title granted by the court below was clearly a relief not claimed by the plaintiff. I do not think there is any justification for the grant. This is because a court has no jurisdiction to give to a party a relief he has not asked for: see Ugo v. Obiekwe (1989)1 NWLR (Pt.99)514; Awosile v. Sotubo (1992)5 NWLR (Pt.243)514; Ayanboye v. Balogun (1990) 5 NWLR(Pt.151) 392). The plaintiff in this case is clearly not entitled to the declaration of title

not claimed by him. In the result, I set aside the declaration of title in his favour and restore the decision of the learned trial judge in the following terms:

"In sum, I declare the purported grant of the piece of land at Okuta Elerinla on Ilesha Road, evidence by exhibit "H" and made to Engineer Akinterinwa null and void. I uphold the grant of the same piece of land to Cornelius Oladunjoye." B

Subject to the above, this appeal by the defendants lacks merit. Accordingly, I dismiss it with N10,000.00 costs in favour of the plaintiff. C

KARIBI-WHYTE JSC

I have had the privilege of reading the judgment of my learned brother Katsina-Alu in this appeal. I agree with his reasons dismissing the appeal in part and allowing it in part. The amendment by the Court of Appeal of the judgment of the High Court is hereby set aside. D

On the 10th of Defendant, 1993, the Court of Appeal Division, sitting in Benin City, dismissed the appeal of the Appellant against the judgment of Adeloje C.J. of the Ondo State High Court, holden at Akure and delivered on 19th April, 1989 in Suit No AK/85/82. In the said judgment of Adeloje C.J. the purported grant of a piece of land to the Defendant at Elerinla on Ilesha Road and evidence by Exhibit "H" was declared null and void. The grant of the same piece of land to the Plaintiff was upheld as valid. General Damages of N1,000, was awarded in favour of the plaintiff and N89 as costs. The claim by the plaintiff before the High Court was for general damages for trespass and for perpetual injunction. F

The facts of this case arose out of the sale of the same piece of land to both parties to the litigation and by different members of the land owning family claiming to have the authority to do so. The issue for determination as formulated by the learned trial Chief judge therefore was which of the sales was the valid one and to have conveyed title to the purchaser. G H

Comprehensively stated, the facts of the case are that plaintiff, herein the Respondent, bought the land in dispute on September 15, 1971

from the Famubo family of Akure for #400, now N800, and was issued a purchase receipt by the family. Plaintiff went into possession cleared the site and marked the four corners with blocks. In 1978 plaintiff had the land which is 537.271 sq meters, surveyed by a licensed Surveyor, and with a survey plan with pillars Nos. D.S 613, D.S.614, D.S 615 and D.S. 616. When plaintiff went on the said land in 1980 he discovered to his dismay that Defendant had entered on the land and had started to dig foundations for a building. He complained to Joseph Famubo, the head of the Famubo family, who advised him to sue Defendant.

The claim of the defendants on the other hand, is that the land in dispute is part of a larger portion of land which originally consisted of four plots. This larger portion of land forms part of land granted in 1964, to Dr. A.I.O. Ogunleye, Mrs. G.T. Bello, Mr. M.O. Bello and the Defendant by the late James Omeiye as beneficial owner acting on behalf of Olisa Arowogbadamu Family, otherwise known as Famubo family of Akure. Defendant claims that James Omeiye was at the time of the grant the oldest member and accredited head of Olisa Arowogbadamu family. That the grant of the land to the Defendant and others was made with the knowledge and consent of the then principal members of Olisa Arowogbadamu family. The Defendant and the three other purchases went into possession.

Plaintiff therefore brought this action claiming damages for trespass and injunction against the Defendant.

The Court commenced hearing of the case against the 1st Defendant and had heard plaintiffs' evidence, when the 2nd, 3rd 4th and 5th Defendants were joined and an amended statement of defence filed to accommodate the defence of all the defendants.

It is pertinent to refer to certain anomalies in the hearing of the case. The 5th Defendant/Appellant started the litigation as Counsel to the 1st Defendant. Sequel to the successful objection of PW1, Joseph Famubo, who as head of family of Famubo granted the land in dispute to plaintiff/Respondent, that 5th Defendant/Respondent was Counsel to the Famubo family, he ceased to be Counsel to 1st Defendant./Respondent, and applied with the others to joined as Defendants in the case. It is

difficult to understand that Mr. Bello, the 5th Defendant is the Counsel before us. What a conflict of professional duty and personal interest.

Third and 4th Defendants died during the pendency of the case. At the conclusion of the hearing of witnesses and addresses of Counsel, the trial Judge gave judgment for Plaintiff/Respondent. The 1st, 4th and 5th Defendants, the 2nd and 3rd having died, appealed against the judgment on the ten grounds of appeal contained in the notice of appeal to the Court below on the 2nd May, 1989.

It is unnecessary to produce the ten grounds of appeal contained in the notice of appeal. It is sufficient for our purposes to set out the issues for determination arising therefrom as formulated by the Court below. This is-

"Whether the learned trial Chief Judge was right in declaring title for the Respondent on the ground that he had proved a better title than the Appellant."

Following upon this formulation of the issue the issue the Court of Appeal heard oral arguments based on briefs of argument filed by the parties and affirmed the judgment of the Court below and dismissed the appeal. It however went further consistent with its formulation of the issue for determination to amend the judgment of the trial Court by "declaring title in favour of the plaintiff in respect of the piece of land at Okuta Elerinla on Ilesha Road, evidence by Exhibit B and sold to the Plaintiff Cornelius Oladunjoye by the Famubo family."

Appellant has further appealed against this judgment by leave of the Court below to this Court on grounds of law and mixed law and facts. Appellants have filed four grounds of appeal which are as follows-

"GROUNDS OF APPEAL

1. The learned Justices of the Court of Appeal erred in law when in their lead judgment they said "this appeal can be disposed of under only one issue as follows:-

Whether the learned trial Chief Judge was right in declaring title for the respondent on the ground that the he had proved a better title than the Appellant.

PARTICULARS OF ERROR

It is the primary duty of a plaintiff in a land matter, who upon a claim of trespass and injunction, to establish a clear and certain identity of the land in dispute as between him and the defendant. It is after the plaintiff had discharged this duty that he can proceed to prove his title to the land. In this case, the plaintiff failed to establish the identity of the land in dispute and so there is nothing to which title or better title can be scribed. In the context, the Court of Appeal misconceived the issue and fell into the same error as the learned trial Chief Judge did when he said in his judgment on the failure of the plaintiff to indicate the precise area to which his claim attached that "this contention to me is leaving the substance to chase the shadow rather than the identity of the land, I hold the view that the court should consider who of the two claimants has proved a better title.

2. The learned Justices of the Court of Appeal erred by virtually ignoring the proper issues for determination as formulated by the appellants and thus failed to consider the salient points vigorously canvassed before them together with the strong legal authorities cited in support thereof.

PARTICULARS OF ERROR

The appellants formulated three issues for determination in the grounds of appeal. The gravamen was and still remains that upon the failures of plaintiff to prove the injunction, the trial court cannot proceed to give judgment and award to him reliefs not claimed as it wrongly did. The Court of Appeal did not appear to have considered these points seriously and the highest authorities cited in support e.g. Elias vs. Omobere (1982) 5 SC.25; Solomon vs. Mogaji & Ors. (1983)2 SC.NLR.209 Ekponyong vs. Onyang (1975) 2 SC.71. The Court thereby came to a wrong decision.

3. The Court of Appeal erred in law by wrongly applying Section 16 of the Court of Appeal Act 1976 to amend the judgment and orders of the High Court.

PARTICULARS OF ERROR

The appellants have complained that the learned trial Chief Judge

was wrong by awarding to the plaintiff a relief which he did not claim thus:

I declare that purported grant of the piece of land at Okuta Elerinla on Ilesha Road evidence by Exhibit 'H' and made to Engineer Akinterinwa null and void." Rather than allow the appeal and set aside the judgment, B the Court of Appeal 'amended' the judgment by clearly substituting its own judgment for the plaintiff thus:

"In sum, title is hereby declared in favour of the plaintiff in respect of the piece of land at Okuta Elerinla on Ilesha Road, evidenced by C exhibit 'B' and sold to the plaintiff, Cornelius Oladunjoye by the Famubo family." a claim which was not made nor proved by the plaintiff coupled with a relief not sought.

4. The Court of Appeal misconceived the notion as to parties D before the Court and misdirected itself in law and on the facts that 1st defendant was the Only appellant against whom the judgment was given and could be enforced.

PARTICULARS OF ERROR

There were five defendants on record who filed a joint Amended E Statement of Defence to the plaintiff's Statement of Claim in the High Court. The trial proceeded against all of them and they contested the case. Some died during the trial but finally, judgment was purportedly given against all the defendants with damages for trespass awarded at F large by the trial Chief Judge. The surviving defendants appealed against the High Court judgment and challenged the decision in the Court of Appeal. Nevertheless the Court of Appeal dismissed the appeal against one appellant."

Learned Counsel has formulated the following two issues as arising from G the grounds of appeal filed.

"1. Whether upon the failure of plaintiff to establish a clear and certain identity of the land to which his claim in trespass and injunction relates and his exclusive possession thereof, the Court of Appeal can H properly give judgment for the Plaintiff as it did in this case.

2. Whether the award by the Court of Appeal to the Plaintiff of reliefs not proved by legal credible evidence and reliefs not claimed by

the Plaintiff at all neither in his writ of summons nor in his amended statement of claim can be sustained in law and on the high judicial authorities."

Concisely stated, the only issues canvassed in this appeal by the Appellant are not contentions that plaintiff has not established the identity of the land in dispute and therefore not entitled to judgment and the fact that the Court below had no jurisdiction to grant a relief not proved by legal credible evidence and not claimed in the writ of summons and the statement of claim.

On his part learned Counsel to the Respondent, Mr. Akanle has formulated only one issue namely

"Which of plaintiff-respondent and first defendant has a better claim to the land in dispute."

The formulation is a faithful adherence to the decisions of the Courts below.

For the purposes of the determination of the first issue, it is important to appreciate the nature of the action before it is important to appreciate the nature of the action before the Court, which is for damages for trespass, and perpetual injunction. Plaintiff did not claim for a declaration of his title to the land subject matter of dispute. Learned Counsel to the Appellants Mr. Bello, consistent with Appellants' brief of argument, submitted orally before us that the primary duty of the plaintiff in a land matter involving a claim for trespass and injunction is to show clearly by evidence the identity of the land upon which the defendant has committed the trespass. Plaintiff should go further to show that he is the owner of the land or he is in exclusive possession or he has a right of possession and that the defendant has wrongly entered into the land. He cited and relied on Odeniyi v. Ogunbiyi (1965) NMLR. 393, at 396-7, and Chief Ibuluya v. Dikibo & Ors. (1976) 1 All NLR (pt.1) 396.

Mr. Bello for the Appellant submitted that Plaintiff/Respondent did not prove his title to the land in dispute and merely gave evidence that he derived his title from sale of the land to him by the Famubo family. Plaintiff tendered a survey plan 'Exh.B' of the land in dispute, but did not call the surveyor who prepared the plan. The identity and description of

the land was not given in evidence. It was submitted that the learned trial Judge and the Court of Appeal ignored these issues. The learned trial Judge held the view that the Court should consider who of the two claimants has proved the better title. The Court of Appeal affirmed the opinion of the trial judge. Learned Counsel also submitted that the Court of Appeal was in error and had misdirected itself in considering the question of title when plaintiff had not fought the action on the basis of any claim to title to any particular land against the 1st Defendant/Appellant.

He also pointed out the error of the Court of Appeal in assuming that the parties relied on traditional evidence, document of title and long possession to prove their title. He also pointed out that Appellant was erroneously stated by the Court of Appeal not to have attended the court throughout the duration of the trial to testify. He pointed out that 1st Defendant/Appellant actually gave evidence in chief and was cross-examined in his defence of title to the land he purchased from the Famubo family and tendered his conveyance of same to him, as Exhibit H.

Learned Counsel referred to the errors of the Court below with respect to the identity of the land in dispute. The Court of Appeal referred to the purported grant by James Omeiye to Bello and purported conveyance of the same land to Bello by the Deji of Akure, and submitted that the plaintiff's claim in trespass was not in respect of Bello's land or 1st Defendant's land, and the 1st Defendant did not claim to have bought land from Bello. It was submitted the identity of the land over which the plaintiff claims trespass has not been established. It was further submitted that not calling the surveyor who made the plan is fatal to the claim of identity of the land. Exhibit B tendered was a site plan and not a plan of the land in dispute. It was not prepared for the purposes of this case and did not show the boundaries of the land in dispute.

It was the contention of Appellant that the court below was in error to hold that calling a surveyor to testify in respect of the plan of a land was not an essential pre-requisite to the identity of the land in dispute.

On the second issue for determination, learned Counsel criticised the Court of Appeal for awarding a relief not claimed in the writ of

summons, and not referred to in the amended statement of claim. The claim of the Plaintiff/Respondent was for trespass and injunction. It was submitted that the plaintiff/Respondent did not claim that the grant made to the 1st Defendant/Appellant evidence by Exhibit H be declared void. Nor did he claim that title to the same land be declared for him. Learned Counsel submitted that section 16 of the Court of Appeal Act 1976 relied upon by the Court below in amending the judgment of the Court did not give such powers. Section 16 of the Court of Appeal Act, 1976 enables the Court to make any order necessary for determining the real question in controversy in the appeal, and to amend any defect or error in the record of appeal. It was submitted that what the Court below did in this case was to write a completely different judgment.

On his part learned Counsel to the plaintiff/Respondent consistent with the formulation of issue for determination in Respondents brief of argument maintained that Plaintiff/Respondent who had bought the land in dispute from the Famubo family in 1971 in a conveyance by the head of the family and other principal members had a better title to the claim of the 1st Defendant/Appellant who claims to have bought from the 5th Defendant, who derived title from the Deji of Akure, who had lost in respect of the land in an action against him by the Famubo family.

It was submitted that the land in dispute is very well known to both parties. The 1st Appellant has himself cleared and surveyed the land. He has also described it in his statement of defence. There have been concurrent findings in this case as to the identity and certainty of the land in dispute. Appellant has not shown the findings to be perverse.

It is convenient for the determination of this appeal to consider the formulation of the issues by learned Counsel for the Appellant.

Appellant's formulation of the issues is a criticism of the decision of the Court of Appeal as erroneous on the ground that the identity of the Land in dispute has not been established. As I will show anon from the proceedings it is a difficult criticism to support. It is a well settled principle of our procedural law that parties are bound by their pleadings - See Vanderpuye v. Gbadebo (1998)3 NWLR (pt.541)271. The parties in this case filed their statement of claim by the plaintiff, and

the statement of Defence by the 1st Defendant. It is important for the purposes of the contention of Appellant to reproduce their respective pleadings on the land in dispute.

The Plaintiff in paragraph 3 of his statement of claim stated as follows-

"3. The land, the subject matter of the dispute, is a plot of land situate, lying and being at Okuta Elerinla Itamerin, Akure (Township).

X X X

7. In 1978 the plaintiff employed the services of one Mr. Olufemi Ilori, Licensed Surveyor to survey the said land now in dispute.

8. The said land is 537.271 sq. meters and bounded by survey pillars, Nos. D.S. 613; D.S. 614, D.S. 615 and. D.S. 616. The survey plan is attached and marked exhibit "A."

X X X D

12. In October, 1982 the plaintiff went on the said plot of land and to his dismay saw that the Defendant had entered the land and started to make foundation there.

13. The Plaintiff avers that he made all efforts to persuade the Defendant to leave the land but the Defendant refused."

The following averments are contained in the statement of Defence filed by the 1st Defendant.

"4. The defendant avers that the piece of land which is the subject matter of this action is situate, lying and being at Okuta Elerinla in Akure town in Ondo State of Nigeria.

5. The Defendant avers that the said piece of land formed part of a larger portion of land which originally consisted of four plots.

X X X G

10. The defendant avers that sometime in 1970 the Defendant and the said three other grantees employed Mr. akin Ogunbiyi licensed surveyor to survey the whole parcel of land comprising the four plots together.

11. A survey plan dated 24/8/71 was prepared by the said licensed surveyor and countersigned by the surveyor general of the then Western State of Nigeria.

12. The defendant avers that the survey plan of the defendant's own plot is plan No. OG. 389C/71 dated 24/8/71 with its total area measuring 985.47 square yards.

13. The defendant's plot is marked "C" on the said survey plan.

$$X \qquad X \qquad X$$

22. Sometime in September, 1982 when the defendant commenced development of the land, the plaintiff came to Mr. M.O. Bello's Office at Akure and also to his house to make enquiries about the land."

C It is clear from the averments in paragraph 3 of the statement of claim, and paragraph 4 of the statement of defence that the parties are referring to the same plot of land, situate, lying and being at Okuta Elerinla Itamerin, Akure. It is the same land in respect of which plaintiff had made all efforts to persuade the defendant to leave, on discovering in October, D 1982 that defendant had started making foundation in the land. Defendant admitted in para. 22 his statement of defence that he commence development on the land sometime in September, 1982, and that plaintiff went to the Office of Mr. M.O. Bello, at Akure and to his house to make F enquiries about the land.

In addition to the averments in the pleadings, there are the averments in the affidavit of plaintiff in support of the Motion for Interim injunction brought on 11/4/83 by plaintiff to restrain the Defendant from further acts of trespass on plaintiff/Appellant's land. The application was granted in the ruling of the learned Chief Judge on the 23rd June, 1983. In the ruling the learned Chief Judge relied on paragraph 22 and 23 of the counter affidavit that

"Para. 22 Sometime in September, 1982, when the Defendant G commenced development of the land, the Plaintiff came to Mr. Bello's Office at Akure and also to his house to make inquiries about the land."

Para. 23. That the plaintiff informed the defendant when they met later in September that he bought the land from someone in 1978 and H the defendant told him the history of his grant as far back as 1964."

In his view, and I entirely agree, the above averments show that both parties know the land in dispute. The opinion is justified also by para. 4 of the affidavit in support of the application for interim injunction which

stated.

"4. That the Defendant went on the land and started to erect buildings thereon immediately he received my writ of summons."

The Counter affidavit of the Defendant opposing the application averred at paragraphs 2,3 and 4 as follows -

"2. That paragraph 4,5,6,7,9,10 and 11 of the plaintiffs affidavit are totally false.

3. That I have been in real and effective possession of the land in dispute since 1964 when the land granted to me together with three other persons mentioned in paragraph 6 of the statement of defence.

4. That I have prepared the land ready for development since 1976 which development was halted for want of funds

X X X

7. That I have started the erection of my said building on the land in dispute long before the plaintiff instituted this action."

The land in dispute herein referred to by both parties can only be the land in respect of which plaintiff claims damages for trespass and perpetual injunction against the Defendant. It is therefore strange and absurd for learned Counsel to the 1st Defendant to contend that the identity of the land in dispute is uncertain. It has always been accepted in our courts in land cases that where the area of land in dispute is well known to the parties, the question of proof not being really in dispute, does not arise. In such a situation it cannot be contended that the area claimed or can the land in dispute be described as uncertain - See Etiko v. Aroyewun (1959) 4 FSC.129 Osho v.Ape (1998)8 NWLR.493. In the circumstances of this case the identity of the land in dispute cannot be described as uncertain since both parties know and have accepted it as the land in dispute.

The contention by Appellant that the evidence of the surveyor who made the plan is a prerequisite to the determination of the identity of the land in dispute is misconceived. There being no difficulty in identifying the land in dispute, there is no issue properly joined, and a declaration can be made without basing it on a plan. The evidence of a surveyor if available is therefore desirable, but not necessary where the proof of the

identity of the land in dispute is unnecessary. - See Arabe v. Asanlu (1980)5-7 SC.78. A plan is therefore not a sine qua non to proof of identity of disputed land. The requirement described as "the acid test" is that the land in dispute must be ascertained with definitive certainty - See B Ate-Kwadzo v. Robert Kwasi Adjei (1944)10 WACA.474. It is so in this case.

Mr. Bello for the Appellant has criticised the proposition relied upon by the Court below that "under our law -A claim for damages for trespass coupled with injunction automatically puts the title of the parties in issue" C Ogunfalu v. Adegbite (1986)5NWLR (Pt.43)549; Ajani v. Ladepo (1986)3 NWLR (pt.28) 276. He argued that plaintiff did not prove hid title to the land in dispute derived from a sale of the land to him by the Famubo family. He also criticised the proposition of the learned Chief D Judge, approved by the Court of Appeal, to wit; "who of the two claimants, Mr. Cornelius Oladunjoye through Joseph Famubo or Engr. Akinterinwa through Mr. Bello and Pa James Omeiye, has proved the better title "I am afraid the cases relied upon do not support his contention. E The proposition criticised relied upon by the trial Judge is well settled.

The law attaches lawful possession to the person with the better title. - See Kasunmu v. Abeo (1972)2 SC.69. Two persons cannot be in F possession of a land at the same time. One must be the lawful possessor, whereas the other is the trespasser. A trespasser does not acquire possession by his act of trespass - See Ayinla v. Sijuwola (1984)1 SCNL.410.

The question the learned Judge posed to himself answered affirmatively in favour of the plaintiff by the learned Chief Judge in the High G Court was, which of plaintiff and Defendant who claimed to be in possession of the land in dispute had a better title? It is a well settled principle of our land law that where there is a dispute as to which of two persons is in possession, the presumption is that the person having title to H the land is in lawful possession - See Abotche Kponuglo v. Ada Kodaja (1931)2 WACA. 24. It is also the law that proof of ownership is prima facie proof of possession - See England v. Palmer 14 WACA. 659.

In the appeal before us, the claim of the plaintiff is not for a

declaration of title, therefore the establishment of title is not paramount consideration. The evidence of title was directed at establishing lawful possession. The claim is for damages for trespass and perpetual injunction. The Plaintiff and Defendant are both claiming to be in possession of the land in dispute. It is well settled law that where a plaintiff claims not only damages for trespass but also perpetual injunction, there is the inference that he can establish title to the land and this must be considered. - See Ogunfaolu v. Adegbite (1986) 5 NWLR (pt.43)549; Ajani v. Ladepo (1986) NWLR (pt.28)276. A person in possession of land can maintain an action against any one who cannot show a better title. -See Onyekaonwu v. Ekwubiri (1966)1 All NLR.32. Hence the court below correctly, in my view, agreed with and approved the holding of the learned Chief Judge, that "The law is: where two persons claiming title and possession adversely to each other claim to be in possession, possession resides in him who can establish a better title." See Amakor v. Benedict Obiefuna (1974) 3 SC. 67, 82, also the judgment of Oputa, JSC in Ogunbiyi v. Adewumi (1988)5 NWLR (pt.93)p.215 at 223"

In determining in this case as between the plaintiff and the Defendant who had the better title, the learned Chief Judge proceeded to appraise the evidence adduced by the parties in proof of their respective claims to title. On the evidence before him, both parties claim to have derived title from the Famubo family. Whereas plaintiff/Respondent claimed to have bought the land in dispute from Joseph Famubo (PW1) who was at the relevant time the accredited Head of the Famubo Family. The 1st Defendant claims to have obtained a grant of the land in dispute from James Omeiye (now deceased) who purported to be the head of Famubo Family at the time, and later got a conveyance from the Deji of Akure as the legal trustee of all land in Akure kingdom.

The learned trial Chief Judge after consideration of the evidence before him came to the conclusion that Pa James Omeiye (now deceased) was at no time the Head of the Famubo Family. He found that Joseph Famubo (PW1) was the recognised Head of the Famubo family at the material time, he accordingly held that Joseph Famubo (PW1) was the right person to sell Famubo Family land in conjunction with other princi-

pal members of the Family and not Pa James Omeiye to Bello was therefore void. Similarly void is the purported conveyance of the same land to Bello by the Deji of Akure who had no title to the land.

The learned Chief Judge then went on to hold, and this has been
B rightly accepted by the Court below that the plaintiff/Respondent has
shown a better title. Indeed in my view 1st Defendant/Appellant has not
shown any title to the land in dispute. His possession of the land, as
correctly held by the learned Chief Judge and accepted by the Court
C below was illegal and therefore a trespass. 1st Appellant cannot by his
act of trespass secure possession in law - See Aromire v. Awoyemi (1972)
2 SC.1.

It is important to point out that in a claim for damages for tres-
pass and injunction, it is only necessary to establish that plaintiff was in
D possession. The question of the establishment of title becomes neces-
sary where there is a competing claim to possession. The claim for
trespass is not dependent on the claim for declaration of title as the issue
to be determined on the claim for trespass and that for declaration of title
E are quite separate and independent issues. - See Oluwi v. Eniola (1967)
NWLR. 339.

Based on the finding that plaintiff in possession has established a
better title to the land in dispute than the 1st Defendant/Appellant, the
F contention of Appellant that the Court below was wrong to have affirmed
the award of N1,000, general damages cannot but be erroneous. The
Court of Appeal rejecting the contention stated it correctly that under our
law trespass to land is actionable per se. That is to say it is established
without proof of actual damage - See Umunna v. Okwuraiwe (1979) 6-7
G SC.1. Damages is awarded on the proof of trespass, which is a legal
wrong - See Obiere v. Eku, Baptist Hospital (1978) 6-7 SC.15. Damages
claimed as recoverable for legal wrongs owe their existence to the legal
wrong. This results in the award of general damages. Plaintiff was not
H able to prove the special damages claimed but was clearly entitled to
general damages. There is no merit in this criticism of the judgment of
the Court below. Learned Counsel to the Appellant has not been able to
show that the judgment of the trial Judge overlooked or misapplied the

principles in the award of damages. There is therefore no basis for the suggestion that the Court of Appeal should interfere with the damages awarded. See Nigerian Telecommunications Ltd. & ors. v. M.O. Ogunbiyi (1972) 7 NWLR.543; karimu v. Union Bank of Nigeria Ltd. (1993) 4 NWLR.502. I also hereby endorse the damages of N1,000 awarded by the learned trial Judge.

I turn to the second issue for determination whether the Court below can award reliefs not proved by legal and credible evidence and not claimed by the plaintiff at all neither in his writ summons nor in the amended statement of claim. This is a relatively simple issue.

Learned Counsel to the Appellant has correctly pointed out that the claim of the plaintiff against the 1st Defendant/Appellant is for damages for trespass and injunction. There was no further amendment to the statement of claim to include declaration of title, though this was inferentially put in issue. It is therefore submitted that the Court of Appeal was wrong to have declared title in favour of the Respondent. Mr. Bello submitted that Plaintiff did not claim that the grant made to the 1st Defendant/Appellant evidenced by Exhibit "H" be declared void, nor did he claim that title to the same land be declared for him. Learned Counsel submitted that the Court of Appeal having found that the High Court was in error on these points, should have dismissed Plaintiffs claims and entered judgment for the 1st Defendant/Appellant. Section 16 of the Court of Appeal Act 1976 cannot be applied in the circumstances.

In his brief of argument, Mr. Akanle for the Respondent submitted that the portion of the judgment of the court 1st instance can be defended as consequential and incidental order. Nothing was said above the amendment made by the court below to the judgment of the Court.

It is both fundamental and an elementary principle in the determination of actions before a court or tribunal, that the adjudicating body is bound to limit itself to the claim before it. A court may make incidental orders which follow naturally from the relief claimed and to strengthen the relief claimed. A Court has no power, and is not under any circumstances entitled to award a relief not claimed by the party in the writ of summons and statement of claim. See Egonu v. Egonu (1978) 11-12 SC.

111, Obioma v. Olomu (1978) 3 SC. 1. See Elumeze v. Elumeze (1969)1 All NLR. 311 Chief Registrar v. Amos (1976) 1 SC. 33. Judgments are based on the issues tried and decided and the right of the parties determined on the claim before the Court. - See Solan v. Olusanya (1975) 6 SC. 55. Where trial is conducted by pleadings, as in the instant case, the judgment thereon must be based on issues joined between the parties - See Metal Construction (W.A.) Ltd. v. Migliore (1979) 6-9 SC. 163.

There is no doubt that on the pleadings in this case issue was not joined on the titles of the parties to the land in dispute since the claim was that of damages for trespass and for injunction. The question of title to the land in dispute was not in issue. The Court below can therefore not be right to hold "that the trial Judge was right in declaring title in favour of the Respondent, who was the Plaintiff." This is supported by the holding of the Court of Appeal that "the learned trial Judge also had no business to "declare the purported grant of the piece of land at Okuta Elerinla on Ilesha Road, evidence by Exhibit "H" and made to Engineer Akinerinwa null and void," as this should have been the subject of a fresh trial if found necessary." Of course, the learned trial Judge had no business in granting a relief as to title which is not in the writ of summons and statement of claim, and therefore not before him.

The Court of Appeal was wrong to have held that "From the writ of summons his business was to declare title in favour of plaintiff, and not to set aside or declare void a purported grant to defendant." It is obvious from the endorsement on the writ of summons and averments in the statement of claim, there was no relief seeking to declare title in favour of the plaintiff. The Court therefore has no power to grant such a relief. Similarly, the Court of Appeal can therefore not amend the judgment of the trial Judge to enable declaration of the title of the land in dispute in favour of the plaintiff in Exhibit B of the survey plan filed by the plaintiff.

The appeal of the 1st Appellant succeeds in part, namely, the declaration of title in favour of the plaintiff/Respondent in respect of the piece of land Okuta Elerinla on Ilesha Road, evidenced by Exhibit B and sold to the Plaintiff, Cornelius Oladunjoye by the Famubo Family is hereby

set aside.

Costs assessed at N10,000 shall be paid by Appellants to the Respondent.

OGUNDARE JSC

I have had the advantage of reading in draft the judgments of my learned brothers Katsina-Alu and Karibi-Whyte, JJ.SC, just delivered. They both, particularly Karibi-Whyte JSC, dealt meticulously with all the issues canvassed in this appeal. I agree entirely with their reasonings and conclusions reached. C

The plaintiff, who is respondent in this appeal, had sued for damages for trespass and injunction; he thereby put his title to the land in dispute in issue. The learned trial Chief Judge was aware of this situation hence he gave full consideration to that issue. He examined thoroughly the case of each party on the issue of title and rightly came to the conclusion that the plaintiff had better title to the land. I think his decision on this issue is unimpeachable. The Court below rightly confirmed it. And in so far as this appeal seeks to impugn that decision, I say it is completely bereft of any substance. The 1st Defendant was rightly damned in damages for trespass, which on his own showing, he committed on the land of the plaintiff. The order for injunction too was rightly made. I affirm these decisions. D E F

The Court below dismissed the Defendants' appeal to it. But in doing so, it granted the plaintiff a declaration of title "in respect of the piece of land at Okuta Elerinla on Ilesha Road, evidence (sic) by Exhibit 'B' and sold to the plaintiff, Cornelius Oladunjoye by the Famubo Family." This order has been criticised in this appeal by the Appellants and Mr. Akanle, learned counsel for the plaintiff gallantly conceded that the order was wrongly made. I agree with both sides that the Court below should not have made the order which was not claimed by the plaintiff nor could be said to be incidental to the reliefs claimed by and granted to the plaintiff. I set aside that order. G H

The only other point I want to comment briefly on is the con-

duct of Mr. M. Olu Bello, a legal practitioner, in this case. Plaintiff had sued the 1st Defendant only. Mr. Bello appeared as counsel for the latter. On the objection of Mr. Joseph Famubo, the head of the Famubo family who were the original owners of the land in dispute, Mr. Bello withdrew his appearance for the 1st Defendant. The objection was based on the fact that Mr. Bello was all along acting for the Famubo Family in respect of that family's land which included the land now in dispute and could not therefore, be seen to be acting against the interest of the family in respect of the land in dispute which had been granted by the family to the plaintiff.

Following the withdrawal of his appearance for the 1st Defendant and when hearing of the case had commenced, Olojugba Alarapin, Chief Adekunle Omeiye, Omoniyi Alatipere (all members of the Famubo Family) and M. Olu Bello sought and obtained leave of the court to join as defendants in the action. In his affidavit in support of the application for joinder, Chief Adekunle Omeiye (who did not give his title) deposed inter alia thus:

"4 That the 4th applicant Mr. M. Olu Bello is one of those to whom portions of our family land was granted by our family.

5. That the said 4th applicant also helped the defendant to secure the plot now in dispute from our family."

Other than that he helped the 1st Defendant to purchase the land in dispute from the land owning family, Mr. M. Olu Bello appeared not to have any interest whatsoever in the land in dispute. The application for joinder and the joint amended statement of defence of all the Defendants were signed by Mr. Alafe, of counsel. Thereafter and throughout the subsequent proceedings in the trial court, in the Court below and in this Court Mr. M. Olu Bello conducted the defence, purportedly appearing in person. No doubt, his joinder which was most unnecessary and undesirable, was a subterfuge to defeat the trial court's ruling against his appearing for the 1st Defendant.

That is not all, Mr. M. Olu Bello was counsel for the Famubo family in their dispute over the land (which include the land in dispute) with the Deji of Akure (Oba Ademuwagun Adesida) and Mr. Ogunka (to

whom the Deji granted some portion of the land. The dispute led to court action in which Mr. Bello acted for the family. The action went from Customary Court through the High Court to the Western State Court of Appeal. The Deji of Akure lost to the family. Strangely enough, it was to the Deji (who had been adjudged not to have title to the land) that Mr. Bello took the conveyances of his wife, his cousin (Dr. Ogunleye) his brother-in-law (1st Defendant) and his own in respect of portions of the land Mr. Bello claimed were sold to the purchasers by the family!

It is very difficult for me to say that the conduct of Mr. M. Olu Bello in this matter is honourable in any way. I can find no justification for his acting against the interest of his former clients in such a blatant manner as his conduct in this case portrays. The less said about this, the better.

Finally, I see no merit in this appeal which I unhesitatingly dismiss. I affirm the judgment of the Court below except as to the declaration of title made in favour of the plaintiff which is hereby set aside. I award to the Plaintiff/Respondent the sum of N10,000.00 (ten thousand Naira) costs of this appeal against the Defendants/Appellants.

MOHAMMED JSC

This appeal is devoid of any merit and for the reasons advanced by my learned brother, Katsina-Alu, JSC. in his judgment, the draft of which I have had the privilege to read before now, I agree to dismiss the appeal. I will also set aside the declaration of title made by the Court of Appeal in favour of the plaintiff. It is a gratuitous grant made by the Court below because the plaintiff had made no claim for such a relief. I restore the decision of the learned trial judge in which he declared the grant to Engineer Akinterinwa of the piece of land at Okuta Elerinla null and void and upheld the grant of the same piece of land to Cornelius Oladunjoye. I award N10,000.00 costs in favour of the plaintiff who is respondent in this appeal.

AYOOLA JSC

This is a simple and straightforward matter. The plaintiff (respondent) claimed damages for trespass and injunction against the defendant (appellant). The High Court awarded damages against the defendant. That court did not order injunction. Neither in the court below nor before us was there any complaint that injunction was not awarded. The parties claimed title through the same family. There are conflicting claims as to who was the head of family competent to make a valid sale of the family property. The trial judge found that the plaintiff's vendor was the head of family and that the plaintiff's vendor had no such status. The Court of Appeal was of the same view. On further appeal to this court, the defendant raised the question of the identity of the land and proof of title of the land. He also complained that the Court of Appeal had granted to the plaintiff a declaration which was not claimed. Counsel for the plaintiff conceded that it was wrong to have done so.

In respect of the declaration granted, I would allow the appeal and set aside the declaration erroneously granted. I would dismiss the appeal otherwise. This is a case of concurrent findings of fact by the trial court and the court below. The findings were amply supported by the evidence. There is no substance in the contention that the identity of the land was not established.

For these reasons and the fuller reasons in the judgment of my learned brother, Katsina-Alu, JSC. I would allow the appeal in the only. Abide by the consequential orders made in the leading judgment.

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