

SUPREME COURT OF NIGERIA
16TH JUNE, 2000. SC. 140/1995
CORAM:- A. G. KARIBI-WHYTE, U. MOHAMMED,
A. I. KATSINA-ALU, S. O. UWAIFO,
A. O. EJIWUNMI, JJSC

SUNDAY UKWU EZE & 6 ORS. ... DEFENDANTS/APPELLANTS
(For themselves and as representatives of
Ngwa-Iyiekwe in Ugwunagbor Community Council,
Osisioma Division).

AND

GILBERT ATASIE & 3 ORS. PLAINTIFFS/RESPONDENTS
(For themselves and as representatives of
Umuololo family in Ogwe Village Ukwu
Division).

APPEALS - *Concurrent findings - Wrong conclusion - Where there is no support for the findings of the trial court - And the Court of Appeal reached a wrong conclusion in the matter - The findings would not rise to the effect of concurrent findings.*

LAND LAW - *Title - Claim for declaration of title - A plaintiff in such a claim must succeed on the strength of his case.*

LAND LAW - *Title to land - Traditional history - Proof - The pleading of the devolution and the evidence in support - Must be reliable and credible.*

LAND LAW - *Title to land - Traditional history - The rule in Kojo II v. Bonsie - Where there is a failure to present a reliable account - Of the founding and devolution of the land in dispute - The rule will not apply.*

LAND LAW - *Title to land - Traditional history - Consequence of reliance on - Where a plaintiff by his pleading and evidence relies on traditional history - For his root of title to land - He fails or succeeds on that*

history.

LAND LAW - *Title to land - Evidence of possession - Where a plaintiff has failed to prove title - It may be necessary to consider the evidence of possession - In order to ascertain whether he is entitled to damages and injunction - Claimed for in the alleged trespass.*

EVIDENCE - *Pleading - Evidence which is at variance with the pleading - Goes to no issue*

FACTS

In the High Court, Aba, the plaintiffs/respondents as members of Umuololo family in Ogwe village of Ukwa Division instituted this action in a representative capacity claiming against the defendants for a declaration of title to a piece of land called "Uzo Egbelu Ogwe"; general damages for trespass, and perpetual injunction. In their statement of claim, the plaintiffs founded their title to the land in dispute on traditional history. They pleaded inter alia that from origin, the land in dispute had been their property through their great ancestor OLOLO who deforested the land and exercised maximum acts of ownership over it. The plaintiffs pleaded their ancestors as, Ekule, Agu, Ukpo Elechi Okirima, Okebe, Nnah, Atasie, Owuogba and Gilbert Atasie (the first plaintiff). They did not show by evidence the founding of the land in dispute. Also they failed to trace the devolution of the land through successive ancestors right to themselves. The names of the ancestors given in evidence, could also not be reconciled with those pleaded.

The plaintiffs pleaded as acts of ownership and possession, that they granted farming rights to some people upon payment of rents; and that they made a grant of part of the land to the 1st defendant as a dwelling place. The evidence led in support of the farming rights allegedly granted was contradictory while the alleged pledges were denied by the defendants. After a full hearing, the learned trial judge found for the plaintiffs and entered judgment in their favour. The defendants appeal to the Court of Appeal (Port Harcourt Division) was dismissed. The defen-

dants have again appealed to the Supreme Court raising six issues but only four of the issues were considered in deciding the appeal.

ISSUES FOR DETERMINATION

"(a) Was the Court of Appeal correct in holding that the Plaintiffs/Respondents who did not prove their traditional history pleaded as root of title were entitled to a declaration of title to the land in dispute based on the rule in KOJO vs. BONSIE.

(b) was the Court of Appeal correct in holding that the Plaintiffs/Respondents had exercised various acts of ownership in and over the Land in dispute sufficient to warrant a declaration of title in their favour.

(d) Was the Court of Appeal correct to have affirmed the trial Court's approach to the evaluation of the traditional history pleaded and given in evidence by the Defendants/Appellants.

(e) Did the Court below misdirect itself when it held that

"In the light of the evidence by both sides one is tempted to ask the question why is it that at all material times it is the Respondents who are claiming that they pledged or let portions of the land in dispute to others. There was no iota of evidence or even a mere assertion that the Appellants made a similar disposition in respect of the land in dispute." and if so, did this lead to a miscarriage of justice?

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

Land law - Title

1. Since it was the respondents who sought title to the land in dispute, the burden was squarely on them to adduce credible and admissible evidence in support of that title. This has long been laid down and stated in the form of a principle that a plaintiff in a claim for a declaration of title must succeed on the strength of his case: see Kodilinye v. Mbanefo Odu (1935) 2 WACA 336; Udegbe v. Nwokafor (1963) 1 ALL NLR 417. (p. 2311 G)

Evidence - Pleading

2. To assess the strength of a plaintiff's case, the pleading and evidence must be examined. If the evidence is at variance with the pleading, such evidence will have no value. It will be discountenanced because it is
 B contrary to the issues joined and therefore goes to no issue worthy of consideration: see Ogboda v. Adulugba (1971) 1 ALL NLR 68 at 72-73. The obvious consequence is that such a plaintiff would have failed to lead evidence to support the particular issue in question. In the present
 C case, that would be the evidence to support the traditional history pleaded by the respondents. (p. 2311 H)

Traditional history - Proof

3. The law is that to establish the traditional history of land relied on as
 D root of title, a plaintiff must plead the names of the founder and those after him upon whom the land devolved to the last successor(s) and lead evidence in support without leaving gaps or creating mysterious or embarrassing linkages which have not been and cannot be explained. In
 E other words, the pleading of the devolution and the evidence in support must be reliable, being credible or plausible, otherwise the claim for title will fail: see Akinloye v. Eyiola (1965) NMLR 92. (p. 2313 F)

Traditional history - The rule in Kojo II v. Bonsie

4. The case of the respondents based on traditional history clearly broke
 down at the stage they failed to present a reliable account of the founding and devolution of the land in dispute. There was therefore no cause to
 G apply the rule in Kojo II v. Bonsie (1957) 1 W.L.R. 1223 as the lower court erroneously proceeded to do. It is now clearly established that for that rule to apply there must exist side by side two stories of tradition,
 one by each party, which are themselves credible or plausible but are in conflict, one with the other, such that the Court is unable realistically and
 H justifiably to prefer one to the other. In that case, either of the two stories may rightly be regarded as likely to be true, or that they are probable. It follows that none of the stories in that situation is arbitrarily rejected, but each one is tested against recent acts of possession and

ownership to determine which of the two stories is more probable. Once this is ascertained, the story that is less probable is rejected: see Mogaji v. Cadbury Nigeria Ltd (supra) at page 430. (p. 2314 A)

Traditional history - Consequence of reliance on

5. Where a plaintiff by his pleading and evidence relies on traditional history for his root of title to land, he fails or succeeds on that history. If the history succeeds, having been accepted by the court on its merits either as standing alone without any competing story, or where any other story is seen to be unreliable and completely rejected, there is no need to show recent acts of ownership. The traditional history is then accepted on its strength and cogency. This is what the authorities have established that where evidence of traditional history is not contradicted, or is not in conflict with another that was set up, and is found by the court to be cogent, it can support a claim for declaration of title without further requirement: see Olujebe of Ijebu v. Oso, the Eleda of Eda (1972) 5 S.C. 143 at p. 151. Conversely, if the history fails, the plaintiff cannot abandon his pleading and rely on acts of ownership over a long period of time, numerous and positive, which is only available to support title base on immemoriality - i.e. time beyond human memory - which is one of the ways of proving title but is separately and distinctly alleged, nor can he be permitted to rely on any recent acts of possession and ownership to back his claim for title: see Mogaji v. Cadbury Nigeria Ltd. (supra) at page 341. (p. 2314 E)

Title to land - Evidence of possession

6. It may be necessary to consider evidence of possession in a case like this, where a plaintiff has failed to prove title, in order to ascertain whether he is in any event entitled to damages and injunction claimed for an alleged trespass if it is shown that he was in possession which was disturbed, as the authorities establish: see Oluwa v. Eniola (1967) NMLR H 339. This is on the basis that trespass is essentially an issue of who is in possession. The law is that a person in possession of land even as a trespasser can sue another person who thereafter comes upon the land

unless that other is the owner or shows some title which gives him a better right to be on the land: see Aromire v. Awoyemi (1972) 2 S.C. 182; Amakor v. Obiefuna (1974) 1 ALL NLR 119 at 126. It is therefore necessary to examine acts of possession, if any. (p. 2315 D)

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Appeals - Concurrent findings

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7. It seems to me that there is no concrete evidence to establish that the respondents were in possession of the land in dispute. There would appear to be no support for the learned trial judge's finding that the respondents proved sufficient acts of ownership and user of the land in dispute. The lower court was certainly in error to have upheld that finding. I have no doubt in my mind that the lower court finally reached a wrong conclusion in this matter, with the greatest respect to the learned Justices, through many inappropriate perceptions of the facts and the law to support the findings of the trial court. In the end, those findings do not, in my view, rise to the effect of concurrent findings by the two courts below as the respondents' counsel canvassed they did. (p. 2316 D/2317 A)

NOTABLE POINTS OF INTEREST

UWAIFO JSC

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1. Rebuttal of false claims to property

Furthermore, the lower court fell into even graver error in the statement made by Edozie JCA and endorsed by the other learned Justices. I have already set the relevant passage out earlier in this judgment, part of which reads:

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"In the light of the evidence led by both sides, one is tempted to ask the question: why is it that at all material times, it is the respondents who were claiming that they pledged or let portions of the land in dispute to others. There was no iota of evidence or even a mere assertion that the appellants made similar dispositions in respect of the land in dispute."

This is obviously non sequitur in addition to being a misdirection, and does not need any elaborate comments. I can only ask: would many false claims by one person to property need to evoke similar claims by

another in order to be able to decide who as between them is the owner? (p. 2316 F)

EJIWUNMIJSC

2. The ways in which ownership of land may be proved

This Court in Idundun v Okumagba (1976) & 10 at pages 246 - 250 had listed the 5 ways in which ownership of land may be proved. These are:-

- (1) By traditional evidence,
- (2) By production of documents of title,
- (3) By providing acts of ownership (such as selling, leasing, renting out or farming on all or part of the land) extending over a sufficient length of time, or which are numerous and positive enough as to warrant the inference that the person is the true owner. (Ekpo v Ita) 11 NLR 68.

(4) By providing acts of long possession and enjoyment of the land. These are really more of a weapon on defence rather than offence (by S. 145 Evidence Act possession raises a presumption although this presumption can be defeated). See also Abatan v Winsalla Sc/516/66 delivered on 26/6/70 unreported.

(5) By proof of possession of connected or adjacent land in circumstances rendering it probable that claimant is also owner of such adjacent land (Section 45 of Evidence Act).

It follows that a plaintiff seeking to prove his ownership of a piece of land must identify one or the other of the five methods of proof listed above to sustain his claim. Having done so, he is not allowed to shift his ground of proof without amending his pleadings accordingly. See - Mogaji & Ors v Cadbury Nig. Ltd & sons (1985) 2 NSCC 959. (p. 2321 F)

3. The quality of evidence that would uphold a case of traditional history

Evidence that would uphold a case of traditional history must in the first place be in accordance with the pleadings, and secondly, it must be credible and reliable. See Akinloye v Eyilola (1965) NMLR 92. The respondents failed these two tests, and had the court below considered the

appeal along these lines, would not have upheld the judgment of the trial Court. The application of the rule in KOJO V BONISIE (1957) 1 WLR 1223, was in the instant case wrongly applied by the trial court, and upheld by the court below. (p.2322 D)

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REPRESENTATION

A. O. Obianwu Esq. with him K. C. Ogunji Esq., for the appellants.
Onwuka Egwu Esq., for the respondents.

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CASES REFERRED TO

Elias v. Omo-Bare (1982) 5 SC. 25 at 57-58

Ohiaeri v. Akabaje (1992) 2 NWLR (pt 221)

Kodilinye v. Odu (1935) 2 WACA 336

D Udegbe v. Nwokafor (1963) 1 ALL NLR 417

Ogboda v. Adulugba (1971) 1 ALL NLR 68 at 72-73

Emegokwue v. Okadigbo (1973) 4 SC 113 at 117

Ige v. Akoju (1994) 4 NWLR (pt. 340) 535 at 546

E Umukoro v. Nigerian Ports Authority (1997) 4 NWLR (pt. 502) 656

LEAD JUDGMENT BY UWAIFO JSC

This is an appeal from a judgment of the Court of Appeal, Port
F Harcourt Division given on 8 June, 1993. The plaintiffs as members of
Umuololo family in Ogwe village of Ukwa Division instituted this action
in a representative capacity at the High Court, Aba on 9 December, 1976.
They sought three reliefs against the defendants, namely (1) a declaration
of title to a piece of land they call Uzo Egbelu Ogwe made up of three
G portions of land known as Akami, Ogbaku, Ugiri Egbede-Iyi Ekwe; (2)
general damages of N2,000.00 for trespass; and (3) perpetual injunction.
After a full hearing, the learned trial judge gave a considered judgment on
26 March, 1985 in which he declared the plaintiffs entitled to the cus-
H tomary right of occupancy of the piece of land, awarded N500.00 as
general damages and ordered perpetual injunction against the defendants.

The defendants raised a number of issues in their appeal to the
Court of Appeal against that judgment. As I already indicated, judgment

in the appeal was given on 8 June, 1993. The appeal was dismissed. The defendants (to whom I shall henceforth refer as appellants) again appealed and raised a number of issues as follows:

"(a) Was the Court of Appeal correct in holding that the Plaintiffs/Respondents who did not prove their traditional history pleaded as root of title were entitled to a declaration of title to the land in dispute based on the rule in *KOJO vs. BONSIE*.

(b) was the Court of Appeal correct in holding that the Plaintiffs/Respondents had exercised various acts of ownership in and over the Land in dispute sufficient to warrant a declaration of title in their favour.

(c) Was the Court below right to have held that the boundaries of the land in dispute were proved.

(d) Was the Court of Appeal correct to have affirmed the trial Court's approach to the evaluation of the traditional history pleaded and given in evidence by the Defendants/Appellants.

(e) Did the Court below misdirect itself when it held that

"In the light of the evidence by both sides one is tempted to ask the question why is it that at all material times it is the Respondents who are claiming that they pledged or let portions of the land in dispute to others. There was no iota of evidence or even a mere assertion that the Appellants made a similar disposition in respect of the land in dispute." and if so, did this lead to a miscarriage of justice?

(f) was the Court of Appeal correct in its interpretation of the provisions of Section 132(1) of the Evidence Act in relation to Exhibits D and E and the document evidencing the alleged grant of Land to the 1st Defendant/Appellant which was rejected by the trial court?"

In their statement of claim, the plaintiffs (to whom I shall henceforth refer as respondents) founded their title to the land in dispute on traditional history. The averments in support of this are contained in paras. 5, 6 and 7 which I reproduce hereunder:

"5. From origin, the land in dispute had been the property of the plaintiffs through their great ancestor OLOLO. OLOLO deforested the land in dispute and exercised maximum acts of ownership over it includ-

ing farming, lumbering, harvesting economic crops.

6. OLOLO established Obasi Miri Shrine on the land and dug wells from which he obtained water. The wells so dug by OLOLO and the shrine are still visible on the land in dispute and are still being ministered to and used by the plaintiffs' people.

7. The following heads of Umuololo family have controlled the land in dispute and sacrificed the obasi Miri Juju established thereon that is to say: Ekule, Agu, Ukpo, Elechi, Okirima, Okebe, Nnah, Atasie, Owuogba and Gilbert Atasie the first plaintiff."

In the course of the judgment of the lower court, Edozie JCA who delivered the leading judgment said:

"I had earlier commented that it did not appear that the learned trial Judge found the traditional evidence of the respondents satisfactory. It is imperative for a plaintiff who seeks title and so relies on traditional history to plead the root of title and the names and the histories of their ancestors and to lead evidence in support of these: A. N. Akinloye & Anor v. Bako Eyiyele and ors (1968) NWLR, 92 at 95. Total (Nig) Ltd v. Wilfred Nweke (1978) 5 SC 1 at 12; Elias v. Omo-Bare (1982) 5 SC. 25 at 57-58, Chukwu Nnanji (1990) 6 NWLR (pt 156) p. 363 at 377; Inyang v. Eshiet (1990) 5 NWLR (pt. 149) p. 178. A party relying on evidence of traditional history must plead his root of title. He must show in his pleading and evidence who those ancestors of his are and how they came to own and possess the land and eventually passed it to him: Ohiaeri v. Akabaje (1992) 2 NWLR (pt 221) p.1. The respondents pleaded that their ancestors Ololo founded the land in dispute and deforested same but in the evidence, of PW1, he could not even say that their ancestor was Ololo although he stated they are Umuololo which respondents' counsel said mean in Ibo, children of Ololo. He mentioned the names of the successive heads of their family through whom the land devolved to the present respondents but the names mentioned did not all agree with those pleaded."

It is not altogether correct to say that p.w.1, Gilbert Atasie, did not mention Ololo in his evidence as the founder of the land in dispute. Although in his evidence-in-chief he merely said "Umuololo family defor-

ested the land in dispute", when cross-examined, he was able to say, "the land in dispute was deforested by Ololo." However, there is nothing to indicate how the lower court dealt with the failure of the respondents to discharge the burden on them to lead admissible evidence to establish the names or histories of their ancestors as pleaded. It is of crucial importance that there is such evidence in matters of traditional history in support of title to land. The lower court no doubt realized this importance as shown in the passage from the judgment of Edozie JCA. B

It seems to me that the learned Justice of the Court of Appeal begged the question and certainly misapplied the applicable law, quite apart from what looks like findings not borne out by the evidence, when it said per Edozie JCA: C

"In the light of the evidence led by both sides, one is tempted to ask the question: why is it that at all material times, it is the respondents who were claiming that they pledged or let portions of the land in dispute to others. There was no iota of evidence or even a mere assertion that the appellants made similar dispositions in respect of the land in dispute. In my view, in the face of the various acts of ownership exercised by the respondents as highlighted above and which spanned for a period of over 40 years from 1930 to 1974 the learned trial Judge was justified in holding as he did, on p. 101 lines 16-18 that 'The plaintiffs have established before the court sufficient acts of ownership and user of the land in dispute. Their story is more convincing'. A contrary finding would have been perverse. I have already expressed the view that on the printed record there was ample evidence of acts of trespass committed by the appellants on the land in dispute." D
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Since it was the respondents who sought title to the land in dispute, the burden was squarely on them to adduce credible and admissible evidence in support of that title. This has long been laid down and stated in the form of a principle that a plaintiff in a claim for a declaration of title must succeed on the strength of his case: see Kodilinye v. Mbanefo Odu (1935) 2 WACA 336; Udegbe v. Nwokafor (1963) 1 ALL NLR 417. To assess the strength of a plaintiff's case, the pleading and evidence must be examined. If the evidence is at G
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variance with the pleading, such evidence will have no value. It will be discountenanced because it is contrary to the issues joined and therefore goes to no issue worthy of consideration: see Ogboda v. Adulugba (1971) 1 ALL NLR 68 at 72-73; Emegokwue v. Okadigbo (1973) 4 SC 113 at 117; Ige v. Akoju (1994) 4 NWLR (pt. 340) 535 at 546; Umukoro v. Nigerian Ports Authority (1997) 4 NWLR (pt. 502) 656 at 666; Allied Bank (Nig.) Ltd v. Akubueze (1997) 6 NWLR (pt. 509) 374 at 396; Makinde v. Akinwale (2000) 2 NWLR (pt. 645) 435 at 450. The obvious consequence is that such a plaintiff would have failed to lead evidence to support the particular issue in question. In the present case, that would be the evidence to support the traditional history pleaded by the respondents.

Learned counsel for the appellants, Mr. Obianwu, has submitted before us as he did in the lower court, that the respondents did not prove by evidence the traditional history set up by them on the grounds that the evidence adduced by them was at variance with the averments. As already indicated, the lower court appeared to have acknowledged this but failed to give it necessary effect. The respondents failed to show by evidence the founding of the land in dispute and to trace the devolution of the land through successive ancestors right to themselves.

It is important to remark that the pleading of the devolution of the land in dispute in most unsatisfactory. The respondents did not plead whether Ololo who allegedly deforested the land, which would make it belong to him personally at that initial stage, had children. If he had, their names would be given and who among them inherited the land, or whichever manner the land devolved, at his death. Then the process by which devolution of the land continued thereafter before getting to the respondents would have been pleaded as well. But here, what has been done was merely to aver the names of some so-called heads of the Umuolol family, Umuololo being interpreted as children of Ololo. As already said, no foundation was laid for the appreciation of the emergence of these alleged children. It follows that how the heads of the family pleaded as successors of the land in dispute by way of devolution came to be is not know. They are simply referred to as heads of Umuololo family who

have controlled the land in dispute.

The respondents pleaded their ancestors in para. 7 of their statement of claim as, Ekule, Agu, Ukpo, Elechi, Okirima, Okebe, Nnah, Atasié, Owuogba and Gilbert Atasié (the first plaintiff). There is nothing to show if it is strictly in descending order of succession. The relationship of one ancestor with another is nowhere indicated (i.e. whether as father and son, or as brothers, or as uncle and nephew) in order to understand the line of devolution. Even so, when p.w. 1 gave evidence of the names of the ancestors, not only were they not stated in the order pleaded, they could also not be reconciled with those pleaded. He said in evidence:

"The members of Umuololo family pledge portions of this land and also give out some portions to members of Ngwa Iyi Ekwe for farming. One Nnah had been the family head of Umuololo and controlled the land at that time. Other heads of Umuololo family at different times were Okebe, Onuoba, Nwankwo Adiele, Adiele Atasié - my own father - Oke, Ogonnaya Dike and Dike Okebe."

Apart from names like Okebe, Nnah and Atasié which are common in the pleading and evidence, there is variance with the rest. It will be observed that ten names were pleaded and eight were given in evidence. The inevitable impression is that the names of the ancestors either pleaded or given in evidence were largely at best a matter of guesswork, but more likely fabrication. That would seem to make the traditional history false. **The law is that to establish the traditional history of land relied on as root of title, a plaintiff must plead the names of the founder and those after him upon whom the land devolved to the last successor(s) and lead evidence in support without leaving gaps or creating mysterious or embarrassing linkages which have not been and cannot be explained. In other words, the pleading of the devolution and the evidence in support must be reliable, being credible or plausible, otherwise the claim for title will fail: see Akinloye v. Eyiola (1965) NMLR 92; Elias v. Omo-Bare (1982) 5 SC 25; Mogaji v. Cadbury Nigeria Ltd (1985) 2 NWLR (pt. 7) 393; Owoade v. Omitola (1988) 2 NWLR (pt. 77) 413; Uchendu v. Ogboni (1999) 5 NWLR (pt. 603) 337.**

The case of the respondents based on traditional history clearly broke down at the stage they failed to present a reliable account of the founding and devolution of the land in dispute. There was therefore no cause to apply the rule in Kojo II v. Bonsie (1957) 1 W.L.R. 1223 as the lower court erroneously proceeded to do. It is now clearly established that for that rule to apply there must exist side by side two stories of tradition, one by each party, which are themselves credible or plausible but are in conflict, one with the other, such that the Court is unable realistically and justifiably to prefer one to the other. In that case, either of the two stories may rightly be regarded as likely to be true, or that they are probable. It follows that none of the stories in that situation is arbitrarily rejected, but each one is tested against recent acts of possession and ownership to determine which of the two stories is more probable. Once this is ascertained, the story that is less probable is rejected: see Mogaji v. Cadbury Nigeria Ltd (supra) at page 430; Ogbuokwelu v. Umeanafunkwa (1994) 4 NWLR (pt. 314) 676 at 699; Okwaranobi v. Mbadugha (1998) 7 NWLR (pt. 558) 471 at 481.

It also follows that it was not open to the lower court to take the issue of any alleged long possession into account to confirm the title awarded the respondents since the traditional history they relied on for title had failed. **Where a plaintiff by his pleading and evidence relies on traditional history for his root of title to land, he fails or succeeds on that history. If the history succeeds, having been accepted by the court on its merits either as standing alone without any competing story, or where any other story is seen to be unreliable and completely rejected, there is no need to show recent acts of ownership. The traditional history is then accepted on its strength and cogency. This is what the authorities have established that where evidence of traditional history is not contradicted, or is not in conflict with another that was set up, and is found by the court to be cogent, it can support a claim for declaration of title without further requirement: see Olujebu of Ijebu v. Oso, the Eleda of Eda (1972) 5 S.C. 143 at p. 151; F. M. Alade v. Lawrence Awo (1975) 4**

S.C. 215 at p. 228; Aikhionbare v. Omoregie (1976) 12 SC 11 at p. 27; Iri v. Erhurhobara (1991) 2 NWLR (pt. 173) 252 at 269. **Conversely, if the history fails, the plaintiff cannot abandon his pleading and rely on acts of ownership over a long period of time, numerous and positive, which is only available to support title base on immemoriality - i.e. time beyond human memory - which is one of the ways of proving title but is separately and distinctly alleged, nor can he be permitted to rely on any recent acts of possession and ownership to back his claim for title: see Mogaji v. Cadbury Nigeria Ltd. (supra) at page 341; Balogun v. Akanji (1988) 1 NWLR (pt. 70) 301 at 322; Fasoro v. Beyioku (1988) 2 NWLR (pt. 76) 263 at 273; Eronini v. Iheuko (1989) 2 NWLR (pt. 101) 46 at 67; Udeze v. Chidelo (1990) 1 NWLR (pt. 125) 141 at 160; Obiora v. Duru (1994) 8 NWLR (pt. 365) 631 at 645. I therefore answer issues (a), (b) and (d) in the negative.**

It may be necessary to consider evidence of possession in a case like this, where a plaintiff has failed to prove title, in order to ascertain whether he is in any event entitled to damages and injunction claimed for an alleged trespass if it is shown that he was in possession which was disturbed, as the authorities establish: see Oluwa v. Eniola (1967) NMLR 339; Kareem v. Ogunde (1972) 1 ALL NLR 73; Adegbite v. Ogunfaolu (1990) 4 NWLR (pt. 146) 578. This is on the basis that trespass is essentially an issue of who is in possession. The law is that a person in possession of land even as a trespasser can sue another person who thereafter comes upon the land unless that other is the owner or shows some title which gives him a better right to be on the land: see Aromire v. Awoyemi (1972) 2 S.C. 182; Amakor v. Obiefuna (1974) 1 ALL NLR 119 at 126; Oduola v. Nabhan (1981) 5 SC 197 at 214; Ekpen v. Uyo (1986) 5 SC 1 at 29-30. It is therefore necessary to examine acts of possession, if any.

The respondents pleaded, as acts of ownership and possession, that (1) they granted farming rights to some people upon payment of H tributes and to some upon payment of rents; (2) they made a grant of part of the land to the 1st appellant as a dwelling place; and (3) they pledged two portions of the land, one in 1930 and the other in September,

1971. There is nothing in the record of evidence to show the said evidence as to the farming rights made upon payment of tributes and to whom. As for farming rights granted upon payment of rents, rent of N20.00 was pleaded. The evidence was rather bizarre. There was contradiction as to the land one of the witnesses was given and as to the rent he paid. He said he paid one pound (Nigerian pound then) in 1970 and two pounds in 1974 not N20.00 pleaded. He denied ever farming on Ogbaku/Ugiri/Egbede portion of the land as pleaded but that he farmed on the portion called Akami. This witness, Adiele Nwachukwu, had been sued by the respondents as the 5th defendant in this suit as if he was a representative of the appellants' village. But he was struck out at the instance of the appellants on the ground that he was not a native of that village. The alleged pledges which the appellants clearly denied were also fraught with discrepancies and doubts as to where the respective lands are located and by whom pledged. Learned counsel for the appellants made detailed submissions to elicit all these matters.

It seems to me that there is no concrete evidence to establish that the respondents were in possession of the land in dispute. There would appear to be no support for the learned trial judge's finding that the respondents proved sufficient acts of ownership and user of the land in dispute. The lower court was certainly in error to have upheld that finding. Furthermore, the lower court fell into even graver error in the statement made by Edozie JCA and endorsed by the other learned Justices. I have already set the relevant passage out earlier in this judgment, part of which reads:

"In the light of the evidence led by both sides, one is tempted to ask the question: why is it that at all material times, it is the respondents who were claiming that they pledged or let portions of the land in dispute to others. There was no iota of evidence or even a mere assertion that the appellants made similar dispositions in respect of the land in dispute."

This is obviously non sequitur in addition to being a misdirection, and does not need any elaborate comments. I can only ask: would many false claims by one person to property need to evoke similar claims by another in order to be able to decide who as between them is the owner?

I have no doubt in my mind that the lower court finally reached a wrong conclusion in this matter, with the greatest respect to the learned Justices, through many inappropriate perceptions of the facts and the law to support the findings of the trial court. In the end, those findings do not, in my view, rise to the effect of concurrent findings by the two courts below as the respondents' counsel canvassed they did. I would answer issue (e) in the negative. I find it unnecessary to consider issues (c) and (f) in the circumstances.

I am satisfied that the respondents woefully failed to prove that they deserved to be declared the owners of the land in dispute or that they were in possession to be entitled to damages and injunction. Their action ought to have been dismissed. I therefore allow this appeal and set aside the judgments of the two courts below together with the costs awarded. I accordingly dismiss the action in its entirety with costs of N10,000.00 to the appellants. In addition, I award the appellants N2,500.00 and N3,500.00 as costs in the High Court and Court of Appeal respectively.

KARIBI-WHYTE JSC

I have read the leading judgment of my learned brother Uwaifo, JSC in this appeal. I agree with the reasoning and the conclusion that this appeal succeeds. I also will allow the appeal with costs assessed in the leading judgment to the Appellants.

MOHAMMED JSC

I agree that this appeal ought to be allowed. I have had the privilege of reading the judgment of my learned brother, Uwaifo, J.S.C., in draft. For the reasons given in that judgment I too would allow the appeal and dismiss the action filed by the respondents who were plaintiffs before the High Court. The judgments of the two lower courts are set aside. I abide by all the consequential orders made in the lead judgment.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment of my learned brother Uwaifo JSC. I agree with it entirely. I will only make a few comments of my own on the crucial issue of traditional history pleaded and the evidence given in support thereof.

It is abundantly clear that the plaintiffs who are respondents in this founded their title to the land in question on traditional history. The averments in support of this are contained in paragraphs 5, 6 and 7 of their Statement of Claim. These paragraphs read as follows:

"5. From origin, the land in dispute had been the property of the plaintiffs through their great ancestor OLOLO. OLOLO deforested the land in dispute and exercised maxim acts of ownership over it including farming, lumbering, harvesting economic crops.

OLOLO established Obasi 'Miri' shrine on the land and dug wells from which he obtained water. The wells so dug by OLOLO and the shrine are still visible on the land in dispute and are still being ministered to and used by the plaintiffs' people.

7. The following heads of Umuololo family have controlled the land in dispute and sacrificed the Obasi Miri Juju established thereon that is to say: Ekule, Agu, Ukpo, Elechi, Okirima, Okebe, Nnah, Atasie, Owuogba and Gilbert Atasie the first plaintiff."

For the plaintiffs to succeed on the state of the pleadings, they must satisfy the court by credible evidence as to the origin and devolution of the title in respect of the land in dispute down to themselves. This is a well settled principle of law. This court in Alhaji Elias v. Omo Bare (1982) 5 S.C 25 per Obaseki, JSC restated the principle as follows:

"This court has not spared its breath of recent and at lease in the past 10 years in all appeals on land matters involving a claim for declaration of title to restate the principle that for a plaintiff to succeed in such a claim, there must be credible evidence establishing the origin and devolution of the title down to the plaintiff. Where the evidence is unsatisfactory as to the description and identity of the land or as to the origin and devolution of title as has been the case in this appeal, the claim must fail."

So, a party relying on evidence of traditional history must plead his root of title. Not only that he must show in his pleading who those ancestors of his were and how they came to own and possess the land and eventually pass it to him. In the case in hand paragraph 7 wherein the plaintiffs pleaded devolution of title is scanty and unsatisfactory. The averment in paragraph 7 did not state how many children Ololo had, if any; it did not state the link between the alleged Ololo and the alleged family heads including the 1st plaintiff. Clearly therefore the line of succession was not traced.

But what was the evidence given? PW1 Gilbert Atasie said in evidence;

"One Nnah had been the family head of Umuololo and controlled the land at that time. Other heads of Umuololo family at different times were Okebe, Onuoba, Nwankwo, Adiele, Atasie - my own father, Oke, Ogbonnaya Dike and Dike Okebe. These men have died and I am now the present head of Umuololo family."

The first thing to be observed is that ten names were pleaded but only eight names were given in evidence. Secondly, out of the names given in evidence, only three were pleaded in paragraph 7.

It cannot be said from any view point that the plaintiffs established their root of title pleaded. This is supported by the view held by the Court of appeal. That court per Edozie JCA said:

"I had earlier commented that it did not appear that the learned trial judge found the traditional evidence of the respondents satisfactory. It is imperative for a plaintiff who seeks title and so relies on traditional history to plead the root of title and the names and the histories of their ancestors and to lead evidence in support of these"

The failure of the plaintiffs to establish their root of title to the land as pleaded by them meant that their claim failed. At that stage their claim should have been dismissed. Rather, the two courts below proceeded to consider the various acts of ownership exercised by the plaintiffs. The trial court held:

"The plaintiffs have established before the court sufficient acts of ownership and user of the land in dispute. Their story was more

convincing."

The Court of Appeal affirmed this view. It said per Edozie JCA:

"In my view, in the face of the various acts of ownership exercised by the respondents as highlighted above and which spanned for a period of over 40 years from 1930 to 1974 the learned trial judge was justified in holding as he did, on p. 101 lines 16-18 that 'The Plaintiffs have established before the court sufficient acts of ownership and user of the land in dispute. Their story is more convincing.' A contrary view would have been perverse."

The Court of Appeal also said:

"Again by the finding, and also the trial judge's apparent rejection of the respondents own traditional history, the door was open for the competing claims to be resolved by reference to the facts in recent years as established by evidence in line with the principle led down in the celebrated case of Kojo v. Bonsie (1957) 1 WLR."

As I indicated earlier, the plaintiffs had failed to prove the root of title pleaded by them. Their claim, at that point, should have been dismissed. The recourse to acts of possession and ownership on the basis of the rule in Kojo v. Bonsie (supra) is misconceived and a grave error. The rule would not apply where a party who relies on traditional history as root of title, fails to establish that root, as in the instant case. In Obioha v. Duru (1994) 8 NWLR (pt. 365) 631; Ogbuokwelu v. Umeanfunkwa (1994) 4 NWLR (pt. 341) 676 this court clearly stated that the rule in Kojo v. Bonsie would only apply where both histories are plausible and capable of credibility and not in a situation such as the present case where the traditional history of the plaintiffs was unproved and reliable. What this means is that the Plaintiffs failed to prove their claim which ought to have been dismissed.

For this reason and the fuller reasons given by my learned brother Uwaifo, JSC, I would also allow this appeal and set aside the judgments of the two courts below together with the costs awarded. I accordingly dismiss the action of the plaintiffs in its entirety with costs of N10,000.00 to the defendants/appellants.

EJIWUNMI JSC

I have read in advance the judgment of my learned brother Uwaifo JSC entering judgment for the appellants in this appeal. For the reasons given in the said appeal, I will also uphold the appeal.

The issue that calls for determination in this appeal is whether the court below was right to have upheld the judgment of the trial court that the respondents duly established their traditional history as pleaded.

It is the contention of the appellants that the court below was wrong to have affirmed the judgment of the trial court on the other hand, the argument of the respondents is that they duly established their traditional history at the trial.

But apart from all that, the basic question that has arisen in this appeal is whether the respondents led evidence in accordance with their pleadings. It must be remembered that once pleadings, are ordered filled and exchanged, the parties and the courts are bound by the pleadings so filed. It therefore follows remorselessly that evidence must be led in accordance with the pleadings. Evidence led not in conformity with the pleadings, and/or upon facts not pleaded went to no issue. See - Nkanu v Omen (1977) 5 SC 13; Ekpoke v Usilo (1978) 6 - 7 Sc. 187; Ataye v Ofili (1986) 1 NWLR (pt. 15) 134; Egbue v Araka (1988) 3 NWLR (pt. 84) 598; Overseas construction Ltd v. Creek Enterprises Ltd (1985) 3 NWLR (pt. 13) 407. The next question is whether the respondents established the traditional history they averred in their pleadings to support their claim to the disputed land.

This Court in Idundun v Okumagba (1976) & 10 at pages 246 - 250 had listed the 5 ways in which ownership of land may be proved. These are:-

- (1) By traditional evidence,
- (2) By production of documents of title,
- (3) By providing acts of ownership (such as selling, leasing, renting out or farming on all or part of the land) extending over a sufficient length of time, or which are numerous and positive enough as to warrant the inference that the person is the true owner. (Ekpo v Ita) 11 NLR 68.

(4) By providing acts of long possession and enjoyment of the land. These are really more of a weapon on defence rather than offence (by S. 145 Evidence Act possession raises a presumption although this presumption can be defeated). See also Abatan v Winsalla Sc/516/66 delivered on 26/6/70 unreported.

(5) By proof of possession of connected or adjacent land in circumstances rendering it probable that claimant is also owner of such adjacent land (Section 45 of Evidence Act).

It follows that a plaintiff seeking to prove his ownership of a piece of land must identify one or the other of the five methods of proof listed above to sustain his claim. Having done so, he is not allowed to shift his ground of proof without amending his pleadings accordingly. See - Mogaji & Ors v Cadbury Nig. Ltd & sons (1985) 2 NSCC 959.

In the case in hand although the respondents pleaded traditional history, it is manifest from the evidence led that they failed to establish their claims to the disputed land accordingly. Evidence that would uphold a case of traditional history must in the first place be in accordance with the pleadings, and secondly, it must be credible and reliable. See Akinloye v Eyilola (1965) NMLR 92; Elias v Omo-Bare (1982) 5 SC 25; Mogaji v. Cadbury Nigeria Ltd (1985). The respondents failed these two tests, and had the court below considered the appeal along these lines, would not have upheld the judgment of the trial Court. The application of the rule in KOJO V BONSIÉ (1957) 1 WLR 1223, was in the instant case wrongly applied by the trial court, and upheld by the court below.

In the result, the appellants' appeal must be upheld as it is manifest that the respondents failed to establish their claim to the land by the traditional history they pleaded, and did not therefore establish any claim to the land as they are obliged to do. See - KODILINYE V ODU (1935) 2 WACA 336; UDEGBE V. NWOKOFAR (1963) 1 ALL NLR 417.

I will therefore uphold this appeal for the above reasons and the fuller reasons given in the leading judgment of my brother Uwaifo JSC. The appellants are awarded costs in the sum of N10,000.00. In addition, I award appellant N2500 and N3500 as costs in the High Court and Court of Appeal.