

SUPREME COURT OF NIGERIA
30TH JUNE, 2000. SC. 15/1995
CORAM:- A. B. WALI, M. E. OGUNDARE, A. I. IGUH,
A. I. KATSINA-ALU, S. O. UWAIFO, JJSC

SUNMONU OLOHUNDE & ANOR. APPELLANTS
AND
PROFESSOR S. K. ADEYOJU RESPONDENT

EVIDENCE - Pleadings - Evidence - Which is at variance with the pleadings - Goes to no issue.

EVIDENCE - Unchallenged evidence - Attitude of the court - To such evidence.

JUDGMENTS - Evidence - Pleadings - Where the plaintiff adduced no evidence - As to the root of title he pleaded - His case ought to have been dismissed.

JUDGMENTS - Findings - Unsupported by any legal evidence - Is perverse and erroneous - And cannot be allowed to stand.

LAND LAW - Land Use Act - Certificate of occupancy - Deemed to be defective - Where a certificate of occupancy has been granted to one of two claimants - Who has not proved a better title - It must be deemed to be defective - And against the spirit of the Act.

LAND LAW - Land Use Act - Certificate of occupancy - Effect of - It is not a conclusive evidence of any right, interest or valid title to land - In favour of the grantee.

LAND LAW - Land Use Act - Certificate of occupancy - Onus of proof - The onus is on the grantee of such certificate - To establish that the land was vested in him - Before the commencement of the Act

LAND LAW - Land Use Act - Certificate of occupancy - Validity - Condition for the validity of a certificate of occupancy issued under the Act

LAND LAW - Land Use Act - Statutory right of occupancy - Deemed holder - A plaintiff who failed to establish that he had any right to a land in dispute - Cannot be deemed a holder of a statutory right of occupancy - Under section 34 of the Act.

LAND LAW - Title to land - Occupation and possession of land - Better title - The law will ascribe possession or occupation - To the person who proves a better title.

LAND LAW - Title to land - Onus of proof - The onus lies on the plaintiff to satisfy the court - That he is entitled on the evidence brought by him to the declaration of title he claimed

LAND LAW - Title to land - Root of title - Once a party traces his root of title to a particular source - To succeed he must also establish the title of that person or source - From whom he claims to have derived title.

LAND LAW - Trespass and injunction - Title to land - Whenever a claim for trespass is coupled with a claim for an injunction - The title of the parties to the land in dispute is automatically put in issue.

LAND LAW - Trespass - Possession - Title to land - Where two parties are on land claiming possession - Trespass can only be at the suit of that party - Who can show that title of the land is in him.

TRESPASS - Damages - Action for - Only a person in possession of land in dispute at the material time - Can maintain an action for damages for trespass.

FACTS

In the Ibadan Judicial Division of the High Court of Justice, Oyo State, the plaintiff/respondent instituted an action against the defendants/appellants jointly and severally claiming for: a declaration that he is the person entitled to occupation and possession of a piece of land situate at Akoka village, Ife Road, Ibadan; special and general damages for trespass; and injunction. The plaintiff's case as pleaded, is that the land in dispute formed part of a large tract of land granted to Beyioku Iseke, the ancestor of Olalere Beyioku by one Efun, a great Ibadan warrior who had acquired the land by first settlement thereon. The case, as presented by the plaintiff, *viva voce*, is that Beyioku was the original owner of the land in dispute by first settlement. In 1975, P.W. 5 Olalere Beyioku and other members of the Beyioku family sold the land in dispute to P.W. 2, Daniel Wellington Aiyedun, and executed a deed of conveyance dated the 21st January, 1976 in his favour. This deed of conveyance, Exhibit G, was registered as No. 57 at page 57 in volume 1881 of the Register of Deeds kept in the Land Registry at Ibadan. P.W. 2 subsequently resold the same land in 1977 to the plaintiff for the sum of N2,600.00 per the receipt Exhibit A dated the 1st March, 1977.

The plaintiff claimed to have gone into possession of the land by clearing same and that he planted *gmelina arborea* trees round its perimeter. He later applied for and was granted a Certificate of Statutory right of occupancy on the 9th March, 1981 by the Oyo State Government in respect of the land. This is Exhibit B. He visited the land in 1982 and discovered that a mosque and an access road had been constructed on the land by the 2nd defendant and that the 1st defendant deposited heaps of sand thereon and uprooted his *gmelina arborea* trees, hence this action. The defendants, on the other hand, denied the above claims of the plaintiff. In particular they denied that *gmelina arborea* trees were ever planted on the land. They testified that Beyioku family land was on the right hand side of the old Ibadan to Ife road, facing Ife, while their Olohunde family land is on the left. The defendants' case was that the land in dispute formed part of a large expanse of virgin land which was originally settled on by their ancestor Olohunde, after the Kiriji war. Olohunde used the land for farming until his death when it devolved on his descendants who

continued to use it for farming. They built houses on part of the land, established a mosque in 1950 thereon and had always used the access road on the land which was originally an ancient foot part. The defendants claimed to be the owners in possession of the land in dispute having inherited it from their ancestor, Olohunde.

At the conclusion of hearing, the learned trial judge, after a review of the evidence entered judgment in favour of the plaintiff. Dissatisfied, the defendants appealed to the Court of Appeal Ibadan Division, which court unanimously dismissed the appeal. The defendants have further appealed to the Supreme Court raising four issues.

ISSUES FOR DETERMINATION

"1. Has the court below not misinterpreted and misapplied the provisions of Section 34 of the Land Use Act 1978 when it relied on mere possession without title to hold that the Respondent was entitled to a Certificate of Statutory Right of Occupancy.

2. Whether, with pleading and evidence at variance, the Respondent had established his case and whether the Court below was right in law to have held that the Respondent who pleaded the original settlement of EFUN as his root of title needed not to have proved the same.

3. Whether the Court below was right in law by holding that the Respondent was entitled to a grant of Exhibit "B" - Certificate of Statutory Right of Occupancy - when the Respondent did not discharge the burden of proving that the land was vested in him before the commencement of the Land Use Act 1978.

4. Whether the finding that the Appellants did not prove their family ownership of the land in dispute was supported by evidence on Record and whether the Court below did not thereby cause a miscarriage of justice by shifting the onus of proof on the Defendants/Appellants."

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

Land Law - Trespass and injunction

1. It is an elementary principle of law that whenever a claim for trespass is coupled with a claim for an injunction, the title of the parties to the land

in dispute is automatically put in issue. See Akintola v. Lasupo (1991) 3 N.W.L.R. (part 180) 508 at 515. The position is even much stronger where, as in the present action, the plaintiff claims a declaration that he is the person entitled, as against the defendant, to occupation and possession of the piece or parcel of land in dispute. (p. 2270 F) B

Title to Land - Occupation and Possession

2. The law is well settled that when the issue is as to which of two claimants has a better right to the possession or occupation of a piece or parcel of land in dispute, the law will ascribe such possession and/or occupation to the person who proves a better title thereto. See Aromire v. Awoyemi (1972) 1 ALL N.L.R. (Part 1) 101 at 112. (p. 2271 B) C

Trespass - Possession

3. In the same vein, where two parties are on land claiming possession, the possession being disputed, trespass can only be at the suit of that party who can show that title of the land is in him. See Awoonor Renner v. Daboh 2 W.A.C.A. 258 at 259 and 263. (p. 2271 C) D E

Title to Land - Onus of Proof

4. Having arrived at the conclusion that it is the question of title to the land in dispute that is the real issue between the parties, it is relevant to draw attention to another basic principle of law which governs the issue of onus of proof in an action involving title to land. The onus in such cases lies on the plaintiff to satisfy the court that he is entitled on the evidence brought by him to the declaration of title claimed. In this regard, the plaintiff must rely on the strength of his own case and not on the weakness of the defendant's case. If this onus is not discharged, the weakness of the defendant's case will not help him and the proper judgment will be for the defendant. See Kodilinye v. Mbanefo Odu 2 W.A.C.A. 336 at 337 and Frempong v. Brempong 14 W.A.C.A. 13. Any evidence, however, adduced by the defendant which, to any extent is favourable to the plaintiff's case, will undoubtedly go to strengthen the case for the plaintiff. See Josiah Akinola and another v. Oluwo and others (1962) 1 F G H

ALL N.L.R. 224 at 225. (p. 2271 D)

Title to land - Root of title

5. It is well settled that once a party pleads and traces his root of title in
 B an action involving title to land to a particular person or source, and this
 averment, as in the present case, is disputed or challenged, that party, to
 succeed, as a plaintiff in the suit must not only establish his own title to
 such land, he must also satisfy the court on the validity of the title of that
 C particular person or source from whom he claims to have derived his
 title. See Mogaji v. Cadbury Nigeria Ltd (1985) 7 S.C. 59, (1985) 2
N.W.L.R. (Part 7) 393 at 431, Elias V. Owo Bare (1982) 5 S.C.. 25 at 37
 -58. It seems to me that the onus of proof is on the plaintiff in the
 D particular circumstances of this case and the state of the pleadings to
 prove the radical title he averred, namely, the title of Efun to the land in
 dispute. This, the plaintiff neither proved nor did he as much as attempt
 to establish the same as no evidence of whatever nature was led by him
 on this all important issue. (p. 2275 H)

Evidence - Pleadings

6. In the first place, it is beyond dispute that parties are bound by their
 pleadings and evidence which is at variance with the averments in the
 F pleadings goes to no issue and should be disregarded by the court. See
Emegokwue v. Okadigbo (1973) 4 .S.C. 113. In my view, the *viva voce*
 evidence adduced on behalf of the plaintiff which traced his root of title
 to Beyioku ought not to have been received in evidence by the trial court
 and should have been disregarded by other courts below. This is be-
 G cause that evidence went to no issue as a party will not be allowed after
 pleading a particular set of material facts to turn round and base his case
 on a totally different set of facts without an amendment of his leading.
 See Ehimare v. Emhonyon (1985) 1 N.W.L.R. (part 2) 177 at 184.
 H (p. 2278 C)

Judgments - Evidence

7. In this case, the plaintiff adduced no evidence whatever, whether credible

or incredible, as to the root of title he pleaded and as to the devolution of the title claimed from Efun down to himself. Having thus failed to establish the case put forward by him in his pleadings, the plaintiff's case ought to have been dismissed by both courts below. See Edward Egonu v. Eziamaka Egonu (1978) 11 - 12 S.C. 111 at 135 - 136. (p. 2279 G) B

Judgments - Findings

8. I am therefore in complete agreement with the contention of the learned counsel for the defendants that the finding of the trial court as affirmed by the court below that the plaintiff had established his case is unsupported by any legal evidence, clearly perverse and patently erroneous. It cannot therefore be allowed to stand. See Igwego v. Ezengo (1992) 6 N.W.L.R. (part 249) 561. (p. 2280 A) C D

Certificate of Occupancy - Onus of Proof

9. The plaintiff's claim of entitlement to the certificate of statutory right of occupancy, Exhibit B, was predicated on his contention that on the coming into force of the Land Use Act, the said land was vested in him by virtue of his ownership thereof, having purchased the same from P.W. 2 in 1977. If the land in dispute was vested in the plaintiff immediately before the commencement of the Land Use Act, 1978, the grant of Exhibit B to him would be without fault and consequently valid. The onus is however on him, the grantee of such certificate, to establish that the land was vested in him immediately before the commencement of the Act. As the position was explained by this court in Ogunleye v. Oni (1990) 2 N.W.L.R. (Part 135) 745 at 752, 774 - 786. (p. 2281 B) E F G

Statutory right of Occupancy - Deemed holder

10. In my view, the plaintiff who failed to establish that he had any right or title to or, indeed, any interest whatsoever, whether legal or equitable, to the land in dispute cannot by any means be rightly said to have had the land in dispute vested in him immediately before the commencement of the Land Use Act on the 29th March, 1978. He cannot, therefore, rightly be deemed a holder of a statutory right of occupancy under section 34 of H

the Land Use Act immediately before the commencement of that Act.
(p. 2281 F)

Certificate of Occupancy - Effect of

- B 11. I think the point must be stressed that a certificate of statutory or customary right of occupancy issued under the Land Use Act, 1978 cannot be said to be conclusive evidence of any right, interest or valid title to land in favour of the grantee. It is, at best, only a prima facie evidence of such right, interest or title without more and may in appropriate cases be effectively challenged and rendered invalid and null and void. See Lababedi v. Lagos Metal Industries (Nig.) Ltd (1973) N.S.C.C. 1 at 6. (p. 2282 E)

D ***Certificate of Occupancy - Deemed to be defective***

12. Where a certificate of occupancy has been granted to one of two claimants who has not proved a better title, it must be deemed to be defective and to have been granted or issued erroneously and against the spirit of the Land Use Act and the holder of such a certificate would have no legal basis for a valid claim over the land in issue. So, too, where it is shown by evidence that another person other than the grantee of a certificate of occupancy had a better right to the grant, the court may have no option but to set aside the grant or otherwise discountenance it as invalid, defective and/or spurious as the case may be. See Joshua Ogunleye v. Oni (supra). (p.2282 F)

Certificate of Occupancy - Validity

- G 13. For a certificate of occupancy under the Land Use Act, 1978 to be therefore valid, there must not be in existence at the time the certificate was issued, a statutory or customary owner of the land in issue who was not divested of his legal interest to the land prior to the grant. (p. 2283 A)

H

Evidence - Unchallenged evidence

14. The law is well settled that where the evidence given by a party to any proceedings was not challenged by the opposite party who had the

opportunity to do so, it is always open to the court seised of the case to act on such unchallenged evidence before it. See Isaac Omoregbee v. Daniel Lawani (1980) 3 - 4 S.C. 108 at 117. (p. 2284 E)

Trespass - Damages

15. On the issue of trespass, it is plain that only a person in possession of land in dispute at the material time can maintain an action for damages for trespass. See Olugbenro v. Ajagunbade III (1990) 3 N.W.L.R. (part 136) 37, Adebanjo v. Brown (1990) 3 N.W.L.R. (part 141) 661. I have already observed that where two parties contest possession or right to possession, the law ascribes possession to the party who has proved a better title to the land in dispute. See too Mogaji v. Cadbury (Nig.) Ltd (1985) 7 S.C. 59 at 77 - 72, Onwuka v. Ediala (1989) 1 N.W.L.R. (part 96) 182. The plaintiff was unable to prove possession of the land in dispute and his claims in damages for trespass must be and are hereby dismissed. The same goes with the claim for perpetual injunction (p. 2286 C)

NOTABLE POINTS OF INTEREST

OGUNDARE JSC

1. Consequence of a party transferring land that did not belong to him
What the evidence of all these witnesses boiled down to is that Beyioku family has land on the right side of the Old Ibadan - Ife road when facing Ife direction while Olohunde family has land on the left side of the road with the road marking the boundary between the two families. The land in dispute is on the left side of the road, that is, on the same side as the Olohunde family land. In effect Beyioku family sold to PW2 what did not belong to them. PW2 did not acquire any title to the land which he could pass to the Plaintiff. (p. 2292 C)

UWAIFO JSC

2. How vested rights recognized under Land Use Act can be defeated
It is also not in doubt that under s.5(1) (a) of the Act, it shall be lawful for the Governor to grant statutory rights of occupancy to any persons in

respect of land, whether or not in an urban area. Under s.5(2), when such a grant is made, all existing rights to the use and occupation of the land which is the subject of the statutory right of occupancy shall be extinguished. But these provisions so far referred to are certainly not to be applied to defeat vested rights recognized under the Act itself. They may, admittedly, defeat "existing rights to the use and occupation of the land" but not vested rights unless such vested rights are first revoked under s.28 of the Act as appropriate. This may be (a) for overriding public interest, (b) by notice on behalf of the President for public purposes, (c) for breach of the provisions imposed by s. 10 of the Act, (d) for breach of any term envisaged by s.8 of the Act, (e) for refusal or neglect to comply with the requirement specified as per s.9(3) of the Act. In all these cases, the revocation shall be signified by notice duly issued and shall become valid when received by the person with such vested right: see s.28(6) and (7) of the Act. It is an accepted legal principle that vested rights are not lightly taken away. Under the Land Use Act it must be in accordance with s. 28 and in addition compensation is payable by virtue of s.29. (p. 2296 F)

3. *When the burden of proof is wrongly placed on a party - Effect*

When the burden of proof is wrongly placed on a party, the judge will act under a misapprehension in the resolution of the issues involved. He will either make wrong presumptions or fail to recognize where necessary presumptions should be made. In consequence of or in addition to such skewed approach, the weight of opinion of the judge as to the direction the case ought to go might be seriously affected, leading to a miscarriage of justice: see In re Moulton, Graham v. Moulton 22 TLR 380 at 384 cited in Sandy v. Hotogua (1952) 14 WACA 18 at 20. (p. 2299 G)

REPRESENTATION

H Alhaji A. Ishola-Gbenla for the appellants.
A. Akintola for the respondents.

CASES REFERRED TO

Akintola v. Lasupo (1991) 3 N. W. L. R. (part 180) 508 at 515

Kponuglo v. Kodadja 2 W. A. C. A. 24

Okorie v. Udom (1960) 5 S. F. C. 162, (1960) S.C.N.L.R. 326

The Registered Trustees of the Apostolic Church v. Olowoleni (1990) 6 N. W. L. R. (part 158) 514 B

Aromire v. Awoyemi (1972) 1 All N. L. R. (Part 1) 101 at 112

Fasoro v. Beyioku (1988) 2 N. W. L. R. (Part 76) 263

Kodilinye v. Odu 2 W. A. C. A. 336 at 337

Frempong v. Brempong 14 W. A. C. A. 13 C

Akinola v. Oluwo (1962) 1 All N. L. R. 224 at 225

Oduaran v. Asarah (1972) 1 All N. L. R. (Part 2) 137

Idundun v. Okumagha (1976) 9 and 10 S. C. 227

D

STATUTE REFERRED TO

Land Use Act, Cap. 202, Laws of the Federation of Nigeria, 1990; ss. 34 and 51(i)

E

LEAD JUDGMENT BY IGUH JSC

By a Writ of summons issued on the 12th day of March, 1982 in the Ibadan Judicial Division of the High Court of Justice, Oyo State, the plaintiff, who is now the respondent, instituted an action against the defendant, now the appellants, jointly and severally claiming, as subsequently amended, as follows:- F

"1. *DECLARATION that he is the person entitled to occupation and possession of the piece of land measuring about 20 metres by 60 metres (67ft x 200ft) covering an area of approximately 0.12 Hectre, G situate at Akoka Village, Ife Road, Ibadan and more particularly marked and delineated on Plan No. L4 & L/D 2131 drawn by Laniyonu & Lawson, Licensed Surveyors and dated 2nd August, 1975 and attached to the Certificate of Statutory Right of Occupancy dated 9th January, 1981 H Registered as No. 9 at page 9 in volume 2357 of the Land Registry in Ibadan.*

2. *The sum of N5,000.00 (five thousand naira) being special*

and general damages for trespass committed by the Defendants on the said land as follows:

1st Defendant

	Special Damages	N1,700.00
B	General Damages	N 800.00
		N2,500.00

2nd Defendants

	Special Damages	N1,700.00
C	General Damages	800.00
		N2,500.00

3. INJUNCTION restraining the defendants, their agents, servants and privies from committing further acts of trespass on the said piece or parcel of land."

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

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

E The case, as presented by the plaintiff, viva voce, is that Beyioku was the original owner of the land in dispute by first settlement. In 1975, P.W. 5, Olalere Beyioku and other members of the Beyioku family sold the land in dispute to P.W. 2, Daniel wellington Aiyedun, and executed a deed of conveyance dated the 21st January, 1976 in his favour. This deed of conveyance, Exhibit G, was registered as No. 57 at Page 57 in Volume 1881 of the Register of Deeds kept in the Land Registry at Ibadan. Daniel Wellington aiyedun subsequently resold the same land in 1977 to the plaintiff for the sum of N2,600.00 per the receipt Exhibit A dated the 1st March, 1977.

H The plaintiff claimed to have gone into possession of the land by clearing the same and that he planted gmelina arborea trees round its perimeter. He later applied for and was granted a certificate of statutory right of occupancy on the 9th March, 1981 by the Oyo State Government in respect of the land. This is Exhibit B and it was registered as No. 9 at page 9 in Volume 2357 of the Land Registry at Ibadan. He visited the land in January, 1982 and discovered that a mosque and an access road

had been constructed on the land by the 2nd defendant and that the 1st defendant deposited heaps of sand thereon and uprooted his gmelina arborea trees, hence this action.

The defendant, on the other hand, denied the above claims of the plaintiff. In particular, they denied that gmelina arborea trees were ever planted on the land. They testified that Beyioku family land was on the right hand side of the old Ibadan to Ife road, facing Ife, while their Olohunde family land is on the left. The defendant's case was that the land in dispute formed part of a large expanse of virgin land which was originally settled on by their ancestor, Olohunde, after the Kiriji war. Olohunde used the land for farming until his death when it devolved on his descendants who continued to use it for farming. They built houses on part of this land, established a mosque in 1950 thereon and had always used the access road on the land which was originally an ancient foot path. The defendants claim to be the owners in possession of the land in dispute, having inherited it from their ancestor, Olohunde.

At the conclusion of hearing, the learned trial Judge, Oloko, J. after a review of the evidence on the 29th September, 1983 found for the plaintiff. The court accordingly granted him declaration that he was entitled to the occupation and possession of the land in dispute, damages for trespass and injunction as claimed.

Dissatisfied with this judgment of the trial court, the defendants lodged an appeal against the same to the Court of Appeal, Ibadan division, which court in a unanimous decision on the 4th day of July, 1989 dismissed the appeal. The award of N1,100.00 as special damages to the plaintiff against the 2nd defendant by the trial court was however disallowed.

Aggrieved by this decision of the court of Appeal, the defendants have further appealed to this court.

Seven grounds of appeal were filed by the appellants against this decision of the Court of appeal. It is unnecessary to reproduce them in this judgment. It suffices to state that the parties pursuant to the Rules of this court filed and exchanged their written briefs of argument.

The four issues distilled from the appellants' grounds of appeal

set out on their behalf for the determination of this court are as follows:-

"1. Has the court below not misinterpreted and misapplied the provisions of Section 34 of the Land Use Act 1978 when it relied on mere possession without title to hold that the Respondent was entitled to a
B Certificate of Statutory Right of Occupancy.

2. Whether, with pleading and evidence at variance, the Respondent had established his case and whether the Court below was right in law to have held that the Respondent who pleaded the original settlement of EFUN as his root of title needed not to have proved the same.
C

3. Whether the Court below was right in law by holding that the Respondent was entitled to a grant of Exhibit "B" - Certificate of Statutory Right of Occupancy - when the Respondent did not discharge the burden of proving that the land was vested in him before the commence-
D ment of the Land Use Act 1978.

4. Whether the finding that the Appellants did not prove their family ownership of the land in dispute was supported by evidence on Record and whether the Court below did not thereby cause a miscarriage
E of justice by shifting the onus of proof on the Defendants/Appellants."

The respondent, on the other hand, identified two issues in his brief of argument as arising for the determination of this appeal. These are:-

"(1) Whether the Plaintiff who was vested with the land in dispute prior to the coming into effect of the Land Use Act in 1978 was not the person entitled to be granted a Certificate of Statutory Right of Occupancy over the land in dispute.
F

(2) whether the Certificate of Occupancy issued to the Plaintiff
G was validly issued."

I have examined the two sets of issues identified in the respective briefs of the parties and it is clear to me that the two issues raised in the respondent's brief are adequately covered by those set out in the
H appellants' brief of argument which I consider sufficiently comprehensive for the determination of this appeal. I shall therefore adopt in this judgment the set of issues formulated in the appellants' brief of argument for my determination of this appeal.

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

The main thrust of the submission of learned counsel for the appellants, Alhaji Isola-Gbenla with regard to issues 1 and 3 is that the court below misinterpreted and misapplied the provisions of section 34 of the Land Use Act, 1978 when it held that mere possession without ownership entitled the respondent to a valid certificate of statutory right of occupancy. He referred to the provisions of Section 34 of the Land Use Act, 1978 and to the decision in Kponuglo v. Kodaja 2 W.A.C.A. 24 and argued that the respondent by the very nature of his claims before the court put his title and right to possession of the land in dispute in issue. He therefore contended that the burden of proof was on the respondent to prove that title to or ownership of the land was vested in him immediately before the commencement of the said Land Use Act, 1978. This he failed to do. He further argued that the court below was wrong in law to have ascribed possession of the land in dispute to the respondent without resolving the issue as to which of the two contending parties to the action had title to the land immediately before the commencement of the Land use Act, 1978.

On issue 2, learned counsel for the appellants submitted that the Court of Appeal was in error when it held that the plaintiff who pleaded acquisition of the land in dispute by original or first settlement of Efun as his root of title needed not prove the same to establish his title to the land in dispute. He argued that once issue was joined by the parties as to the root of title in respect of the land in dispute, the plaintiff, to succeed, must trace his title to one whose title to the land has been established. He pointed out that the averments in the plaintiff's Statement of Claim were at variance with his evidence on the question of his root of title. He submitted that on this point alone, the plaintiff's claims ought to fail. Finally, on issue 4, Alhaji Ishola-Gbenla submitted that the court below wrongly shifted the burden of proof of title to the land in dispute on the defendants when the plaintiff failed to discharge the initial burden on him and that this, without doubt, caused a serious miscarriage of justice. He

urged the court to allow the appeal.

Learned counsel for the respondent, A. Akintola Esq, in his reply submitted that the plaintiff became vested with the land in dispute when he purchased the same in 1977 from p.w. 2 and went into possession thereof. He explained that the same land was earlier on conveyed per Exhibit G to p.w. 2, Daniel Wellington Aiyedun, by the Beyioku family, the defendants of one Beyioke, the original owner of the land who first acquired it by settlement many years ago. This conveyance was dated the 21st January, 1976. He stressed that both courts below having found that the plaintiff's root of title was traceable to the original owner, Beyioku, the land in dispute was properly vested in him immediately prior to the coming into force of the Land Use Act on the 27th March, 1978. He argued that the plaintiff's certificate of occupancy, Exhibit B, is valid and protects his right of possession and occupation of the said land. Learned counsel conceded that the plaintiff did not prove Efun's root of title to the land in dispute. He nonetheless urged the court to dismiss this appeal.

A close study of the issues formulated on behalf of the appellants for the resolution of this appeal shows that they all concern the inability of the plaintiff/respondent to establish his title to the land in dispute. This is as a result of his complete failure to prove Efun's title to the land, having traced the root of his title in his Statement of Claim to the said Efun. I therefore consider it convenient to take all the four issues raised on behalf of the appellants together.

It is an elementary principle of law that whenever a claim for trespass is coupled with a claim for an injunction, the title of the parties to the land in dispute is automatically put in issue. See Akintola v. Lasupo (1991) 3 N.W.L.R. (part 180) 508 at 515, Abotche Kponuglo v. Kodadja 2 W.A.C.A 24, Okorie v. Udom (1960) 5 S.F.C. 162, (1960) S.C.N.L.R. 326, The Registered Trustees of the Apostolic Church v. Olowoleni (1990) 6 N.W.L.R. (part 158) 514. The position is even much stronger where, as in the present action, the plaintiff claims a declaration that he is the person entitled, as against the defendant, to occupation and possession of the piece or parcel of land in dispute. The present action involves not only damages for tres-

pass and perpetual injunction, but a declaration as to the plaintiff's entitlement to the occupation and possession of the land in dispute. It cannot be doubted, in these circumstances, particularly having regard to the pleadings filed in the suit and the evidence of the parties, that the title of the parties to the land in dispute is what is primarily in issue in the case. B This is simply because **the law is well settled that when the issue is as to which of two claimants has a better right to the possession or occupation of a piece or parcel of land in dispute, the law will ascribe such possession and/or occupation to the person who proves a better title thereto.** See Aromire v. Awoyemi (1972) 1 ALL N.L.R. (Part 1) 101 at 112 Fasoro v. Beyioku (1988) 2 N.W.L.R. (part 76) 263 etc. In the same vein, where two parties are on land claiming possession, the possession being disputed, trespass can only be at the suit of that party who can show that title of the land is in him. D See Awoonor Renner v. Daboh 2 W.A.C.A. 258 at 259 and 263, Umeobi v. Otukoya (1978) 4 SC. 33.

Having arrived at the conclusion that it is the question of title to the land in dispute that is the real issue between the parties, E it is relevant to draw attention to another basic principle of law which governs the issue of onus of proof in an action involving title to land. The onus in such cases lies on the plaintiff to satisfy the court that he is entitled on the evidence brought by him to the F declaration of title claimed. In this regard, the plaintiff must rely on the strength of his own case and not on the weakness of the defendant's case. If this onus is not discharged, the weakness of the defendant's case will not help him and the proper judgment will be for the defendant. G See Kodilinye v. Mbanefo Odu 2 W.A.C.A 336 at 337 and Frempong v. Brempong 14 W.A.C.A. 13. Any evidence, however, adduced by the defendant which, to any extent is favourable to the plaintiff's case, will undoubtedly go to strengthen the case for the plaintiff. H See Josiah Akinola and another v. Oluwo and others (1962) 1 ALL N.L.R. 224 at 225, Oduaran v. Asarah (1972) 1 ALL N.L.R. (part 2) 137, Idundun and others v. Daniel Okumagba (1976) 9 and 10 S.C. 227. It seems to me convenient at this stage to turn to the pleadings of the

parties in the case.

For a better appreciation of the plaintiff's case, as pleaded, it is necessary to reproduce paragraphs 2 - 4(g) and 4(j) - 10 of his Statement of Claim, namely:-

B *"2. The plaintiff is the owner and/or occupier of a piece or parcel of land situate at Akoka Village, Ife Road, Ibadan in Ibadan Municipal Local Government Area of Oyo State of Nigeria.*

3. The said land measures 200ft by 67ft and is approximately 0.12 Hectre in area.

C *4. The boundaries are marked by beacon numbers AA 5916, AA 5917, AA 6340 and AA 6341 and more particularly marked and delineated on Plan No. L4 L/D 2131 drawn by Lanionu & Lawson, Licensed Surveyors and dated 2nd August, 1975.*

D *4(a) The Land in dispute formed part of a large tract of land granted to Beyioku Iseke, by Efun, one of the great Ibadan Warriors who had earlier settled on the land.*

E *4(b) Beyioku Iseke was Efun's medicine man and they went together to various wars, including the Kiriji and Ijaye Wars.*

4(c) It was after the Ijaye war that Efun granted the piece of land including the land in dispute to Beyioku Iseke the ancestor of Olalere Beyioku in appreciation of his meta physical powers.

F *4(d) After the grant, Beyioku Iseke took effective possession of the land, cultivating the same and planting food crops and economic crops thereon without hindrance from anybody.*

G *4(e) Beyioku Iseke died about a hundred years ago but during his lifetime he had many children including Omolare, Ogunjobi, Akinrinlo and Akinfenwa.*

4(f) Akinrinlo begat Olalere Beyioku while Ogunjobi begat Salawu Ajadi and Akinfenwa begat James Boladale and Ajintoni Beyioku.

4(g) Olalere Beyioku is at present the mogaji of Beyioku family.

H
 4(j) In January, 1976, while the said land remained vested in the Beyioku family, Olalere Beyioku as Head of family and James Boladale Akinfenwa, Raimi Ajitoni Akinfenwa, Salawu Ajadi and Fatoki Adisa

as principal members of the Beyioku family sold and conveyed to one David Wellington Aiyedun the land in dispute which is part of their family land.

4(k) The said sale was witnessed by a conveyance dated 21st January, 1976 and registered as No. 57 in Volume 1881 in the Land Registry in its Office in Ibadan. B

5. The Plaintiff bought the said land from Mr. D.W. Aiyedun of E9/540, Oluyoro, Ibadan for the sum of N2,600 (two thousand, six hundred naira) on 1st March, 1977.

5(a) The said Mr. D. W. Aiyedun executed a Deed of transfer in favour of the Plaintiff on 12th October, 1977. C

6. The plaintiff went into possession of the land immediately after the said purchase, cleared the land and planted Gmelina Arbona trees on the said land, D

7. The Plaintiff has remained in continued and undisturbed possession of the said land since the purchase of the land in 1977.

8. The Plaintiff applied to the Oyo State Government for a Statutory Right of Occupancy in respect of the said land. E

8(a) The Plaintiff submitted along with his application for a certificate of occupancy, the original of the Deed of Conveyance executed in favour of Mr. D.W. Aiyedun as well as the original of the Deed of Transfer executed by Mr. D. W. Aiyedun in favour of the plaintiff. F

9. The Oyo State Government granted the Plaintiff a Statutory right to occupy the said land and issued him with a Certificate of Statutory Right of Occupancy on 9th March, 1981.

10. The said Certificate was registered as No. 9 at page 9 in Volume 2357 of the land Registry in Ibadan on 9th March, 1981." G

It is crystal clear from the above averments that the plaintiff's case, as pleaded, is that the land in dispute formed part of a large tract of land granted to Beyioku Iseke, the ancestor of Olalere Beyioku by one Efun, a great Ibadan warrior who had acquired the land by first settlement thereon. H

The defendants, on the other hand, specifically denied the above averments of the plaintiff and pleaded that their own ancestor, Olohunde,

was the original settler on a large virgin forest land of which the land in dispute formed a part. They further averred that Olohunde and his descendants have since been using the land in various ways as owners thereof until this day. In paragraphs 2 - 4 and 7 - 14 of their Statement of

B Defence, the defendants, in particular, averred thus:-

"2. *The defendants deny paragraph 2, 3, 4, 4(a), 4(c), 4(d), 4(e), 5, 5(a) 6, 7, 8, 8(a), 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24 of the Amended Statement of Claim and put the*

C *Plaintiff to the strictest proof thereof.*

3. *The defendants who are farmers and petty traders live at Akoka Village Ibadan and are members of Olohunde family of Akoka Village.*

4. *The area of land verged red on the Counter Survey Plan No. LS AT/6Y of 9th July 1982 forms only a portion of large area of farm-*
D *land originally settled on by Olohunde, the ancestor of Olohunde family of Akoka Village Ibadan.*

5. *The area of land verged yellow on the said Counter Survey Plan No. LS AT/6Y which measures 1830.206 square metres is an open*
E *space in front of the defendant's family Compound within Olohunde family land and is not the same land as shown in the Plaintiffs Survey Plan.*

6. *The defendants will contend at the hearing that there is no mosque on or an access road across the area of land verged yellow on*
F *Counter Survey Plan No. LS AT/6Y but there is an ancient footpath flanked on one side by the defendants' family row of houses and Akoka community mosque all within Olohunde family land.*

7. *The defendants aver that their said ancestor, Olohunde, came to Ibadan from Ede before the kiriji War and settled at Ajinti Compound*
G *Ita Bale Ologbode, Ibadan.*

8. *The said Olohunde went to Kiriji War but after the war he returned to Ajinti Compound from where he went to acquire by settlement a large parcel of Virgin forest land for farming purposes at what is today*
H *known as Akoka Village.*

9. *That the defendant's ancestor met Fabunmi, father of Togunde, Arije and Ojo Alias "Akoka Baara" from whom the Village took its name and many others and these people formed boundaries with Olohunde*

in the area.

10. That Olohunde made use of the said large parcel of forest land for farming, planting thereon cotton, maize, coconut, kola, yams plantain, palm trees, tobacco, and vegetables while he also built a house which later became part of Akoka village.

B

11. That Olohunde exercised acts of ownership on the said farmland including the area verged yellow on the Counter survey Plan for several years before he died and was survived thereon by Aborisade, Aderanti (f) Kolade and Omidele.

C

12. That Aborisade begat Sunmonu Olohunde - the first defendant and Adeniran while Aderanti (f) begat Alimi Oduola - the second defendant. That Omidele begat Oyeku, father of Alhaji Lamidi.

13. That after the death of Olohunde, his descendants in succession continued to use the said large parcel of farmland for farming, planting thereon cocoa, oranges, coffee, palm trees, kola, coconut, plantain and food crops and many of the economic trees are still on the land.

D

14. That Olohunde family has also built several houses scattered all over the land and forming Olohunde Compound while building plots were sold on parts thereof to people who have developed their plots."

E

It cannot be doubted that in the face of the above averments in the pleadings that issues were clearly raised and properly joined by the parties as to who had title to, and was therefore in lawful possession of the land in dispute. I will later in this judgment deal with the validity or otherwise of Exhibit B, the certificate of statutory right of occupancy which was granted to the plaintiff in respect of the land in dispute on the strength of Exhibit A. It suffices, for the moment, to state that on the face of the pleadings, the parties joined issue on the question of title to the land in dispute. While the plaintiff pleaded and traced his root of title to Efun, an Ibadan warrior who acquired the land by first settlement, the defendants traced their title to Olohunde who was also said to have acquired the same land by first settlement very many years ago.

F

G

H

It is well settled that once a party pleads and traces his root of title in an action involving title to land to a particular person or source, and this averment, as in the present case, is disputed or

challenged, that party, to succeed, as a plaintiff in the suit must not only establish his own title to such land, he must also satisfy the court on the validity of the title of that particular person or source from whom he claims to have derived his title. See Mogaji v. Cadbury Nigeria Ltd (1985) 7 S.C. 59, (1985) 2 N.W.L.R. (Part 7) 393 at 431, Elias V. Owo Bare (1982) 5 S.C.. 25 at 37 -58. It seems to me that the onus of proof is on the plaintiff in the particular circumstances of this case and the state of the pleadings to prove the radical title he averred, namely, the title of Efun to the land in dispute. This, the plaintiff neither proved nor did he as much as attempt to establish the same as no evidence of whatever nature was led by him on this all important issue.

Dismissing the aforesaid onus of proof on the plaintiff to establish the root of title he relied on, the court below after affirming the finding of the trial court that the land in dispute was validly purchased by the plaintiff from P.W.2, Aiyedun, concluded thus -

*"The Respondent's case was not that of grant or settlement and he needed not to have proved any of them.
The Respondent clearly in my view established and proved his case at the trial."*

I cannot, with profound respect, accept the above reasoning of the court below and its subsequent finding that the plaintiff established and proved his case at the trial as well founded. The position would have been different if the plaintiff's root of title, namely, first settlement of the land by Efun, was either admitted by the defence or not put in issue. In that case there will be no need to establish the same at the trial.

Learned counsel for the plaintiff, in answer to a question from the court, did frankly concede, and quite rightly in my view, that the plaintiff failed to prove the title of Efun to the land in dispute. In the circumstances, it is clear to me that both courts below were in definite error by upholding the validity of the alleged sale of the land in dispute by Aiyedun to the plaintiff when there was no proof whatever by the said plaintiff of the root of title pleaded and relied on by him. In my view, the plaintiff woefully failed to prove his title to the land in dispute.

Another fatal defect in the way of the plaintiff's case is the conflict between the root of title pleaded by him as against the evidence led by him at the trial on the issue. On the one part, the root of title pleaded by the plaintiff was traced to Efun as the original settler on the land and that the said Efun made a grant of the land to Beyioku. This is contrary B to the case presented viva voce by the plaintiff to the effect that it was Beyioku who originally acquired the land in dispute. P.W.5, Olalere Beyioku, the plaintiff's star witness at the trial testified to this effect as follow

*"I know the plaintiff in court. I also know the land in dispute. C
Beyioku was the original owners of the land in dispute"*

The learned trial Judge in summarizing the evidence of the plaintiff in this regard stated thus:-

*"The case for the plaintiff as averred in his Amended Statement D
of Claim and his evidence before the Court is that the land in dispute originally belonged to Beyioku family who sold same to one David Wellington Aiyedun in 1976."*

The Court of Appeal, for its own part, with regard to the same E evidence of the plaintiff in respect of his root of title commented as follows:-

*"The plaintiff's case as revealed by the pleadings and evidence F
is that the land in dispute originally belonged to BEYIOKU family. It was one Beyioku who settled on the land over 100 years ago. In 1976 one Olalere Beyioku (P.W.5) as head of the Beyioku family together with the principal members of that family, sold the land in dispute to DAVID WELLINGTON AIYEDUN and executed a deed of conveyance dated G
21st January, 1976 in his favour."*

There is next paragraph 2.3. of the plaintiff's own brief of argument in this court in respect of his root of title where he stated as follows:-

*"The Plaintiff traced his root of title from one Beyioku who was H
in absolute possession of the land in dispute about a hundred years ago. When Beyioku died the land became vested in his children who were also in possession of the land in dispute till they died."*

There is finally paragraph 5.2 of the same plaintiff's brief of argument before this court where, again, he emphasized in relation to his root of title as follows:-

"The plaintiff's predecessor in title Mr. D. W. Aiyedun was granted a conveyance of the land in dispute on 21st January, 1976 by the Beyioku Family who were the descendants of one Beyioku whom the two lower Courts found was the Plaintiff's root of title."

It therefore seems to me plain that the radical title of the land in dispute was, on the evidence of the plaintiff, traced to Beyioku thus contradicting the averments as pleaded in paragraphs 4(a) - 4(c) of his Statement of Claim.

In the first place, it is beyond dispute that parties are bound by their pleadings and evidence which is at variance with the averments in the pleadings goes to no issue and should be disregarded by the court. See Emegokwue v. Okadigbo (1973) 4 S.C. 113, Ekpeyong and others v. Chief Ayi (1973) E.C.S.L.R. 411, Odunmosu v. A.C.B. (1976) 11 S.C. 261, Kalu Njoku and others v. Ukwu Eme and others (1973) 5 S.C. 293. In my view, the viva voce evidence adduced on behalf of the plaintiff which traced his root of title to Beyioku ought not to have been received in evidence by the trial court and should have been disregarded by other courts below. This is because that evidence went to no issue as a party will not be allowed after pleading a particular set of material facts to turn round and base his case on a totally different set of facts without an amendment of his leading. See Ehimare v. Emhonyon (1985) 1 N.W.L.R. (part 2) 177 at 184, Metalimpex v. Leventis (Nigeria) Ltd. (1976) 2 S.C. 91 at 102.

In the present case, there was no amendment of the plaintiff's Statement of Claim to the effect that it was no more Efun but Beyioku that first acquired the land by settlement under customary law. Accordingly, since there was no evidence whatsoever in support of the averment in the plaintiff's pleadings that Efun acquired the land in dispute by first settlement and that he made a grant thereof to Beyioku, neither Efun's title nor that of Beyioku was established by the plaintiff. Consequently

the Beyioku family had nothing to sell to P.W. 2, Aiyedun, by virtue of the maxim, nemo dat quod non habet, that is to say, that no one can give that which he does not have. In the same vein, Exhibit G which is not worth the paper on which it was made became a nudum pactum and passed nothing to P.W.2. This being the case, the plaintiff purchased nothing B from P.W. 2 and did not therefore establish his claims as averred in his pleadings.

In the present case, issue was joined by the parties in the pleadings, not only as to the plaintiff's root of title in respect of the land in dispute, not only as to the title of the plaintiff's alleged vendor, Aiyedun, C but also as to the title of the Beyioku family thereto. The parties also joined issue as to the alleged title of Efun who was pleaded in the plaintiff's Statement of Claim as the warrior who first acquired the land in dispute by settlement under customary law. But, as I have already stated, the D plaintiff, to succeed in his claims on the state of the pleadings 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 himself. This principle of law is well established. So in Alhaji Elias v. Omo Bare 1982 5 S.C. 25 at E 57 - 58, this court per Obaseki, J.S.C. restated the principle as follows:-

"This court has not spared its breath of recent and at least in the past 10 years in all appeal on land matters involving a claim for declaration of title to restate the principle that for a plaintiff to succeed in F such a claim, there must be credible evidence describing and identifying the land with certainty as well as 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 G origin and devolution of title as has been the case in this appeal, the claim must fail."

In this case, the plaintiff adduced no evidence whatever, whether credible or incredible, as to the root of title he pleaded and as to the devolution of the title claimed from Efun down to himself. H Having thus failed to establish the case put forward by him in his pleadings, the plaintiff's case ought to have been dismissed by both courts below. See Edward Egonu v. Eziamaka Egonu (1978) 11 - 12

S.C. 111 at 135 - 136, Odum v. Chinwe (1978) 6-7 S.C. 251.

I am therefore in complete agreement with the contention of the learned counsel for the defendants that the finding of the trial court as affirmed by the court below that the plaintiff had established his case is unsupported by any legal evidence, clearly perverse and patently erroneous. It cannot therefore be allowed to stand. See Igwego v. Ezengo (1992) 6 N.W.L.R. (part 249) 561, Woluchem v. Gudi (1981) 5 S.C. 291 at 326, Mora v. Okonkwo (1987) 3 N.W.L.R. (part 60) 314 at 321 etc.

Learned counsel for the defendants also submitted that the certificate of statutory right of occupancy, Exhibit B, was not validly issued by the Oyo State Government to the plaintiff. He contended that this is because the plaintiff did not discharge the burden of proving that the land in dispute was vested in him immediately before the commencement of the Land Use Act on the 29th March, 1978.

The relevant provisions of section 34 of the Land Use Act 1978 state as follows:-

"34 (1) The following provisions of this Section shall have effect in respect of land in an urban area vested in any person immediately before the commencement of this Act.

34 (2) Where the land is developed, the land shall continue to be held by the person in whom it was vested immediately before the commencement of this Act as if the holder of the land was the holder of a statutory right of occupancy issued by the Governor under this Act.

34 (3) In respect of land to which sub-section (2) of this section applies, there shall be issued by the Governor on application to him in the prescribed form a certificate of occupancy if the Governor is satisfied that the land was, immediately before the commencement of this Act, vested in that person".

It is common ground that the land in dispute over which Exhibit B was issued in favour of the plaintiff is within the urban area of Ibadan. It is not in dispute that it is developed land within the provisions of Section 51(1) of the Land Use Act 1978. Accordingly, pursuant to section 34(2) of the Land Use Act, the land in dispute shall continue to be held by

the person in whom it was vested immediately before the commencement of the Land use Act on the 29th March, 1978 as if such person was the holder of a statutory right of occupancy issued to him by the Governor under the Act. The real question is whether the plaintiff established that the land in dispute was vested in him immediately before the commencement of the Land Use Act. B

The plaintiff's claim of entitlement to the certificate of statutory right of occupancy, Exhibit B, was predicated on his contention that on the coming into force of the Land Use Act, the said land was vested in him by virtue of his ownership thereof, having purchased the same from P.W. 2 in 1977. If the land in dispute was vested in the plaintiff immediately before the commencement of the Land Use Act, 1978, the grant of Exhibit B to him would be without fault and consequently valid. The onus is however on him, the grantee of such certificate, to establish that the land was vested in him immediately before the commencement of the Act. As the position was explained by this court in Ogunleye v. Oni (1990) 2 N.W.L.R. (Part 135) 745 at 752, 774 - 786. C D E

"This is the weakness of a Certificate of Occupancy issued in such a case. It is never associated with title. Thus, where as in this case, a Certificate of Occupancy has been granted to one of the claimants who has not proved a better title, it has been granted against the letters and spirit of the Land Use Act". F

In my view, the plaintiff who failed to establish that he had any right or title to or, indeed, any interest whatsoever, whether legal or equitable, to the land in dispute cannot by any means be rightly said to have had the land in dispute vested in him immediately before the commencement of the Land Use Act on the 29th March, 1978. He cannot, therefore, rightly be deemed a holder of a statutory right of occupancy under section 34 of the Land Use Act immediately before the commencement of that Act. I will however return to this aspect of the case later in this judgment. G H

The trial court would appear to have found for the plaintiff in respect of the first arm of his claim mainly on the ground of the issuance

of Exhibit B to him. Said the learned trial Judge:-

"In this case the Plaintiff is claiming a right to occupation and possession of the land in dispute and relied heavily on the Certificate of Statutory Right of Occupancy, Exhibit 'B'. it is my view that where a plaintiff, armed with the Certificate of Statutory Right of Occupancy in respect of a piece of land, prays the Court for a declaration that he is entitled to the occupation and use of the piece of land described in the said Certificate, a defendant cannot set up a defence based on family ownership of such piece of land."

He concluded:-

"I am satisfied that by virtue of Exhibit 'B' and in the absence of any defence consistent with the provisions of Land Use Act I find as a fact that the Plaintiff succeeded on the 1st leg of his claim to wit: declaration that he is entitled to the occupation and possession of a piece of land situate at Akoka Village, measuring 20 metres by 60 metres, described in Exhibit 'B' and registered as No. 9 at page 9 in Volume 2357 of the Lands Registry in Ibadan."

I think the point must be stressed that a certificate of statutory or customary right of occupancy issued under the Land Use Act, 1978 cannot be said to be conclusive evidence of any right, interest or valid title to land in favour of the grantee. It is, at best, only a prima facie evidence of such right, interest or title without more and may in appropriate cases be effectively challenged and rendered invalid and null and void. See Lababedi v. Lagos Metal Industries (Nig.) Ltd (1973) N.S.C.C. 1 at 6.

Where a certificate of occupancy has been granted to one of two claimants who has not proved a better title, it must be deemed to be defective and to have been granted or issued erroneously and against the spirit of the Land Use Act and the holder of such a certificate would have no legal basis for a valid claim over the land in issue. So, too, where it is shown by evidence that another person other than the grantee of a certificate of occupancy had a better right to the grant, the court may have no option but to set aside the grant or otherwise discountenance it as invalid, defective and/or

spurious as the case may be. See **Joshua Ogunleye v. Oni (supra), Ozungwe v. Gbisbe and Another (1985) 2 N.W.L.R. (part 8) 528 at 540.** For a certificate of occupancy under the Land Use Act, 1978 to be therefore valid, there must not be in existence at the time the certificate was issued, a statutory or customary owner of the land in issue who was not divested of his legal interest to the land prior to the grant. B

The trial court in its judgment was of the view that the defendants could not set up a defence of family ownership of the land in dispute in answer to the plaintiff's action. This proposition was rejected by the court below which nevertheless went on to observe as follows:- C

"The Appellants failed at the trial to prove that the land belonged to them or their family. It is therefore not correct for the learned trial Judge to have opined that once the Respondent held a Certificate of Occupancy, the Appellants could not have set up a defence of family ownership". D

I think, with respect, that the Court of Appeal was in error by shifting the burden of proof in respect of ownership of the land in dispute on the defendants when, as already pointed out, the plaintiff was unable to adduce prima facie evidence in proof of his alleged ownership and possession of the land. E

One more point must be made in connection with this abysmal failure on the part of the plaintiff to establish the right he claimed in respect of the land in dispute. This, as I have stated, is the fact that the evidence adduced by him as to his root of title was at variance with the averments in his pleadings in relation thereto and should therefore be discountenanced. In these circumstances, it is clear to me that the respondent was totally unable to prove any entitlement to the land in dispute. F G

On the contrary, the defendants, as already stated, led copious evidence that the land in dispute formed part of a large parcel of virgin forest land which was acquired by first settlement under customary law by their ancestor, Olohunde. Thereafter, Olohunde immediately went into possession thereof and became the owner of the land until his death H

when it devolved on his descendants who continued to exercise maximum acts of ownership thereon. Indeed, they have houses, and a mosque which was built in 1950, on the land. The defendants and their family claimed to be the owners in possession of the land, having inherited it from their ancestor, Olohunde.

The trial court acknowledged that the defendants' family led evidence in line with their pleadings and that they traced their root of title to the land in dispute to Olohunde, the radical owner. Said the trial court:-

"On the other hand, the Defendants testified in line with the averments of their Amended Statement of Defence. They traced their root of title to their ancestor, Olohunde, who settled on a large tract of land including the land in dispute many years ago."

It ought to be noted that the above observation of the trial court is clearly supported by the evidence of D.W.1 who gave copious traditional evidence in respect of their ownership of the land in dispute.

It seems to me strange that the above traditional evidence led by the defendants in respect of their ownership and possession of the land in dispute was never challenged under cross-examination by the plaintiff. Not one single question was put to any of the three witnesses who testified on behalf of the defendants with a view to challenging the traditional history they led in evidence.

The law is well settled that where the evidence given by a party to any proceedings was not challenged by the opposite party who had the opportunity to do so, it is always open to the court seised of the case to act on such unchallenged evidence before it. See Isaac Omoregbee v. Daniel Lawani (1980) 3 - 4 S.C. 108 at 117, Odulaja v. Haddad (1973) 11 S.C. 35, Nigerian Maritime Services Ltd. v. Alhaji Bello Afolabi (1978) 2 S.C. 79 at 81, Abel Boshali v. Allied Commercial Exporters Ltd. (1961) ALL N.L.R. 917.

The above, notwithstanding, the learned trial Judge found himself able, without any justification, in my view, to ignore the defendants' traditional evidence which, as I have stated, was not challenged in any manner. He dismissed the same holding as follows:-

In this case, the defendants have set up a defence based on

family ownership of the land in dispute. I therefore hold that their defence is derailed and worthless. In my view where a Plaintiff is armed with a Certificate of Statutory right of Occupancy, a defence based on fraud or predicated on the provisions of Section 34 will be open to such defendant."

I think, with respect, that this summary dismissal of the defendants' evidence of title to the land in dispute by the trial court is, to say the least, completely erroneous and without justification.

The court below, for its own part, tried to justify the finding in respect of title made by the trial court in favour of the plaintiff when inter alia it stated as follows:-

"But having earlier come to the conclusion that the respondent had had the land lawfully vested in him before the commencement of the Act, I think the learned trial judge rightly came to the conclusion that the respondent was entitled to the grant of the certificate of a Statutory Right of Occupancy (Exh. B), in respect of the land in dispute."

Again, with profound respect, I think the court below was in error when it affirmed the plaintiff's right to the possession of the land in dispute by holding that the same was lawfully vested in him immediately before the commencement of the Land Use Act. It is my view that the certificate of statutory right of occupancy, Exhibit B, was not validly issued to the plaintiff as the land it covers was at no time vested in him as required by law immediately before the commencement of the Land Use Act. On the contrary, it is my view that the said land was at all material times vested in the defendants' family whose evidence of radical title in their ancestor, Olohunde, and the devolution of the land down to the said defendants was not challenged at the trial.

There is finally the question of the location of the land allegedly sold to the plaintiff. On the evidence of P.W.2, Daniel Wellington Aiyedun, the land he bought from the Beyioku family which he resold to the plaintiff is on the left hand side of the old Ibadan to Ife road, facing Ife. P.W.5, Olalere Beyioku, on the other hand, testified that the said land is situate on the right hand side of the same road facing Ife. Both witnesses were therefore not in agreement as to the location of the land in dispute

said to have been sold to the plaintiff.

There is, on the other hand, the unchallenged evidence of the defendants that facing Ife on the old Ife Road, the land of Olohunde family is situate on the left hand side whilst that of Beyioku family is on the right hand side. Having regard to the conflict in the evidence of the plaintiff, it would seem that the land allegedly sold to the plaintiff, if in fact, it is situate on the left hand side of the old Ife Road facing Ife as testified to by P.W.2 must belong to the defendants and not to the Beyioku family.

On the issue of trespass, it is plain that only a person in possession of land in dispute at the material time can maintain an action for damages for trespass. See Olugbenro v. Ajagunbade III (1990) 3 N.W.L.R. (part 136) 37, Adebanjo v. Brown (1990) 3 N.W.L.R. (part 141) 661. I have already observed that where two parties contest possession or right to possession, the law ascribes possession to the party who has proved a better title to the land in dispute. See too Mogaji v. Cadbury (Nig.) Ltd (1985) 7 S.C. 59 at 77 - 72, Onwuka v. Ediala (1989) 1 N.W.L.R. (part 96) 182. The plaintiff was unable to prove possession of the land in dispute and his claims in damages for trespass must be and are hereby dismissed. The same goes with the claim for perpetual injunction.

In the final analysis, this appeal succeeds and it is hereby allowed. The judgments and orders of both courts below are hereby set aside and it is ordered that the plaintiff's claims be and are hereby dismissed with costs to the defendants against the plaintiff which I assess and fix at N500.00 in the High Court, N1,000.00 in the Court of Appeal and N10,000.00 in this court.

WALI JSC

I have had the privilege of reading in advance, the lead judgment of my learned brother Iguh JSC and I entirely agree with the reasoning and conclusion therein for allowing the appeal.

By way of emphasis, the mere fact that the respondent had ob-

tained a certificate of Statutory Right of Occupancy Exhibit B on the strength of Exhibit A given to him by PW 2 from whom he bought the land in dispute, is not conclusive proof that the land belongs to him having regard to the pleadings in this case by the contending parties.

The respondent as plaintiff claims that the land in dispute formed part of a larger area of land granted to Beyioku Iseke by one Efun, an Ibadan Warrior, who had earlier settled there. On the other hand, the appellants as Defendants claim that Olohunde, their ancestor, was the original settler on a large virgin forest land of which the land in dispute forms part.

By the averments contained in their respective pleadings, the appellants/defendants and the respondent/plaintiff have joined issue as to who has the radical title and lawful possession of the land in dispute. The ball was in plaintiff/respondent's court to prove his own title by tracing it to Efun, the original settler he claimed to have first settled on the land of which the land in dispute forms part. He pleaded traditional evidence and to succeed in his claim, he must adduce cogent and uncontradicted evidence in line with his pleading. See ALADE V AWO (1975) 4 SC 215. Neither the plaintiff/respondent nor any of his witnesses linked the land to Efun. In para 4 (a) of the amended statement of claim he pleaded thus:

"4(a) The land in dispute formed part of a large tract of land, granted to Beyioku Iseke by Efun, one of the great Ibadan Warriors who had earlier settled on the land."

PW5, Olalere Beyioku testified thus:

"I know the land in dispute. Beyioku was the original owner of the land in dispute I know PW2. He bought land from our family. We executed a conveyance in his favour."

PW2, the man that sold the land to the plaintiff/respondent said in his evidence -

"The land in dispute belongs to the plaintiff. I sold the land in dispute to the plaintiff in 1977 I purchased the land in dispute from Messrs Olatere Beyioku, J.B. Akinfenwa, R. A. Akinfenwa, Salawu Ajadi and Fatoki Adisa in 1975. These people are the sellers who executed a Deed of conveyance in my favour."

The plaintiff/respondent gave evidence as PW1 wherein he stated:-

"I bought the land in March, 1977 from one D.W. Wellington Aiyedun. After the purchase, Mr Aiyedun gave me a receipt In further establishment of my title, I obtained a Certificate of Occupancy."

B In none of the evidence adduced by the plaintiff/respondent is the land in dispute traced and connected to Efun whom he alleged in para 4 (a) of the statement of claim, first settled on the large tract of land of which the land in dispute was part of. While PW2 testified further that the land he sold to the plaintiff/respondent is on the left hand side of the Old Ibadan - Ife road facing Ife direction and that Beyioku Family has no land on that side, PW5 contradicted this evidence when he said in his evidence that his family land is on the right hand side when facing Ife. He also stated that the mosque which the plaintiff/respondent said was built on the land in dispute, was on Olohunde's family land, i.e the defendants/appellants. The evidence given by both PW2 and PW5 is not only contradictory, but also not in line with most essential facts pleaded in para 4(a) of the statement of claim and the trial court should have ignored it. See OGBODA V ADULUGBA (1971) ALL NLR 70.

The plaintiff/respondent's source of title is defective. He failed to discharge the burden of proof cast on him. See ABIODUN AND OTHERS V ADEHIN (1962) ALL NLR 550; NANA DARKU FREMPONG II V NANA OWODU ASEKU BREMPONG II 14 WACA 13 and FASOFO V BEYIOKU (1988) 2 NWLR (PT 76) 263.

If both the trial court and the Court of Appeal had properly considered the evidence adduced by the plaintiff/respondent they would have come to the conclusion that the plaintiff's case was not proved and would have dismissed it without more. See GBAJOR v OGUNBUREGUI (1961) ALL NLR (PT 4) 835. It is for these and the fuller reasons contained in the lead judgment of my learned brother Iguh JSC that I also hereby allow the appeal and substitute a verdict in favour of the defendants/appellants. I endorse the consequential orders made in the lead judgment, that of costs inclusive.

OGUNDARE JSC

I have had the privilege of a preview of the judgment of my learned brother Iguh JSC just delivered. I agree entirely with him. And for the reasons given by him which I adopt as mine, I too find substance in this appeal and allow it accordingly. B

I only want to comment briefly on the statement made by the Court below, per Kutigi JCA (as he then was), that -

"The Appellants failed at the trial to prove that the land belonged to them or their family."

Is this statement correct? I rather think not. First is the observation of the learned trial Judge that - C

"..... the Defendants testified in line with the averments of their Amended Statement of Defence. They traced their root of title to their ancestor OLOHUNDE who settled on a large tract of land including the land in dispute" D

As against this is the total failure of the Plaintiff to prove satisfactorily his root of title to the land in dispute. His star witness on this issue, Olalere Beyioku (PW5) head of the Beyiolu family, testified thus: E

"I also know the land in dispute. Beyioku was the original owner of the land in dispute, A farm (sic) granted land to Beyioku. I am a grandson of Beyioku." (emphasis mine)

There is a seeming contradiction in the evidence of this witness. In one breath, he said Beyioku was the original owner of the land in dispute. In another breath, he said it was some undeciphered name, but presumably Efun, that granted land to Beyioku. Even on the most favourable construction of the evidence of this witness that it was Efun who granted land (of which the land in dispute forms a part) to Beyioku, the evidence still falls short of proof of how Efun came, in the first instance, to own the land that he granted to Beyioku. The onus is, of course, on the Plaintiff to prove this and without this proof he cannot be said to have discharged the onus on him to prove his title to the land in dispute - F
H
Mogaji v. Cadbury (Nig.) Ltd. (1985) 2 NMLR 393. G

I must point out, however, that this case was fought at the trial on the basis that Beyioku was the original owner of the land in dispute.

In his judgment the learned trial Judge had this to say:

"The case for the Plaintiff as averred in his Amended Statement of Claim and his evidence before the Court is that the land in dispute originally belonged to Beyioku family who sold same to one David Wellington Aiyedun in 1976."

The Court of Appeal also found that -

"The plaintiff's case as revealed by the pleading and evidence is that the land in dispute originally belonged to BEYIOKU family. It was one Beyioku who settled on the land over 100 years ago."

The Plaintiff, in his brief, re-echoed the same thing where at page 2 of the brief the following appears:

"The Plaintiff traced his root of title from one Beyioku who was in absolute possession of the land in dispute about a hundred years ago."

When Beyioku died, the land became vested in his children who were also in possession of the land in dispute till they died."

and on page 5 the following also appears:

"The plaintiff's predecessor in title Mr. D.W. Aiyedun was granted a conveyance of the land in dispute on 21st January 1976 by the Beyioku Family who were the descendants of the Beyioku whom the two lower Courts found was the plaintiff's root of title."

But more importantly is the recital in Exhibit G, the deed of conveyance Beyioku family executed in favour of PW2, D.W. Aiyedun. In it, it is recited as follows:

"WHEREAS on Beyioku the common ancestor of the Vendors and the entire members of Beyioku Family settled on a large area of land situate, lying and being at Akoka village, Ife Road, Ibadan over 100 years ago when the said area of land was a virgin forest."

This case is obviously in conflict with paragraph 4(a) of the amended Statement of Claim which reads:

"The land in dispute formed part of large tract of land granted to Beyioku Iseke, by Efun, one of the great Ibadan warriors who had earlier settled on the land."

And this is enough to dispose of plaintiff's case. Whichever way, therefore, one looks at this case, the Plaintiff clearly fails to prove his title to

the land in dispute.

Secondly, there is the seeming admission of PW5, Olalere Beyioku that the land, in fact, is not part of their family land. PW5 testified thus:

"I know Akoka mosque. It is about 30 years old. The mosque is on Olohunde's land. The mosque was rebuilt about 4 or 5 years ago. My family land is on the right when facing Ife.

There is a stream at Akoka. It is called Adun Stream. It is correct to say that there is an ancient footpath to the stream. The ancient footpath is now motorable.

I know Olohunde family Compound at Akoka. The road motorable footpath is on the same side with Olohunde family land.

(underlinings are mine)

PW2, D.W. Aiyedun, Plaintiff's immediate predecessor in title bought the land in dispute from Beyioku family. He testified that the land sold to him is on the left hand of the old Ibadan Ife road facing Ife direction. Beyioku family has no land on this side of the road. According to D.W. 1 Alhaji Alimi Oduola, it is Olohunde family that has land there. D.W.1 testified thus:

"I know Akoka Mosque. It is built on Olohunde's land

.....

I know the land in dispute. Facing Ife on old Ife Road, the land in dispute is situated on the left. There is a footpath leading to Adunu Stream separates the mosque from the land in dispute. The footpath is now motorable and being used by tipper lorries.

I know Beyioku family land. When facing Ife direction, Beyioku family land is on the right. (underlinings are mine)

D.W. 3, Alhaji alimi Togunde whose family has land in Akoka village testified thus:

"I know the land in dispute. The land in dispute is located at Old Ife Road, mile 6. One Olohunde owns the land in dispute. My father by name Togunde has land in that area also. My father's land forms boundary with Olohunde's family land. The following are the boundaryman of Olohunde family:-

1. OJO AKOKA

2. ARIJE

3. ALHAJI ALIM TOGUNDE

I know the members of Beyioku family. Beyioku family has land in Akoka area. I know Beyioku family land. Facing Ife on Old Ife Road from Ibadan, Beyioku's family land is on the right; Olohunde family land is on the left." (underlining is mine)

Cross-examined, he added:

"The old Ife Road passes between Olohunde and Beyioku's family land."

What the evidence of all these witnesses boiled down to is that Beyioku family has land on the right side of the Old Ibadan - Ife road when facing Ife direction while Olohunde family has land on the left side of the road with the road marking the boundary between the two families. The land in dispute is on the left side of the road, that is, on the same side as the Olohunde family land. In effect Beyioku family sold to PW2 what did not belong to them. PW2 did not acquire any title to the land which he could pass to the Plaintiff.

In the light of the above and the unchallenged traditional evidence of the Defendant it cannot be correct to say that they failed to prove that the land belonged to them. On the evidence both Courts below ought to have found that the land in dispute vested in the Defendants, rather than the Plaintiff, immediately before the commencement of the Land Use Act.

This appeal succeeds and it is allowed by me. I subscribe to all the consequential orders made by my learned brother Iguh JSC. including the orders as to costs in this Court and in the Courts below.

KATSINA-ALU JSC

I read in advance the judgment of my learned brother Iguh JSC and I do agree with him that this appeal has merit and should be allowed. For the reasons he has given, I also would allow this appeal. I also abide by the order for costs.

UWAIFO JSC

I read in advance the judgment of my learned brother Iguh JSC and I do agree with him that this appeal has merit and should be allowed. I shall briefly express myself on some aspects of the case in support of the judgment.

The respondent, as plaintiff, brought this action against the appellants claiming a declaration of title, damages of N2,500.00 against each of the appellants and an injunction in respect of land 20 metres by 60 metres at Akoka village on Ife Road, Ibadan. The trial judge (Oloko, J.) gave judgment for the respondent on 29 September, 1983. The Court of Appeal dismissed the appeal against that judgment on 4 July, 1989.

In his pleading and evidence respondent traced his title to the land through Beyioku. The evidence is that Beyioku sold to one Daniel Wellington Aiyedun (p.w.2) who sold to the respondent. As to how Beyioku got the land, one Efun was pleaded as the first settler on the land from which Beyioku was given a grant by Efun. There was some argument whether there was evidence that Efun made a grant to Beyioku. It seems to me evidence was led to that effect but that there was a typographical error in the printed record on this. The 5th p.w., Olalere Beyioku, who was at the material time the Mogaji of Beyioku family testified thus:

"I know the plaintiff in court. I also know the land in dispute. Beyioku was the original owner of the land in dispute. Afarm granted land to Beyioku."

"Afarm" as recorded seems to be a curious typographical error of the word 'Efun' otherwise it would make no sense at all to say that Afarm granted land. That Beyioku was said to be the original owner of the land in dispute can only be because in relation to the averments in paras. 4(a), 4(b), 4(c) and 4(d) of the statement of claim, it might be thought that the ancestor of the witness being the alleged grantee of the land direct from Efun he was the original owner of the said land in the family line of Beyioku. That is quite a reasonable way of regarding the very Beyioku to whom the land was granted. The said averments are as follows:

"4(a) The land in dispute formed part of a large tract of land granted to Beyioku Iseke, by Efun, one of the great Ibadan warriors who

had earlier settled on the land.

4(b) Beyioku Iseke was Efun's medicine man and they went together to various wars, including the Kiriji and Ijaye wars.

4(c) It was after the Ijaye war that Efun granted the piece of land including the land in dispute to Beyioku Iseke the ancestor of Olalere Beyioku in appreciation of his metaphysical powers.

4(d) After the grant, Beyioku Iseke took effective possession of the land, cultivating the same and planting food crops and economic crops thereon without hindrance from anybody."

This case does not depend on whether the respondent pleaded his root of title to have original with Efun but that Beyioku was given in oral evidence as the original owner of the land. If it did, I would not have hesitated to insist that the typographical error already pointed could not be fatal to establish who the founder of the land was. The name Efun was in line with the pleading. However, the recital in a conveyance by Beyioku family to D.W. Aiyedun (exhibit G) clearly dealt a fatal blow even to that oral evidence. It was therein stated that Beyioku was the first settler on the land. But the merit of the case also hangs on the other evidence before the court which the learned trial judge neither appreciated nor considered. While the respondent says he bought the land in dispute as part of Beyioku family land, the appellant asserts that the land in dispute is part of Olohunde family land.

Before going into that it is pertinent to say that although it was pleaded in para.4(a) of the statement of claim as recited above that Efun was one of the great Ibadan Warriors who had earlier settled on the land in dispute, there is no scintilla of evidence to support this. Nothing was said as to his being a warrior; nor was there even a passing allusion to his ever settling on the land. It may sound incredible that the only evidence regarding Efun throughout the entire evidence given in support of the respondent's case is as short and complete as follows: Efun granted land to Beyioku. So it must be said that it is not shown how Efun himself got the land. Pleading is not evidence. The law is clear that it is not enough for a plaintiff seeking a declaration of title to land to lead evidence to trace his title to a particular person. He must go beyond that to establish by

credible evidence the root of that person's title otherwise title will not be declared in him: see Mogaji v. Cadbury Nigeria Ltd (1985) 2 NWLR (pt. 7) 393; (1985) 7 S.C. 59; Ogunleye v. Oni (1990) 2 NWLR (pt. 135) 745; Uche v. Eke (1992) 2 NWLR (pt. 224) 433. This along was enough to defeat the respondent's claim to title. The learned trial judge did not realize this, nor did the lower court.

Over and above this, the learned trial judge made some fundamental errors. First, he took no account of the crucial evidence before him: apart from having failed to consider whether the respondent was able to trace his root of title, he did not also consider the evidence as to the location of the land in dispute; he made no finding as to which of the two families could lay claim to the land.

Second, the learned trial judge relied solely on a certificate of statutory right of Occupancy (exhibit B) produced by the respondent in respect of the land in dispute. He then made reference to section 34(1) and (5) of the Land Use Act (formerly Decree) and laid emphasis on the provisions therein that in respect of land in an urban area, it shall continue to be held by the person in whom it was vested immediately before the commencement of the Act as if he was the holder of a statutory right of occupancy issued by the Governor. I shall show shortly that these provisions do not apply to the facts of the present case since the respondent in fact was granted a certificate of statutory right of occupancy at the material time and it was not a question of a deemed right of occupancy as such.

Third, upon such reliance on those provisions of the Act, the learned trial judge then observed inter alia:

"With reference to the above provisions, it is my view that where a plaintiff, armed with the Certificate of Statutory Right of Occupancy in respect of a piece of land, prays the Court for a declaration that he is entitled to the occupation and use of the piece of land described in the said certificate, a defendant cannot set up a defence based on family ownership of such piece of land. Such defence is grossly inconsistent with the provisions of Land Use Act - see section 1."

He then recited the said section 1 which in effect vests land in a State in

the Governor of that State in trust to be administered for the benefit of all Nigerians in accordance with the provisions of the Act. He thereafter went further to say:

"In this case, the defendants have set up a defence based on family ownership of the land in dispute. I therefore hold that their defence is derailed and worthless. In my view where a plaintiff is armed with a Certificate of Statutory right of Occupancy, a defence based on fraud or predicated on the provisions of section 34 will be open to such defendant.

I am satisfied that by virtue of exhibit 'B' and in the absence of any defence consistent with the provisions of Land Use Act I found (sic) as a fact that the plaintiff succeeded (sic) on the 1st leg of his claim to wit: declaration that he is entitled to the occupation and possession of a piece of land situated at Akoka village measuring 20 metres by 60 metres described in exhibit 'B' and registered as No.9 at page 9 in volume 2357 of the Lands Registry in Ibadan."

It was upon these grounds, fraught altogether with vice as I have already indicated, that judgment was given for the respondent. It is not in doubt that s. 1 of the Land Use Act vests in the Governor of a State the land in that State to be held in trust and administered accordingly. All lands in urban areas are under his control and management. All other lands are under the control and management of the respective Local Governments subject to certain aspects of intervention and determination of the Governor. It is also not in doubt that under s.5(1) (a) of the Act, it shall be lawful for the Governor to grant statutory rights of occupancy to any persons in respect of land, whether or not in an urban area. Under s.5(2), when such a grant is made, all existing rights to the use and occupation of the land which is the subject of the statutory right of occupancy shall be extinguished.

But these provisions so far referred to are certainly not to be applied to defeat vested rights recognized under the Act itself. They may, admittedly, defeat "existing rights to the use and occupation of the land" but not vested rights unless such vested rights are first revoked under s.28 of the Act as appropriate. This may be (a) for overriding

public interest, (b) by notice on behalf of the President for public purposes, (c) for breach of the provisions imposed by s. 10 of the Act, (d) for breach of any term envisaged by s.8 of the Act, (e) for refusal or neglect to comply with the requirement specified as per s.9(3) of the Act. In all these cases, the revocation shall be signified by notice duly B issued and shall become valid when received by the person with such vested right: see s.28(6) and (7) of the Act. It is an accepted legal principle that vested rights are not lightly taken away. Under the Land Use Act it must be in accordance with s. 28 and in addition compensation C is payable by virtue of s.29.

A person granted a right of occupancy acquires a vested right. So also is a person deemed to have been granted a right of occupancy under the relevant provisions of s.34 of the Act which read:

"34(1) The following provisions of this section shall have effect D in respect of land in an urban area vested in any person immediately before the commencement of this Act.

(2) Where the land is developed the land shall continue to be held by the person in whom it was vested immediately before the com- E mencement of this Act as if the holder of the land was the holder of a statutory right of occupancy issued by the Governor under this Act."

The land in dispute was developed land before the commencement of the Land Use Act. This can be seen from the evidence of Olalere F Beyioku, p.w.5, which he gave on 7/8/83 inter alia as follows:

"I know Akoka Mosque. It is about 30 years old The mosque was rebuilt about 4 or 5 years ago."

If on the date this witness gave evidence he said the mosque was about G 30 years old, it was certainly built well before 29 May, 1978 when the Land Use Act was promulgated. That makes the land developed land at that time. Now, the mosque about which the said p.w.5 testified which is at Akoka is also the mosque about which p.w.1, Samuel Kolade Adeyoju (Plaintiff), testified. He tried to give the impression that the mosque was H built between 1979 and December, 1981. But that cannot be true going by the evidence of p.w.5. In his evidence p.w. 1 said inter alia:

"I know the defendants in this case. I also know the land in

dispute. It is situated at Akoka village Old Ife Road within Ibadan municipality. I bought the land in March, 1977 from one Mr. D.W. Aiyedun I moved into the land, cleared the whole land and planted gmelia arborea on the perimeter in 1977 In 1979 I was away in Addis Ababa for a United Nations assignment. I returned in December, 1981. In January, 1982 I visited the land and found that a mosque had been built on one corner of the piece of land."

The land in dispute being developed land before the Land Use Act came into force, who ever had it vested in him then was deemed to have continued to hold the land after the commencement of the Act as if he was the holder of a statutory right of occupancy issued by the Governor under s.5 of the Act. It then follows that no other person can be granted a right of occupancy unless s.28 of the Act is complied with. Any right of occupancy otherwise purportedly granted is contrary to the provisions of the Act and will be of no validity: see Teniola v. Olohunkun (1999) 5 NWLR (pt. 602) 280. It will be set aside by the court in an appropriate case, or be discountenanced when relied on as against a subsisting holder or deemed holder of a right of Occupancy.

The learned trial judge did not bear this in mind when he simply conferred overriding effect and quality on the certificate of a statutory right of occupancy (exhibit B) purportedly granted in favour of the respondent over the land in dispute. It is therefore necessary to examine in whom there was a right over the land in dispute at the material time. I shall briefly call in aid just the evidence of p.w. 1 and that of p.w.5 to decide this. As already shown and I will now recount, p.w. 1 said:

"In January, 1982 I visited the land and found that a Mosque had been built on one corner of the piece of land."

In respect of the same mosque, p.w.5 said:

"I know Akoka Mosque. It is about 30 years old. The mosque is on Olohunde's land."

Olohunde is the defendants' family of Akoka village. By the evidence of the Mogaji of Beyioku family, the mosque is on the Olohunde family land, and that part of the land is the one in dispute in this case. In other words, Olohunde family was deemed to be a holder of the statutory right of

occupancy over the said land as if issued by the Governor.

The position can be summarized thus. The Olohunde family at all material times had title to the land in dispute, at any rate, as can be implied from the evidence of Beyioku family head. Beyioku family purported to have sold that land to D.W. Aiyedun who sold to the respondent. In fact, Beyioku family sold property which it did not have - nemo dat quod non habet. So it passed no title to Aiyedun which he could give to the respondent.

The lower court acknowledged the legal position that a certificate of occupancy will not have the effect of extinguishing the vested right and interest in land unless validly issued. But it went on to say, per Kutigi JCA who read the leading judgment, as follows:

"But having earlier come to the conclusion that the respondent had had the land lawfully vested in him before the commencement of the Act, I think the learned trial judge rightly came to the conclusion that the respondent was entitled to the grant of the certificate of a statutory right of occupancy (exh.B), in respect of the land in dispute."

This is the product, with due respect, of a complete misunderstanding of the evidence in the case and the relevant sections of the Land Use Act. The learned Justice went further to say:

"The appellants failed at the trial to prove that the land in dispute belonged to them or to their family."

To my mind, this was a carry-over of the misconception I alluded to earlier coupled with the fact that the burden was now shifted to the appellants who were defendants but did not counterclaim when indeed the respondent did not lead satisfactory evidence to show that even the said certificate of occupancy related to the land of the family through which he asserted title. This amounted to placing the onus of proof wrongly on a party to proceedings and this has a telling effect on the case in a grave dimension. When the burden of proof is wrongly placed on a party, the judge will act under a misapprehension in the resolution of the issues involved. He will either make wrong presumptions or fail to recognize where necessary presumptions should be made. In consequence of or in addition to such skewed approach, the weight of opinion of the

judge as to the direction the case ought to go might be seriously affected, leading to a miscarriage of justice: see In re Moulton, Graham v. Moulton 22 TLR 380 at 384 cited in Sandy v. Hotogua (1952) 14 WACA 18 at 20 and Onobruhere v. Esegine (1986) 1 NSCC vol. 17 (pt. 1) 343 at 345.

B In this case, the onus was on the respondent to prove that the land in dispute belonged to Beyioku family. It is the law that a plaintiff must show a prima facie case before the need to consider whether the defendant has led sufficient evidence to meet that case can arise: see Aromire v. Awoyemi (1972) 2 SC 1 at 10-11. Even so, there was abundant evidence by appellants in this case showing that the land in dispute belonged to their family. The title granted to the respondent was not deserved.

D As regards the damages and injunction awarded, there was absolutely on basis for them. The appellants were in possession at all material times as the land was part of their family land. The respondent was not, as the facts show, on the land with proper title nor with the authority of the appellants. He was there as a person who though he had a right to the land but was in law a trespasser.

E In the circumstances, the two courts below were in error to have given judgment for the respondent. For the reasons I have given and those fully stated by my learned brother Iguh JSC, I will allow this appeal and set aside the judgments of the two courts below. I consider a dismissal of the suit more appropriate and I do so order accordingly. I abide by the costs awarded by Iguh JSC.

G

H