

SUPREME COURT OF NIGERIA

14TH JULY, 2000. SC. 26/1995

**CORAM:- A. B. WALI, O. ACHIKE, U. A. KALGO, A. O.
EJIWUNMI, E. O. AYoola, JJSC**

NNADI CHIKERE & ORS. DEFENDANTS/APPELLANTS
(For themselves and on behalf of other members of
Olori kindred of Umueze village, Nkume)

AND

GEORGE OKEGBE & ORS. PLAINTIFFS/RESPONDENTS
(For themselves and on behalf of other members of
Okwu kindred of Umuokpo village, Nkume)

APPEALS - Cross appeal - Judgment - A party who has not cross appealed
- Cannot question the judgment in the first action

APPEALS - Notice of appeal - Consolidated suits - Where the notice of
appeal indicated that the part of the decision appealed from - Is that which
related to one of the consolidated suits - The appellant cannot challenge
any other part of the decision - Without first amending his notice of appeal

CUSTOMARY LAW - Customary tenancy - Possession - A customary
tenant has a right of possession - Unless he commits acts of misconduct

EVIDENCE - Circumstantial evidence - Inferences - To be drawn from
such evidence - Are rebuttable - But where such evidence is not rebutted
- Finding of the trial court should not be interfered with by an appellate
court

JUDGMENTS - Inference from facts - Finding of fact - Which was made
as a result of inference - How to impugn such finding.

JUDGMENTS - Non suit - Locus standi - Order of non suit is not
appropriate in a case - Where the plaintiffs have been found not to have
a standing to bring the action

JUDGMENTS - *Non suit order* - *Implies that although on that particular occasion the plaintiff has failed to prove his case - He should in fairness not be denied the opportunity of relitigating the same case.*

LAND LAW - *Traditional histories* - *Conflict* - *Kojo II v. Bonsie* - *The principle in that case* - *Is one of drawing inference from proved facts of the probability of truth* - *Of one of two or several competing histories*

FACTS

In the Orlu Judicial Division of the High Court of Imo State, the plaintiffs/respondents in a representative capacity instituted an action suit No. HOR/24/76 against the defendants/appellants also in a representative capacity and claimed for declaration of title to land, trespass and injunction. Later in 1982, the defendants/appellants in a representative capacity instituted a cross-action, suit No HOR/48/82 against the plaintiffs/respondents also, in a representative capacity, at the same court and also sought similar reliefs in respect of the same land. The two actions were consolidated. The plaintiffs in the first suit became the plaintiffs in the consolidated suits, while the plaintiffs in the later suit (HOR/48/82) became the defendants in the consolidated suits. The plaintiffs/respondents' case was that many years ago their ancestors made grants of portions of the land in dispute to the ancestors of the appellants who have been living on the portions granted to their ancestors. The grants were made by their ancestors individually and at different times to the ancestors of the appellants also individually. Notwithstanding the grants, the grantors continued to harvest all the economic trees on the land where the appellants live.

Dispute arose because the 2nd defendant/appellant chased away one Baby Nmezies, and someone who had come to harvest palm fruits for her on the land, and proceeded to cut down palm trees and other economic trees on the land. On the other hand, the defendants/appellants claimed that they and the plaintiffs had a common ancestor, one Nkume, and claimed title to the land through one Eze whom they described as one of the four sons of Nkume. They categorically denied any grant. At the

conclusion of trial which included the visit to the Locus in quo, the learned trial judge, non-suited the plaintiffs in the consolidated suits and dismissed the action of the defendants in the consolidated suits. The plaintiffs/respondents did not appeal against the non-suit order made against them, but the defendants/appellants appealed against the said order of non-suit to the Court of Appeal. The appeal was dismissed. The defendants have now further appealed to the Supreme Court raising several issues but the appeal was determined based on a single issue.

ISSUE FOR DETERMINATION

Whether the inference which the trial judge drew from established facts was right or not.

HELD (Unanimously dismissing the appeal but varying the order made by the High Court, per lead judgment of **AYOOLA JSC**)

Land law - Traditional histories

1. The principle which the much-cited case of *Kojo II v. Bonsie*, [1957] 1 WLR 1223 is authority for, in the final analysis, is one of drawing inference from proved facts of the probability of truth of one of two or several competing traditional histories. Lord Denning in that case said at 1226: "*Where there is a conflict of traditional historyThe best way to test the traditional history is by reference to the facts in recent years as established by evidence and by seeing which of two competing histories is the more probable.*" (p. 2608 B)

Judgments - Inference from facts

2. In order, successfully to impugn a finding of a fact in issue which was made as a result of inference of fact from facts which a trial court has found established, it must be shown, either, that the facts should not have been found established in the first place; or that even if they have been so found the inference drawn does not reasonably follow. (p. 2608 D)

Evidence - Circumstantial evidence

3. Inferences to be drawn from circumstantial evidence are rebuttable.

However, where there is no evidence in rebuttal or such evidence as there is was not effective in rebuttal, the trial judge's finding should not be interfered with by an appellate court. (p. 2608 E)

B Customary tenancy

4. The finding that the defendants are customary tenants of the plaintiffs makes the question of possession of the land in dispute inconsequential. The law is clear that possession is an incident of customary tenancy. The cases are abundant that the customary tenant has a right of possession. It is also evident from the cases, some of which I have mentioned in this judgment, that unless the defendants commit acts of misconduct, whereby they would incur forfeiture of their respective tenancies, the defendants are entitled to remain in occupation of the land severally granted to their ancestors. (p. 2609 A)

Appeals - Consolidated suits

5. When an appeal is taken from the decision in consolidated suits and the notice of appeal has indicated that the appeal is against the whole decision, the appeal must be taken as having been from the decision as it affects the totality of the consolidated suits. Where, however, as in this case, the notice of appeal in the court below indicated that the part of the decision appealed from is that which related to one of the consolidated suits, the appellant cannot challenge any other part of the decision, without first amending his notice of appeal. (p. 2610 D)

Non suit order - Implication

6. An order of non-suit implies that although, on that particular occasion, the plaintiff has failed to prove his case against the defendant, he should, in fairness, not be denied an opportunity of relitigating the same case. (See *Melifonwu v. Adazie* (1964) 1 AII NLR 346. (p. 2611 A)

Non suit - Locus standi

7. The order of non-suit is not appropriate in a case, such as the present one, where the plaintiffs have been found not to have a standing to bring

the action. The court below, after considering the question, was however, in error in confirming the order of non-suit made by the trial judge. The appropriate order should be one striking out the plaintiffs' action. I would set aside the order non-suiting the plaintiffs and substitute one striking out the first action. (p. 2611 B)

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Appeals - Cross appeal

8. The plaintiffs who have not cross-appealed cannot raise the question, as counsel on their behalf had tried to do, whether or not the judgment in the first action should not have been given for the plaintiffs instead of the order of non-suit made. (p. 2611 E)

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NOTABLE POINTS OF INTEREST

ACHIKE JSC

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1. Consequential order must flow from the circumstances of the decision

It must be stressed that the mere fact that appellants' senior counsel urged for the order of non-suit cannot be a valid reason why the order must be so made. As consequential orders a court makes must, of necessity, flow from the circumstances of the decision of the court, it is not open to the court to make a consequential order that is at cross-purposes or contradictory to its decision. If that happens the appellate court will cut it down. (p. 2618 B)

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2. The principle of slip rule does not extend to counsel's mistaken submission

It is quite clear to me that the submission of appellants' counsel in the alternative was quite deliberate and even if he was in fact mistaken in his urge for a non-suit the court would not have jurisdiction to correct the error because the principle of "slip rule" does not extend to clerical error made by counsel. My understanding of the principle of "slip rule" is that the court has always had jurisdiction to amend its order which by mistake does not correctly represent the intention of the court. This latitude in my view does not extend to errors made by counsel in his submission. After all, counsel's submission is not binding on the court as the order

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made by a court which commands immediate authority until set aside by a court of competent jurisdiction. (p. 2618 E)

3. Distinction between order for striking out and order of non-suit

- B The simple reason justifying the order for striking out is that respondents' suit is incompetent being wrongly constituted. See Ukatta v Ndinaeze (1977) 4 NWLR (Pt. 499) 251. On the other hand an order of non-suit means giving the plaintiff a second chance to prove his case where there has been an omission detrimental to his case arising from the inadvertence of counsel. See Craig v Craig (1967) NMLR 52. (p. 2619H)

KALGO JSC

4. The court can act on the admission of counsel on behalf of his clients

- D In the course of argument in the appeal in this court, the learned counsel for the appellants Chief Iketuonye SAN admitted that appellants are in fact the customary tenants to the respondents. By this admission, which is acceptable by this court, the main dispute between the parties in the consolidated case and in this appeal is fully resolved and the appeal automatically collapsed. The appellants are bound by the unequivocal admission of their counsel and this court would be right in acting on the admission of counsel on behalf of his clients. See Adewunmi v. Plastex Nigeria Limited (1986) 3 NWLR (p. 2621 G)

REPRESENTATION

Chief A. B. C. Iketuonye, SAN with Amechi Nwaiwu for the appellant
Mrs. A. J. Offiah for the respondents

CASES REFERRED TO

- Melifonwu v. Adazie (1964) 1 AII NLR 346
Thyme v. Thyme (1955) 3 All E.R. 129 at 146
H Craig v Craig (1967) NMLR 52
Olayioye v. Oso (1969) 1 All NLR 281
Oduola v. Nabhan [1981] NSCC 180
Lokoyi v Olojo (1983) 2 SCN LR 127

Ibodo v Enarofia (1980) 5 SC 42 at 4

Igwe v The State (1982) 9 SC 174

LEAD JUDGMENT BY AYoola JSC

In the Orlu Judicial Division of the High Court of Imo State there were two suits. One, Suit No HOR/24/76, was by one George Okegbe and others, suing as representatives of the Okwu kindred of Umuokpo village, against one Nnadi Chikaire and others, sued as representative of the Umuodudu village. Both villages are in Nkume, in Nkwere Division. The other, Suit No HOR/48/82, was by one Nwashigwolem Okoroemume and others, suing as representatives of Umuodudu family in 'Oriri Umueze Nkume', against one Achiamuonye Ike and others, as representatives of 'the people of Umuokpo Okwu'. The two actions were consolidated. The Okwu kindred, plaintiffs in HOR/24/76 ("the first suit") became the plaintiffs in the consolidated suits, while the "Umuodudu kindred" who were the plaintiffs in HOR/48/82, ("the cross action") became the defendants in those suits. The plaintiffs' claim was for a declaration that they were entitled to the customary right of occupancy in respect of a piece of land "known as and called 'UHU OKWARA OHONAOBI' situate at Umuokpo village Nkume", damages for trespass, possession and injunction. By their cross-action the defendant sought a similar declaration in respect of the same land which they described as "UHU UMUODUDU situate at Umuodudu in Nkume.", damages for trespass and injunction. The trial judge, Ononuju, J., on April 27, 1990, dismissed the cross action and non-suited the plaintiffs. The plaintiffs did not appeal from the decision of the learned judge whereby they were non-suited. However, the defendants appealed to the Court of Appeal who on June 2, 1994 dismissed their appeal. This is an appeal from the decision of the Court of Appeal. In this judgment, for convenience, the plaintiffs in the High Court, who are respondents in this appeal, will be referred to as "the plaintiffs", and the defendants in the High Court, who are appellants in this appeal, will be referred to as "the defendants".

The plaintiffs' case, in a nutshell, was that the land in dispute was a portion of a larger area of land called 'Uhu Okwara Ohonaobi'

which is owned by the plaintiffs by successive descent from their ancestor, one Okwu, from whom it had descended successively to the members of their kindred. They claimed that members of their family lived and farmed on the land, and have been harvesting all the economic tress thereon from time immemorial. The story was told that the defendants were from a place called 'Olori Umueze Nkume' and that the defendants' kindred were called Orori Umueze. Evidence was given that the defendants' had no land within or around the land in dispute. It was alleged that the defendants, ancestors approached the plaintiffs' ancestors individually when, having run away from their village upon the murder of a person in Umuduru in Umueze, they returned to find that their land at Olori Umueze Nkume had been confiscated by the family of the man killed by the defendants' ancestors. It was the plaintiffs' case that portions of the land in dispute were granted on individual basis to the ancestors of the defendants by ancestors of the plaintiffs, also on individual basis. Each of the ancestors of the defendants brought palm wine and kola nuts when shown where to live within the land. It was the condition of the grant that each grantee should work for the grantor every 'Orie market day', and present a cock to his grantor whenever the grantee was shown where to farm and that each grantee must be of good conduct. Notwithstanding the grants, the grantors continued to harvest all the economic trees on the land where the defendants live. This dispute arose because the 2nd defendant chased away one Baby Nmezie and someone who had come to harvest palm fruits for her on the land, and proceeded to cut down palm trees and other economic trees on the land.

For their part, the defendants claimed that and the plaintiffs had a common ancestor, one Nkume, and claimed title to the land through one Eze whom they described as one of the four sons of Nkume. They confirmed the story that someone was murdered in Umuodudu, but only to the extent that some members of their kindred committed the murder and had to run away to a place called Atta. They claimed that several members of their kindred did not run away, and that those who did were given back their land upon their return.

The record of the High Court and the judgment of the trial judge

showed that after evidence had been taken in the matter and on the day fixed for judgment, the court the parties and their counsel went to the land in dispute to see the northern boundary of the land in dispute. The purpose of the visit, as recorded in the judge's notes, was for the 1st plaintiff to show the area of land shown to the defendants to live and the area of land trespassed upon by the defendants. The trial judge wrote that he derived much help from the visit to the land. B

The basis of the decision of the trial judge was succinctly put in his judgment. In regard to the conflict in the evidence of the parties as to whether there was a grant to the defendants' ancestors or not, he came to the conclusion as follows: C

"Even though the defendants deny the issue of grant but they confirmed the story of Umuodudu killing some one from Umueze and ran to Atta where they stayed for some time before returning to Olori in Umueze. The defendants admit that where they live share a common boundary with the land of the plaintiffs. It is agreed on both sided that the defendants are from Olori. D. W. I admitted that their own Olori is of the same Olori where the plaintiffs alleged the ancestors of the defendants were living before they ran out. D. W. I also admitted that there is a village separating the two Oloris called Umueke (sic). From the above, I am inclined to believe that the Olori near to the plaintiffs, i.e. the defendants were shown where they now live in the plaintiffs' land when they returned from Atta where they ran to after the murder incident. Otherwise, how could they leave their kith and kin at Olori, cross another village-Umueke to come to live where they now live. I am more inclined to believe the plaintiffs that where the defendants now live is within their Umuokpo village. D E F G

"When the Court visited locus, it was shown where the defendants' ancestors were living before and this was not challenged by the defendants. Other members of Olori kindred still live there till today."

Having come to that conclusion, it was inevitable that the learned H judge should dismiss the defendants' cross-action.

In regard to non-suiting the plaintiffs, the learned trial judge had this to say:

"If individuals of the plaintiffs' ancestors granted their individual portions of land to individuals of the ancestor of the defendants at different times and on different terms, and the land in dispute is not communal land, I hold the view that each plaintiff should bring a separate action to claim from the each defendant the land granted to the defendants ancestors individually to live."

B Besides, in regard to the claim for forfeiture, the learned trial judge said:

"Again Exhibit 'A' did not show the portions of the land in dispute granted individually to the ancestors of the defendants to make court make an order for forfeiture as the defendants are claiming the land in dispute as their own."

C The defendants' appeal to the Court of Appeal turned on facts. Notwithstanding that Rowland, JCA, who delivered the leading judgment D of that court, apparently out of abundance of caution having regard to the briefs of argument, dealt extensively with several points, citing copious authorities in the process, it is manifest that the material issues, decisive of the appeal before that court were whether the trial judge had E properly evaluated the evidence and whether on the evidence before him, he was right in his finding that conclusion arrived at by Rowland, JCA, and concurred in by Edozie and Onalaja, JJCA, was conclusive of the appeal when he said with reference to the passage from the judgment F of the trial court, first quoted above, that:

"It seems to me that the above findings of fact by the trial court are based on the totality of the evidence placed before it (and an appellate court should not disturb it as it is not perverse or over-reach)..."

G Having come to that unequivocal conclusion, it was unnecessary for him to have invested so much effort into consideration of the deficiencies in the defendants' case in regard to proof of their title by evidence of tradition. Encompassed and implied in the findings of the trial judge that the defendants' ancestors were individual grantees and H tenants of the plaintiffs' several ancestors, is a rejection of the defendants' case based on evidence of tradition and, even, possession.

As earlier said, the Court of Appeal dismissed the defendants' appeal. This is a further appeal from that decision. On their appeal to

this court, the defendants, by their counsel, have canvassed, substantially, the same points as were canvassed in the Court of Appeal, no doubt encourage by the amount of effort that court had put into considering their case on appeal. It was contended in the appellants' brief of argument, filed by counsel on behalf of the defendants, that the plaintiffs did prove a customary grant to the defendants; that the defendants have been shown to be in possession of the land for a long time should not have been deemed to rely on evidence of tradition in proof of their title as the trial court and the court below did; that the defendants should have been given the benefit of section 146 of the Evidence Act; and, finally, that the plaintiffs should not have been non-suited but that the order that should have been made was one striking out the plaintiffs' case. B C

Responding, the plaintiffs by the respondents' brief filed by counsel on their behalf, contended that the finding of grant made by the trial judge and confirmed by the court below were concurrent finding of fact which this court should not interfere with, there being no exceptional circumstances to justify such interference. They also contended that there was nothing in the case to warrant an application of section 146 of the Evidence Act. It is fitting to rambling nature. Although six issues for determination were identified in the brief, arguments were presented under a single head without specifying what issues were being addressed. That from of brief writing is to be deprecated. It puts an unnecessary burden not only on the opponent but also on the court, to fathom what issue arguments presented related to and whether such arguments have relevance to any of the issues arising on the appeal. D E F

Although the defendants by the appellants brief of argument, had raised several issues, at the end of the day, in the cause of Oral argument, learned senior counsel for the defendants on this appeal, Chief Iketuonye, SAN, conceded that there was a grant by the plaintiffs to the defendants. What he appeared to be concerned with on this appeal was that the defendants' possession should not be disturbed, although their cross-action had been dismissed on the ground that they are customary tenants, as found by the trial judge and confirmed by the court below. He pressed the point that the proper order that should have been made in G H

relation to the first case was one striking out the case and not one of non-suit.

It is not difficult to hold that learned counsel for the defendants, by the concession he made, albeit at a late hour in the appeal, had allowed mature judgment to prevail. The real issue on the appeals, both to the court below and to this court, is whether the inference which the trial judge drew from established facts was right or not. **The principle which the much-cited case of Kojo II v. Bonsie, [1957] 1 WLR 1223 is authority for, in the final analysis, is one of drawing inference from proved facts of the probability of truth of one of two or several competing traditional histories. Lord Denning in that case said at 1226:**

"Where there is a conflict of tradition historyThe best way to test the traditional history is by reference to the facts in recent years as established by evidence and by seeing which of two competing histories is the more probable."

In order, successfully to impugn a finding of a fact in issue which was made as a result of inference of fact from facts which a trial court has found established, it must be shown, either, that the facts should not have been found established in the first place; or that even if they have been so found the inference drawn does not reasonably follow. Inferences to be drawn from circumstantial evidence are rebuttable. However, where there is no evidence in rebuttal or such evidence as there is was not effective in rebuttal, the trial judge's finding should not be interfered with by an appellate court.

In this case, the finding of the trial judge cannot be impugned on the ground that the facts from which he drew an inference of grant were not established. Those facts were virtually admitted and were common ground. In the copious submissions made in the court below and this court, it has not been suggested that the inference was unreasonable. In these circumstances learned counsel for the defendants, in my opinion, took the best course by conceding that the finding made by the learned trial judge was correct.

The finding that the defendants are customary tenants of the plaintiffs makes the question of possession of the land in dispute inconsequential. The law is clear that possession is an incident of customary tenancy. The cases are abundant that the customary tenant has a right of possession. In *Suleman and another v. Hannibal Johnson* (1951) 13 WACA 213 at P. 215 it was said that:

"It is clear that when original owners have granted rights of occupation to another, the possession of the other is not adverse possession and the owner's acquiescence therein is part and parcel of the grant and cannot affect the owner's reversionary rights. It is only, therefore, when it comes to the owner's knowledge that the tenant has alienated or is attempting to alienate the land that the question of acquiescence can arise. The owner is not in possession, and has indeed no right to possession, and is not concerned, therefore, with the acts of the tenant unless and until becomes aware that those acts are inconsistent with and, therefore, a denial of the overlord's rights."

Similarly, in *Sagay v. New Independence Rubber Ltd* (1977) SC 143, Sowemimo, JSC, said at P.158:

"It is now settled law that once land is granted to a tenant in accordance with Native Law and Custom, whatever be the consideration, full rights of possession are conveyed to the grantee. The only right remaining in the grantor is that of reversion, should the grantee deny title or abandon or attempt to alienate."

The result of the cases is that no inference favourable to the title which the defendants claim in the land by their cross-action can be drawn from the fact of possession, once the finding is made and upheld that they were customary tenants. **It is also evident from the cases, some of which I have mentioned in this judgment, that unless the defendants commit acts of misconduct, whereby they would incur forfeiture of their respective tenancies, the defendants are entitled to remain in occupation of the land severally granted to their ancestors.** The fear of learned counsel for the defendants that dismissal of the defendants' cross-action may by itself, alone, lead to an eviction of the defendants from the land seems to me not well founded at all.

Enough, I believe, has been said to show that the defendants' cross-action has been properly dismissed and that the Court of Appeal were right in so holding.

I now turn to the order of non-suit made in respect of the first
 B action brought by the plaintiffs. The ground for non-suiting the plaintiffs
 as stated by the trial judge has been set out earlier in this judgment. In
 short, it is that since the grantors and grantees were acting severally and
 individually and not collectively and communally, the actions were not
 C properly constituted in representative capacities for the communities,
 described as 'kindred'. Counsel for the defendants argued that the plain-
 tiffs' action should have been struck out. The plaintiffs' counsel argued
 that since the appeal was not from the decision in the first case the point
 could not be raised on this appeal and also that this court should substi-
 D tute judgment for the plaintiffs for the non-suit ordered.

**When an appeal is taken from the decision in consolidated
 suits and the notice of appeal has indicated that the appeal is against
 the whole decision, the appeal must be taken as having been from
 E the decision as it affects the totality of the consolidated suits. Where,
 however, as in this case, the notice of appeal in the court below
 indicated that the part of the decision appealed from is that which
 related to one of the consolidated suits, the appellant cannot chal-
 F lenge any other part of the decision, without first amending his
 notice of appeal.**

In this case, the defendants by their notice of appeal indicated
 that they were appealing to the court below from the 'decision of the
 Lower Court in suit No. HOR/48/82 striking out the defendants' cross-
 G action. There was no appeal from that part of the decision non-suiting
 the plaintiffs. Although the court below considered the issue of the order
 that the trial court should have made in respect of the first action, it was
 evident that it would have done so without jurisdiction but for the provi-
 H sions of Order 3 Rule 23 (1) and (2) of the Court of Appeal Rules, 1981
 which empowers the Court Appeal inter alia, to make such order as the
 case may require notwithstanding that the appeal may have asked that
 only part of the decision may be reversed.

Technicality aside, this court now has before it an order of non-suit made by the trial court and confirmed by the court below, which is clearly inappropriate in the circumstances. **An order of non-suit implies that although, on that particular occasion, the plaintiff has failed to prove his case against the defendant, he should, in fairness, not be denied an opportunity of relitigating the same case.** (See *Melifonwu v. Adazie* (1964) 1 All NLR 346; *Olayioye v. Oso* (1969) 1 All NLR 281; *Oduola & Ors v. Nabhan & Ors* [1981] NSCC 180). **The order of non-suit is not appropriate in a case, such as the present one, where the plaintiffs have been found not to have a standing to bring the action.** Notwithstanding that there had been no appeal to the court below from the decision non-suiting the plaintiffs, that court should have invoked its powers under the Rules referred to above and made the appropriate order which the trial judge should have made. **The court below, after considering the question, was however, in error in confirming the order of non-suit made by the trial judge. The appropriate order should be one striking out the plaintiffs' action. I would set aside the order non-suiting the plaintiffs and substitute one striking out the first action. The plaintiffs who have not cross-appealed cannot raise the question, as counsel on their behalf had tried to do, whether or not the judgment in the first action should not have been given for the plaintiffs instead of the order of non-suit made.**

For the reasons which I have given, subject to a variation of the order made by the High Court in the first suit by substituting an order striking out the suit for that non-suiting the plaintiffs, I would dismiss the defendants' (appellants') appeal in its entirety. I order N10, 000 costs to the plaintiffs (respondents) being cost of the appeal.

WALI JSC

I have had the privilege of reading in draft, the lead judgment of my learned brother, Ayoola JSC and I entirely agree with his reasoning and conclusion for dismissing this appeal. I adopt the reasoning for doing so as mine.

For these same reasons I also hereby dismiss the appeal with costs of N10,000.00 to the plaintiffs/Respondents.

ACHIKE JSC

B The respondents herein, as plaintiffs, instituted an action, Suit
No. HOR/24/76 against the appellants herein, as defendants and claimed
for declaration of title to land, trespass and injunction at the High Court
of Orlu Judicial Division of Imo State. Each party was prosecuting their
C case in a representative capacity. Later in 1982, the present appellants
instituted their cross-action, Suit No. HOR/48/82 against the respondents,
at the same court and also claimed for declaration of title to land and
injunction. Like in the earlier case, the parties prosecuted the cross-
action in a representative capacity. The two actions were consolidated
D and by the order of the court and as earlier noted, the respondents herein
who were the plaintiffs in the first case become the plaintiffs in the con-
solidated suit while the appellants herein were ordered to be the defen-
dants in the consolidated suit.

E After due trial which included the visit to the locus in quo, the
learned trial Judge, Ononuju, J, non-suited the respondents as plaintiffs
in Suit No. HOR/24/76 and dismissed the action of the appellants as
plaintiffs in Suit No. HOR/48/82. In essence, the respondents' case was
F that many years ago their ancestors made grants of portions of the land
in dispute, verged pink in their plan Exhibit 'A' to the ancestors of the
appellants who have been living on the portions granted to their ances-
tors. The grants were made by their ancestors individually and at differ-
ent times to the ancestors of the appellants also individually.

G On the other hand, the appellants' case, as defendants in the
consolidated suit was that they and their ancestors had been living on the
land in dispute from time immemorial, which land was shown in their
plan Exhibit 'B'. The appellants categorically denied any grant. But as
H already stated, the learned trial Judge respectively non-suited and dis-
missed the parties' case in the two consolidated suits.

The respondents did not appeal against the non-suit order made
against them, rather the appellants on appeal, submitted against the said

order of non-suit. Appellants' appeal to the lower court was dismissed. This appeal is against the dismissal of appellants' appeal by the lower court.

The judgment orders of the learned trial judge were premised on two weighty findings. Consequent to the visit to the locus in quo and upon the evaluation of the evidence tendered by both parties particularly relying on the evidence of D. W. 1 (appellants' witness) the learned trial Judge reached the following conclusion:

"I am inclined to behave that the Olori near to the plaintiffs, i. e. the defendants were shown where they now live in the plaintiffs' land when they returned from Atta where they ran to after the murder incident. Otherwise, how could they leave their kit and kin at Olori, cross another village-Umueke to come to live where they now live. I am more inclined to believe the plaintiffs that where the defendants now live is within their Umuokpo village."

When the Court visited locus, it were living before and this was not challenged by the defendants. Other members of Olori kindred still live there till today."

Upon this conclusion, it became obvious that the trial Judge would dismiss the appellants' cross-action.

Again, on the evaluation of the evidence of the grant made by the respondents, the trial Judge reasoned thus:

"If individuals of the plaintiffs' ancestors granted their individual portions of land to individuals of the ancestors of the defendants at different times and different terms, and the land in dispute is not communal land, I hold that each plaintiff should bring a separate action to claim from the (sic) each defendant the land granted to the defendants' ancestors individually to live."

And thereupon his Lordship non-suited the respondents. Again, upon the respondents, claim for forfeiture, his Lordship was quite discerning:

"Again Exhibit 'A' did not show the portions of the land in dispute granted individually to the ancestors of the defendants to make court make an order for forfeiture as the defendants are claiming the land in dispute as their own."

The Court of Appeal adopted these findings in dismissing the appellants' appeal to that court.

The above is a sketchy synopsis of the facts and major findings made by the trial confirmed by the Court of Appeal and it was against this background that both courts respectively reached the same decision whereupon the respondents were non-suited in their original suit and the appellants' suit was dismissed in its entirety. The detailed factual situation and the legal analysis of those facts leading to the concurrence by the lower court of the decision of the trial court have been well-taken in the leading judgment of my learned brother Ayoola, JSC, and since I cannot, in my view, improve on that analysis, I respectfully adopt them as mine and thereby avoid being repetitive. Needless to say that those concurrent findings and inference of grant made by the two lower courts which have not been dented by the appellants in this Court ought not ordinarily be interfered with or reversed by the Supreme Court more so when those findings are reasonably justified and supported by evidence given in the case and no special circumstances, showing obvious or palpable errors in the current findings have been established in the interest of justice to do so. See Lokoyi v Olojo (1983) 2 SCN LR 127, Ibodo v Enarofia & ors (1980) 5 SC 42 at 4, Igwe v The State (1982) 9 SC 174 and Salami v Gbodoolu (1997) 4 NWLR (Pt. 499) 277.

The appellants' appeal to this Court is predicated essentially on the arguments previously agitated at the two lower courts. The main plank of the issue strongly or doggedly contested before us in their Issue No. 6 by the appellants' learned senior counsel, Chief A. B. C. Iketuonye, SAN, was that the respondents ought not to have been non-suited but that their case should have been struck out. My contribution to the leading is directed only to further amplification of the final order of non-suit made by the lower courts.

In fairness to learned counsel, the very same point had earlier been agitated by him before the two lower courts. Consideration of some excerpts of the record may shed some light on this point. On 23/11/89, in his final address, he had this to say, per the court's record:

"Submitted to non-suit the plaintiffs or strike the case out on the

ground that there is misjoinder of action which offends the rule in Amachree v. Newting 14 WACA 97, in that the plaintiffs in their Amended Statement of Claim - paragraph 19 averred as they testified that 13 of their ancestors individually at different time made grants of the portions of the land to 1 ancestors of the defendants. Though we do not concede B the grants, since the plaintiffs are asking for forfeiture each and every ancestor of the plaintiffs or their descendants should bring a separate claim against the ancestors of the defendants who are alive seeking to recover the said portions of land granted to the defendants. Action is C misconceived- Oladotuy Okorji v. Alidufumni (1976) 11 S. C. 245 - 252.

Court to strike out the plaintiffs' claim and consider the counter claim of the defendants. Court to take into consideration the fact that the defendants have been on the land in dispute for over two generations." D

Repeating his submission on this point, senior learned counsel urged:

"The land was not communally granted to the defendants. This action is misconceived - Oludotuy Okorji v. Aladufumni (1976) 11 S. C. 249 - 252. Plaintiffs claim should be struck out in view of the defendants claim. Defendants have been on the land for over two generations." E

In response to the submission urged by counsel, the trial court in its judgment decided the issue thus:

"In the circumstances of this case I agree with the learned Senior Advocate of Nigeria that the proper order to make is that of non-suit." F

Although neither party appealed against the trial Judge's order of non-suit at the Court of Appeal, the observation of the that Court in this regard is germane to the present discussion. The lower court opined: G

"In any event, it should be mentioned that in making his final submissions at the Lower Court, the learned Senior Advocate for the appellants indicated the grounds upon which he requested that the respondents' case should fail and he urged the Court below to non-suit the respondents in Suit No. HOR/24/76. See Page 190 lines 23-32 Page 191 lined 1-5 of the Record of Proceedings. The judgment non-suiting the H

respondents from the record was based on three grounds, such order of non-suit in law is a final judgment which is subject to appeal. Neither side has appealed against that order. It operates as estoppel and as binding on both the appellants and the respondents. The Court of Appeal then cited the case of Chief N. Nkanu & ors v. Chief Onum & ors (1977) 5 S. C. 13 at 40."

Senior counsel in his brief and also before us in his oral submission in this Court urged as follows:

"It is humbly submitted that the non-suit in the said judgment is patently a slip that can be corrected at any time and by any Court. There cannot be an order of non-suit unless there is a competent action and a hearing followed by judgment. In the instant case, the respondents action in Suit No. HOR/24/76 was incompetent ab initio and was never instituted under the rule of Madukolu v Nkemdilim (1962)1 All NLR 587. Suit No. HOR/24/76 by the respondents was initiated by persons who had no competence to institute the action in a representative capacity. The action was therefore not initiated by due process of law and upon the fulfillment of condition precedent to the exercise of jurisdiction. Hence the Trial Court was urged to strike out the suit on the authority of Olodotun Kukoyi & Ors v. Adeatu Ladunne (1976) 11 S. C. 245 at 259 also cited in the Trial Court at Page 205 lines 25-26."

Learned Senior Advocate Submitted in the appellants' brief that at no time at the trial did he urge the trial court to non-suit the respondents as recorded by the Court of Appeal. Accordingly, counsel submitted that the non-suit order was a clerical error which under the principle of "Slip Rule" could be corrected. Counsel further argued that the respondents' action was incompetent because it was improperly constituted and accordingly could not sustain an order of non-suit. Finally, he submitted that what was intended in the instant case, was a striking out order and not a non-suit and accordingly urged the Court "to invoke its wide powers under section 22 Supreme Court Act, 1960 and correct the error of the Court of Appeal by amending the word non-suit to the word striking out to reflect the submission of counsel to the appellants at Page 90 and 91 of the Record."

For the respondents, their learned counsel, Mrs. A. J. Offiah, on the appellants' 6th issue dealing with the order of non-suit, submitted that this issue, as formulated under the 6th issue, was not raised in any form whatsoever in the Court of appeal as there was no ground of appeal upon which such issue could have been predicated. Consequently, counsel submitted, and rightly in my view, that leave to argue this point in the Supreme Court ought to have been sought and obtained before it could be argued; such leave not having been granted, the 6th issue should be struck out and be entirely disregarded. Although counsel's submission no doubt, is correct and can be subsumed under the generally accepted principle, it may not be the last word on the matter as it will not foreclose every conceivable circumstance in which the Supreme Court, as the apex Court, may feel disposed to act in the overall interest of justice. To this point I shall return presently.

Responding to the submissions made on behalf of the appellants on the issue of the non-suit order, Mrs. Offiah submitted that it is patently false for the appellants' learned Senior Advocate to say that the order for non-suit was not asked for; she referred specifically to the record of appeal in which appellants' senior counsel, as recorded by the learned trial Judge, ran as follows:

"Submitted to non-suit the Plaintiffs or strike the case out on the ground that there is misjoinder of action which offends the rule in Amachree v Newington 14 WACA"

Learned respondents' counsel submitted that having asked for the order for non-suit, which in turn was accepted by the trial Judge, it was not open to the appellants to quarrel with the acceptance of this view by the court of Appeal. Learned respondents' counsel also submitted that learned senior counsel was in error to have argued that the respondents' action was incompetent and arose from misjoinder of causes of action. Briefly put, it is counsel's submission that there was ample communal interest among the parties in the land in dispute to justify the court's order to prosecute the suit in a representative capacity, more so there was averment of partition in the pleadings to derogate for the communality of interest of the parties. Counsel submitted that Amachree v Newington

(supra) relied upon by the appellants was inapplicable, being distinguishable.

I am satisfied that a perusal of the record of appeal indisputably demonstrated that learned Senior Advocate for the appellants had urged the trial court to either order a non-suit or strike out the respondents' suit. Of course, the trial Judge in his wisdom ordered a non-suit and that order was unanimously confirmed by the Court of Appeal. Of course, it must be stressed that the mere fact that appellants' senior counsel urged for the order of non-suit cannot be a valid reason why the order must be so made. As consequential orders a court makes must, of necessity, flow from the circumstances of the decision of the court, it is not open to the court to make a consequential order that is at cross-purposes or contradictory to its decision. If that happens the appellate court will cut it down.

It will be recalled that learned appellants' Senior counsel having submitted in the alternative for the court to order either a non-suit or a striking out subsequently urged us to prefer and make the order of striking out the respondents' suit rather than one for a non-suit on the ground that his request for a non-suit was a clerical error under the principle of "Slip Rule". This line of submission is rather strange. It is quite clear to me that the submission of appellants' counsel in the alternative was quite deliberate and even if he was in fact mistaken in his urge for a non-suit the court would not have jurisdiction to correct the error because the principle of "slip rule" does not extend to clerical error made by counsel. My understanding of the principle of "slip rule" is that the court has always had jurisdiction to amend its order which by mistake does not correctly represent the intention of the court. This latitude in my view does not extend to errors made by counsel in his submission. After all, counsel's submission is not binding on the court as the order made by a court which commands immediate authority until set aside by a court of competent jurisdiction. An erroneous submission by counsel, in any event, can be rejected by the court but could also be mistakenly approved by court. In the later situation, the only remedy available to counsel is to appeal but not to request the court to vary its mistaken submission by the

invocation of the "slip rule". In other words. The remedy for correcting a counsel's mistaken or erroneous submission is completely outside the purview of the "slip rule". See Thyme v. Thyme (1955) 3 All E.R. 129 at 146 and Asiyanbi v Adeniji (1967) 1 All NLR 82, PP 89-90.

Finally, it must be stated in the clearest possible terms that the submission requesting this Court to amend counsel's erroneous submission is totally misconceived. Little wonder senior counsel is unable to support his contention with any known authority on the well-established principle of "slip rule". The irony of senior counsel's submission is that he is unable to appreciate that this Court has no power to review any judgment once given and delivered by it save to correct any clerical mistake or accidental slip made by it; this right of review of its own judgment is strictly circumscribed; see Supreme Court Rules Order 8 Rule 16.

It is also important to observe that the learned trial Judge, after a careful evaluation of the evidence before him, reached the following conclusion:

"It is my view following the above case, that the plaintiffs have not jointly together a ground for instituting a suit for declaration or forfeiture of the land in dispute which is not a communal land and not granted communally but individually. In the circumstances this case, I agree with the learned Senior Advocate of Nigeria that the proper order to make is that of non- suit."

As earlier noted, there is no appeal against this finding and the same was confirmed by the Court of Appeal. Not having appealed against that finding, learned respondents' counsel cannot now surreptitiously urge on the existence of communalism of interest in the respondents, as plaintiffs, to justify their representative action. The crucial question now is whether the lower courts were right to decree the order of non-suit consequent to the reasoning that the respondents' action as decided by the trial court was improperly constituted. I do not have any hesitation whatsoever that on the concurrent findings of the learned trial Judge and the unanimous judgment of the Court of Appeal the only order open to those courts was an order for striking the suit out. The simple reason justify-

ing the order for striking out is that respondents' suit is incompetent being wrongly constituted. See Ukatta v Ndinaeze (1977) 4 NWLR (Pt. 499) 251. On the other hand an order of non- suit means giving the plaintiff a second chance to prove his case where there has been an omission detrimental to his case arising from the inadvertence of counsel. See Craig v Craig (1967) NMLR 52.

It is pertinent to recall that the appellants did not obtain leave of this court to argue Issue No.6, a matter not raised in the court below which respondents had contended was not arguable in this court with the necessary leave having been first sought and obtained. I indicated earlier that I would return to this matter. I now come to that point. The right to amend or correct an erroneous order or judgment even though no notice of appeal has been given in respect of such error, in my view, is within the general powers of this Court. These powers are set clearly in order 8 Rules (2) and (5). For ease of reference I reproduce these Rules of Order 8:

"(2) The Court shall have power to draw inferences facts and to give any judgment and make any order which ought to have been given or made, and to make such further or other orders as the case may require, including any order as to costs.

"(5) The powers of the Court under the foregoing provisions of this rule may be exercised notwithstanding that no notice of appeal has been given in respect of any particular party to the proceedings in that court, or that any ground for allowing the appeal or for affirming or varying the decision of that court is not specified in such a notice; and the court may make any order, on such terms as the Court thinks just, to ensure the determination on the merits of the real question in controversy between the parties."

The provisions of sub-rules (2) or (5) show the plenitude of the supervisory power enjoyed by the supreme Court, as apex Court, to ensure that the determination of cases on appeal to it is reached on the merits of the real question in controversy between the parties. For avoidance of doubt, this expansive power vested in the Supreme Court is further fortified by the equally general power conferred on it under section 22 of the Su-

preme Court Act, 1960.

I am therefore clearly of opinion that this Court enjoys the expansive power which enable it to correct what is unquestionably the erroneous order of non-suit made by the trial court and equally mistakenly confirmed by the Court of Appeal. B

It is pertinent to recapitulate that despite the various attractive issues canvassed in the appellants' brief which their learned senior counsel partially agitated at the oral hearing of the appeal, their counsel Chief Iketuonye, SAN, later speaking with utmost candour conceded that respondents make a grant to the appellants. This is how it should be. C
There were findings or at any rate facts from which the trial Judge was entitled to make an inference of grant. This inference of grant has not been challenged in the appellants' brief, rather learned senior counsel in the face of all odd, found himself able, and rightly in my view, to make a D
frank though belated concession on the question of grant.

In the result, and for the reasons stated by me, the order of non-suit made by the trial court and confirmed by the Court of Appeal is erroneous and the same is hereby set aside. The appeal partially succeeds. In its place, I would strike out the respondents' action and abide E
by the other consequential orders contained in the leading judgment.

KALGO JSC

This appeal concerned two land cases which were separately F
filed and which were later consolidated and heard together in the trial court. At the end of the trial, the learned trial judge Ononju J. non-suited the case of the respondents and dismissed that of the appellant. G
The appellants' appeal to the Court of Appeal was dismissed. They now appealed to this court.

In the course of argument in the appeal in this court, the learned counsel for the appellants Chief Iketuonye SAN admitted that appellants are in fact the customary tenants to the respondents. By this admission, H
which is acceptable by this court, the main dispute between the parties in the consolidated case and in this appeal is fully resolved and the appeal automatically collapsed. The appellants are bound by the unequivocal

admission of their counsel and this court would be right in acting on the admission of counsel on behalf of his clients. See Adewunmi v. Plastex Nigeria Limited (1986) 3 NWLR (pt. 32); M. G. M. Ltd V. N. S. P Ltd (1987) 2 NWLR (Pt. 55) 110; Akanbi V Alao (1989) 3 NWLR (Pt. 108) 118; Strauss V Strauss L R. 1 Q.B. 379.

It is common ground that the respondents who were plaintiffs in the first suit were non-suited on the main dispute on the land by the learned trial judge and there was no appeal against that order. The appellant's case at trial was also dismissed the Court of Appeal affirmed the order of non-suit and dismissed the appeal of the appellants. I agree with the views expressed in the judgment of my learned brother Ayoola JSC that having regard to the facts and circumstances of this case, the order of non-suit was improper and that although there was no appeal to it on the order of non-suit, the Court of Appeal could properly deal with it in accordance with 0.3 rule 23 (1) and (2) of the Court of Appeal Rules 1981. Accordingly I find that the order of non-suit is in-appropriate in this case and the Court of Appeal was wrong to affirm it. As a result, I set aside the order and strike out the respondents' case at the trial.

It is for this and more detailed reasons given by my learned brother Ayoola JSC in his leading judgment which has just been delivered and which I have read earlier, that I find no merit in this appeal. I accordingly dismiss it with N10,000. 00 costs in favour of the respondents

EJIWUNMI JSC

Being privileged to have read in advance the judgment just delivered by my learned brother Ayoola JSC, I agree for the reasons given for dismissing the appeal.

The appeal is therefore also dismissed by me, and I abide with all the consequential orders made in the said judgment of my learned brother, Ayoola JSC.

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