

SUPREME COURT OF NIGERIA

7TH JULY 2000. SC. 23/1995

**CORAM:- A. G. KARIBI-WHYTE, E. O. OGWUEGBU,
S. U. ONU, A. I. KATSINA-ALU, U. A. KALGO, JJSC**

DAVID ITAUMA APPELLANT
AND
FRIDAY JACKSON AKPE-IME RESPONDENT

DOCUMENTS - *Due execution - Illiterate jurat - Document executed by an illiterate - Strict compliance with the law is mandatory.*

EVIDENCE - *Burden of proof - In civil cases the burden is not static - While it initially lies on the plaintiff - The proof or rebuttal of issues which arise in the course of proceedings - May shift from the plaintiff to the defendant and vice versa*

EVIDENCE - *Pleadings - Evidence which is contrary to the pleadings - Goes to no issues*

LAND LAW - *Title to land - Declaration of - Onus of proof - The onus is on the plaintiff to satisfy the court that he is entitled to the declaration he seeks - And he must rely on the strength of his own case.*

FACTS

In the High Court of Akwa Ibom State holden at Eket, the plaintiff/appellant sued the defendant/respondent claiming for; a declaration that there is no valid and/or any lease agreement between the plaintiff and the defendant whereby any lease of the land in dispute was granted to the defendant; a declaration that the defendant is a licensee whose licence to occupy the land in dispute was determined either by notice or breach of condition under a parol agreement; order of ejection, and injunction. The plaintiff's case is that he is an illiterate. That sometime in 1962 he orally granted mere permission to the defendant to erect a temporary shed in

the fore court of his land at a rent of f4 (four pounds) per annum. He denied ever granting the defendant a 99 year lease over the land in dispute.

The case of the defendant is that in 1962 he approached the plaintiff for a lease of the piece of land in dispute. The plaintiff granted him a 99 year lease at an annual rent of f4 (four pounds). Lease agreement tendered as Exhibit 'B' was thereafter prepared and executed. He said he was let into possession by the plaintiff. He admitted that the plaintiff is an illiterate. On the face of Exhibit "B" there is no jurat and the name and address of the writer were not given. The plaintiff denied in his pleading and on oath that he ever signed and executed Exhibit "B". At the conclusion of hearing, the learned trial judge in a reserved judgment dismissed the plaintiff's claim. The plaintiff's appeal to the Court of Appeal was dismissed. He has now further appealed to the Supreme Court raising three issues

ISSUES FOR DETERMINATION

1. Did the Courts below advert their minds to the onus and burden of proof and did the Respondent discharge the burden of proving that Appellant granted him a lease of portion of his land in Exhibits B?

2. Whether the courts below considered that it was not a part of the Defendant/Respondent's case as pleaded that he was granted the land in equity or according to the customary law of the people.

3. Having regard to the fact that Appellant's illiteracy was admitted did the courts below consider clear provisions of section 3 of the illiteracy Protection Ordinance Cap. 88 which was in force in 1962. The Defendant has adopted the issues for determination formulated by the Plaintiff.

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

Land law - Title to land

1. In a claim for declaration of title to land the onus is on the plaintiff to satisfy the court that he is entitled on the evidence brought by him to the declaration he seeks. The plaintiff must rely on the strength of his own

case and not on the weakness of the defendant's case. If the onus is not discharged, then the proper judgment is for the defendant: See Kodilinye v. Odu (1935) 2 WACA 336. (p. 2806 B)

Burden of proof

2. In the present case, the onus of proof on the Plaintiff was to adduce evidence of his title to the whole of Anyankana land. However, the Defendant has conceded that the radical title over Anyankana land is in the plaintiff. In these circumstances, the burden shifted on the Defendant to prove a grant by lease of the portion he claims. This is so because in civil cases the burden of proof is not static; while the burden of proof initially lies on the plaintiff, the proof or rebuttal of issues which arise in the course of proceedings may shift from the plaintiff to the defendant and vice versa. (p. 2806 C)

Documents - Due execution - Illiterate jurat

3. It must be remembered that the Plaintiff denied in his pleadings and on oath that he ever signed or executed Exhibit 'B'. So that, in the face of these contradictions in the evidence of the Defendant and his witness, it should have been obvious to the Court of Appeal that the conclusion by the learned judge that the Defendant established the grant was not borne out by the evidence before him.

In my judgment the Defendant did not discharge the onus placed on him to prove the alleged grant to him by the Plaintiff.
(p. 2810 D/2811 C)

Evidence - Pleadings

4. In his 22 paragraph Statement of Defence the Defendant did not plead customary grant or title in equity. A party in a civil case is bound by his pleadings: see Emegokwue v. Okadigbo (1973) 4 SC. 113 at 117. Any evidence called by a party which is contrary to his pleadings goes to no issue. I am in agreement with learned Counsel for the Plaintiff that evidence on title in equity or grant accordingly to native law and custom is strictly immaterial and goes to no issue and must be and should have

been disregarded by the two courts below. (p. 2810 H)

NOTABLE POINTS OF INTEREST

OGWUEGBU JSC

B *1. The object of the illiterates protection law*

It is clear from the evidence and on the face of Exhibit "B" that it does not comply with section 3 of the Illiterates Protection Law. The object of the law is to protect the illiterate person from fraud. Strict compliance therefore becomes obligatory as regards the writer of such document. See C U.A.C. (Nig) Ltd. v. Edems & Or. (1958) N.R.L.R. 33. (p. 2816 E)

2. Effect of non-compliance with the Land Instruments Registration Law

D The defendant did not prove that the plaintiff executed Exhibit "B". The courts below were therefore in error in deciding the case on points not raised in the pleadings. It is not within the competence of a judge to make a case for the parties. The facts of this case are distinguishable E from those of Okoye v. Dumez Nig. Ltd. & Or. (1985) 1 N.W.L.R. (Pt. 4) 783 and Obijuru v. Ozims (1985) 2 N.W.L.R. (Pt. 6) 167 among others. Exhibit "B" cannot therefore be enforced against the plaintiff. It is also inadmissible in evidence for non-compliance with section 15 of F the Land Instruments Registration Law. (p. 2816 H)

KALGO JSC

3. Use of previous judgments when tendered in a trial

G It has been well settled that court judgments are only used, when tendered in a trial, to determine and confirm what was actually decided in the case and not to use the evidence given in it for or against any of the parties therein. See Igwego v. Egeugo (1992) 6 NWLR (pt. 240) 561 at 587. (p. 2825 E)

H

REPRESENTATION

Ada Okonkwo (Mrs) for the Respondent

The Appellant was absent and not represented by counsel.

CASES REFERRED TO

Igwego v. Egeugo (1992) 6 NWLR (pt. 240) 561 at 587

Ukuegbu v. Ugoji 6 NWLR (pt. 196) 129

Udomba v. Odiese (1990) 1 NWLR (pt. 125) at 186

B

Okoye v. Dumez Nig. Ltd. (1985) 1 N.W.L.R. (Pt. 4) 783

Obijuru v. Ozims (1985) 2 N.W.L.R. (Pt. 6) 167

U.A.C. (Nig) Ltd. v. Edems (1958) N.R.L.R. 33

Kodilinye v. Odu (1935) 2 WACA 336

C

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

Ogbechie v. Onochie (1988) 1 NWLR (pt. 70) 370

Ugo v. Obiekwe (1989) 1 NWLR (pt. 99) 566

D

STATUTES REFERRED TO

Illiterates Protection Law Cap. 56 Laws of the Cross River State, 1981 applicable to Akwa Ibom State; S.3.

Land Instruments Registration Law Cap. 62 Laws of the Cross River State applicable Akwa Ibom State; ss. 8 (i) and 15.

LEAD JUDGMENT BY KATSINA-ALU JSC

The Appellant herein as Plaintiff sued the Defendant (Respondent at the Eket High Court claiming the following reliefs: F

(a) A declaration that there is no valid and/or any lease agreement between the plaintiff and the defendant whereby any grant was made to the Defendant of the land called "ANYANKANA" or any part thereof. G

(b) A declaration that the defendant is a licensee whose licence to occupy the said land or site was determined either by notice or breach of condition under a parol agreement.

(c) Order of Ejection.

H

(d) Injunction

The Plaintiff's case as stated in his Amended Statement of Claim and his evidence in court is that first, he is an illiterate secondly that he

granted the Defendant a mere permission to erect a temporary stall in the forecourt of the land at an annual rent of #4 (four pounds) in 1962. See paragraphs 7-9 of the Amended Statement of claim. He denied ever granting the Defendant a 99 year lease over the land in dispute.

B The case of the Defendant is that in 1962 he approached the Plaintiff for a lease of the piece of land in dispute. The Plaintiff granted him a 99 year lease at an annual rent of #4 (Four Pounds). Lease agreement tendered as Exhibit 'B' was thereafter prepared and executed. He said he was let into possession by the Plaintiff.

C The learned trial judge in a reserved judgment dismissed the Plaintiff's claim. The Plaintiff's appeal to the Court of Appeal was dismissed. He has now further appealed to this Court upon a number of grounds.

D Counsel for the Plaintiff formulated three questions for determination in this appeal. These are:

1. Did the Courts below advert their minds to the onus and burden of proof and did the Respondent discharge the burden of proving
E that Appellant granted him a lease of portion of his land in Exhibits B?

2. Whether the courts below considered that it was not a part of the Defendant/Respondent's case as pleaded that he was granted the land in equity or according to the customary law of the people.

F 3. Having regard to the fact that Appellant's illiteracy was admitted did the courts below consider clear provisions of section 3 of the illiteracy Protection Ordinance Cap. 88 which was in force in 1962.

The Defendant has adopted the issues for determination formulated by the Plaintiff.

G I shall consider the three issues raised together. To appreciate the case of each party, it is necessary to have a recourse to their respective pleadings. The Plaintiff, in paragraphs 1,2,3,4,5,6,7,8 and 9 of the Amended Statement of claim averred as follows:

H "1. The Plaintiff is a nightwatchman and an illiterate working for the Ministry of Works and Transport Eket and is a native and resident of Usung Invang, Eket in the Eket Local Government Area within jurisdiction of the Honourable Court.

2. *The Plaintiff is the owner and in possession of the land known and called "Anyankana" situate along Eket-Oron Road, Eket.*

3. *The Plaintiff lives and has a house and shop situate on part of the said "Anyankana" land.*

4. *The said "Anyakana" land with three buildings situate thereon is more particularly delineated and edged pink on the plan No. RIM/3425 attached to this Statement of claim.*

5. *In this Statement of Claim the word "premises" or site means part of the "Anyankana" land occupied by the defendant and the word "land" means where the context permits the "premises" or "site"*

6. *The Plaintiff lives in the rear building marked "A" indicated in the said plan and lets out building "C" as a watch repairers shop and restaurant which situates to the far right and the land and building marked "B" situated nearest Eket-Oron Road presently in the occupation of the Barclays Bank Nig. Ltd. Eket, is a subject matter of this action against the defendant.*

7. *In or about the year 1962 on a date uncertain, the defendant approached the plaintiff requesting that he (defendant) be given permission to erect a temporary shed in the fore court of the plaintiff's land (the said Anyankana land) for use in selling provisions and drinks. The plaintiff was not agreeable to this proposition.*

8. *However, after much persistence by the defendant and the promise of the defendant that his stay will be temporary and that he will vacate the site whenever requested to do so by the plaintiff, the plaintiff succeeded (sic) to the request of the defendant but not without stressing to the defendant that in the near future the plaintiff intends to erect a permanent building on the site.*

9. *For the use of the site by the defendant, the plaintiff charged the defendant an annual rent of four pounds (£4) which by conversion is N8 (Eight naira).*

In his response, the Defendant pleaded in paragraphs 2,3,4,5,6,7,8,9,10,11, and 12 as follows:

2. The defendant admits paragraph 1 of the plaintiff's Amended Statement of Claim. The said land is also known to the Plaintiff as

"Ayankrang Okukwot Usung Inyang."

3. The defendant denies paragraph 2 of the plaintiff's Amended Statement of Claim and adds that the Plaintiff is only in possession of a small portion of the land and not the land which is the subject matter of this suit. The other portion were (sic) the Barclays Bank building is situate is in the possession of the defendant by a lease agreement for 99 years executed between the plaintiff and the defendant on 19th March, 1962. The said agreement and the Survey Plan of the land No. IN/5805 drawn by a licensed Surveyor Mr. I.O. Inyang will be founded upon at the trial.

4. The defendant admits paragraph 3 of the plaintiff's Amended Statement of Claim,

5. The defendant is not in a position to deny or admit paragraph 4 of the Plaintiff's Amended Statement of Claim and will put the Plaintiff to the strictest proof of the allegations therein contained.

6. The Defendant is not in a position to admit or deny paragraph 5 of the plaintiff's Amended Statement of Claim.

7. The defendant is not in a position to admit or deny paragraph 6 of the plaintiff's Amended Statement of claim and will put the palintiff to the strictest proof of the allegations therein.

8. The defendant denies part of paragraph 7 of the plaintiff's Amended Statement of Claim but admits that in or about 1962 the plaintiff with full consent granted a lease of the portion of land on which the Barclays Bank building situates to the defendant for a term of 99 years at the rent of #4 (four pounds) now N8.00 (eight naira) per annum, which the defendant paid regularly yearly and for which receipts dated 19th January, 1963 thumimpressed by the plaintiffs, 25th January, 1964, signed by the plaintiff's son, one Samuel David, January, 1965, 25th January, 1966, 1st April 1967, 17th April, 1968 and 4th April, 1969 all signed by the plaintiff's son, one Etuk Itauma, will be relied upon by defendant.

9. The defendant further adds that when the plaintiff granted the said lease he was an adult and was fully aware of the implications thereof

10. The defendant further adds that the lease granted him by the plaintiff was not for the building of a temporary shed for selling provi-

sions and drinks but for any purpose whatsoever.

11. The defendant denies paragraph 8 of the plaintiff's Amended statement of Claim to the extent which it alleges that the defendant's lease was "Temporary and that he will vacate the site whenever requested to do so by the palintiff." However, in further answer to paragraph 8 of the Amended Statement of Claim the defendant says that the plaintiff granted him a lease for 99 years renewable ten yearly at the rent of #4 (four pounds) now N8.00 (eight naira) and that the plaintiff was only entitled to the reversionary interest at the end of the ninety -nine years. In further answer to paragraph 8 of the plaintiff's amended Statement of Claim, the defendant adds that the plaintiff has never at anytime stressed to the defendant that in the near future he the plaintiff would like to put a permanent Building on that site.

12. The defendant admits paragraph 9 of the plaintiff's Amended statement of claim.

From these averments certain facts emerge. First, that the radical title to "Anyankana" land was in the Plaintiff. Secondly that whereas it is conceded that the plaintiff made some form of grant of the portion of the land, the subject of this suit, to the Defendant in or about 1962 the issue is whether what was granted was a determinable right to erect temporary sheds, as the plaintiff claims or a lease for 99 years as the defendant maintains. Thirdly, it was not a part of the Defendant's case as pleaded that he was granted the land in equity or according to the customary law of the people.

It has been submitted for the plaintiff, having regard to the parts and circumstances of this case, that the onus of proof on the plaintiff, was to adduce evidence of his title to the whole of Anyankana land but as this has been conceded on the pleadings, the burden shifted on the Defendant to prove a grant by lease of the portion he claims. It was argued that in civil cases the burden of proof is not static, rather it keeps shifting from the plaintiff to the Defendant. Learned Counsel for the plaintiff H relied on the case of Osawaru v. Ezeiruka (1978) 6 & 7 SC. 135.

For his part, the Defendant agrees with the proposition of law relating to the burden of proof in civil cases as stated in the case of

Osawaru v. Ezeiruka (supra). It was however contended that the Defendant led credible evidence to prove the grant by the plaintiff. Learned Counsel for the Defendant referred to paragraphs 3,8,9,10,11, 13, and 14 of the Further Amended statement of defence and submitted that the Defendant adduced enough evidence to show that the plaintiff signed and executed Exhibit 'B'.

Now, in a claim for declaration of title to land the onus is on the plaintiff to satisfy the court that he is entitled on the evidence brought by him to the declaration he seeks. The plaintiff must rely on the strength of his own case and not on the weakness of the defendant's case. If the onus is not discharged, then the proper judgment is for the defendant: See Kodilinye v. Odu (1935) 2 WACA 336. In the present case, the onus of proof on the Plaintiff was to adduce evidence of his title to the whole of Anyankana land. However, the Defendant has conceded that the radical title over Anyankana land is in the plaintiff. In these circumstances, the burden shifted on the Defendant to prove a grant by lease of the portion he claims. This is so because in civil cases the burden of proof is not static; while the burden of proof initially lies on the plaintiff, the proof or rebuttal of issues which arise in the course of proceedings may shift from the plaintiff to the defendant and vice versa.

The onus was on the Defendant to prove the grant. In this regard, he was under a duty to establish by credible evidence that the plaintiff signed and executed Exhibit 'B'. This is moreso as the plaintiff denies ever granting the Defendant a 99 year lease over the land in question. I think this is the crucial issue in this case. The Defendant clearly hung his case on Exhibit 'B' and no more. See paragraph 14 of his further amended statement of Defence which states:

"14. In further answer to paragraph 10 of the Plaintiff's Amended Statement of claim the defendant states that there has never been any prior understanding between the plaintiff and the defendant over the said lease outside the terms of the lease as spelt out in the lease agreement itself. The said lease agreement and the plan of the portion of the

land which was granted by the Plaintiff to the defendant for a term of 99 years will be founded upon at the trial. The defendant will put the plaintiff to this strictest proof of the allegation contained in paragraph 10 of the Amended Statement of claim."

Clearly therefore the Defendant's case would succeed or fail on due proof of the lease. I shall say more on this later in the judgment. B

I must now examine the evidence before the court of trial. I start with the evidence of the Plaintiff. Part of his evidence in-chief runs as follows:

"I am in Court with the Defendant today because in 1962 when I came home the Defendant approached me and asked me for a place to set up for the sale of his drinks. The Defendant wanted to sell palm wine. I came home from my work at Etebi to see my wife and children at Eket. The land the Defendant asked me to give to him is called ANYAKANA USUNG INYANG. The land is situate along Eket/Oron Road, Eket. At that particular time I was still living on that land with my family. When the Defendant came to approach me for the land. I told him that I was living on that land with my family. Apart from the Defendant being a youngman, I rejected the request of the Defendant because of my wife and my daughters. When I came back home again, the defendant approached me for the second time and begged me for the second time. I then gave the land to the Defendant. Before I handed over the land to the Defendant I told him that I would be collecting #4 (four pounds) from him as annual rent. I then went back to my station at Etebi. Before I left to Etebi I did not give the Defendant any other conditions nor made any written agreement with him. I am a illiterate. I do not know how to read and write. It is not true that I executed any written agreement with the Defendant. It is not true that I granted the lease of the land to the Defendant on a 99 year lease. I gave the Defendant another condition that he would leave the land at any time I wanted to use it for my personal business. C D E F G H

When he was cross-examined, the Plaintiff maintained that:

"I showed the Defendant a portion of land to stay and sell his drinks. I asked the defendant to build a temporary place on the land and

then quit whenever I would ask him to do so"

Again under cross-examination the Plaintiff testified thus:

"The defendant did not approach me to sell the land to him for #400 (four hundred pounds). I did not sell the land to the Defendant for #400 or for any other amount. I did not measure any dimension of the land where he would set up the temporary building. I only asked him to stay temporarily on the land. There was no other person present when I gave the land to the Defendant except my wife"

C I now turn to the evidence called by the Defendant. He testified in his own behalf and called one witness. In his testimony the Defendant said:

"The Plaintiff is a native of Usung Inyang Eket. He is my landlord in respect of the land now in dispute. The Plaintiff is a retired nightwatchman. He was working as Nightwatchman at E.N.D.C. before he retired. The Plaintiff was working at Etebi at the time. On 19/3/62, I went and negotiated with the Plaintiff for a lease of land at Okukwot Usung Inyang situate along Eket/Oron Road. The plaintiff accepted to lease the land to me. There were witnesses when he accepted to lease the land. The Plaintiff eventually leased the land to me. The name of the land is ANYANKANA OKUQUOT situate along Eket/Oron Road, Eket. The Plaintiff also calls this particular land "ANYANKANA OKUQUOT USUNG INYANG". When the plaintiff agreed to lease the land to me, he fixed that I with my witness should come on 19/3/62. I went with my witnesses. The plaintiff went and showed me and my witnesses the land which he agreed to lease to me. The Plaintiff's witnesses were also there. We settled for the rent in respect of the lease. We fixed the rent at #4 (four pounds) per year. The Plaintiff asked me to give him goat and drink and I did so. I paid the 54 rent to the plaintiff before the execution of the lease. I told the plaintiff that I would put up a permanent building on the land. I eventually put up the building in 1962 on the land. I completed the building in early 1963. I entered into the lease agreement. The Plaintiff thumbprinted the document and his uncle's son by name Etuk Jacob Itauma wrote the plaintiff's name on the document in the presence of five witnesses, two from the side of the plaintiff and three

from my side. The persons who signed on the side of the Plaintiff were George Mbuk and Etuk Jacob Itauma, the son of the Senior brother to the Plaintiff. I signed the document and my junior Sunday Jack Akpe Ime or Ekong Ime, Chief Michael Umanha Obot, village Head of Iko Eket and Joseph Akpe also signed.

B

When the Defendant was cross-examined he testified as follows:

"..... I called Nathan Essien to prepare the agreement for me. I cannot remember whether I said in 1980 that it was the typist in my vocational school who typed the Agreement. I was running a Vocational School at that time. The agreement might have been typed in my school. I was not the person who typed the Agreement I do not know the person who typed the Agreement. But I know that the Agreement was drafted by Nathan Essien. I remember that there was a condition that the Agreement was to be renewed after ten years" (Underlining mine)

C

D

The Defendant's lone witness Joseph Akpe testified as DW 2. In his evidence-in-chief he said:

"I was present when the Agreement between the Plaintiff and the Defendant in respect of the land in dispute was made. I thumbpinted on the Agreement as a witness. There were other people present when the Agreement was made The names of other people who were present with us when the Agreement was made: apart from me, the Plaintiff and the Defendant were:-

F

- (1) Wife to the Plaintiff
- (2) Akpan Jacob Itauma, son to the Plaintiff's half brother.
- (3) George Mbuk,
- (4) Chief Michael Umaha Obot
- (5) Nathan Essien who drew up the Agreement."

G

Under cross-examination, this witness stated as follows:

"The Agreement was drafted by one Nathan Essien before he look it for typing. It was typed by Nathan Essien. Nathan Essien sat in the house of the Plaintiff and typed the Agreement. It was not typed in the vocational School. It was the Plaintiff who procured Nathan Essien to type the Agreement. Nathan Essien is from the same village with the Plaintiff, that is Usung Inyang. Eket. After the amount of rent was

H

agreed upon, it was the Plaintiff who directed Nathan Essien to write what he said. It was the Plaintiff who engaged Nathan Essien to write the Agreement." (Underlining for emphasis).

There are contradictions apparent in the evidence of the Defendant and his witness (DW 2). While DW 2 named the Plaintiff's wife as one of the persons who witnessed the signing of the Agreement, the Defendant did not. Again While DW2 said that Nathan Essien who prepared and typed the Agreement was also present at the ceremony, the Defendant was silent on it. More importantly, the Defendant said that he called Nathan Essien to prepare the Agreement, his witness said that it was the plaintiff who engaged Nathan Essien to do so. It was also the evidence of DW 2 that it was Nathan who typed the Agreement in the house of the Plaintiff. The Defendant himself does not know who typed it and the place where it was typed.

It must be remembered that the Plaintiff denied in his pleadings and on oath that he ever signed or executed Exhibit 'B'. So that, in the face of these contradictions in the evidence of the Defendant and his witness, it should have been obvious to the Court of Appeal that the conclusion by the learned judge that the Defendant established the grant was not borne out by the evidence before him.

I must add here that the Plaintiff is an illiterate. This is not in dispute. Plaintiff pleaded this fact in paragraph 1 of his Amended Statement of Defence. On the face of Exhibit ' B' which he was alleged to have signed, there is no jurat duly signed and the name and address of the writer were not given as required by law. Although the Defendant claimed that it was Nathan Essien who prepared Exhibit 'B' he was not called as a witness moreso as the Plaintiff has strongly denied ever signing Exhibit 'B'. No reason was given for the failure to call him.

One last point. As I have already indicated, the Defendant clearly hung his case on Exhibit 'B' and no more. See paragraph 14 of the further Amened Statement of Defence which I have set out earlier on in this judgment. **In his 22 paragraph Statement of Defence the Defendant did not plead customary grant or title in equity. A party in**

a civil case is bound by his pleadings: see Emegokwue v. Okadigbo (1973) 4 SC. 113 at 117; Ogbechie v. Onochie (1988) 1 NWLR (pt. 70) 370; Ugo v. Obiekwe (1989) 1 NWLR (pt. 99) 566; North Western Salt Co. Ltd v. Electrolytic Alkali Co. Ltd. (1914) AC (H.L.) 461. Any evidence called by a party which is contrary to his pleadings goes to no issue. I am in agreement with learned Counsel for the Plaintiff that evidence on title in equity or grant accordingly to native law and custom is strictly immaterial and goes to no issue and must be and should have been disregarded by the two courts below.

In my judgment the Defendant did not discharge the onus placed on him to prove the alleged grant to him by the Plaintiff. In the result this appeal succeeds and is allowed by me. I set aside the judgment of the Court of Appeal which affirmed the decision of the trial court. I enter judgment for Plaintiff as per his claim. The Plaintiff is entitled to costs assessed at N10,000.00 in this Court, N500.00 in the trial court and N2,000.00 in the Court of Appeal.

KARIBI-WHYTE JSC

I had the privilege of reading the leading judgment of my learned brother Katsina-Alu, JSC in this appeal. I agree entirely with his reasoning and conclusion that this appeal should be allowed. I also agree entirely with the opinion of Ogwuegbu, JSC on the applicability of section 3 of the Illiterates Protection Law, Cap.95, Laws of Cross River State applicable to Akwa-Ibom State to this case. This issue has been very fully discussed by my learned brother Ogwuegbu, JSC in his judgment in amplification of the leading judgment of Katsina-Alu, JSC. In the circumstances, I do not consider it necessary to add to the opinions expressed in the two judgments.

I also will and hereby allow the appeal of the Appellant against the judgment of the Court below. The judgment of the Court below is hereby set aside. Plaintiff/Appellant is entitled to the cost of this appeal assessed at N10,000.

OGWUEGBU JSC

I have had the advantage of reading in draft the judgment just delivered by my learned brother Katsina-Alu; J.S.C. and I agree entirely with him that this appeal should be allowed. I wish to add a few comments of mine by way of emphasis on the issues submitted by the appellant for our determination. They are as follows:

"1. Did the courts below adverted (sic) their minds to the onus and burden of proof and did the respondent discharged (sic) the burden of proving that appellant granted him a lease of the portion of his land in Exhibit B.

2. Whether the courts below considered that it was not a part of the defendant/respondent's case as pleaded that he was granted the land in equity or according to the customary law of the people.

3. Having regard to the fact that appellant's illiteracy was admitted did the courts below consider clear provisions of section 3 of the Illiterate Protection Ordinance Cap. 88 which was in force in 1992 (sic) (1962)"

At the hearing of the appeal on 10-4-2000, the appellant was absent and not represented by counsel but filed a brief. The appeal was treated as having been argued on the brief. See Order 6, Rule 8 (6) of the Rules of this court.

The facts of the case having been fully set out in the judgment of my learned brother, Katsina-Alu, J.S.C., I do not intend to repeat them here except as is necessary for the better appreciation of the issues being discussed. Sometime in 1962 plaintiff orally granted mere permission to the defendant/respondent to erect a temporary shed in the fore court of his land at a rent of #4.00 (N8.00) per annum. It was also the plaintiff's case that he is an illiterate. The defendant's case is that plaintiff granted him a lease for 99 years at an annual rent of four pounds per annum. It was also his case that he executed Exhibit "B" with the plaintiff. He admitted in paragraph 2 of his further amended statement of defence that the plaintiff is an illiterate. At the close of pleadings, the parties joined issue on the due execution of Exhibit "B".

The due execution of Exhibit "B" is very much in issue in this case. The plaintiff having adduced evidence which was in line with his pleading that he orally granted a temporary right to erect a shed to the defendant on a portion of his land the subject matter of this suit in 1962 on a yearly rent of #4 (N8.00) per year, the onus of proof that the grant B made to him by the plaintiff is for 99 years and that all the conditions of the grant are as contained in Exhibit "B" shifted to the defendant. The defendant in paragraph 14 of his further amended statement of defence averred as follows:

"14. In further answer to paragraph 10 of the Plaintiff's Amended C Statement of Claim the defendant states that there has never been any prior understanding between the plaintiff and the defendant over the said lease outside the terms of the lease as spelt out in the lease agreement itself. The said lease agreement and the plan of the portion of the D land which was granted by the Plaintiff to the defendant for a term of 99 years will be founded upon at the trial."

Considering the averment in paragraph 1 of the amended statement of claim where the plaintiff stated that he is a nightwatchman and E an illiterate working for the Ministry of works, and Transport, Eket and the defendant's admission of the illiteracy of the plaintiff in paragraph 2 of the further amended statement defence, it is necessary to determine the validity of Exhibit "B". This exhibit was admitted in evidence at the F court of trial despite the objection of learned counsel for the plaintiff to its admissibility. Sections 8 (1) and 15 of the Land Instruments Registration Law Cap. 62 Laws of the Cross River State applicable to Akwa Ibom State will be applied if exhibit "B" is found to be duly executed by G the plaintiff. Sections 8 (1) and 15 provide as follows:

"8 (1) No instrument executed in Nigeria after the commencement of this law, the grantor, or one or more of the grantors, whereof is illiterate, shall be registered unless it has been executed by such illiterate grantor or grantors in the presence of a magistrate or justice of the peace H as a witness thereto."

"15. No instrument shall be pleaded or given in evidence in any court as affecting any land unless the same shall be registered."

The defendant admitted in his further amended statement of defence that the plaintiff is an illiterate. That he thumb printed Exhibit "B" in the presence of five witnesses after his uncle's son named Etuk Jacob Ituama wrote the plaintiff's name on the document.

B In paragraph 14 of the further amended statement of defence the defendant averred thus:

"14. In further answer to paragraph 10 of the plaintiff's Amended Statement of Claim the defendant states that there has never been any prior understanding between the plaintiff and the defendant over the said lease outside the terms of the lease as spelt out in the lease agreement itself. The said agreement and the Plan of the portion of the land which was granted by the plaintiff to the defendant for a term of 99 years will be founded upon at the trial"

D The evidence of the defendant on the execution of Exhibit "B" reads in part:

"I entered into the lease agreement. The plaintiff thumb printed the document and his uncle's son by name Etuk Jacob Ituama wrote the plaintiff's name on the document in the presence of five witnesses, two from the side of the plaintiff and three from my side"

The defendant went on to name the five persons who witnessed Exhibit "B".

F Before considering the point whether the Exhibit "B" is registrable or not and whether a legal estate, equitable interest or contractual right was created by Exhibit "B" its due execution must be established. This brings me to section 3 of the Illiterates Protection Law Cap. 56 Laws of the Cross River State, 1981 applicable to Akwa Ibom State.

G The said section 3 provides:

"3. Any person who shall write any letter or document at the request, on behalf, or in the name of any illiterate person shall also write on such letter or other document his own name as the writer thereof and H his address; and his so doing shall be equivalent to a statement

(a) that he was instructed to write such letter or document by the person for whom it purports to have been written and that the letter or document fully and correctly represents his instructions; and

(b) if the letter or document purports to be signed with the signature or mark of the illiterate person, that prior to its being so signed it was read over and explained to the illiterate person, and that the signature or mark was made by such person."

Exhibit "B" created legal rights between the plaintiff who is an illiterate and the defendant who also admitted in his pleading that the defendant is an illiterate. There is therefore need to call evidence to prove what happened at the time Exhibit "B" was prepared by the writer and signed by the parties.

I have carefully examined Exhibit "B". It was thumb printed by the plaintiff who was described as lessor in the presence of Mbak George and Etuk Jacob (E.J.I.) who signed as witnesses for the lessor. The defendant signed as lessee in the presence of Michael U. Obot, Sunday J. A. Ime and Joseph Akpe. These are witnesses for the lessee (defendant). The first two signed and Joseph Akpe thumb printed. The following appeared at the foot of Exhibit "B":

"Read and interpreted in (Efik) vernacular to the Land-Lord and all the parties concerned."

The writer failed to write his name and address. He did not sign it either. Of the five persons who witnessed the document, only Joseph Akpe was called as a witness (D.W. 2). In answer to cross-examination as to the execution of Exhibit "B", he stated as follows:

"The Agreement was drafted by one Nathan Essien before he took it for typing. It was typed by Nathan Essien. Nathan Essien sat in the house of the plaintiff and typed the Agreement. It was not typed in the Vocational School of the Defendant. By that time the Defendant did not open his Vocational School. It was the plaintiff who procured Nathan Essien to type the Agreement. Nathan Essien is from the same village with the Plaintiff, that is Usung Inyang, Eket." (the underlining is for emphasis)

Let me contrast the above evidence with that of the defendant (D.W. 1) on the same point. The defendant in answer to cross-examination by plaintiff's counsel said:

"Exhibit B was written by Nathan Essien from Usung Inyang,

Eket. *The plaintiff and Nathan Essien are from the same village. The agreement was written and typed by Nathan Essien. I cannot remember where it was typed. I remember that it was Nathan Essien who drafted the Agreement, originally. But I do not know whether I said that the agreement was typed with my typewriter. I told the court in 1980 that I called Nathan Essien to prepare the agreement for me. I cannot remember whether I said in 1980 that it was the typist in my vocational school who typed the Agreement. I was running a Vocational School at that time. The agreement might have been typed in my school. I was not the person who typed the agreement. But I know that the Agreement was drafted by Nathan Essien There was no oral agreement between me and the Plaintiff that I was to remain on the premises temporarily.*" (the underlining is for emphasis).

D There are contradictions in the evidence of the plaintiff (sic defendant) and his witness D.W. 2 as to who asked Nathan Essien to prepare Exhibit "B" and where it was typed. It is evident that the plaintiff (sic defendant) procured Nathan Essien to prepare it. That much was E admitted by the plaintiff (sic defendant).

It is clear from the evidence and on the face of Exhibit "B" that it does not comply with section 3 of the Illiterates Protection Law. The object of the law is to protect the illiterate person from fraud. Strict F compliance therefore becomes obligatory as regards the writer of such document. See U.A.C. (Nig) Ltd. v. Edems & Or. (1958) N.R.L.R. 33 and S.C.O.A., Zaria, v. Okon (1959) 4 F. SC. 220.

G The defendant on whom the onus of proof of due execution lay called only one witness (D.W. 2) out of five persons who witnessed the purported execution of Exhibit "B". The evidence of D.W. 2 contradicted that of the plaintiff. Four other witnesses to the document are alive and why he did not call them, the court was not told. If it was impossible procure them as witnesses, a hand writing expert would have H assisted the trial court. He failed to establish that the thumb-impression on Exhibit "B" is that of the plaintiff. The defendant did not prove that the plaintiff executed Exhibit "B". The courts below were therefore in error in deciding the case on points not raised in the pleadings. It is not within

the competence of a judge to make a case for the parties. The facts of this case are distinguishable from those of Okoye v. Dumez Nig. Ltd. & Or. (1985) 1 N.W.L.R. (Pt. 4) 783 and Obijuru v. Ozims (1985) 2 N.W.L.R. (Pt. 6) 167 among others. Exhibit "B" cannot therefore be enforced against the plaintiff. It is also inadmissible in evidence for non-compliance with section 15 of the Land Instruments Registration Law. B

It is for the above reasons and the fuller reasons contained in the judgment of my learned brother Katsina-Alu J.S.C. that I allow this appeal and set aside the judgment of the court below affirming the decision of the trial judge. The plaintiff is entitled to costs which I assess at N10,000.00. C

ONU JSC

I had the advantage of reading before now the judgment of my learned brother Katsina-Alu, J.S.C. just delivered. I am in agreement therewith that the appeal succeeds and ought to be allowed by me. I wish to make a few comments of mine as follows:- D E

The appeal herein came into being as a result of a suit commenced by the Appellant who was Plaintiff as against the Defendant now Respondent, at the High Court of Akwa Ibom State sitting at Eket for the following reliefs: F

"(a) a declaration that there is no valid and/or any lease agreement between the Plaintiff and the defendant whereby any grant was made to the defendant of the land called "ANYANKANA" or any part thereof.

(b) A declaration that the defendant is a licensee whose licence to occupy the said land or site was determined either by notice or breach of condition under a parol agreement. G

(c) Order for Ejection.

(d) Injunction." H

The facts of the case which are not in dispute are as lucidly set out in the review made from the Records of the two Courts below. They have been so ably reviewed and set out in the Parties' Briefs proffered at their

instance by learned counsel on either side that I deem it un-necessary going over them. Suffice it to say, that the three issues the Parties have agreed to and did adopt for our determination are as follows:-

B "1. Did the Courts below advert their minds to the Onus and burden of proof and did the respondent discharge the burden of proving that appellant granted him a lease of portion of his land in Exh. B

C 2. Whether the Courts below considered that it was not a part of the Defendant/Respondent's case as pleaded that he was granted the land in equity or according to customary Law of the people.

3. Having regard to the fact that appellant's illiteracy was admitted did the Courts below consider clear provisions of section 3 of the illiterate Protection Ordinance (Law) Cap. 88 which was in force in 1992?"

D I will now proceed to consider the above three issues together while bearing in mind the strategic importance of Exhibit B. in resolving the case one way or the other as follows:

The first and foremost point to observe is that by their pleadings the Parties (Plaintiff and the Defendant) had joined issues. While for E instance, the Plaintiff averred in paragraph 1 of his Amended Statement of Claim thus:

F "The Plaintiff is a nightwatchman and an illiterate working for the Ministry of Works and Transport Eket and is a native and resident of Usung Inyang, Eket Local Government Area within jurisdiction of this Honourable Court." (Underlining supplied)

By joining issues with the Plaintiff in his paragraph 2 of his further Amended Statement of Defence among others, the Defendant pleaded as follows:-

G "The Defendant admits paragraph 1 of the Plaintiffs Amended Statement of Claim. The said land is also known to the Plaintiff as "Anyankrang Okukwot Usung Inyang."

H The parties having joined issues and answered each other's pleadings as procedural law demands, - for which see Isamotu Otanioku v. Lawal Mustafa Alli (1977) 11-12 S.C. 9; Ehimare & Anor v. Okaka Emhonyon (1985) 1 NWLR 177 and Harrison Welli & Anor v. Charles Okechukwu & Ors (1985) 6 S.C 132 at 146, to mention but a few cases,

the case went to trial by each party calling his witnesses/witness to testify.

Secondly, after evidence was led by either side to the case in this civil claim and the burden of proof which initially fell on the Plaintiff to prove his case by a preponderance of evidence, (see Section 138 of the Evidence Act and the cases of Abiodun & Others v. Adehin (1962) 1 All NLR 550 554; Odunukwe v. Administrator General of East Central State (1978) 1 S.C 25 at 31 and Imana v. Robinson (1979) 3-4 S.C 1 at 9) the onus shifted on the Defendant to prove the grant of land he alleged the Plaintiff made to him of the piece of land in dispute. In this wise, it fell to his lot

(a) bounden duty) to establish by credible evidence that the Plaintiff signed and executed Exhibit 'B' which is the pivot upon which the entire case here, in my view, revolves. This is the moreso that the defendant regarded Exhibit 'B' as not only the linch-pin of his case but the crucial point upon which/he lay the success or failure of his entire case. For instance, in paragraph 14 of his further Amended Statement of Defence, the Defendant Plead:-

"In further answer to paragraph 10 of the Plaintiff's Amended Statement of Claim the Defendant States that there has never been any prior understanding between the Plaintiff and the Defendant over the said lease outside the terms of the lease as spelt out in the lease agreement itself. The said lease agreement and the Plan of the portion of the land which was granted by the Plaintiff to the Defendant for a term of 99 years will be founded upon at the trial. The Defendant will put the Plaintiff to the strictest proof of the allegation contained in paragraph 10 of the Amended Statement of Claim." (Underlining is mine for emphasis)

It is necessary to advert to the Plaintiff's evidence at the trial to appreciate this case. Testifying in evidence-in-chief before Udofia, the Plaintiff said inter alia as follows:-

"I am in Court with the Defendant today because in 1962 when I came home the Defendant approached me and asked me for a place to set up for the sale of his drinks. The Defendant wanted to sell palm

wine. I came home from my work place at Etebi to see my wife and children at Eket. The land the Defendant asked me to give to him is called ANYAKANA USUNG INYANG. The Land is situate along Eket/Oron Road, Eket. At that particular time I was still living on that land with my family. When the Defendant came to approach me for the land, I told him that I was living on that land with my family. Apart from the Defendant being a young man, I rejected the request of the Defendant because of my wife and my daughter. When I came back home again, the Defendant approached me for the second time and begged me for the second time. I then gave the land to the Defendant. Before I handed over the land to the Defendant I told him that I would be collecting #4 (four pounds) from him as annual rent. I then went back to my station at Etebi. Before I left to Etebi I did not give the Defendant any other conditions nor made any written agreement with him. I am an illiterate. I do not know how to read and write. It is not true that I executed any written agreement with the defendant. It is not true that I granted the lease of the land to the Defendant on a 99 year lease. I gave the Defendant another condition that he would leave the land at any time I wanted to use it for my personal business." (underlining is for emphasis)

Subjected to some rigorous cross-examination, the Plaintiff admitted he showed the Defendant the piece of land on which to stay and sell drinks build a temporary place for the purpose and then quit when a demand was made for it. He denied being approached with N400.00 by the Defendant as purchase money for the land but only authorised him to stay temporarily. There was no other person present when the transaction took place except his (Plaintiff's) wife.

Before the Defendant testified and called his lone witness, Joseph Akpe, he (Plaintiff) was subjected to cross-examination, and the answers he gave thereto revealed firstly, that the radical title to the land in dispute, "Anyankana" resided in the plaintiff. Secondly, that while it was conceded that the Plaintiff made some form of grant of the portion of land in question to the Defendant in or about 1962, the issue is whether what was granted was a determinable right to erect temporary sheds as the Plaintiff claimed or a lease for 99 years (renewable every 10 years)

as the Defendant said. Thirdly, although it was not the Defendant's case as pleaded that he was granted the piece of land in equity or according to the Customary Law of Eket people, he (Defendant) toyed between the two incidents of disposition of property but stopped short of proving either.

But as I earlier mentioned, the proof in the case not being static shifted from side to side, the duty to prove grant fell on the Defendant vide Osawaru v. Ezeiruka (1978) 6 & 7 S.C. 135. It was, however, contended on Defendant's behalf that he led enough credible evidence that Plaintiff signed the lease (Exhibit 'B').

Albeit, the Defendant, following his pleading, testified in his defence which was later supported in the testimony of his lone witness (Joseph Akpe) to the following effect:-

" The Plaintiff is a native of Usung Inyang Eket. He is my landlord in respect of the land now in dispute. The Plaintiff is a retired night watchman. He was working as a Night Watchman at E.N.D.C. before he retired. On 19/3/62, I went and negotiated with the Plaintiff for a lease of land at Okukwot Usung Inyang situate along Eket/Oron Road. The Plaintiff eventually leased the land to me. The name of the land is ANYANKANA OKUQUOT situate along Eket/Oron Road, Eket. The Plaintiff also calls his particular land "ANYANKANA OKUQUOT USUNG INYANG".

When the Plaintiff agreed to the lease of the land to me, he fixed that I with my witnesses should come on 19/3/62. I went with my witnesses. The Plaintiff went and showed me and my witnesses the land which he agreed to lease to me. The Plaintiff's witnesses were also there. We settled for the rent in respect of the lease. We fixed the rent at #4 (four pounds) per year. The Plaintiff asked me to give him goat and drink and I did so I eventually put up the building in 1962 on the land. I completed the building in early 1963. I entered into the lease agreement. The Plaintiff thumb-printed the document and his uncle's son by name Etuk Jacob Itauma wrote the Plaintiff's name on the document in the presence of five witnesses, two from the side of the Plaintiff and three from my side. The persons who signed on the side of the Plaintiff were

George Mbak and Etuk Jacob Itauma, the son of the Senior brother to the Plaintiff. I signed the document and my junior (sic) Sunday Jack Akpe Ime or Ekong Ime, Chief Minhad Umaha Obot, Village of Iko-Eket and Joseph Akpe also signed."

B The Defendant when cross-examined said rather eratically and equivocally, if absent-mindedly as follows:-

"..... I called Nathan Essien to prepare the agreement for me. I cannot remember whether I said in 1980 that it was the typist in my Vocational School who typed the Agreement. I was running a Vocational School at that time. The Agreement might have been typed in my school. I was not the person who typed the Agreement. I do not know the person who typed the Agreement. But I know that the Agreement was drafted by Nathan Essien. I remember that there was a condition that the Agree-
C ment was to be renewed after ten years." (Underlining is for emphasis).
D

The Defendant's lone witness, Joseph Akpe testified and supported his case to the hilt although with some aberrations. I shall shortly highlight light when he was examined-in-chief for instance, named five
E witnesses (the Plaintiff's wife excepted), he said were present at the transaction when the Agreement was signed. Under cross-examination, however, the witness stated among other things, as follows:-

"The Agreement was drafted by one Nathan Essien before he took it for typing. It was typed by Nathan Essien. Nathan Essien sat in
F the house of the Plaintiff and typed the Agreement. It was not typed in the Vocational School. It was the Plaintiff who procured Nathan Essien to type the Agreement. Nathan Essien is from the same village with the Plaintiff, that is Usung Inyang, Eket. After the amount of rent was
G agreed upon, it was the Plaintiff who directed Nathan Essien to write what he said. It was the Plaintiff who engaged Nathan Essien to write the Agreement." (Underlining is also mine for emphasis).

From the foregoing there are clear contradictions in the evidence of the
H Defendant and his lone witness (DW 2). For, while DW 2 said the Plaintiff's wife was present and was one of those who signed the Agreement, the Defendant said nothing about her. Also, while DW 2 said that Nathan Essien it was who prepared and typed the Agreement the Defen-

dant said nothing on or about it. Worthy of note is the claim by the Defendant that he called Nathan Essien to prepare the Agreement; DW 2 said that it was the Plaintiff who engaged Nathan Essien to do so. It was also the evidence of DW 2 that it was Nathan Essien who typed the Agreement in the house of the Plaintiff as opposed to what the Defendant himself said in evidence that the document was typed at his vocational School. The Defendant could not tell who typed the Agreement and in what place it was typed. Besides, the Defendant testified as to how paragraph 8 of Exhibit 'B' contains a clause, condition or term for the renewal of the Agreement after 10 years.

When it is borne in mind that the Plaintiff denied in both his pleadings. (See paragraph 1 of the Amended Statement of Claim) and his testimony on Oath that he never signed or executed Exhibit 'B' with the attendant contradictions precipitated in the evidence of the Defendant and his witness (DW 2), the Court of Appeal should have been chary in accepting the hasty conclusion arrived at by the learned trial Judge that the Defendant by his pleadings and evidence established such a grant from the evidence before him.

Since from above reasons, I have inevitably arrived at the conclusion that by the failure of the Defendant to prove the grant after the burden thereof shifted to him from the Plaintiff to do so (see N.N.S.L. v. Afolabi (1978) 2 S.C. 79 at 84) and this, on the preponderance of evidence, (see Awoyale v. Ogunbiyi (1986) 4 S.C 98 at 112 and Alhaji Sabalemotu Kaiyaoja v. Lasisi Egunla (1974) 4 S.C. at 61), any evidence called to establish Defendant's title in equity or grant in accordance with native law and custom proffered in the courts below ought to be discountenanced since much of the oral evidence was strictly immaterial or irrelevant and as it was obtained under cross-examination, it went to no issue. See N.I.P.C. Co. Ltd. v. Thompson Organisation Ltd. (1969) 1 All NLR 138 at page 142; Idahosa v. Oronsaye (1959) 4 F.S.C. 166; Dina v Nigeria Newspapers Ltd. (1986) 2 NWLR 353.

Finally, although some of the issues raised in this appeal border on concurrent findings of facts by the two Courts below, an area in which this Court sitting on appeal is usually reluctant to interfere, yet I

am inclined, having regard to all I have said hereinbefore, to invoke the principle which has now been established in numerous decision such as Chikwendu & Ors v. Mbamali & Ors. (1980) 3-4 S.C. 3; Ojomu v. Ajao (1983) 9 S.C. 22, 53; Onobruhere & Anor v. Esegine & Anor. (1986) 1 NWLR (Part 19) 799 and Olujinle v. Adeagbo (1988) 2 NWLR (Part 75) 238 at page 255, to uphold this appeal by interfering with the decisions of the two courts below which ought to be and is hereby set aside.

Ordinarily, in land matters like the one in hand, it is an established principle that the Plaintiff must succeed on the strength of his case and not on the weakness of the Defendant's case. See Kodilinye v. Mbanefo Odu (1936) 2 W.A.C.A 336; Bello v. Eweka (1981) 1 S.C. 101 at 102. At times, however, the case of the defence may strengthen the Plaintiff's case See Akinola v. Oluwo (1962) 1 S.C. NLR 352; Akintola v. Solano (1986) 2 NWLR (Part 24) 598 and Amuda Adebambo v. Olowosago (1985) 3 NWLR (Part 11) 207. This was what happened in the instant case.

In the result, and for the reasons I have given as well as those elaborately set out in the leading judgment of my learned brother Katsina-Alu, JSC, I too allow the appeal, set aside the judgment of the Court below which affirmed the decision of the trial Court and enter judgment for the Plaintiff as per his claim. I make similar orders as to costs as contained in the leading judgment.

KALGO JSC

I have read in advance the judgment of my learned brother Katsina-Alu JSC just delivered and I am in complete agreement with him that there is merit in the appeal and it ought to be allowed.

From the totality of the evidence at the trial there is no dispute that the appellant was the owner of the portion of land called "Anyankana" land which was in dispute. What was in dispute was whether the appellant granted the respondent lease of this land for a term of 99 years for which he (appellant) executed Exhibit 'B' the lease agreement.

The appellant at the trial pleaded that he was illiterate and this

was admitted by the respondent. His case was that he only granted the land in dispute to the respondent temporarily to put up a shade for selling his drinks and that whenever he (appellant) requested him to leave he shall do so. He did not at any time sell the said land to the respondent. The appellant therefore emphatically denied any lease or executed any such lease as in Exhibit 'B' in favour of the respondent. B

Since the respondent did not dispute that the appellant owned the land in dispute, and the appellant denied executing Exhibit 'B' the burden shifted on the respondent to prove the grant of the lease to him. See Balogun v. Labiran (1988) 3 NWLR (pt. 80) 66; Kate Enterprises Ltd v. Daewoo Nigeria Ltd (1985) 2 NWLR (pt. 5) 16. The only evidence in support was given by the respondent and his only witness DW. 2. Unfortunately, their evidence contained serious contradictions on how, where and who wrote the agreement since the appellant was illiterate. And even one Nathan Essien who was alleged to have prepared the lease agreement at the request of the appellant was not called to give evidence. The learned trial judge also heavily relied on the evidence contained in the customary court judgment tendered at the trial as Exhibit 'F' to draw certain conclusions which led him to arrive at the decision that Exhibit 'B' was a valid lease agreement. This approach was no doubt wrong in law and the Court of Appeal should not have, in my view, agreed with the trial court on this. It has been well settled that court judgments are only used, when tendered in a trial, to determined and confirm what was actually decided in the case and not to use the evidence given in it for or against any of the parties therein. See Igwego v. Egeugo (1992) 6 NWLR (pt. 240) 561 at 587; Ukuegbu v. Ugoji 6 NWLR (pt. 196) 129 Udomba v. Odiese (1990) 1 NWLR (pt. 125) at 186. C D E F G

I have also carefully examined the contents of Exhibit 'B', the lease agreement and find that it did not comply with the provisions or requirements of the illiterate Protection Act applicable at the time as it contained no jurat. H

The Court of Appeal was therefore wrong to have agreed with the learned trial judge that Exhibit 'B' was a valid lease agreement between the parties and was properly executed by the appellant.

In the result, I fully agree with the reasoning conclusions reached by my learned brother Katsina-Alu JSC in the leading judgment. I accordingly allow this appeal as being meritorious and award costs to the appellant as assessed in the leading judgment.

B

C

D

E

F

G

H